Privy Council Appeal No. 25 *of* 1929.

Allahabad Appeal No. 6 *of* 1927.

Rai Shadi Lal - - - - - - - *Appellant*

v.

Lal Bahadur *alias* **Jagdamba Sahai and others** - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT ALLAHABAD.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 19TH DECEMBER, 1932.

Present at the Hearing:

LORD WRIGHT.
SIR GEORGE LOWNDES.
SIR DINSHAH MULLA.

Delivered by SIR DINSHAH MULLA.]

This is an appeal from a judgment and decree, dated the 10th November, 1926, of the High Court at Allahabad which varied a judgment and decree, dated the 31st July, 1923, of the Subordinate Judge of Bareilly.

On the 20th December, 1905, Munshi Inder Sahai executed a mortgage of his share of a village situated at Bareilly to secure payment of Rs. 7,000 lent to him by Rai Kishun Lal at interest at the rate of 7 annas per cent. per mensem.

The mortgage was one with possession, and the mortgagee was put in possession of the property on the same day. The mortgage was for a term of five years.

On the 15th June, 1906, the mortgagor executed a document called *zamanatnama* (security bond) by which he created a charge on two other properties, the charge to operate if the property mortgaged by the deed of 1905 was found to be insufficient for payment of the mortgage debt in full. It was stated in the document that both these properties belonged to the mortgagor.

Some time thereafter the mortgagor died leaving him surviving two sons, who are the 1st and 2nd respondents before the Board, and a widow, who is the 3rd respondent. After his death the mortgagee obtained a decree on the 26th April, 1909, against the heirs of the mortgagor for Rs. 679-6-6, being the balance of interest due up to the 2nd January, 1909, and recovered the amount from them.

Respondents Nos. 4 to 7 are the heirs of the mortgagee, and the appellant is the transferee of their interest in all the properties. The 8th respondent held a lease of part of the mortgaged property from respondents Nos. 4 to 7 at an annual rent of Rs. 150. The lease expired some years ago, but it was alleged that a fresh lease had been granted to him by respondents Nos. 1 to 3. Respondents Nos. 9 to 12 are transferees of the interest of respondents Nos. 1 to 3 in some of the properties.

On the 20th December, 1922, the appellant brought the suit out of which the present appeal arises in the Court of the Subordinate Judge of Bareilly against the respondents to enforce the mortgage by sale of all the three properties. The amount claimed was Rs. 14,000, of which Rs. 7,000 was for principal, and the balance for interest.

In their written statement, respondents Nos. 1 and 2 averred that " the mortgaged property " was ancestral, and that there was no necessity for the loan. They also pleaded that the mortgage debt had been paid out of the rents and profits of the mortgaged property, and that nothing was due to the appellant.

Respondents Nos. 4 to 7 also filed a written statement alleging that they had transferred their interest to the appellant, and that they were wrongly joined as defendants to the suit.

Several issues were framed by the Subordinate Judge of which the following three only are now material :—

> " 2. Whether the mortgaged property was the ancestral property of Inder Sahai, and whether the debt was incurred for legal and family necessity and binding on the sons of Inder Sahai ? "
>
> " 6. Whether the bond is paid up by the usufruct of the property ? "
>
> " 10. Whether the plaintiff is entitled to any relief, and if so, under what terms and conditions ? "

Several witnesses were examined on both sides. The Trial Judge found on issue No. 2 that the mortgaged property was not ancestral. He treated the issue as one confined to the property mortgaged by the deed of 1905. He found issue No. 6 in the negative, and declared that the amount due under the mortgage was Rs. 14,000, to which he added Rs. 766 for costs, and a further sum of Rs. 935-10-8 for interest calculated at the rate of 6 per cent. per annum on Rs. 14,000 from the date of suit up to the 31st January, 1924, being the date fixed for redemption. In the result he passed a decree for sale of the properties comprised both in the mortgage deed and the *zamanatnama*.

The 1st, 2nd and 3rd respondents appealed to the High Court at Allahabad. The learned Judges of the High Court agreed with the Trial Judge on his finding that the property mortgaged by the deed of 1905 was not ancestral, but held, differing from him, that the properties included in the *zamanatnama* were ancestral. They also held that the appellant had failed to keep such accounts as are required of a mortgagee in possession, and disallowed the claim both for past and future interest. In the result they varied the decree of the Trial Judge by excluding the properties mentioned in the *zamanatnama* from the order for sale, and by disallowing all interest. The order of the lower Court as to costs was also varied, and directions were given for the costs of the appeal. From that decree of the High Court the plaintiff has brought the present appeal to His Majesty in Council. There was no appearance for the respondents at the hearing of the appeal before the Board.

Two contentions were raised on behalf of the appellant: (1) that the finding of the High Court that the properties comprised in the *zamanatnama* were ancestral was wrong; and (2) that the High Court were wrong in disallowing the appellant's claim for interest.

On the first point the learned Judges of the High Court said in their judgment as follows :—

> "An issue was framed as to whether the mortgaged property was the ancestral property of Indar Sahai or not, and the Judge found that it was not. He appears to have come to this finding with regard only to the property originally included in the mortgage and to have paid no attention whatever to the property covered by the security bond, and yet he has granted the plaintiff a decree which will enable him to put all the property to sale. We agree that the property included in the original mortgage bond is not ancestral property, but not only is there no proof that the house and the property in Maheshpur, which is included in the security bond, is not ancestral property, but the allegation in the written statement to that effect has never been answered even by the plaintiff."

Their Lordships are unable to find any allegation in the written statement that the properties included in the *zamanatnama* were ancestral. Paragraphs 1, 2, 3, and the first part of paragraph 4 of "further pleas" in the written statement, relate solely to the property mortgaged by the deed of 1905, and issue No. 2, set out above, refers only to that property. The *zamanatnama* is referred to in the latter part of paragraph 4, and the only issue as to that was whether it was "illegal and without consideration." Such being the pleadings and issues, it was not necessary for the Trial Judge to inquire whether the properties comprised in the *zamanatnama* were ancestral. There is no presumption that a family, because it is joint, possesses joint property, and it was for the sons of the mortgagor to allege and prove that those properties were joint family properties. This, their Lordships think, they failed to do. Their Lordships are therefore unable to agree with the High Court that the properties included in the *zamanatnama* were ancestral.

As to interest, it was urged that the High Court ought not to have disallowed the appellant's claim *in toto*, and they ought to have in any event directed an inquiry into the accounts. Their Lordships are unable to accede to this contention. As regards accounts, it is enacted by section 76, clause (*g*), of the Transfer of Property Act, that a mortgagee in possession " must keep clear, full and accurate accounts of all sums received and spent by him as mortgagee." No such accounts were kept by the appellant or his predecessors, nor were any such filed in Court. All that the appellant did was to place before the Court a day before the judgment was pronounced, and after the evidence was closed, some accounts which apparently were prepared from *khataunis* kept by the revenue authorities. No actual receipts from the land were shown in the accounts. The receipts as shown in the accounts included *inter alia* the rent payable by the 8th respondent, which, as already stated, was Rs. 150 per annum. The 8th respondent was a clerk in the employ of the heirs of the mortgagee, and he admitted in his evidence that the lease to him was " nominal," and that he paid the profits of the land to the heirs. Those profits were not shown in the accounts. In the circumstances, their Lordships think that the High Court were right in disallowing the appellant's claim for interest.

In the result, their Lordships are of opinion that the appeal should be allowed in part, and the decree of the High Court, dated the 10th November, 1926, should be varied by ordering that if the money realized by the sale of the property mortgaged by the deed of the 20th December, 1905, shall not be sufficient for payment in full of the amount decreed by the High Court, the properties comprised in the *zamanatnama* dated the 15th June, 1906, or a sufficient part thereof, shall be sold, and the nett proceeds of the sale shall be applied in payment of the balance due to the appellant, and their Lordships will humbly advise His Majesty accordingly. The appellant will bear his own costs before this Board.

In the Privy Council.

RAI SHADI LAL

v.

LAL BAHADUR *alias* JAGDAMBA SAHAI AND OTHERS.

DELIVERED BY SIR DINSHAH MULLA.

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