

**(1869) 03 CAL CK 0002**

**Calcutta High Court**

**Case No:** Regular Appeal No. 146 of 1868

Gopalsaran Lal Bhagat and  
Another

APPELLANT

Vs

Bharat Lal Bhagat

RESPONDENT

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**Date of Decision:** March 31, 1869

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### **Judgement**

Markby, J.

In this case Jaideb Panda, Mani Panda, and Mukteswar Panda, borrowed, from Ramnarayan Bhagat and Gopaliram Bhagat on the 9th January 1862, the sum of Rs. 10,000, on the security of a simple mortgage of a two-anna share of four talooks, including one called Kalinagha. In the year 1863, Ramnarayan and Gopaliram obtained a simple money-decree against the Pandas, and attached their share in all the four talooks. They did not, however, proceed to a sale. On the 2nd July 1864, Bharat Lal Bhagat advanced a sum of Rs. 2,000 upon a simple mortgage of the same share of the single Talook Kalinagha, which money was immediately handed to Ramnarayan and Gopaliram, in satisfaction of another advance which they had made to the Pandas. It has been found by the lower Court, and is not now disputed, that this advance was procured through the agency of Ramnarayan, and that Ramnarayan was guilty of fraud, in that he did not inform Bharat Lal of his own prior mortgage upon the same property. Subsequently, Bharat Lal obtained a simple money-decree for his debt, and under that decree he attached the share of Talook Kalinagha comprised in his mortgage, and this share was brought to sale on the 18th June 1866, when Bharat Lal purchased the property himself for Rs. 100. Before the sale, Ramnarayan and Gopaliram gave notice of their claim to a mortgage on the property, and Bharat Lal appears to have admitted in the Court below that, in consequence, he purchased the property for about one-fortieth of its full value. Ramnarayan and Gopaliram have now brought a suit against the Pandas, against Bharat Lal, and against other persons who hold mortgages of one or other of the talooks subsequent to that of the plaintiffs, and who have obtained decrees and caused the two-anna share of those talooks belonging to the Pandas to be sold in

satisfaction of their decrees. The object of the suit was stated to be to declare the plaintiffs' mortgage lien, and to obtain an order for the sale of the two-anna share of three out of the four talooks including Kalinagha.

2. One objection taken before the Principal Sudder Ameen was, that the two-anna share which was mortgaged by the Pandas to the plaintiffs, was not a two-anna share of each talook, but a half-anna share of each talook, and that these four half anna shares being added together, made up the two-anna, share, which the Pandas mortgaged. The Principal Sudder Ameen of course, overruled this objection: and, as it has been again raised on appeal we may say at once that we cannot look upon it as otherwise than absurd.

3. Another objection taken was, that the plaintiffs, having already sued upon their mortgage bond and obtained a money-decree, could not, having regard to the provisions of section 7 of the Code of Civil Procedure, bring another suit to enforce their lien. This objection the Principal Sudder Ameen also overruled.

4. The other objection related to the case of the defendant Bharat Lal alone. He contended that, as his advance was made at the instance of the plaintiffs, who fraudulently concealed the fact that they had themselves made a prior advance upon the same property, the plaintiffs could not set up their rights as mortgagees in opposition to him, and that as between the plaintiffs and himself he must be considered as having the first incumbrance. The plaintiffs meet this, as to Gopaliram by contending that he was no party to the fraud, and as to Ramnarayan by contending that Bharat Lal, not yet having obtained any decree declaring his lien upon the property, comes before the Court as a purchaser only; that he purchased only the rights and interests of the judgment-debtor, that is to say, the right to redeem, and that he cannot in this suit set up any rights which he may have against the plaintiffs as mortgagees arising out of the peculiar circumstances under which their mortgage was created.

5. With regard to this objection, the Principal Sudder Ameen admits the argument that, owing to the plaintiff Ramnarayan's fraud, he ought not, as against the defendant, to be permitted to assert his mortgage, but he adds "the circumstances of this case are so very peculiar, that I cannot, however much I may wish it, enforce that penalty. The circumstances I allude to are, that Kalinagha has already been sold under Bharat Lal's decree; that the sale was made with a notification of plaintiff's lien; that Bharat Lal did not object to the notification but purchased subject to it, and, as he admits to me, had the property knocked down to him in consequence for about one-fortieth part of what it was really worth." He does not believe that Gopaliram was, as the witnesses allege, present when the fraudulent statements were made by Ramnarayan, and considers, therefore, that so far as he is concerned, the question whether his own fraud stands in his way does not arise. The result is, that the Principal Sudder Ameen gives the plaintiffs a decree, which declares them entitled to sell the two-anna share of the three talooks, as prayed in satisfaction of

the amount due to them from the Pandas, under the bond of 1862. The decree does not expressly say so, but there is no doubt that, what is meant is, that the plaintiffs are to sell the talooks clear of all mortgages subsequent to their own.

6. Only Bharat Lal has appealed. In addition to the points taken below, he raises the objection that the suit is wrongly framed, there being no common cause of action against all the defendants. We think, however, that this objection comes too late. As the case now stands, we have a very simple question to decide between the plaintiffs and a single defendant. On the three other points taken below and again raised here, we have already disposed of one, the other two have been very fully argued, and upon these we have taken time to consider our judgment. We find, however, that it is not necessary, for our decision, to advert to the second ground. We think, without entering into the question of law which has been raised, that the suit on the facts ought to have been dismissed.

7. Though the Principal Sudder Ameen may be right in thinking that Gopaliram was not actually present when Ramnarayan made the statements which he did in respect of the property on which Bharat Lal took his mortgage, yet we have no doubt that he was fully cognizant of all that was done in reference to this transaction. Gopaliram and Ramnarayan were exceedingly intimate, their families had intermarried, they were both money-lenders, and they were jointly interested in this money-lending transaction. We think it most improbable, under such circumstances, that Gopaliram was not aware of all that Ramnarayan had done. At least he must have been aware of Bharat Lal's mortgage, and we do not see, upon what grounds, the Principal Sudder Ameen rejects the testimony of the Mohurrir Sheikh Abdul Kurrim, who is apparently in an independent and respectable situation, and who swears positively that Gopaliram confirmed what Ramnarayan had said. We think, therefore, that, as regards the fraud perpetrated, Ramnarayan and Gopaliram stand precisely in the same position, and we think that the true effect of the fraudulent statement is that, as between the plaintiffs and Bharat Lal, Bharat Lal must be considered as the first mortgagee, and the question is, whether the Principal Sudder Ameen is right in holding that the fact of Bharat Lal having purchased the property at a sale in execution, after notice of the plaintiffs' mortgage, makes any difference. We think not. Bharat Lal, though he states his right as purchaser at the execution sale in his written statement, is now asserting only such rights as he had prior to that sale, namely his rights as mortgagee. Although, therefore, it may be true that, having purchased, with notice of the plaintiffs' mortgage, his rights as purchaser may be subject to the mortgage, it does not follow that his rights as mortgagee are so. We think that, as first mortgagee, he would have a right to stop the sale which is the ultimate object of this suit, and we do not think he is in any worse position by reason of having purchased at the sale in execution of his own decree after notice of the plaintiffs' mortgage.

8. Upon this ground, therefore, we think the plaintiffs' suit ought to be dismissed. The only hesitation we have had upon this part of the case is lest the interests of the mortgagors might suffer. As matters at present stand, they have lost all their interest in the property; the plaintiffs will still claim to recover the whole of their advance; and it would be only in the usual course of things if Bharat Lal did so also.

9. We do not at all mean to intimate our opinion that such exorbitant and unreasonable demands can be maintained, but we are relieved, in the present case, from any necessity of considering this question by Bharat Lal having, through his vakeel in the course of the argument before us, expressly surrendered all further claim against the Pandas in respect of his mortgage-debt. We, therefore, reverse the decision of the lower Court, and dismiss the suit as against Bharat Lal. The plaintiffs will pay the costs of the appeal and the costs of this defendant in the Court below.