

(1947) 03 BOM CK 0001
In the Bombay High Court

Jan Mohammad

APPELLANT

Vs

Karam Chand

RESPONDENT

Date of Decision : 13-03-1947

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 24
Evidence Act, 1872 — Section 115, 32(5)

Citation : (1947) 49 BOMLR 577

Hon'ble Judges : Uthwatt, J;Madhavan Nair, J;John Beaumont, J

Bench : Full Bench

Final Decision : Dismissed

Judgement

Madhavan Nair, J.—These are consolidated appeals by the plaintiff, defendants Nos. 4 to 8, and Mohib Ali, a transferee from defendants Nos. 13 and 14, from the judgment and decrees dated May 29, 1941, of the Court of the Judicial Commissioner, North West Frontier Province, Peshawar, varying the judgment and decrees dated October 81, 1939, of the Court of the District Judge, Peshawar, which in turn varied a judgment and decree dated; December 3, 1938, of the Senior Subordinate Judge, Peshawar, as a result of which, the plaintiff and defendants Nos. 13 and 14, were given decrees for the redemption in specified "shares in the property in dispute with the exception of the site leased by Government to Parma Nand (father of defendants Nos. 4 to 8) in 1934", on payment of specified sums of money.

2. The appeals arise out of a suit for the redemption of mortgages executed by a Mahomedan, Chaudhri Nathu. Broadly stated, the questions arising for determination relate to who are the representatives of the mortgagor, he being dead, entitled to redeem the property; whether the property is liable to be redeemed at all; what is the extent of the interests of the representatives in the property to be redeemed; and whether the Cinema built on the site "excepted" by the decree, by the father of defendants Nos. 4 to 8, should not be delivered to the plaintiff.

3. The facts of the case are somewhat complicated, but for the purposes of these appeals may be briefly stated as follows:- on March 27, 1884, Chaudhri Nathu executed a mortgage with possession of the suit property described below, in favour of one Lorinda Mal, the grandfather of defendants Nos. 4 to 8. He executed further mortgages of the same property in favour of Lorinda Mal for Rs. 500, and for Rs. 1,000, carrying interest at 15 per cent, per annum on May 1, 1884, and August, 8, 1886, respectively.

4. The mortgaged property is described as a serai consisting of 26 rooms and some buildings all built by Chaudhri Nathu on a site of which he was in possession before 1871, as a licensee from the Government. The land is situated within the Cantonment of Peshawar and was held under what is known as the "Cantonment tenure." Such land belongs to Government and could not be alienated by the grantee. The regulation of the Governor General passed on September, 1836 (see (1931) ILR 58 858 (Privy Council) states one of the usual conditions of a grant as follows:- "The Government to retain the power of resumption at any time, on giving one month's notice and paying the value of such buildings as may have been authorised to be erected" (see Clause 6 1st condition). The site on which the serai stands is expressly excluded from the mortgage. The mortgaged serai had also vacant land appurtenant to it.

5. Chaudhri Nathu, the mortgagor, died in 1880. The plaintiff purchased the equity of redemption in the property in 1985, from defendants Nos. 11 and 12, the sons of Mst. Mohammadi Begum the daughter of Chaudhri Nathu, alleging that she was his sole heir, and after her death defendants Nos. 11 and 12 became the owners of the property; and instituted the suit for redemption out of which the consolidated appeals arise. Mst. Mohammadi Begum died on September 12, 1891.

6. Defendants Nos. 4 to 8 are the contesting defendants in the suit. On the death of Chaudhri Nathu, Mst. Babo Jan, his widow, sold the property in 1890 to Lorinda Mai the mortgagee for Rs. 4,000 to liquidate her husband's debts. The defendants stated that Chaudhri Nathu's family was governed by custom and not Muhammadan law, that his widow had power to alienate her husband's properties to pay off his debts, and hence, the suit property could not be redeemed at all. In a family partition in 1930, the suit property was allotted to Parma Nand, a son of Lorinda Mal and the father of defendants Nos. 4 to 8. Their predecessors-in-interest had improved and extended the suit property by adding new rooms and buildings to it; and in 1934, their father had obtained a lease from Government of a portion of the site originally mortgaged by Chaudhri Nathu-"1/3 of the site originally under the serai"-and with their permission had constructed a cinema on it, spending, it is said, as much as Rs. 40,000. In case the plaintiff is allowed to redeem the property, they claimed increased value for the land and the entire cost of improvement amounting to about a lakh of rupees.

7. As regards the custom pleaded by the contesting defendants it may be stated at once that all the three Courts that have considered the case have found that

the family of Chaudhri Nathu is governed by Mahomedan law, and not by custom; and that the sale by Mst, Baba Jan of the whole propety was invalid and was good only to the extent of her share, namely, 3/24. This ground was therefore not seriously relied on by the learned Counsel Mr. Rewcastle in support of the claim of his clients to the entire property. He has however urged another ground in support of their plea which their Lordships will consider in due course, viz, that Mst. Babo Jan, the widow, in administering her husband's estate was entitled to sell and did sell the entire serai to discharge his debts on May 12, 1890, and that since then they and their predecessors-in-interest have been enjoying the property as owners.

8. Defendants Nos. 13 and 14 along with defendant No. 15 who has dropped out from the case were made parties to the suit after it had been filed, by an order passed in revision by the Court of the Judicial Commissioner. Alleging that they are some of the heirs of Chaudhri Nathu they claimed interest in the suit property and the right to redeem their share. The nature of their claim and whether they have succeeded in proving it will be considered later. It may be stated here that differing from the finding of the Senior Subordinate Judge, the District Judge as well as the Court of the Judicial Commissioner has found that they have proved their claim and the latter Court has awarded them 3/7 1/2 share in the suit property. The finding as regards the heirship of these defendants to Chaudhri Nathu has been attacked by learned Counsel for the plaintiff-appellant, Sir Herbert Cunliffe, as it necessarily reduces the share allotted to his client.

9. From the facts thus far stated it is obvious that the question as to who are the heirs of Ch. Nathu became very important in the case. The precise relationship of some of the alleged heirs and even the existence of some of them were strenuously disputed in the Courts below; but by the time the case went up before the Judicial Commissioner's Court, the differences were reduced to a minimum. The following pedigree table is taken from the judgment of the Judicial Commissioner's Court:-

Mohd Jan		-----			(1) m. Chaudri
Nathu m.	(2)	Babo Jan Mohd Khan			Faquir m. Mst. Mohamadi Mst. Mahbuba
Mohd		-----			Mst. Shah Jehan Nawab Khan
-----		Azizullah Sardar Khan			D.15 Mohd Bakhsh Khuda Baksh
-----					Mst. Marufjan Mst. Yaqut D.14 Jan D.13

10. The above pedigree shows that Ch. Nathu had two daughters, namely, Mst. Mohammadi Begum by his first wife (who is stated to have predeceased him), and Mst. M. Mahbuba who is said to have died young, by his other wife, Mst. Babo Jan, who survived him. It shows that Mst. Mahbuba is the real daughter of Mst. Babo Jan, and not her step daughter as was found impliedly by the Senior Subordinate Judge, and explicitly by the District Judge. It also shows that Ch. Nathu had a brother Mohd. Khan and that defendants Nos. 13 and 14 are related to him through this brother, as was also found by the District Judge. As stated by

the learned Judges, this pedigree table was disputed before them in the above two respects, but they held the two relationships proved as shown in the pedigree. Both these findings have been attacked before their Lordships. The third point of dispute noted by the learned Judge is unsubstantial, was held to be so by them, and has not been referred to before the Board. In no other respect has the pedigree table been attacked. It follows therefore that Mst. Babo Jan, Mst. Mohammadi Begum and Mst. Mahbuba were accepted by the parties as heirs of Ch. Nathu, and the only questions as to heirship which the Court of the Judicial Commissioner had to decide were, whether defendants Nos. 13 and 14 are also heirs of Ch. Nathu, and what was the precise relationship of Mst. Mahbuba to Mst. Babo Jan, -whether she was her step daughter or real daughter; and these questions arise also before the Board for decision. It may be mentioned here that the correctness of the division into shares of the suit property according to the Mahomedan law as decided by the Court of the Judicial Commissioner if the relationship of his heirs to Ch. Nathu is established as found by that Court, has not been questioned before their Lordships; nor have the parties questioned the amounts ordered to be paid for redemption in the event of the relevant findings of the Court below being upheld by the Board.

11. The findings of the Courts below strictly material to the questions arising for determination by the Board may now be summarised:-

12. The Senior Subordinate Judge held that the only heirs of Ch. Nathu were his widow Mst. Babo Jan and his two daughters Mst. Mohammadi Begum and Mst. Mahbuba, and that on his death his widow would get $\frac{1}{8}$, his two daughters $\frac{1}{3}$ each, leaving a residue of $\frac{5}{24}$ which would go to the two daughters; and that on the death of Mst. Mahbuba who died on November 7, 1897, there being no other heirs, the sons of Mst. Mohammadi Begum (defendants Nos. 11 and 12) would come in as distant kindred, so that except the $\frac{1}{8}$ share of Mst. Babo Jan, the rest eventually would come to the sons of Mst. Mohammadi Begum. In other words the plaintiff was given a decree for the redemption of $\frac{7}{8}$ share of the serai mortgaged on payment of the mortgage amount and interest. His suit about the recovery of land on which all the buildings stood was dismissed, the land being the property of the Government. His suit about the buildings known as the cinema and appurtenant buildings built with the sanction of the Government was also dismissed.

13. Against the above decree three appeals were filed in the District Court, viz. appeal No. 730/1938 by defendants Nos. 4 to 8 who prayed that the plaintiff's suit should be dismissed in toto, appeal No. 14/1939 by the plaintiff, who prayed that his original claim be decreed in full, i.e. for the entire land and superstructures on it including the cinema, and the sum that he has to pay should be reduced, appeal No. 61/1939 by defendants Nos. 13 and 14 who claimed $\frac{1}{2}$ $\frac{3}{4}$ share of the property, i.e. the proportion which would fall to their branch of the family on the ground of being heirs of Ch. Nathu.

14. In a consolidated judgment which he delivered the District Judge held

agreeing with the trial Judge that Mst. Babo Jan could transfer only $\frac{1}{8}$ share in the property, but he held, as already stated, differing from the trial Court, that Nawab Khan was related to Ch. Nathu through Mohd. Khan his brother, and that defendants Nos. 13 and 14 as heirs of Ch. Nathu were entitled to $\frac{5}{24}$ share and that on the death of Mahbuba, whom he held to be the step daughter of Mst. Babo Jan, her interest, i.e. $\frac{8}{24}$ share went to Nawab Khan who thus became owner of $\frac{1}{2} \frac{3}{4}$ share in the property. He therefore held that the share of defendants Nos. 11 and 12, from whom the plaintiff purchased the property, became reduced from $\frac{1}{3}$ to $\frac{8}{24}$ or $\frac{1}{3}$. He increased the amount payable to defendants Nos. 4 to 8 to Rs. 11,902, dismissing their appeal in other respects. He also decided that of this amount the plaintiff should pay defendants Nos. 4 to 8, Rs. 4,534 and defendants Nos. 13 and 14, Rs. 7,368, for redeeming their respective shares of the property: but he did not pass a decree in favour of the latter, as he held that his Court had no jurisdiction to entertain an appeal involving that amount. He therefore directed that their memo of appeal should be returned for presentation to the Court of the Judicial Commissioner. As regards the cinema he held that the site of the serai was land of which Ch. Nathu was a licensee from the Government, and when the Cantonment authorities granted a licence in 1934 to the father of defendants Nos. 4 to 8 for the construction of a cinema it could not be assumed as contended for by defendants Nos. 4 to 8 that they had resumed the site from Ch. Nathu's heirs. In his view, the lease had effect only between the lessor and the lessee, and therefore he decided in modification of the decree that the plaintiff was "entitled to redeem with possession $\frac{1}{3}$ only of the site of the serai originally mortgaged and all the structure now standing thereon including the cinema....".

15. Against the above decree, the plaintiff, defendants Nos. 13 and 14, and defendants Nos. 4 to 8, appealed to the Court of the Judicial Commissioner. That Court held as already stated that defendants Nos. 13 and 14 were also heirs of Ch. Nathu, but it held differing from the District Judge that Mst. Mahbuba was the real daughter of Mst. Babo Jan, and not her step-daughter. This meant a reduction in the share that would be inherited by defendants Nos. 13 and 14. As regards the cinema it held that the site on which the cinema stood had to be excluded from the decree because in its opinion when the Government granted a lease to Parma Nand they thereby "revoked the licence which had previously been granted to Ch. Nathu but of which they were presumably unaware at the time." That Court therefore modified the decree of the District Judge and granted "the plaintiff a decree for $\frac{2}{7} \frac{4}{2}$ share in the property in dispute with the exception of the site leased by Government to Parma Nand in 1934....". Defendants Nos. 13 and 14 were given a decree for possession of $\frac{3}{7} \frac{1}{2}$ share of the same property.

16. It may be mentioned here that as regards the appeal by defendants Nos. 13 and 14 it was contended before the Court of the Judicial Commissioner that it was filed out of time in that Court, that the appeal memo was not taken back and presented to the Court as directed by the District Judge though it came to

the Court along with the records and that the District Judge's refusal to give a decree to defendants Nos. 18 and 14 was justified as he had no jurisdiction to deal with their case, the amount involved in it being above Rs. 5,000. The Judicial Commissioners, inholding that the District Judge had jurisdiction to deal with the appeal of defendants Nos. 13 and 14, treated it as still pending before that Court and withdrew it to their own Court u/s 24, Civil Procedure Code, and then disposed of it in the manner indicated above. In the appeal before the Board, Mr. Rewcastle referred to the irregularities mentioned above, but after consideration did not press the objections.

17. Their Lordships will now proceed to deal with the questions that arise before them for determination. The first question is whether defendants Nos. 13 and 14 have proved their heirship to Ch. Nathu. The oral evidence in the case is not of much value. The most important piece of evidence relied on by Sir Thomas Strangman who appears for them and also by the Courts below is suit No. 58 of 1898 in the Court of the District Judge at Peshawar. That suit was brought by Nawab Khan as the son of Mohd. Khan on the assumption that Mohd. Khan was the brother of Chaudhri Nathu against Mst. Babo Jan his widow and another, with respect to the validity of the sale by her of a house which Ch. Nathu had gifted to his daughter Mahbuba. The parties in their pleadings admitted the relationship alleged (see paras. 1 and 5 of the plaint and para. 1 of the written statement of Babo Jan) and the judgment of the learned Judge also establishes it. Sir Thomas Strangman relies on Section 32(5) of the Indian Evidence Act to show that the statement as to relationship contained in the pleadings is admissible in evidence as having been made before the question was raised by persons who had special means of knowing the relationship to which the statement relates, but Sir Herbert Cunliffe argues that neither the statement nor the decision can bind defendants Nos. 11 and 12, the sons of Must. Mohammadi Begum (the vendors of the plaintiff) who were not even cited as witnesses in the suit, though they were admittedly interested in the question. The argument requires consideration; it may be, as argued by the learned Counsel, that the parties made the statement with a view to establish their claim to the house, but this is only a suggestion; and there is nothing on the record to show that the suit was a collusive one. It has also to be noticed that during the long period of about 36 years that has passed since the decision, no objection to it was ever taken by defendants Nos. 11 or 12 at any time before the present suit. Indeed, it is difficult to believe that they knew nothing about it. In the circumstances, after carefully considering the matter their Lordships are not inclined to give effect to the learned Counsel's contention. They would therefore hold, agreeing with the concurrent findings of the District Judge, and of the Court of the Judicial Commissioner, that defendants Nos. 13 and 14 have established their heirship to Ch. Nathu.

18. It will be convenient here to consider whether Mst. Mahbuba was the step-daughter of Mst. Babo Jan or her real daughter. The question is important for all parties, for if Mst. Mahbuba was only her step-daughter, then Mst. Babo Jan would not be qualified to inherit from her and her share would all devolve on

defendants Nos. 13 and 14. These defendants therefore lend their support to the plaintiff, but both are resisted by defendants Nos. 4 to 8, because, if the widow inherits from Mst. Mahbuba, which she can do only if she is her daughter, then a portion of Mst. Mahbuba's share could be claimed by them under the sale from Mst. Babo Jan by virtue of Section 115 of the Indian Evidence Act, as was decided by the Court of the Judicial Commissioner, the remainder of it going to defendants Nos. 13 and 14. Plaintiff can establish his claim to Mst. Mahbuba's estate only if he succeeds in disproving the heirship of defendants Nos. 13 and 14 (in which he has now failed) and also succeeds in showing that Mst. Mahbuba was only the step-daughter of Mst. Babo Jan.

19. The relevant evidence that requires to be considered in connection with the precise relationship of Mst. Mahbuba to Mst. Babo Jan is furnished by the application for succession certificate made by Mst. Babo Jan to recover the debts due to her husband, D4, the dower deed executed by him in her favour on January 7, 1888, D3, another document executed on the same date under which a house was gifted by him to Mst. Mahbuba and Mst. Babo Jan's own statement made in civil suit 58/1898. It is true that in mentioning the heirs of Ch. Nathu, Mst. Mahbuba is described by Mst. Babo Jan only as the minor daughter of the deceased, and not as her daughter; but, as noticed by the Court of the Judicial Commissioner, the object of the application was to describe the heirs of the deceased and it was only natural that she should be described as his daughter. In the light of the evidence considered by the Court of the Judicial Commissioner, D4 does not necessarily show that it was given to Mst. Babo Jan on the day of her marriage and, therefore, it does not follow from it that Mst. Mahbuba could not be her daughter. These documents do not injure the case that Mst. Mahbuba is the real daughter of Mst. Babo Jan. The important piece of evidence that supports the contention is Mst. Babo Jan's statement in suit No. 58/1898 that she is her daughter." Defendants Nos. 18 and 14 having relied on the proceedings in that suit in support of their heirship should not now be allowed to ignore it. Considering the evidence as a whole, their Lordships agree with the conclusion arrived at by the Court of the Judicial Commissioner on this question. To sum up, their Lordships accept the finding that the heirs of Ch. Nathu are his widow, Mst. Babo Jan, her stepdaughter Mst. Mohammadi Begum, Mst. Mahbuba, his daughter by Mst. Babo Jan, and defendants Nos. 13 and 14.

20. The next question for determination is whether the mortgaged property is liable to be redeemed at all. The contention based on custom having been found against him by all the Courts, the next ground urged by the learned Counsel, supported by an array of facts showing that Ch. Nathu died leaving various debts, is that his widow Babo Jan in administering her husband's estate of which she was in possession and in paying off his debts and funeral expenses, was entitled in law to sell and did sell the equity of redemption in the entire serai to Lorinda Mal which made defendants Nos. 4 to 8 his successors in interest, full owners of the property. It is not disputed that in so selling the property Babo Jan did not consult any of the heirs of Ch. Nathu, for the plea of defendants Nos. 4 to

8 is that "Chaudhri Nathu died issueless on March 28th 1889, leaving only a widow, Babo Jan, who entered into possession of the estate." Further on, she is described in the statement as "heir and representative of the mortgagor." Their Lordships have now held that Ch. Nathu died leaving other heirs also, besides Babo Jan. The question arises: had Babo Jan, one of the heirs in possession of the estate left by the deceased, power to alienate the shares of the other heirs also for the purpose of discharging his debts ? The law applicable to the case is thus stated in Mulla's Mahomedan Law, 12th Edition, p. 36:

One of several heirs of a deceased Mahomedan, though he may be in possession of the whole estate of the deceased, has no power to alienate the shares of his co-heirs, not even for the purpose of discharging the debts of the deceased. If he sells or mortgages any property in his possession forming part of the estate of the deceased, though it may be for the payment of the debts of the deceased, such sale or mortgage operates as a transfer only of his interest in the property. It is not binding on the other heirs or the other creditors of the deceased.

21. This statement of law is amply supported by the full bench decision of the Madras High Court in Abdul Majeeth v. Krishnamachariar I.L.R.(1916) Mad. 243 where it was held that

when one of the co-heirs of a deceased Muhamadan, in possession of the whole or part of the estate of the deceased, sells property in his possession forming part of the estate for discharging the debts of the deceased, such sale is not binding on the other co-heirs or creditors of the deceased

the reason being that the estate of a Mahomedan dying intestate devolves on his heirs at the moment of his death and his heirs "take their shares in severalty, their rights being analogous to those of tenants in common, and not of members of a joint Hindu family..." It follows that the sale by Babo Jan to Lorinda Mal is invalid except to the extent of her share which is only one-eighth. Defendants Nos. 4 to 8 cannot therefore retain possession of the entire serai and say that the property is not liable to be redeemed at all.

22. The next question is what is the extent of the interests of the various parties in the property in suit. The extent of the interests as decided by the District Judge was altered by the Court of the Judicial Commissioner as that Court differing from the District Judge held that Mst. Mahbuba was the real daughter of Mst. Babo Jan. Assuming the property to consist of 72 shares, the Court held that on her death 8 shares would go to Mst. Babo Jan and 16 shares to Nawab Khan. That Court further held that as Mst. Babo Jan held out to Lorinda Mai that she was the sole owner of the property when she sold it to him, those shares which she inherited from her daughter should in view of Section 115 of the Indian Evidence Act be decreed to defendants Nos. 4 to 8. On this reasoning the Court of the Judicial Commissioner held that the shares of the parties interested in the redemption of the suit property are as follows:- The plaintiff gets 24 shares, defendants Nos. 4 to 8, 17 shares, and defendants Nos. 13 to 14, 31

shares. This division of shares is correct under Mohamrnadan law, on the basis of the findings of the Court of the Judicial Commissioner which their Lordships have accepted. The plaintiff and defendants Nos. 13 and 14 are thus entitled to redeem the suit property in the proportions as mentioned above.

23. The last question for determination is whether the Court of the Judicial Commissioner should not have decreed the delivery of possession of the cinema. The facts which have a bearing on this question have not been disputed. The cinema on the construction of which a large sum of money had been spent was admittedly built on a portion of the "site originally mortgaged by Chaudhri Nathu" which he held as a licensee from the Government. In 1934 Parma Nand obtained from the cantonment authorities a lease for 30 years of a portion of the site on which the serai had been built, for the purpose of building the cinema, and he built it with the sanction of the competent authorities. It is not disputed that before the lease to Parma Nand was granted that the Government had not revoked the licence granted to Chaudhri Nathu under which he held from the year 1871. It is argued by Sir Herbert Cunliffe that though under Clause 6 of the Governor General's resolution, the Government may resume the site at any time, they can do so only after giving one month's notice to the person holding under them, and that since there is no evidence to show that the land was legally resumed by the Government acting under this rule, it must be held that the subsequent lease of 1934, given to Parma Nand cannot have any legal effect, and that therefore the site should be surrendered by defendants Nos. 4 to 8 to the plaintiff and others now interested in its redemption with all the superstructures standing on it including the cinema, The argument is not without force, but their Lordships should examine the circumstances to see whether effect can be given to it. The evidence bearing on the dealings between Lorinda Mal and his descendants with respect to this land has been given by D.W. 13, Walayati Ram, record keeper of the office of the cantonment authority, Peshawar Cantonment. His evidence shows that after the sale of the land to Lorinda Mal, his descendants made applications to the authorities for effecting repairs and the like to the serai in 1900, 1917, 1924, 1925 and 1926. In 1924 Karam Chand made an application for addition and alterations to the original building No. 68, u/s 179 of the Cantonment Act submitting a plan with his application. In the application he stated that he had obtained the serai by purchase and sanction was granted by the Headquarters Peshawar. In another application made in 1925, for further alterations and additions the acquisition of the serai by purchase was reiterated, and the required sanction was granted. Another application made in 1926 for the erection of 4 kothris repeats the assertion of ownership by purchase as in the previous applications and the application was granted by the Cantonment Board as well as the Commander, Peshawar district. On October, 1983, Parma Nand made his application for permission to build a cinema and the lease in question was granted to him by the execution of a deed on September 11, 1934. The witness deposes that proclamations and notices are issued before any new erection, additions and alterations are made except in the

case of ordinary repairs, and that when the lease was granted the necessary proclamations and notices were issued. These proclamations according to the witness are made by beat of drum and are read out in the bazaar area and in the vicinity of the property concerned. The serai is situated about a mile from the bazaar. The Senior Subordinate Judge says it is not proved that the proclamations were brought to the notice of the heirs of Chaudhri Nathu and he also refers to the evidence that defendants Nos. 11 and 12 appear to have served a notice on the father of defendants Nos. 4 to 8 to desist from the building of the cinema. There cannot be any doubt that the proclamations and notices would have given great publicity to the transactions between the Government and Lorinda Mal and his descendants, and their activities with reference to this property, and yet no protest seems to have been made to the Government by those interested in now claiming to redeem the property. The evidence appears to show that the Government treated Lorinda Mal and his successors in interest as true owners of the property of which the site belonged to them, and they were justified in doing so. No evidence has been brought to their Lordships' notice that those interested in the original lease to Chaudhari Nathu ever made Government aware of the fact that the true ownership of the property vested in them and not in Lorinda Mal and his descendants. In these circumstances, their Lordships think that any notice of cancellation and intending resumption of the original lease could properly be given to Parma Nand. If that be so, it was open to Parma Nand to waive the giving of the notice and by acceptance of the lease he must be taken to have done so, as such waiver is to his advantage. The validity of the lease of 1984 cannot therefore be called into question. In their Lordships' view the decree passed by the Court of the Judicial Commissioner refusing the delivery of the cinema standing on the site leased to Parma Nand in 1934 to the parties interested in redemption is right though they have reached their conclusion on a different ground.

24. Their Lordships would add that at the hearing before them, Sir Thomas Strangman sought to argue that although Parma Nand applied to take the new lease for his own benefit, he by reason that his only interest in the serai was that of a mortgagee held the new lease as part of the mortgaged property for the benefit of all those interested in the original lease. (See Section 90 of the Indian Trusts Act, and Section 3, ill. (d), of the Specific Relief Act), The point was neither pleaded nor argued in the Court below, and their Lordships therefore refused to allow the point to be taken before them.

25. In the result, their Lordships will humbly advise His Majesty that these consolidated appeals should be dismissed. Having regard to the circumstances of the case there will be no order as to the costs of the appeal before the Board.