

Magistrate had no jurisdiction to order the re-hearing of a complaint which he had already dismissed under s. 203 of the Criminal Procedure Code, the mere fact of his being in charge of the District Magistrate's office not giving him any power to pass such an order; and (2) that the District Magistrate having referred the case to the Bench for disposal under ss. 379 and 417 of the Penal Code, it was not open to the Bench, in order to give itself summary jurisdiction, to reject one part of the complaint under s. 417, which was not triable summarily, and to accept the other part of the complaint under s. 379, which was triable summarily.

The Sessions Judge, being of opinion that on the grounds above set out the proceedings of the Bench of Magistrates should be set aside, referred the case to the High Court.

No one appeared for either party on the reference.

The order of the Court (FIELD and BEVERLEY, JJ.) was as follows:—

For the reasons set out by the Sessions Judge, we reverse the conviction of Koylash Mahton, and direct that the fine, if realized, be refunded.

A Deputy Magistrate placed in charge of the current duties of the District Magistrate's office is not thereby vested with jurisdiction under s. 437 of the Code of Criminal Procedure.

Conviction set aside.

PRIVY COUNCIL.

DEPUTY COMMISSIONER OF RAE BABELI (PLAINTIFF) *v.* RAMPAL SINGH (DEFENDANT.)

P. C.*
1884
November 14.

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Construction of instrument of mortgage.

An instrument, mortgaging villages for a sum payable within a certain period by instalments, and making distinct provision that, upon default in payment of an instalment, the mortgagee by his servants was to take possession, and after paying the revenue and the expenses of collection, to

* *Present*: LORD FITZGERALD, SIR D. PRADOCK, SIR R. P. COLLIER, SIR R. COUCH, and SIR A. HOBHOUSE.

1884
 DEPUTY
 COMMISSIONER OF
 BAE BAROLI
 v.
 RAMPAL
 SINGH.

credit the balance towards payment of the instalment, also contained the following: "Should on the expiration of the term of this instrument any money remain due, then, till payment thereof, possession will continue according to the terms herein set out. If I do not accept this, then, as soon as the breach of promise occurs, they will at the end of the year realize the whole amount of instalment by sale of the villages and of other moveable and immoveable property belonging to me."

Held, that such an instrument must be taken as a whole, and that the true construction to be put on it should be that which, being reasonable, would also give effect to all parts of it.

Held, accordingly, (on the contention that those words negatived the mortgagee's right to take possession upon default in payment of an instalment, leaving him only a right to proceed to sale) that, as this construction would not give due effect to the first part of the instrument, it must yield to a construction which, not only would give such effect, but would also be the more reasonable one, *viz.*, that the mortgagee should take possession upon such a default, and also might sell if the mortgagor objected to his applying the rents in reduction of the principal and interest due.

APPEAL from a decree (31st October 1881, of the Judicial Commissioner of Oudh, reversing a decree (20th December 1880) of the District Judge of Rai Baroli.

This suit was instituted by the appellant as the manager, on behalf of the Court of Wards, in charge of the Pindri Ganeshpur estate, of which Shahdeo Singh was the proprietor, to obtain possession by enforcing a mortgage of thirty-one villages, executed by the respondent's wife, the Rani Subhao Koer, on the 10th March 1874. Possession was claimed on the ground that the mortgagor had failed to pay the stipulated yearly instalment.

This claim was resisted by Raja Rampal Singh, on the ground that the right to possession, on such default, depended, by the terms of the mortgage, on the mortgagor's consent; and that in the absence, or on the refusal, of such consent, the mortgagee must exercise his ordinary right of realizing his security by obtaining an order for sale, and selling his security.

The material parts of the mortgage-deed of 10th March 1874 are set forth in their Lordships' judgment, as well as the circumstances under which another defendant became, and ceased to be a party to this suit.

The District Judge of Rai Baroli, after concluding on that part of his judgment which is quoted by their Lordships, that the

power of obtaining possession by the mortgagee, on default, being made in payment of the instalment, was given absolutely, added the following :—

“ Had such power been intended to be subject to the wish of the mortgagor, the natural way of expressing the idea would be *kabza de denge* (I will give possession), and there would have been an express mention that such delivery of possession would be contingent upon the will of the mortgagor. Such is not the case here. The form of mortgage in which property is mortgaged, and delivery of possession is made contingent upon failure of instalments, is very common; and in interpreting deeds of this kind, and in the absence of clear and explicit condition to the contrary, the Courts will not accept a construction which would materially vary the rights of the parties and create rights and obligations different to what they are understood to be under such mortgages. That, in executing the mortgage in question, the parties intended to create a mortgage different in its nature to the ordinary kind of mortgages does not appear from the deed; and I cannot hold that the words *agar mañh ko yeh manzur na ho* (if this be not agreeable to me) were intended to mean that the preceding terms of the mortgage would become null and void at the will of the mortgagor. Again, the expression used with reference to the mortgagee's power of recovering the instalment money is expressed in the words *wusul karlen* (may realise), an expression which by no means can be understood to confine and limit the mortgagee's remedy to that relief only; but indicates option in the matter, as the grammatical sense of the words clearly shows. The clause appears to have been introduced to benefit the mortgagee by giving him immediate power of recovery of the mortgage money, and not to divest him of the power, which he would independently have, of obtaining possession on failure of due payment of instalments. So that, if the mortgagee chooses to waive his right of immediate recovery of the mortgage money, there is nothing to preclude him from falling back upon the power vested in him by the preceding conditions of the mortgage, and to seek recovery of possession. This construction receives further support from the circumstance that, even after the clause just referred to, the deed goes on to lay down certain

1884

DEPUTY
COMMISSIONER OF
RAJ BAREILLY
S.
RAMPAL
SINGH.

1884
 DEPUTY
 COMMISSIONER OF
 RAE BARELI
 v.
 RAMPAL
 SINGH.

other conditions which relate to the mortgagee's rights whilst in possession."

The Judicial Commissioner, holding that "the mortgagee must realize his security," reversed the decree of the District Judge.

On this appeal,—

Mr. *J. D. Mayne* and Mr. *J. T. Woodroffe*, for the appellant, argued that the decision of the Judicial Commissioner was wrong. The first Court had rightly held that the instrument gave the mortgagee the right to convert the mortgage, upon a default occurring in payment of the instalments, from one without possession into a mortgage with possession. This power had not been put, by the effect of subsequent words, under the control of the mortgagor to compel the mortgagee to sell.

Mr. *R. V. Doyne* and Mr. *C. W. Arathoon*, for the respondent, contended that there was an actual expression of the intention of the parties, to the effect that possession could not be taken on the part of the mortgagee, without the consent of the mortgagor.

Counsel for the respondent were not called upon to reply.

Their Lordships' judgment was delivered by

SIR R. COUCH.—The suit in this case was brought by the present appellant. The plaint prayed that under the terms of an instrument of mortgage, dated the 10th March 1874, possession as mortgagee of 31 villages specified in that instrument of mortgage should be awarded to the plaintiff. At the time of filing the plaint the respondent Raja Rampal Singh was not in possession of the villages. The person in possession was Dirgaj Kunwar, his mother. Rampal Singh was made a defendant on the ground that, under the circumstances which were stated in the plaint, he was liable to pay the original debt, and was the real owner of the mortgaged villages. Dirgaj Kunwar was made a defendant as being the party in possession. The plaint was filed on the 31st March 1880. On the 11th June 1880 there were proceedings for mutation of names. It is not necessary to go into the particulars of those proceedings, the result of which was that Rampal Singh came into possession, and on the 14th June, in his written statement in the suit, he defended

it as being in possession, and Dirgaj Kunwar in fact became no longer a real party to it. The contest is between the present appellant and Rampal Singh. The only question which is now raised is, upon the construction of the mortgage of the 10th March 1874.

1884
DEPUTY
COMMISSIONER OF
RAE BAREILLY
v.
RAMPAL
SINGH.

The terms of that mortgage, after reciting particulars showing how it came to be entered into, are these: After stating that there was to be a mortgage for Rs. 50,000, with a promise to pay it up in five years, from 1875 to 1879, it proceeds,—“Therefore I, while enjoying sound health and proper senses, do hereby mortgage without possession to the Shahzada, in lieu of Rs. 50,000, being the balance of the consideration of the above-mentioned decree, the following villages, as per boundaries given below, situate in the above-named pargana and district, together with all vested and contingent rights, the gross rental of which is Rs. 18,253-12-3, and the Government revenue, Rs. 7,986; my husband having gifted them to me by a deed of gift dated 2nd June 1873, with power to sell, or mortgage, or transfer in every way the proprietary right, and I holding possession thereof: Raja Hanwant Singh, my father-in-law, has also recognised the fact by the decree dated 7th September 1871; and in case of change of heirs from time to time this property cannot be taken out of my possession; and I covenant as follows: (1) I will pay Rs. 10,000 per annum at both crops to the Shahzada Sahib, and out of that amount his servants will first deduct the interest, whatever it may come to by calculation, and then credit the balance towards the principal: and in case of any disorder which may cause default in payment of the instalment, the servants of the Shahzada Sahib Bahadur, taking complete possession of the mortgaged estate, will hold themselves liable for the payment of the Government revenue, including land-revenue and cesses of all sorts, and having first deducted from the savings the cost of making collections at the rate of 10 per cent. on the gross rental on account of the pay of servants, will credit the balance towards the instalment money; at the end of each year, in the months of May, June, November, and December, having made up accounts, they will note the date of realisation. Till the time the accounts are not made up

1884

DEPUTY
COMMIS-
SIONER OF
RAE DARWELI
RAMPAL
SINGH.

there will be no claim or objection on my part to set off the interest against the amount collected; on the other hand the amount collected will be considered as amount in deposit." To stop here for the present, there is here a distinct provision that upon default in payment of an instalment the mortgagee by his servants was to take possession of the mortgaged property, and to collect the revenue, and apply it towards the payment of the instalment. The words are: "The servants taking complete possession." That evidently shows that possession was to be taken; the mortgagee was to have power to take possession on the non-payment of an instalment. What is said by the District Judge in his judgment is very pertinent to this part of the instrument. He says: "The question involved in the fifth issue now remains to be determined, *viz.*, whether under the terms of the deed of mortgage the plaintiff is entitled to sue for possession. The words of the deed, so far as they bear upon this point, have been carefully read and considered by me in the original Hindustani, and a literal translation has been given above in this judgment. There is no doubt that there is some ambiguity in the language of the deed. That a breach of the condition as to regular payment of instalments has taken place is not denied on behalf of the defence; but it is contended that such breach having taken place the plaintiff's only remedy is to sue for the recovery of the mortgage debt, and that the plaintiff's right to enter into possession was intended to be contingent upon the wish of the mortgagor. For this contention the defence relies upon these words of the deed: 'And if this be not agreeable to me then immediately on the happening of the breach of promise, after the end of the year, they may realise the entire instalment money, &c.' It is contended by the defence that the word 'this' (*yeh*), used in the above sentence, applies to all the preceding conditions in the deed, and that it makes the condition of taking possession entirely dependent upon the mortgagor's wish. But I am of opinion that this is not a fair construction of the Hindustani words as they are used in the deed. The language of the deed shows that the power of obtaining possession on failure of regular and full payment of instalments was given absolutely, the words used being *labza learko* (having taken possession)

“and emphasised by the words *usi wakt*, at once, which, read “together, indicate absolute power to take possession.” Therefore we have in the first part of this instrument an absolute power on the part of the mortgagee to take possession on non-payment of an instalment. That this was contemplated is shown also by the provision at the end of the instrument, which says: “Should, on the expiry of the term of this instrument, any money remain due, then, till the payment thereof, possession will continue according to the terms herein set out.” Then, after the passage which has been read, comes the part upon which the respondent relies: “If I do not accept this, then as soon as the breach of promise occurs they will at the end of the year realise the whole amount of instalment by sale of the villages and of other moveable and immoveable property belonging to me. Should in any way any objection be raised by me, or by my husband, as between us or in Court, it will be void.” The contention on the part of the respondent is, that these words apply to all the previous part of the deed, and that the mortgagee could not take possession, except at the option of the mortgagor; and if the mortgagor thought fit to say that the mortgagee should not take possession but should realise the amount of the instalment by sale of the villages, that course must be adopted, and a suit for possession could not be maintained. Now the consequence of putting such a construction as that on this part of the instrument would be to make it not consistent with the former part, which gives a power to take absolute possession. The instrument must be taken as a whole, and that construction must be put upon it which will be a reasonable one, and will give effect to all the parts of it. A construction which will give effect to all is that the words, “if I do not accept this,” may be referred to the part which immediately precedes that passage, namely, that which provides for the setting off the interest against the amount collected by the mortgagee when in possession. The other construction would not only not give the proper effect to the first part of the instrument, but it would also involve what could scarcely have been contemplated by the parties, *viz.*, that the only security, the only remedy which the mortgagee would have if the mortgagor thought fit to insist

1884

 DEPUTY
 COMMISSIONER OF
 RAJ BARELI
 *.
 RAMPAL
 SINGH.

1884
 DEPUTY
 COMMISSIONER OF
 RAN BARALI
 v.
 RAMPAL
 SINGH.

upon it, would be that upon default in payment of an instalment he would be obliged to sell a portion of the property so as to realise the amount of that instalment. That can scarcely have been in the contemplation of the parties. The instrument must be looked at as a whole, and in their Lordships' opinion the reasonable construction is that there was an absolute power to the mortgagee to take possession on default in payment of an instalment, but if the mortgagor objected to the mortgagee applying the rents in reduction of the principal and interest, the mortgagee might sell the mortgaged property and other property which was brought into the security, in order to satisfy the debt. This seems to their Lordships to be the reasonable construction of the instrument. It is the construction which the District Judge put upon it, but which the Judicial Commissioner thought was wrong, and therefore reversed his judgment.

Their Lordships will humbly advise Her Majesty to reverse the decree of the Judicial Commissioner, leaving the judgment of the District Judge to stand, and the respondent will pay the costs of this appeal, and the costs of the appeal in the Court of the Judicial Commissioner.

Solicitor for the appellant: Mr. H. Treasure.

Solicitors for the respondent: Messrs. Deane, Chubb & Co.

P. O.*
 1884
 November 18.

BISHENMUN SINGH AND OTHERS (OBJECTORS) v. THE LAND MORTGAGE BANK OF INDIA (PETITIONERS.)

[On appeal from the High Court at Fort William in Bengal.]

Jurisdiction as between District Judge and Subordinate Judge of a Court making a decree to execute it, notwithstanding certain special matters.

The sale of mortgaged property was decreed by a Subordinate Judge. Before the sale another suit, instituted in the same Court for the purpose of having other property substituted in lieu of part of that mortgaged, was transferred to the Court of the District Judge, who decreed, upon consent, that the substituted property should be sold, and that, for the purpose of this sale, this suit should be taken as supplemental to the former one. On the petition of the mortgagee for execution of the decrees, in both suits, in the District Court, it was objected that execution could

* Present: LORD FITZGERALD, SIR B. PEACOCK, SIR R. P. COLLIER, SIR R. COCHRAN, and SIR A. HOUBOURN.