PRIVY COUNCIL.

MADHOPERSAD (PLAINTIFF) *v.* GAJUDHAR AND OTHERS (DEFENDANTS.)

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

P. C.*
1884
July 4 and 12.

Foreclosure of Mortgage—Regulation XVII of 1806, *s.* 8—*Service of copy of petition and of parwana, in the manner provided, essential.*

The provisions of s. 8 of Regulation XVII of 1806 are not merely directory, but imperative, prescribing conditions precedent to the right of the mortgagee to enforce forfeiture of the estate of the mortgagor, and have for their object the protection of mortgagors from fraud. The prescribed procedure must be strictly followed. *Norender Narain Singh* v. *Dwarka Lall Mundur* (1) referred to and followed.

Held, that although the mortgagor at the hearing of the foreclosure suit in the Court of first instance had not insisted on the insufficiency of the notification of the mortgagee's application to foreclose, but had relied on another defence, this could not be construed as a binding admission that notice had been duly given; that service of the copy petition for foreclosure, and of the parwana signed by the Judge, was essential; and that the mortgagor was not precluded from questioning the regularity of the proceedings in his subsequent appeal.

APPEAL from a decree (15th March 1881) of the Judicial Commissioner of Oudh, reversing a decree (8th September 1880) of the District Judge of Lucknow, and dismissing the appellant's suit for foreclosure of a mortgage.

The principal question raised on this appeal related to the sufficiency of proceedings purporting to have been in conformity with Regulation XVII of 1806, s. 8. Another question was whether or not the mortgagors had received the mortgage money, on which the Courts in India differed.

The object of the suit was to obtain possession, in proprietary right, of mouzah Bhadin in the Unao district of Oudh, which had been mortgaged by way of conditional sale by the respondents, or their predecessors in estate, to the father of the appellant. The mortgage, dated 3rd May 1863, was registered under Act XIX

* *Present*: LORD WATSON, SIR B. PEACOCK, SIR R. P. COLLIER, SIR R. COUCH, and SIR A. HOBHOUSE.

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of 1843 (1), the mortgage money Rs. 4,851 being payable, with interest at one per cent. per month, within five years. It contained a clause to this effect: "Should the principal amount with interest be not paid within the time above specified, and the whole or a portion thereof remain unpaid, this mortgage deed will be held an absolute deed of sale, free from all dispute, and the mortgagee will be entitled to possession of the village, according to the terms of a deed of sale.

The execution of this mortgage being admitted, the defence was that the consideration had not, in fact, been paid, the instrument having been made upon a promise by the mortgagee that the expenses of the mortgagors attending an appeal, in which they were interested, should be defrayed by the mortgagee. The appeal, however, turning out to be unnecessary, never was made.

Issues having been fixed, and the defendants called on to disprove the *primâ facie* case against them, the Court of first instance, the District Judge of Lucknow, gave judgment in favor of the plaintiff, finding on the evidence that there was affirmative proof of the consideration money having been in fact paid; and foreclosure of the mortgage was accordingly decreed. This decision was reversed by the Judicial Commissioner. He held that, under the circumstances, the plaintiff might be fairly put to the proof of the consideration; and that the evidence, oral and documentary, had been insufficient to establish it. He was, however, of opinion that if he had concurred with the Judge of the first Court as to the receipt, in fact, of the mortgage money by the mortgagors, it would still have been necessary to dismiss the suit in its present form, on the ground that notice of foreclosure had not been duly served, according to s. 8, Regulation XVII of 1806, and that the proceedings were therefore invalid. His judgment on this point was the following: "Although the parwana of 26th April 1876, purports to issue by order of Deputy Commissioner, it certainly does not bear his official signature; there was no copy of the written application for foreclosure served with it at the same

(1) Under this Act registration of deeds affecting interests in land was not compulsory; but such deeds when registered were to be satisfied in preference to those not registered.

time; nor does it notify that, if the mortgagor shall not redeem the property mortgaged, in the manner provided for in the foregoing section of the Act, within one year from the date of the notification, the mortgage will be finally foreclosed, and the conditional sale will become conclusive.

What it does do is simply to order them to appear by the 18th May to take away notice deeds in the matter of Madhopersad's notice of foreclosure of mouzah Bhadin for Rs. 12,365-6, on conditional deed of sale.

It is urged that their subsequent petition objecting to foreclosure proves that they were aware of the claim to foreclose the amount claimed, and the amount was to be paid by them within one year, but this is not so. What it proves is that they were aware that petitioner had claimed all this, but that is a very different matter to an authoritative notice by the Judge that such was the law. It is further urged that this objection was not taken in the Court of first instance, and so must be held to be waived, but I cannot concur. The provisions of s. 8 of Regulation XVII of 1806 are imperative and not merely directory. In *The Bank of Hindoostan* v. *Shoroshibala Debee* (1) a formal notice was served, and the mortgagors must have been well aware of the legal results of such notice, for they had once gone through the whole foreclosure proceedings of the same mortgage; although the proceedings were subsequently cancelled, yet there being no proof of service at the same time of a copy of the written application for foreclosure, this was held to be fatal to the plaintiff's claim to foreclose. And in my opinion the tendency of all cases is to show that, whether parties raise it or not, it is imperative on the Judge to try and decide the issue, whether notice of foreclosure had been duly served or not. Foreclosure being an act which puts an end to the right of the mortgagor, it must be carried out strictly in accordance with the Regulation. The right to foreclosure rests upon such notice as the law requires to be given; and though it may be hard on the claimant that he should suffer from the laches of the Court, yet it is eminently his duty to see that everything is done in conformity with law,

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and it would be much harder if the mortgagors were to lose their estate for non-conformance with a notice which in *no* important respect was conformable with the law.

On these grounds I decree this appeal and cancel the decree of the District Judge, dated 8th September 1880, and dismiss this suit. As to costs, there being found no fraud on the part of plaintiff, who probably found this bond among old family papers without knowing its real value, I do not think it necessary to decree costs against him. Each party will bear their own costs in both Courts."

On this appeal—

Mr. *R. V. Doyne*, for the appellant, argued that the judgment of the first Court was correct upon the evidence; and that the Judicial Commissioner had reversed the finding upon insufficient grounds. He also contended that the notices given with a view to foreclosure had been in effect a substantial compliance with the requirements of s. 8 of Regulation XVII of 1806, followed as they had been by the other proceedings in the District Court in which the respondents had virtually admitted the receipt of due notice; so that it was not open to them to contest this point at a later stage.

He referred to Macpherson on Mortgages, 6th edition, 210; and *The Bank of Hindoostan* v. *Shoroshibala Debee* (1).

The respondents did not appear.

On a subsequent day, July 12th, their Lordships' judgment was delivered by

SIR R. P. COLLIER.—This is an appeal from a judgment of the Judicial Commissioner of Oudh, reversing a judgment of the District Judge of Lucknow.

The plaintiff, a banker, sued to recover proprietary possession of a village on the completion of foreclosure proceedings with respect to a mortgage of it. The mortgage was dated 3rd May 1863, 17 years before the commencement of the suit; of the mortgagors, 17 in number, 11 survived, the remaining defendants being representatives of those who had died. The mortgagee was Rajah Behari Lál, the father of the plaintiff. The deed of mortgage purports to be a security for the repayment within five years of Rs. 4.851, with 12 per cent. interest, the receipt of

(1) I. L. R. 2 Calc., 313, 315.

which sum is acknowledged, and it declares that if the principal and interest are not repaid within five years the instrument shall operate as an absolute deed of sale.

The principal sum is stated to be made up of debts due by the mortgagors, or otherwise secured by former mortgages, which they were to be provided with money to pay, of a balance due to the Bank, and an advance of Rs. 1,356 " for necessary expenses."

The plaintiff alleged default in the payment of the mortgage money, that the proper proceedings for foreclosure had been taken, and claimed possession of the land.

The defendants denied that any consideration was given for the bond, and alleged that it was given only to secure advances which might be made to pay the costs to which the plaintiff might be put by the prosecution of an appeal by two persons who had brought a suit against them, and failed in the lower Court; that no appeal was preferred, and that nothing was advanced.

The issues stated were :—

(1) Did the defendants receive no consideration ?

(2) Were the defendants induced to execute the deed by fraud and misrepresentation ?

On the part of the plaintiff the mortgage was duly proved, which undoubtedly threw upon the defendants the burden of proving absence of consideration.

The plaintiff further called witnesses to the actual payment of the consideration money when the mortgage was executed. He put in the former mortgages. He showed an entry in his books whereby it appeared that the sums due on the former mortgages were either advanced to the defendants or paid for them; that they owed the balance to the Bank stated in the mortgage deed, and received the amount stated to have been paid to them. Against this evidence the defendants called two witnesses who swore that they were present on the examination of the deeds, and that no money passed, but none of the mortgagors, of whom 11 were living, were called to prove want of consideration, the pendency of the litigation, to meet the possible cost of which they alleged the mortgage to have been given,

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or indeed any part of their case, which involved a charge of gross fraud against the bankers. The District Judge believed the evidence of the plaintiff, and gave judgment in his favour. This judgment was reversed by the Judicial Commissioner on two grounds: 1st, that the mortgage was without consideration; 2nd, that the proper proceedings had not been taken to effect foreclosure.

The finding of the Judicial Commissioner on the first point seems to have been mainly based on three considerations:—

(1) That the entries in the books of the plaintiff contradict his story. Their Lordships have already intimated that in their view these entries confirm it.

(2) That the money was said to be advanced before the deed was registered. It is to be observed here that the transaction occurred in 1863, a year before the Registration Act of 1864 came into force, which, for the first time, provided that payment of the consideration of deeds might be made in the presence of the Registrar at the time of registration and recorded by him—a practice which has since become common. As the banker was not a party to the deed, his presence before the Registrar was not necessary, while that of the defendants was. If there is some force in the observation that it is strange that he should after parting with his money have entrusted the deed to the defendants to have it registered and receive it back from the Registrar, on the other hand it is to be observed that the deed must at some time have been returned to the banker, as he produced it at the trial.

(3) The absence of any demand of interest from the time of the mortgage money being due to the date of the suit, nearly 12 years, an observation certainly of some weight.

On the whole, however, their Lordships are of opinion that the evidence preponderates on the side of some consideration having been received by the defendants, though how much was actually advanced to them in cash may admit of doubt.

The second ground, on which the Judicial Commissioner reversed the judgment of the District Judge presents a question of more difficulty. It was contended on the part of the appellant that, inasmuch as the defendants had in the Court

below rested their case solely on the absence of consideration for the mortgage, and had admitted in their written statement that they received some notice of foreclosure, and no issue as to the validity of the foreclosure had been raised in the Court of the District Judge, the defendants were precluded from questioning the regularity of the foreclosure proceedings before the Judicial Commissioner, although they took the point in their grounds of appeal; and that the Commissioner had no power to inquire into those proceedings.

The proceedings necessary to effect foreclosure are thus prescribed in s. 8 of Reg. XVII of 1806:—

"Whenever the receiver or holder of a deed of mortgage and conditional sale may be desirous of foreclosing the mortgage, and rendering the sale conclusive on the expiration of the stipulated period, at any time subsequent before the sum lent is repaid, he shall (after demanding payment from the borrower or his representative) apply for that purpose by a written petition, to be presented by himself or by one of the authorized vakeels of the Court to the Judge of the zillah or city in which the mortgaged land or other property may be situated. The Judge, on receiving such written application, shall cause the mortgagor or his legal representative to be furnished as soon as possible with a copy of it, and shall at the same time notify to him by a parwana, under his seal and official signature, that if he shall not redeem the property mortgaged in the manner provided for by the foregoing section within one year from the date of the notification, the mortgage will be finally foreclosed, and the conditional sale will become conclusive."

These provisions are not merely directory but imperative, prescribing conditions precedent to the right of the mortgagee to enforce forfeiture of the estate of the mortgagor, and have for their object to protect mortgagors, who are often (as in the present case) poor and ignorant men, from fraud and oppression on the part of money lenders. Accordingly, both in the Courts of India and by this Board, it has been held that the prescribed procedure must be strtictly observed. In the case of *Norender Narain Singh* v. *Dwarka Lall Mundur* (1) it was held that the finding of the Zillah Judge, in the foreclosure proceedings, that notice had been duly given to the mortgagors, was not even *primâ facie* evidence of the Regulation having been complied with, and

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that the service of the *petition for foreclosure* and the parwana of the Judge in the form directed by the Regulation must be strictly proved. To construe the pleadings in the District Court as a binding admission that the respondents had received due notice, according to the Regulation of 1806, in the foreclosure proceedings, would be to apply to pleadings in India a stricter construction than is usual.

The Judicial Commissioner had the subject brought before him by the grounds of appeal; he had power to take additional evidence, or to frame a new issue, which it is to be presumed that he would have done had it been necessary, and had the parties desired it. In their Lordships' judgment he had, at the least, a discretion to inquire into the subject if he thought fit, and they are not prepared to say that he exercised that discretion so wrongly that his judgment ought to be reversed.

Although the vakeel for the mortgagors appeared before the Judicial Commissioner, argued the question of foreclosure, and adduced evidence upon it, it does not appear that any application was made for the settlement of an issue on this question, nor was it suggested, nor is it now suggested, that further evidence of the regularity of the foreclosure proceedings was obtainable.

The question remains whether, in the foreclosure proceedings, the provisions of the Regulation of 1806, with respect to the notification to be made to the mortgagor, were or were not duly observed.

Several documents were put in, of which the following is a specimen:—

"Translation of Notice to Ishri, dated 30th March 1876.

"(Signed) H. B. H.

"Madhopersad, son of Rajah Behari Lal, Bahadur, Sahukar (banker) and Talukdar of Maurawan, &c. ... ... *Plaintiff*,

versus

"1, Gajadhar; 2, Jagan; 3, Matadin, son of Thakur; 4, Ishri, son of Dhaukal; 5, Janki, son of Jowrakhan; 6, Lalta; 7, Badloo, and 8, Bhagwandin, sons of Madari; 9, Sheo Charan; 10, Gauri; 11, Janki, and 12, Mathura, sons of Pem; 13, Kusahar, son of Baji; 14, Kalidin; 15, Rajwa, and 16, Sheo Singh, sons of Badri; 17, Sankata, minor son of Ram Sahai, under the guardianship of his mother; and 18, Bala, son of

Bhawanidin, Brahmins, residents, and co-sharers of mouzah Bhadin, pargana and tahsil Purwa, in the district of Unao, mortgagors ... . *Defendants.*

"Claim.—Foreclosure of mortgage of the entire village Bhadin in the pargana and tahsil Purwa, in the Unao district, under the terms of the deed of mortgage by conditional sale, dated 3rd May 1863 A.D. for an amount noted below :—

"Notice.

"To Ishri, son of Dhaukal, caste Brahmin, resident and sharer of mouzah Bhadin.

"Whereas plaintiff has filed in the Court an application for foreclosure of mortgage in respect of village Bhadin described in the deed of mortgage by conditional sale, dated 3rd May 1863, owing to non-performance of the conditions entered therein, notice of one year's currency is hereby given to you, as laid down in s. 8, Regulation XVII of 1806, that if you will not pay up the mortgage money with interest within twelve months and redeem the mortgaged property, the mortgagee shall, at the expiration of the period stipulated for, become in virtue of the condition as regards non-receipt of the mortgage money and interest the absolute proprietor of the said village, and no objection whatever will thereafter be attended to.

	Rs.	As.	P.
" Principal mortgage money	4,851	0	0
Interest	6,932	4	0
Future interest for one year	582	2	0
Costs	8	4	0
Total	12,373	10	0

"Dated the 30th March 1876.

"In Hindi.

"(Signed) ISHRI, Lumberdar, with pen of Gauri, Patwari. Witnessed by Gauri, Patwari."

H. B. H. are said to be the initials of the District Judge.

The signature at the bottom is said to represent the receipt of the document by Ishri, one of the defendants, but when and where he received it is not very certain.

The following is a sample of another set of notices, dated the 26th of April 1876 :—

"By Order of the Deputy Commissioner of Unao.

"Notice of Foreclosure of Mortgage.

"No. 59. Miscellaneous, Civil.

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"Madhopersad, son of Rajah Behari Lal, Bahadur, Banker, and Talukdar of Maurawan, &c. ... ... *Plaintiff*,

versus

"Gajadhar, &c. (18 persons), residents of mouzah Bhadin, pargana and tahsil Purwa ... ... *Defendants*.

"Claim.—Foreclosure of mortgage by conditional sale of the entire village Bhadin in lieu of Rs. 12,365-6 in all.

"Notice to Sheo Charan, defendant.

"Whereas the plaintiff named above has put in a petition in this Court requesting that a notice of foreclosure of mortgage be issued to you, you are therefore directed to attend this Court, on 18th May of the current year, and take away the aforesaid notices, filed by the plaintiff after understanding their full purport; consider this urgent.

"Dated this 26th day of April 1876, A.D.

" (L.S.) (Signed)

It would appear by this that the defendants are summoned to attend the Court on the 18th May, in order to receive a notice of foreclosure, and that consequently they had not received notice before.

Accordingly on the 18th of May they attend the Court.

The proceedings before the Court are headed:—

"Claim to foreclosure of mortgage of village Bhadin in lieu of Rs. 12,365-6. Application for the issue of notice of foreclosure for the term of one year."

The defendants objected to receiving the notice, on the ground of want of consideration for the mortgage.

A minute of the Court of the Deputy Commissioner, dated 19th December 1876, is in these terms:—

"Parties are present, *i.e.*, the defendants, who were sent for, have appeared in person, while the plaintiff's pleader is present for him; notice has been delivered."

It has been contended that on that day at least the notices were delivered to the defendants, and that on that occasion they signed their names as having received them.

But what did they receive? The document of 30th March; none other is suggested, unless it be the document of the 26th of April, which is less favourable to the plaintiff.

This document of the 30th of March, however, is not a compliance with the Regulation. It is not a parwana under the seal and official signature of the Judge; it does not notify from

what date the year during which redemption shall be made begins to run, and it neither was nor purports to be a copy of the petition for foreclosure, the furnishing which to the mortgagor is declared by this Board in the case before cited to be essential. Their Lordships are therefore of opinion that the Judicial Commissioner was right in holding that the requirements of the Regulation had not been complied with, and they will humbly advise Her Majesty that his judgment be affirmed.

Solicitor for the appellant: Mr. *T. L. Wilson.*

Appeal dismissed.

KALIDAS MULLICK (PLAINTIFF) *v.* KANHAYA LAL PUNDIT, AND ON HIS DECEASE, BEHARY LAL PUNDIT AND OTHERS (DEFENDANTS.)

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

P. C.*
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July 4, 8 and 23.

Construction of gift, as to quantity of estate given—Limitation, Act XV of 1877, *Sch. II, Arts.* 134 *and* 144*—Gift when operative without delivery of possession—Hindu Law.*

The rule as to the construction of the language in which a gift is made, independently of the "Transfer of Property Act," Act IV of 1882, (which may, or may not, have been expressed so as to lay down, in favour of absolute gifts, a rule more positive,) is that indefinite words of gift are calculated to convey all the interest of the grantor, it being also necessary to read the whole of an instrument in order to gather the intention.

A gift being thus expressed,—"I put a stop to my interest in those taluqs, and withdraw my enjoyment thereof, and I make them over to you;" *held*, that this must be read with what preceded it, *viz.*, "in order that you may perform those religious ceremonies, celebrate the festivals satisfactorily, and may provide for your own support, by having the property under your authority and control;" and that the words of gift must be taken to be limited by the purpose of the gift; the whole taken together showing that the donor's intention was that the donee should take the property for life only.

Held, also, that, consistently with the authorities in the Hindu law, a gift, where the donor supports it, the person who disputes it claiming adversely to both donor and donee, is not invalid for the mere reason that the donor has not delivered possession; and that where a donee, or vendee, is under the terms of the gift, or sale, entitled to possession, there is no reason why such gift, or sale, though not accompanied by possession, whether of move-

* *Present:* LORD WATSON, SIR B. PEACOCK, SIR R. P. COLLIER, SIR R. COUCH, and SIR A. HOBHOUSE.