PRIVY COUNCIL.

P. C.* 1884 *February* 5.

NAROTAM DASS (PLAINTIFF) *v.* SHEO PARGASH SINGH (DEFENDANT).

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

Act XXIV of 1870 (The Oudh Taluqdars' Relief Act, 1870)—Hypothecation of lands under management.

A taluqdar, the management of whose taluq at the time was vested in an officer appointed under s. 3 of Act XXIV of 1870, made an instrument purporting to hypothecate the taluq to secure payment of money borrowed by him.

Held that, as the document contained no personal contract to pay out of personal estate, or any estate other than the taluq, it was unnecessary to consider whether a taluqdar, whilst his taluq is under management in pursuance of the provisions of the above Act, is competent to make a personal contract: this being only an hypothecation of the property falling within s. 4, cl. 3 of the Act, and invalid within its meaning.

APPEAL from a decree of the Judicial Commissioner of Oudh (13th October 1881), whereby a decree of the Judge of the Fyzabad District (19th April 1881) was confirmed.

On the 18th July 1873 the respondent, a taluqdar of Oudh, the management of whose taluq was then vested in an officer appointed by the Chief Commissioner, under the provisions of s. 3 of Act XXIV of 1870 (The Oudh Taluqdars' Relief Act, 1870), executed in favor of the appellant (a shraf at Fyzabad), the instrument of which the clauses are set forth in their Lordships' judgment. Before the institution of this suit against him, for principal and interest due to the 15th July 1873, which, with subsequent interest was made up to the sum of Rs. 10,981, the respondent had been restored to the possession of his taluq, under s. 12; but had made no payment.

The defence, besides denying the receipt of the money, alleged that the claim was invalid, inasmuch as the bond on which it was based had been executed while the defendant's estate was under the operation of Act XXIV of 1870, and an issue was fixed on this point.

* *Present*: LORD BLACKBURN, SIR B. PEACOCK, SIR R. P. COLLIER, SIR R. COUCH AND SIR A. HOBHOUSE.

In the Court of first instance the suit was dismissed with costs on the ground that the instrument on which the claim was based was a mortgage, and invalid under s. 4. The Judicial Commissioner dismissed the appeal for the same reason.

On this appeal,—

Mr. *J. T. Woodroffe*, for the appellant, argued that the instrument of 18th July 1863, though invalid for the purpose of charging the taluq, was evidence of a contract to pay the debt for which the taluqdar was personally liable. By reason of his estate being brought under the operation of Act XXIV of 1870, he had been rendered unable to charge the taluq, but not incompetent to contract. The instrument bore the construction that it contained a promise to pay, distinct from the hypothecation, and the transaction itself was to be regarded. A document rendered inoperative for a particular and limited purpose might be used as evidence of a different matter; for instance, as occurred under the registration laws. A document required by law to be registered, in so far as it affected land, was admissible, even if unregistered, in evidence for any purpose with regard to which its registration was not compulsory—*Lachmipat Singh Dugar* v. *Mirza Khairat Ali* (1). So a document, purporting to charge land, might be invalid for that purpose, under s. 4 of Act XXIV of 1870, but receivable for another purpose, *viz.*, as evidence of a debt.

He referred also to the sections in "The Scinde Encumbered Estates Act," XIV of 1876, corresponding to ss. 3, 4, 8, and 12 in Act XXIV of 1870.

Mr. *R. V. Doyne* and Mr. *H. Cowell* for the respondent were not called upon.

Their Lordships' judgment was delivered by

SIR B. PEACOCK.—The issue raised in this case is, can the bond be held to be a valid document and binding upon the defendant when it was executed during the time the estate was under the operation of the Taluqdars' Relief Act, 1870 (Act XXIV of 1870)? It is not necessary to consider whether a taluqdar, whilst his taluq is under management in pursuance of that Act, is competent to make a personal contract, inasmuch as it does not arise in the

(1) 1 B. L. R. (F.B.) 18.

1884

NAROTAM DASS v. SHEO PARGASH SINGH.

present case. The question depends upon the construction of the document which is set out on the record, and which their Lordships consider to be a mortgage of the estate and nothing else. It contains no personal contract by the defendant to pay out of his personal estate, but it is a mere contract to pay out of the hypothecated estate.

The contract commences by stating that he has borrowed the sum of Rs. 4,100 at a certain rate of interest. Then it goes on: "I have by this instrument hypothecated the whole of my property in taluq Chandipur Birhar, situate in Fyzabad." There he describes it as an hypothecation. "As the aforesaid taluq of Chandipur Birhar is under management under the Encumbered Estates Act, and I have already filed in the office of the Superintendent a schedule of my debts specifying the names of my creditors, I do hereby promise and give it in writing that I shall without any plea repay the principal with interest within the term of two years." But the contract does not stop there. It goes on: "The mode of payment will be, that after paying up the scheduled debts, I shall first of all pay up the debt covered by this bond, including interest"—that is to say, that he will pay this bond after he has paid the scheduled debts. "I shall thereafter appropriate the profits of the estate and attend to the liquidation of other debts. I shall not take the profits of the estate without paying up the present debt with interest; if I do take the profits, it will be for the payment of this debt. I shall, until this debt is repaid, abstain from contracting other debts from the bank or anywhere else." Up to this period it is evidently a mere hypothecation of the estate as a security for the money. Then he says lower down: "When my estate is released from management under the Encumbered Estates Act, I will immediately first of all pay the debt due to the said banker, and will pay the other creditors afterwards." That is merely an intention on the part of the borrower that this debt shall be a prior charge upon the estate after payment of the scheduled debts. "In both cases, that is, while the estate is under management and after it is released, the repayment of this debt will be the subject of my first consideration. In the event of any breach of contract taking place on my part, the said banker is at liberty to institute

a suit within the time fixed in this bond and recover the money. I will not transfer or mortgage to any one the hypothecated property till the principal and interest of this debt is paid up; if I do so it will be illegal." Then he goes on: "These few lines have therefore been written as an unconditional bond hypothecating my property, so that it may serve as a document and be of use when required. *P.S.*—I have taken this Rs. 4,100 over and above the Rs. 3,200 borrowe d by me, by hypothecation of the property, by the mortgage deed attested on 17th March 1873."

Looking at the whole of this deed, their Lordships cannot place any other interpretation upon it than that it was a mere hypothecation of the taluq which was then under management.

Then with regard to s. 4, cl. 3, which says, "that, so long as such management continues, the taluqdar and his heir shall be incompetent to mortgage, charge, lease, or alienate their immoveable property or any part thereof, or to grant valid receipts for the rents and profits arising or accruing therefrom," it appears to their Lordships that this deed, being a mere hypothecation of the property, falls clearly within the clause, and consequently that it was invalid. Both the Courts have held that the deed was invalid within the meaning of the Act; and their Lordships think that those decisions are right. They will therefore humbly advise Her Majesty to affirm the decision of the Court; and the appellant must pay the costs of this appeal.

Solicitors for the appellant: Messrs. *Watkins* and *Lattey*.

Solicitors for the respondent: Messrs. *Barrow* and *Rogers*.

APPELLATE CIVIL.

Before Mr. Justice Tottenham and Mr. Justice Norris.

GOPAL CHUNDER SIRCAR (PLAINTIFF) *v.* ADHIRAJ AFTAB CHAND MAHATAB (DEFENDANT).*

1884 *May* 28.

Cesses, Liability for—Debutter land—"Owner and holder"—Bengal Act IX of 1880, s. 56.

Bengal Act IX of 1880 contemplates the payment of the cesses by persons beneficially interested in the land in respect of which the cesses are levied.

* Appeal from Appellate Decree No. 1686 of 1883, against the decree of Baboo Jogesh Chunder Mitter, Second Subordinate Judge of Burdwan, dated the 26th of March and 29th of March 1883, reversing the decree of Baboo Gopal Chunder Bose, Second Sudder Munsiff of Burdwan, dated the 15th of December 1882.