1878

IN THE MATTER OF THE PETITION OF NARAIN DAS.

One Durga Prasad was tried for certain offences by Mr. C. J. Daniell, Sessions Judge of Mainpuri, with the aid of Assessors, and acquitted, after his defence had been heard, without the opinion of the Assessors being asked. The first ground in the application for revision of this judgment of acquittal took exception to this procedure of the Sessions Judge.

Mr. *J. E. Howard*, for the petitioner.

The judgment of the High Court, so far as it related to such ground, was as follows :

PEARSON, J.—The opinion of the Assessors does not appear to have been taken as it is not found on the record. The omission to take it was a serious irregularity and must be pointed out to the Judge, and he must be cautioned to avoid a similar irregularity in future. At the same time I cannot hold that it affected the conduct of the prosecution or prejudiced the prisoner in his defence, and it is not therefore, with reference to the provisions of ss. 283 and 300 of Act X of 1872, a ground for revisional interference.

APPELLATE CIVIL.

1878
February 27.

Before Mr. Justice Pearson and Mr. Justice Turner.

GANGA PRASAD (DEFENDANT) *v.* KUSYARI DIN (PLAINTIFF) *

Suit for Money charged on Immoveable Property—Mortgage.

The obligor of a bond for the payment of money gave the obligee a moiety of the profits of a certain mauza up to the end of the current settlement, and charged the other moiety of such profits with the payment of such money. It was also stipulated in such bond that the obligee should take the management of such mauza, rendering accounts to the obligor, and that, if the obligor failed to pay such money when due, the obligee should remain in possession of the entire mauza until payment of all that was due. The original obligor having died his heir gave the obligee a second bond, in which he admitted the creation of the original charge and a certain further debt. A portion of such further debt he undertook to pay on a certain date, and he agreed that the balance due should be realised by the obligee from a moiety of the profits of the mauza, according to the terms of the first bond, and that the mauza should remain in the obligee's possession until the amounts due under both bonds were realised by him, and that he, the obligor, should have no power to sell, mortgage, or alienate the mauza. *Held*, in a suit by the obligee on the bonds, that the bonds created a mortgage only of the profits

* Regular Appeal, No. 112 of 1877, from a decree of Maulvi Ali Bakhsh Khan, Subordinate Judge of Banda, dated the 28th September, 1877.

1878

GANGA PRASAD v. KUSYARI DIN.

of the mauza and not of the mauza itself, and accordingly that they did not entitle the obligee to a decree for the sale of the mauza.

THIS was a suit to bring to sale a certain mauza for the satisfaction of the debts due under bonds dated the 17th April, 1860, and the 6th February, 1873, respectively. The fact of the case are sufficiently stated for the purposes of this report in the judgment of the High Court, to which the defendant appealed against the decree of the Court of first instance, on the ground that the bonds in suit created no charge upon the mauza but only on its profits.

Munshi *Hanuman Prasad* and Pandit *Bishambhar Nath*, for the appellant.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*) and Babu *Jogindro Nath Chaudhri*, for the respondent.

The judgment of the Court was delivered by

TURNER, J.—In our judgment, on the proper construction of the two deeds on which the respondent relies, by neither of them was such a security created as would entitle the mortgagee to call for a sale of the mauza.

By the first deed, executed on the 17th April, 1860, in consideration of a loan of Rs. 710 the mortgagor gave the mortgagee one half of the profits of the mauza up to the end of the then current settlement, and he charged the remaining one half share of the profits with the payment of the mortgage-debt and interest. It was also stipulated that the mortgagee should take the management of the mauza, rendering accounts to the mortgagor, and that, if the mortgagor should fail to pay the debt therein mentioned, or should take another loan and fail to pay it within the term therein mentioned, the mortgagee should remain in possession of the entire mauza until payment of all that might be due. This deed clearly created no hypothecation of the mauza itself. It assigned one half of the profits to the mortgagee for the period of the then current settlement and charged the residue of the profits with the mortgage.

The original mortgagor having died his heir executed a second deed on the 6th February, 1873, in which he admitted the creation of the original charge and the existence of a further debt of Rs. 1,000. The further debt of Rs. 1,000 he undertook to discharge

1878

GANGA PRASAD v. KUSYARI DIN.

by payment of Rs. 500 in Chait, 1920 Sambat, and he agreed that the balance should be realised by the mortgagee from half the profits of the mauza in his possession *according to the terms of the bond for Rs.* 710, dated the 17th April, 1860, and that, until the realisation of the amounts entered in both bonds as well as of any amount borrowed in future, the mauza should continue in the possession of the mortgagee, and that the mortgagor should have no power to sell, mortgage, nor alienate it. Had this last condition stood alone it may be conceded that it would have been sufficient to constitute a simple mortgage of the estate (1), and the respondent would have been entitled to an order for sale, but the clause must be read with what preceded it, and so read it is to our minds clear that the parties intended to mortgage the profits and not the mauza itself nor any share in it. This construction is favoured by the direction which immediately follows the agreement not to alienate, and which is to the effect that an arrear of revenue which had been defrayed by the mortgagee should be realised from the profits. We must therefore hold that the respondent is not entitled to the relief he seeks in this suit, and reversing so much of the decree of the Court below as decreed the claim in part we must dismiss the suit with costs.

Appeal allowed.

APPELLATE CIVIL.

1878
March 4.

Before Mr. Justice Spankie and Mr. Justice Oldfield.

SUNDAR AND OTHERS (PLAINTIFFS) *v.* KHUMAN SINGH (DEFENDANT).*

Record-of-Rights—Jurisdiction of Civil and Revenue Court—Act XIX of 1873 *(North-Western Provinces Land Revenue Act), ss.* 62, 91, 94, 241.

The Civil Courts are not competent to try suits to alter or amend a record-of-rights, or to give directions in respect of the same, but they are not debarred from entertaining and determining questions of right merely because such questions may have been the subject of entries in the record-of-rights, and because such determination may show that such entries are wrong and need correction. Consequently, a claim in the Civil Court for a declaration of the right to make

* Second Appeal, No. 1375 of 1877, from a decree of R. F Saunders, Esq., Judge of Farukhabad, dated the 7th September, 1877, affirming a decree of Maulvi Muhammad Abdul Basit, Munsif of Chibramau, dated the 24th July, 1877.

(1) See *Raj Kumar Ramgopal Narayan Singh* v. *Ram Dutt Chowdhry*, 5 B. L. R., F. B., 264, S. C, 13 W. R., F. B., 82, where it was held that a bond for the payment of money containing an agreement by the obligor not to alienate certain lands until such money was paid, operated as a mortgage of such lands. See also *Martin* v. *Parsram*, H. C. R., N.-W. P., 1867, p. 124.