

1877  
December 6.

## APPELLATE CIVIL.

*Before Mr. Justice Turner and Mr. Justice Spinkie.*

SAHIB ZADAH AND OTHERS (DEFENDANTS) v. PARMESHAR DAS  
AND ANOTHER (PLAINTIFFS).\*

*Usufructuary Mortgage—Redemption of Mortgage—Conditional Decree.*

In a suit to recover possession of certain lands founded on the allegation that the defendants had obtained possession of them from the plaintiffs as usufructuary mortgagees, and that the mortgage-debt had been satisfied from the usufruct of the lands, the lower Court, although it found that the mortgage-debt had not been satisfied as alleged, gave the plaintiffs a decree for possession conditional on the payment of the balance of the mortgage-debt. *Held* that, inasmuch as the defendants never rendered any accounts, and inasmuch as no agreement had been made between the parties as to the amount at which the profits of the lands should be estimated, it was impossible for the plaintiffs to have ascertained before suit what sum, if any, was due by them, and seeing that whether such decree was altered or not, the plaintiffs might immediately pay the balance of the mortgage-debt and demand possession, it was unnecessary to interfere with such decree.

This was a suit for possession of certain lands founded on the allegation that the defendants were in possession of the same as usufructuary mortgagees under a mortgage from the plaintiffs, and that, as the mortgage-debt had been satisfied from the usufruct of the lands, the plaintiffs were entitled to possession and also to mesne profits for two years. The defendants denied that they were in possession of the lands as usufructuary mortgagees, and that the annual profits of the lands were as large as the plaintiffs asserted them to be. The Court of first instance, fixing an issue as to the amount of the annual profits of the lands, decided that the defendants were in possession of certain of the lands as usufructuary mortgagees, and that the mortgage-debt had not been satisfied from the usufruct, and gave the plaintiffs a conditional decree in respect of those lands. On appeal by the defendants the lower appellate Court also decided that the defendants were in possession of certain of the lands as usufructuary mortgagees, and gave the plaintiffs a conditional decree in respect of those lands.

On special appeal by the defendants to the High Court it was contended by them that, inasmuch as the plaintiffs had sued on the

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\* Special Appeal, No 900 of 1877, from a decree of Maulvi Nasir Ali Khan, Subordinate Judge of Ghazipur, dated the 25th April, 1877, modifying a decree of Munshi Kishori Lal, Munsif of Rasrah, dated the 22nd December, 1876.

allegation that the mortgage-debt had been satisfied, and it had been found that this was not the case, the plaintiffs were not entitled to a conditional decree.

Munshi *Sukh Ram*, for the appellants.

Lala *Lalta Prasad*, for the respondents.

The judgment of the Court, so far as it is material for the purposes of this report, was as follows :

TURNER, J.—We are not satisfied that a conditional decree was improper in this case. It does not appear that the appellants ever rendered any accounts, indeed, they denied they were in possession as mortgagees, and inasmuch as no agreement had been made as to the amount at which the profits should be estimated it was impossible for the respondents to have ascertained before suit what sum, if any, was due by them. The more proper course would have doubtless been for the respondents to have offered to pay what might be found due. Seeing that whether the decree is altered or not the respondents may immediately pay the balance and demand possession, and the appellants could not legally refuse it, we think it unnecessary to interfere with the decree in this case.

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## APPELLATE CIVIL.

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*Before Mr. Justice Pearson and Mr. Justice Spankie.*

HUSAIN BAKHSI (DECREE-HOLDER) v. A. D. MADGE (JUDGMENT-DEBTOR).\*

*Execution of Decree—Application to enforce or keep in force the Decree—Limitation—Act VIII of 1859 (Civil Procedure Code), ss. 212, 285—Act IX of 1871 (Limitation Act), sch. ii, art. 167.*

*Held* that an application under s. 285 of Act VIII of 1859, being a necessary and decided step towards the execution of the decree, was an application to enforce or keep in force the decree, within the meaning of art. 167, sch. ii of Act IX of 1871.

THIS was an application for the execution of a decree. The decree was passed by the Civil Judge of Lucknow on the 20th February, 1874. On the 28th May, 1875, the decree-holder made an application to the Civil Judge of Lucknow, under s. 285 of Act

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\* Miscellaneous Regular Appeal, No. 64 of 1877, from an order of H. Lushington, Esq., Judge of Allahabad, dated the 20th June, 1877.

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SABIE ZADAH  
v.  
PARNESHAR  
DAS.

1877

December 7.