

APPELLATE CIVIL.

1879
March 1

*Before Mr. Justice Pearson and Mr. Justice Oldfield.*NIKKA MAL AND OTHERS (PLAINTIFFS) *v.* SULAIMAN SHEIKH GARDNER
(DEFENDANT).**Usufructuary Mortgage.*

By the terms of a deed of usufructuary mortgage the mortgagor accepted the liability on account of any addition that might be made to the demand of the Government at the time of settlement. During the currency of the mortgage-tenure the mortgagees, averring that they had had to pay a certain sum in excess of the amount of Government revenue entered in the deed of mortgage from 1279 to 1281 fasli, sued the mortgagor to recover such excess. *Held* that, inasmuch as no settlement of accounts was contemplated or was necessary under the provisions of the deed of mortgage, and such deed did not contain a provision reserving the adjustment of any sums paid by the mortgagees in excess of the amount of the Government demand at the time of the execution of such deed to the time when the mortgage-tenure should be brought to an end, the suit was not premature and could be entertained.

THE facts of this case were as follows: The defendant in this suit, on the 28th May, 1869, gave the plaintiffs in this suit a usufructuary mortgage of one moiety of a certain village, and put the plaintiffs into possession. Under the terms of the deed of mortgage the mortgagees agreed to collect rents, to pay the Government revenue, and to take the profits in lieu of interest on the mortgage-money, and the mortgagors were at liberty on the expiry of five years to repay the mortgage-money, and to enter on the property. The deed also contained this condition, *viz.*, "If the Government demand be enhanced or reduced at the time of settlement, I, the mortgagor, am liable for it, and the mortgagees shall have nothing to do with the increase or decrease of the Government demand." The deed also empowered the mortgagees to enhance the rents at any time. The revenue which was payable in respect of the mortgaged property at the time of the execution of the deed of mortgage having been enhanced, and the plaintiffs having paid the enhanced revenue for three years, the plaintiffs brought the present suit to recover from the mortgagor the sum paid by them in excess of the revenue which was payable at the time of the exe-

* Second Appeal, No. 992 of 1878, from a decree of G. L. Lang, Esq., Judge of Aligarh, dated the 10th June, 1878, affirming a decree of Maulvi Farid-ud-din Ahmad, Subordinate Judge of Aligarh, dated the 19th January, 1878.

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cution of the deed of mortgage, basing their suit on the condition in the deed of mortgage stated above. The defendant set up as a defence to the suit that on a proper construction of the deed of mortgage the claim of the plaintiffs could not be preferred during the currency of the mortgage, but only when accounts were settled on redemption of the mortgage. The Court of first instance allowed this contention and dismissed the suit, and on appeal by the plaintiffs the lower appellate Court also allowed it.

The plaintiffs appealed to the High Court contending that the lower Courts had improperly construed the deed of mortgage, and they were entitled, under the condition in the deed of mortgage upon which the suit was based, to prefer the present claim.

Pandit *Bishambar Nath* and Babu *Jogendro Nath Chaudhri*, for the appellants.

Babu *Oprokash Chandar*, for the respondent.

The judgment of the Court was delivered by

PEARSON, J.—By the terms of the deed of mortgage, dated 28th May, 1869, the mortgagor accepted the liability on account of any addition that might be made to the demand of the Government at the time of settlement. The mortgagees, averring that they have had to pay Rs. 1907-13-3 in excess of the amount of the Government demand entered in the mortgage-deed from 1279 to 1281 fasli, sue to recover that amount with interest. The lower Courts have disallowed the suit on the ground that the mortgagees are not competent to prefer a claim of this sort in a suit during the currency of the mortgage-tenure. Such a claim, in the opinion of the lower Courts, can only be properly advanced and adjusted when a settlement of accounts between the parties takes place at the termination of the mortgage-tenure. One obvious objection to the opinion of the lower Courts on this subject is that no settlement of accounts is contemplated by or is necessary under the provisions of the deed of mortgage, which allows the mortgagees to appropriate the profits realised by them during the term of mortgage in lieu of interest, and the mortgagor to recover his estate at the end of that term by payment of the principal or the

amount of the loan. Another not less obvious objection is the unreasonableness of expecting the mortgagees to make large payment year after year for the mortgagor to be treated as mere supplements to the original loan. But apart from the objections aforesaid, the view of the lower Courts that a suit of the nature of the present cannot be brought year by year by the mortgagees for the recovery of any sums paid by them in excess of the amount of the Government demand at the time of execution of the deed of mortgage, merely because there is no express provision made for such suit being brought in the deed of mortgage, is quite untenable. The law authorises a man to sue for a debt whenever it becomes due to him. The mortgagees could only have been precluded from so suing, had there been an express provision in the deed reserving the adjustment of such claims to the moment when the mortgage-tenure should be brought to an end. It is admitted that a similar suit has been already once before brought by the mortgagees. It was not then pleaded that the suit was premature and could not be entertained. On the contrary it was entertained and the claim was decreed. The lower appellate Court has remarked that the deed of mortgage has been carelessly drawn up, inasmuch as the mortgagees are authorised to raise the rents, yet no provision is made for the disposal of the increased profits due to their enhancement; although it can hardly be supposed that it was the intention of the mortgagor that she should pay any increase of revenue to Government, and that the mortgagees should enjoy all the corresponding increase of profits consequent on the enhancement of the rents. We observe, however, that in the present case it is no part of the defence that the increased demand of the Government has been met by a corresponding enhancement of rent. On the contrary the plea is that although empowered to enhance the rent, the mortgagees have neglected to do so. There is nothing in the deed of mortgage binding the mortgagees to enhance the rents in the event of the *jama* being enhanced. All that is said is that "if the mortgagees wish to enhance the rent of any tenant, they may enhance it, &c." On the other hand the liability undertaken by the mortgagor to pay any additional demand made by the Government is not limited by any condition that such increased demand cannot

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be met by a corresponding enhancement of rents. In the former suit to which reference has been made it was held that enhancement of rents by the mortgagees would not debar them from recovering enhanced *jama*; and the ruling was not impugned by appeal. The ground on which the suit has been disallowed by the lower Courts failing, it does not appear that there is any substantial defence to the suit, or that in reference to the foregoing remarks it is necessary to remand the case for the trial of the other issues laid down for trial by the Court of first instance.

We decree the appeal and claim with costs in all the Courts, and interest at 6 per cent. per annum from the date of this decree to the date of realisation.

Appeal allowed.

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March 20.

Before Mr. Justice Pearson and Mr. Justice Spinkie.

THE COLLECTOR OF MORADABAD (DEPENDANT) v. MUHAMMAD DAIM KHAN (PLAINTIFF). *

Act VIII of 1859 (Civil Procedure Code), s. 309—Pauper Suit—Sale in Execution of Decree—Distribution of Sale-Proceeds—Court-Fees—Prerogative of the Crown.

With a view to recover the amount of Court-fees which *J* would have had to pay had he not been permitted to bring a suit as a pauper, the Government caused certain property belonging to *B*, the defendant in such suit, who had been ordered by the decree in such suit to pay such amount, to be attached. This property was subsequently attached by the holder of a decree against *B* which declared a lien on the property created by a bond. The property was sold in the execution of this decree. *Held* that the Government was entitled to be paid first out of the proceeds of such sale the amount of the Court-fees *J* would have had to pay had he not been allowed to sue as a pauper, the principle that the Government takes precedence of all other creditors not being liable to an exception in the case of lien-holders. The decision in *Ganpat Putaya v. The Collector of Kanara* (1) applied in this case.

THE facts of this case were as follows: One Jagan Nath brought a suit as a pauper against Bulaki Das in the Moradabad district, in which suit a decree was made against Bulaki Das directing that he should pay the costs of such suit. The Collector

* Second Appeal, No. 1060 of 1878, from a decree of Maulvi Muhammad Sami-ul-la Khan, Subordinate Judge of Moradabad, dated the 4th June, 1878, reversing a decree of Maulvi Ain-ud-din, Munsif of Moradabad, dated the 19th November, 1877.

(1) I. L. R., 1 Bom. 7.