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were executed; but the question of admissibility being a matter of procedure, would be governed by the present law. The Judge has altogether excluded from his consideration the two leases, which are the most important evidence in the case, and without which the merits of the case cannot be considered. We ask him to admit these leases, and re-consider the whole case upon the evidence, and to record a fresh judgment under s. 574, Civil Procedure Code. I would decree this appeal, and setting aside the decree of the lower appellate Court, remand the case to that Court, leaving costs to abide the result.

I may add that in support of the view taken by me of the leases in this case, our attention has been called by the learned pleader for the appellant to an unreported judgment of the Full Bench of this Court (1), which supports the view taken by me, though the interpretation of the law in that case related to the old Registration Act of 1864.

TYRRELL, J.—I am of the same opinion.

Case remanded.

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April 21.

Before Mr. Justice Tyrrell and Mr. Justice Mahmood.

KARAMAT KHAN (PLAINTIFF) *v.* SAMI-UDDIN AND OTHERS (DEFENDANTS).*

Act IV of 1882 (*Transfer of Property Act*), *ss.* 41, 48,—*Transfer by ostensible owner—Sir-land—Act XII of* 1881 (*N.-W. P. Rent Act*), *s.* 7—*Meaning of "held"—Statute, construction of—Retrospective effect—Mortgage of sir-land before passing of Act XVIII of* 1873 (*N.-W. P. Rent Act*)—*Sale of mortgagor's proprietary rights while that Act was in force—Right of mortgagee.*

In 1869, *A* and *J*, two co-sharers of a moiety of a ten biswas share in a village (*F* and *W* being also co-sharers in the same moiety), joined with *H*, the holder of the other moiety, in giving to *K* a usufructuary mortgage of 87 bighas of land, being the whole of the *sir*-land appertaining to the ten biswas share. The deed of mortgage authorized the mortgagee to retain possession of the land until payment of the mortgage-money, and to receive profits in lieu of interest; and he obtained possession accordingly. In 1872, *F*, *W* and *A* gave to other persons a usufructuary mortgage of their five biswas share, together with a moiety of the 87 bighas of *sir*-land; and it was stated in the deed that half the mortgage-money due to *K* on the mortgage of 1869 was due by the executants, and that they accordingly left the same with the mortgagees in order that the latter might redeem. In

* Second Appeal No. 1266 of 1885, from a decree of W. R. Barry, Esq., Additional Judge of Aligarh, dated the 22nd July, 1885, modifying a decree of Maulvi Muhammad Sami-ullah Khan, Subordinate Judge of Aligarh, dated the 28th March, 1884.

(1) Since reported in *Weekly Notes*, 1886, p. 115.

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November, 1876, *H's* five biswas share, together with its *sir*-land, was sold in execution of a decree. Subsequently, *K*, alleging that the mortgagees under the deed of 1872, and the purchasers under the execution-sale of 1876 had dispossessed him, and that his mortgage-debt had not been paid, sued to recover possession of the 87 bighas of *sir*-land, by virtue of his mortgage-deed of 1869. The Court of first instance held that the plaintiff was not entitled to enforce his mortgage in respect of *F's* and *W's* share in the 87 bighas, because they were not parties to the deed of 1869. The lower appellate Court further held that from the date of the execution-sale of November, 1876, *H* became an ex-proprietary tenant of his *sir* land, and that to give the plaintiff possession thereof would be contrary to the provisions of s. 7 of Act XVIII of 1873 (N.-W. P. Rent Act).

Held that inasmuch as it was clear that at the time when the mortgage-deed of 1869 was executed, *F* and *W* were aware of the transaction which made *K* the mortgagee, under the deed, of the whole property, and that, knowing this, they allowed the possession of *A*, *J*, and *H* to appear as if covering the entire zamindari rights in the ten biswas share of the *sir*-land, and inasmuch as the statements contained in the mortgage-deed of 1872 were an admission on the part of *F* and *W* that the mortgage of 1869 was executed with their consent, the equitable doctrine contained in s. 41 of the Transfer of Property Act applied to the case, and *F* and *W* had no defence, either in law or in equity, to the plaintiff's suit, with reference to their shares, and for the purpose of obviating the lien of 1869. *Ramcoomar Koondoo* v. *M queen* (1) referred to.

Per MAHMOOD, J., with reference to the effect of the execution-sale of November, 1876, in regard to the provisions of s. 7 of Act XVIII. of 1873, that the general rule that statutory provisions have no retrospective operation did not apply to the case; that, by reason of the sale, *H* who had proprietary rights in the mahál, and held the five biswas share of the *sir* as such (the word "*held*" as used in s. 7 of the Rent Act not being confined to manual or physical holding), lost his proprietary rights, and so became an ex-proprietary tenant of the land belonging to him at that time; that although the mortgage of 1869 must not be so affected as to deprive the mortgagee of all his rights, yet by the terms of s. 7 of Act XVIII of 1873, and by virtue of the sale, his means of benefiting by the mortgage were necessarily changed; that neither the preamble nor s. 1 of the Act contained any saving clause which would justify the interpretation that all the conditions included in a usufructuary mortgage are to be exempted from the operation of the Act, or of s. 7 in particular, merely because the mortgage was a subsisting one; that under these circumstances possession must be given to the plaintiff of such rights as *H* had at the time of the mortgage subject only to *H's* rights as an ex-proprietary tenant; that the rights of the purchaser of *H's* share under the sale were subject to the mortgage of 1869; and that, by virtue of the rule enunciated in s 48 of the Transfer of Property Act, the rights of the mortgagees under the deed of 1872 must give way to the incidents of the prior deed of 1869, both mortgages being usufructuary. *Tulshi* v. *Radha Kishan* (2) referred to.

Per TYRRELL, J., that in 1876, by reason of the execution-sale, the *sir* rights and interests of *H*, mortgaged by him in 1869, as such went out of existence, and

(1) 11 B. L. R., 46. (2) Weekly Notes, 1886, p. 74.

assumed a different character; that over that tenure in its altered character the plaintiff, though he still had his mortgage charge, had not, in the existing state of the law, a right to physical possession of the actual land; and that, subject to this new right of *H*, the plaintiff retained his mortgage charge of 1869 over the zamindari interests in the portion of the land acquired by *H*'s vendees.

THE facts of this case were as follows:—In August, 1869, Fida Husain, Ata Husain, and Jamal Husain, sons, and Wahid-un-nissa, widow, of Ahmad Husain, deceased, were co-sharers in a moiety of a ten biswas share of a certain village, and Himayat Husain was the holder of the other moiety. The *sír*-land appertaining to this ten biswas share was 87 bighas. On the 2nd August, 1869, Ata Husain, Jamal Husain and Himayat Husain gave Karamat Khan, the plaintiff in this case, a usufructuary mortgage of the whole 87 biswas of this *sír*-land. The deed of mortgage authorized the mortgagee to retain possession of the land until payment of the mortgage money, and to receive the profits in lieu of interest. On the 17th April, 1872, Fida Husain, Wahid-un-nissa, Ata Husain and Jamal Husain, gave a usufructuary mortgage of their 5 biswas share together with a moiety of the 87 bighas of *sír*-land to Sami-uddin, Hidayat Ali, and Inayat Ali. In the deed of mortgage it was stated that half of the mortgage-money due to the plaintiff on the mortgage of the 2nd August, 1869, was due by the executants, and that they accordingly left the same with the mortgagees in order that they might redeem. On the 20th November, 1876, Himayat Husain's five biswas share with its *sír*-land was sold in the execution of a decree. The plaintiff, alleging that the mortgagees under the mortgage of the 17th April, 1872, and the purchasers under the execution-sale of the 20th November, 1876, had dispossessed him, and that his mortgage-debt had not been paid, sued to recover possession of the 87 bighas of *sír*-land by virtue of his mortgage-deed of the 2nd August, 1869.

The Court of first instance gave him a decree for possession of the 87 bighas. On appeal, the lower appellate Court held that the plaintiff was not entitled to enforce his mortgage in respect of the share in the 87 bighas of land in suit of Fida Husain and Wahid-un-nissa, because these persons were not parties to the mortgage-deed. With regard to the *sír*-land appertaining to the 5 biswas share of Himayat Husain, the lower appellate Court held that from

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the date of the execution-sale of the 20th November, 1876, Himayat Husain became an ex-proprietary tenant of his *sir*-land, and to give the plaintiff possession of such land would be to enforce a transfer prohibited by Act XVIII of 1873 (N.-W. P. Rent Act). The Court therefore modified the decree of the first Court, by dismissing the plaintiff's suit in respect to the shares in the 87 bighas of land claimed of Fida Husain, Wahid-un-nissa and Himayat Husain.

The plaintiff appealed to the High Court on the grounds (i) that Fida Husain and Wahid-un-nissa were estopped from disputing the plaintiff's title as mortgagee to their shares of the mortgaged property; (ii) that the mortgage to him was executed by Ata Husain, Jamal Husain, and Himayat Husain for themselves and as agents of Fida Husain and Wahid-un-nissa, and (iii) that the share of Himayat Husain in the mortgaged property was still liable for the mortgage-debt.

Mr. *Amir-ud-din*, for the appellant.

Mr. *J. Simeon*, for the respondents.

MAHMOOD, J.—I have been asked by my brother Tyrrell to deliver judgment in this case, which, in consequence of the course that has been taken by the learned counsel for the appellant and the learned pleader for the respondents, and also in consequence of the manner in which the lower appellate Court has interfered with the first Court's decision, is not very simple. It is therefore advisable briefly to recapitulate the facts, to show what the real questions are which we have to determine in second appeal. It appears that certain property, over 87 bighas of *sir*-land, is situated in the village of certain co-sharers. Among others, one Kazi Ahmad Husain held *sir*-land in proportion to his 5 biswas share of the village, and Himayat Husain, who is said to have been related to Kazi Ahmad Husain, held in proportion to the other 5 biswas share of the zamindari. Upon the death of Ahmad Husain the *sir*-land, to the extent of his share, would devolve, according to the Muhammadan law, upon his sons Fida Husain, Ata Husain, and Jamal Husain and his widow Wahid-un-nissa. The devolution would be in certain proportions which it is unnecessary to describe It appears that on the 2nd August, 1869, Ata Husain, Jamal Husain, and Himayat

Husain executed a deed of usufructuary mortgage in favour of the present plaintiff, Karamat Khan, and it has been found that they placed him in the entire possession of the 37 bighas representing their *sir* in the village. It has been found that the mortgagee was placed in full possession of the whole area, and one difficulty in dealing with the case arises from the admitted fact that in that area were included the shares of Fida Husain and Wahid-un-nissa, whose names were not put to the mortgage-deed of the 2nd August, 1869. On the 17th April, 1872, Fida Husain and Wahid-un-nissa joined with Ata Husain in executing a usufructuary mortgage in favour of three persons named Sami-ud-din, Hidayat Ali and Inayat Ali—Hidayat Ali being now represented by his daughter Ali-un-nissa and his sister Nasib-un-nissa. Another circumstance which should be mentioned is, that on the 20th November, 1876, in the course of certain execution-proceedings, the zamindari rights of Himayat Husain, one of the mortgagors under the deed of the 2nd August, 1869, were sold by auction and were purchased by Wazir Khan, Amin-ud-din and Inayat Ali, who was one of the mortgagees under the deed of the 17th April, 1872. It has been found that it was not until October, 1879, that Karamat Khan, the plaintiff-appellant, who obtained possession as mortgagee under the deed of 1869, was dispossessed of the land by the various defendants upon various allegations of right and repudiations of his rights under that deed. The object of the present suit is to recover possession of all the lands comprised in the mortgage of 1869, and the parties impleaded as defendants are the executants of that mortgage, also Fida Husain and Wahid-un-nissa, also the mortgagees under the deed of 1872, also the purchasers of Himayat's rights at the auction-sale of the 20th November, 1876. The suit has been resisted upon various pleas which need not be described, except that Fida Husain and Wahid-un-nissa repudiated the mortgage on which the suit was brought, on the ground that they were not parties to it, and it was not binding on them This plea related only to a 2½ biswas share of the *sir*-land which is in suit. The other plea was that raised by Himayat Husain, who admittedly was a party to the mortgage of 1869, and whose rights had been sold in the auction-sale of the 20th November, 1876. The Subordinate Judge has decreed the whole suit, except certain money-claims,

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regarding mesne profits, which are not now the subject of appeal, and in reference to which no argument has been addressed to us. The various defendants appealed to the District Judge, and he, in a judgment which went fully into the facts, arrived at a conclusion which, in my opinion, is unsound in law. First, with reference to the 2½ biswas share of the *sir*-land which would be the share of Fida Husain and Wahid-un-nissa, he dismissed the claim on the ground that they were not parties to the mortgage of 1869. But it is clear from the findings of the Courts below, that at the time when that document was executed, Fida Husain and Wahid-un-nissa were aware of the transaction which made Karamat Khan the mortgagee, under the deed, of the whole property. It is also clear that, knowing this, they allowed the possession of Ata Husain, Jamal Husain and Himayat to appear as if covering the entire zamindari rights in the 10 biswas share of the *sir*. Under these circumstances this case appears to me to be one to which the equitable doctrine reproduced by s. 41 of the Transfer of Property Act applies. That section runs thus :—"Where, with the consent, express or implied, of the persons interested in immoveable property, a person is the ostensible owner of such property, and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorized to make it: provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith." This rule, which in principle is the same as that on which s. 115 of the Evidence Act is based, does no more than reproduce the *dicta* of the Privy Council in *Ramcoomar Koondoo* v. *McQueen* (1) where their Lordships observed :—"It is a principle of natural equity, which must be universally applicable, that, where one man allows another to hold himself out as the owner of an estate, and a third person purchases it, for value, from the apparent owner in the belief that he is the real owner, the man who so allows the other to hold himself out shall not be permitted to recover upon his secret title, unless he can overthrow that of the purchaser by showing, either that he had direct notice, or something that amounts to constructive notice, of the real title; or that there existed circumstances which ought to have put him upon an inquiry that, if

(1) 11 B. L. R. at p. 52.

prosecuted, would have led to a discovery of it." Now the circumstances of this case furnish grounds for the application of this doctrine, and, so far, there is force in the argument of Mr. *Amir-ud-din* for the appellant, that the action of Fida Husain and Wahid-un-nissa, in allowing his clients to obtain a mortgage of the whole 10 biswas share of *sír*, amounted to making the mortgagee alter his position by the omission of these two persons, and that they cannot now turn round and say that at the time of the mortgage of 1869, the apparent parties to that transaction had no authority to mortgage the 2½ biswas. But the case does not rest here: for only three years after the deed of 1869 these two persons, Fida Husain and Wahid-un-nissa, executed a mortgage, dated the 17th April, 1872, in favour of strangers, a mortgage which, being usufructuary, would clash with the rights of Karamat Khan under the mortgage of 1869. It is unnecessary to consider the exact terms of that mortgage, but it contained a distinct statement by Fida Husain and Wahid-un-nissa that, although their names did not appear in the mortgage of 1869, yet they had mortgaged to him through or in the names of Fida Husain's brothers and Wahid-un-nissa's sons —Ata Husain and Jamal Husain. This deed further represents the amount of the money due in respect of their share as a charge which was to be paid off by the second mortgagee. This admission, so solemn and deliberate, not only shows that the second mortgagees of 1872 had notice of the prior mortgage of 1869, but is an admission, the best evidence in such cases, that the mortgage of 1869 was executed with the consent of Fida Husain and Wahid-un-nissa. It therefore appears that these two persons have no defence, either in law or equity, to the plaintiff's suit, with reference to their shares, and for the purpose of obviating the consequences of the lien of 1869.

Then, with reference to the 5 biswas share of zamindari rights in the *sír*, that is, of Himayat Husain, the question is what was the effect of the auction-sale of the 20th November, 1876, in regard to the provisions of s. 7 of Act XVIII of 1873. That is to say, did Himayat, by reason of those provisions, acquire any right of the nature therein described so as to prevent Karamat Khan from getting physical possession of the land now in suit, in derogation of the occupancy-right? Mr. *Amir-ud-din's* argument at first struck

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me as a plausible one. He contended that by the general rule of construction—*nova constitutio futuris formam imponere debet, non præteritis*—statutory provisions have ordinarily no retrospective effect. This, I concede; but the question is, does the rule apply to the present case? The argument is that Karamat Khan's rights were acquired under the deed of 1869; that he got actual possession of the land; and that, inasmuch as his rights originated in 1869, they cannot be vitiated by the Rent Act of 1873. Another rule is that where rights are taken away or impaired, the Court must place as strict a construction as they are in the habit of applying to penal statutes. This rule is discussed at pp. 160-161 of Wilberforce's work on *Statute Law* and in Maxwell *On the Interpretation of Statutes*, pp. 257-258. It does not, however, apply to the present case. In India, since 1859, the Legislature has interfered in the interests of the agricultural population, by giving tenants the right of occupancy. In Lower Bengal this has been done recently even in a more extensive sense, but in these Provinces it was first effected by Act X. of 1859, and this was afterwards replaced by the Rent Act of 1873, which was in force when Himayat's proprietary rights in the zamindari mahal were sold. At that time there was no such ex-proprietary right as is provided by s. 7 of that Act, and is maintained in the present Act (XII of 1881). Now it is a rule of interpretation that when the Legislature changes the law, the change itself is an indication of the intentions of the Legislature, and is an element in the construction to be placed upon the later statute (Wilberforce, p. 108). Applying this rule, and reading this section carefully, I am of opinion that the statute operates to a certain extent in derogation of the rights of Mr. *Amir-ud-din's* clients under the deed of 1869, and effects the advantages which he would otherwise derive thereunder. S. 7 is in the following terms:—"Every person who may hereafter lose or part with his proprietary rights in any mahal shall have a right of occupancy in the land held by him as *sir* in such mahal at the date of such loss or parting, at a rent which shall be four annas in the rupee less than the prevailing rate payable by tenants-at-will for land of similar quality and with similar advantages. Persons having such rights of occupancy shall be called 'ex-proprietary tenants,' and shall have all rights of occupancy

tenants." It appears to me that the most important word in the section in connection with the present case is "hereafter." The statute was passed on the 22nd December, 1873. The rights of Himayat were sold on the 20th November, 1876, so there can be no doubt that Himayat, who had proprietary rights in the mahal in question, and held *sir* as such, did lose his proprietary rights, and therefore the case comes within the first portion of s. 7. The next important word is "held," which Mr. *Amir-ud-din* argues denotes actual possession. A short time ago, in the case *Tulshi* v. *Radha Kishan* (1), the present learned Chief Justice laid down, with my concurrence, that the word "held" in this section must not be rigidly construed to refer to manual or physical holding, but land possessed and belonging to a person as his *sir*. I am glad to find that my brother Tyrrell approves of this interpretation. There can be no doubt that Himayat "held" the 5 biswas share of the *sir*. Then, the question is, what is the effect of this view of the law? Although the mortgage of 1869 must not be so affected as to deprive the mortgagee of all his rights, yet by the terms of s. 7, and by reason of the sale of the 20th November, 1876, the nature of his means of benefiting by the mortgage were necessarily changed. Neither the preamble nor s. 1 of the Act contains any saving clause which could justify the interpretation that all the conditions included in a usufructuary mortgage are to be exempted from the operation of the Act, or of s. 7 in particular, merely because the mortgage was a subsisting one. If we were so to hold, in some cases where usufructuary mortgagees are in possession, no such rights as are created by s. 7 could come into existence for sixty years. Moreover, such mortgages may possibly never be redeemed; and if the fact that a mortgage, such as that of 1869 in the present case, is subsisting, were sufficient to prevent the operation of the statute, the result would be that the object aimed at by the Legislature would be defeated in respect of all *sir*-lands situate in villages which may at that time be in the hands of mortgagees. Such could not have been the intention of the Legislature, and I may add that the interpretation which I have placed is supported by the construction of similar phrases in English statutes, of which illustrations are given by Mr. Wilber-

(1) Weekly Notes, 1886, p 74.

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force at p. 165 of his work. In the result, I hold that Fida Husain and Wahid-un-nissa did mortgage their rights, or rather rendered their rights subject to the deed of 1869. Secondly, Himayat, by the operation of s. 7 of the Rent Act, became an ex-proprietary tenant of the land belonging to him at the time of the sale of the 20th November, 1876. Under these circumstances, the possession must be given to the plaintiff-mortgagee under the deed of 1869 of such rights as Himayat had at the time of the mortgage, subject to Himayat's right as an ex-proprietary tenant. So far as the purchasers of Himayat's share, under the sale of 20th November, 1876, are concerned, their rights are of course subject to the mortgage of 1869. Again, the rights of the mortgagees under the deed of 17th April, 1872, fall under the rule of the law of mortgage, which constitutes the essence of the rule of priority, and which has been best enunciated in s. 48 of the Transfer of Property Act. Here the mortgage of 1869, and that of 1872, being both usufructuary, the latter must give way to the incidents of the former. I would give effect to these views in the decree of this Court. The first Court gave a decree for possession without qualification as to the statutory rights of Himayat. The lower appellate Court modified the decree. I am of opinion that the decree of this Court should be that the appeal succeeds in part, the lower appellate Court's decree being reversed, and that of the first Court being restored, with this qualification, that the possession which the plaintiff will get under this decree will be subject to such ex-proprietary tenant rights as Himayat may have had in his portion of the *sir*-land. With reference to costs, we propose to exercise the discretionary power given to us by s. 220 of the Civil Procedure Code by apportioning the costs as follows :—The plaintiff will recover his costs in all Courts as against Fida Husain and Wahid-un-nissa to the extent of his claim against them. The decree as to costs in reference to the other defendants will be the same. As regards Himayat Husain, he and the plaintiff will respectively bear their own costs in all Courts, and, with reference to the costs of the other defendants, they will bear their own costs to the extent of their shares.

TYRRELL, J.—I agree that Musammat Wahid-un-nissa and her son Fida Husain, by their acts and omissions in 1869, as well as

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by their express admissions in 1872, have furnished sufficient grounds to justify the first Court's finding that they made themselves liable to the appellant in respect of the obligations and liabilities created by the persons who executed the mortgage to the appellant of 1869.

And, as to the question of the retrospective application of the rule of s. 7 of Act XVIII. of 1873, I doubt if it be really involved in this case. Himayat Husain mortgaged his *sír* in 1869, and in 1876, his *sír* rights and interests, as such, went out of existence under the operation of the law of 1873 and assumed a different character. Over that tenure in its altered character the appellant still has his mortgage charge, but he has not, in the existing state of the law, a right to physical possession of the actual land, which was formerly Himayat Husain's *sír*, but is now his occupancy tenure.

Subject to this new right of Himayat Husain, the appellant retains his mortgage charge of 1869 over the zamindari interests in this portion of the land acquired by Himayat Husain's vendee. But as the present claim of the appellant is for possession only, it is unnecessary to go further into this aspect of the question.

Before Mr. Justice Oldfield and Mr. Justice Mahmood.

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May 14.

JOKHU RAM AND OTHERS (JUDGMENT-DEBTORS) *v.* RAM DIN AND ANOTHER (DECREE-HOLDERS).*

Execution of decree—Civil Procedure Code, s. 230—Twelve years' old decree—Statute, construction of—General words—Retrospective effect.

The holder of a decree bearing date the 15th June, 1872, applied for execution thereof on the 9th February, 1885, the previous application being dated the 27th November, 1883.

Held that the application for execution was not barred by s. 230 of the Civil Procedure Code. *Musharraf Begam* v. *Ghalib Ali* (1) followed. *Goluck Chandra Mytee* v. *Harapriah Debi* (2), *Bhawani Das* v. *Daulat Ram* (3), and *Sreenath Goohe* v. *Yusoof Khan* (4) referred to. *Tufail Ahmad* v. *Sadhu Saran Singh* (5) discussed and dissented from by MAHMOOD, J.

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* Second Appeal No. 23 of 1886, from an order of R. J. Leeds, Esq., District Judge of Gorakhpur, dated the 16th February, 1886, reversing an order of Shah Ahmad-ullah Khan, Subordinate Judge of Gorakhpur, dated the 11th August, 1885.

(1) I. L. R., 6 All. 189.
(2) I. L. R., 12 Calc. 559.
(3) I. L. R., 6 All. 383.
(4) I. L. R., 7 Calc. 556.
(5) Weekly Notes, 1885, p. 193.