

1886
April 20.

Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Brodhurst.

SAMAR ALI (PLAINTIFF) v. KARIM-UL-JAU (DEFENDANT)*.

Mortgage—Usufructuary mortgage—Redemption—Regulation XXXIV of 1803, ss. 9, 10—Act XXVIII of 1855—Act XIV of 1870—Act IV of 1882 (Transfer of Property Act), s. 2.

A deed of usufructuary mortgage executed in 1846, under which the mortgagee had obtained possession, contained the following conditions:—"Until the mortgage-money is paid, the mortgagees shall remain in possession of the mortgaged land, and what profits may remain after paying the Government revenue are allowed to the mortgagee, and shall not be deducted at the time of redemption. At the end of any year, the mortgagors may pay the mortgage-money and redeem the property. Until they pay the mortgage-money, neither they nor their heirs shall have any right in the property." In 1884, a representative in title of one of the original mortgagors sued to redeem his share of the mortgaged property, upon the allegation that the principal amount and interest due upon the mortgage had been satisfied from the profits, and that he was entitled to a balance of Rs. 45. It was found that from the profits, after deducting Government revenue, the principal money with interest at the rate of 12 per cent. per annum had been realized, and that the surplus claimed by the plaintiff was due to him. The lower appellate Court dismissed the suit, on the ground that under s. 62 (5) of the Transfer of Property Act (IV of 1882), and with reference to the terms of the deed of mortgage, the plaintiff was not entitled to recover the property until he paid the mortgage-money.

Held that, although the word "interest" was not specifically used, the natural and reasonable construction of the deed was that it was arranged that the mortgagee should have possession of the property and enjoy the profits thereof, until the principal sum was paid, in lieu of interest.

Held that the provisions of ss. 9 and 10 of Regulation XXXIV of 1803, which was in force when the deed of mortgage was executed, were not affected or abrogated by Act XXVIII of 1855 or Act XIV of 1870 or Act IV of 1882; that these provisions were incidents attached to the mortgagor's rights of which he was entitled to have the benefit; and that the contract of mortgage being subject to these provisions, the charge would have been redeemed as soon as the principal mortgage-money with twelve per cent. interest had been realized by the mortgagee from the profits of the property.

The plaintiff in this suit claimed to recover possession of one-sixth of certain mortgaged land. The mortgage was for Rs. 100, with possession, and the deed, which was dated the 20th September, 1846, contained the following conditions:—

"The conditions are these:—Until the mortgage-money is paid, the mortgagee shall remain in possession of the mortgaged

* Second Appeal No. 1254 of 1885, from a decree of H. G. Pearce, Esq., Additional Judge of Moradabad, dated the 1st May, 1885, reversing a decree of Maulvi Muhammad Mazhar Husain, Muusif of Nagina, dated the 24th December, 1884.

1886

 SAMAR ALI
 v.
 KARIM-
 UL-LAH.

land, and what profits may remain after paying the Government revenue are allowed to the mortgagee, and shall not be deducted at the time of redemption. At the end of any year the mortgagors may pay the mortgage-money and redeem the property. Until they pay the mortgage-money neither they nor their heirs shall have any right in the property."

The plaintiff represented in title one of the original mortgagors, who owned one-sixth of the land. The equity of redemption of the remaining five-sixths had been purchased by the defendant the mortgagee. The plaintiff alleged that the mortgage-money in respect of one-sixth of the property was Rs. 16-10-8, that is, one-sixth of Rs. 100, and that the defendant had received more than this sum together with interest at the rate of 12 per cent. per annum from the property, but notwithstanding this he would not restore the land. The defendant set up as a defence, *inter alia*, that with reference to s. 62 (b) of the Transfer of Property Act and the terms of the mortgage-deed, the mortgagor had not a right to recover the property until he paid the mortgage-money.

The Court of first instance held that the mortgage in question was not governed by the provisions of s. 62 of the Transfer of Property Act, and that, having regard to the provisions of Regulation XXXIV of 1803, if an account showed that the principal money, together with interest at 12 per cent. per annum, had been paid from the profits, the plaintiff had a right to recover the property. The Court having taken an account, found that from the profits of the property, after deducting Government revenue, the principal money together with interest at the rate mentioned above had not only been realized, but a surplus of Rs. 45 was due to the plaintiff; and it gave the plaintiff a decree for joint possession of the property and for Rs. 45.

On appeal by the defendant the lower appellate Court held that the Regulation relied on by the first Court was not applicable, and the plaintiff was not entitled to recover the property until he paid the mortgage-money as provided by the deed of mortgage, and dismissed the suit.

The plaintiff appealed to the High Court, contending that the decision of the first Court was correct, and the lower appellate Court had improperly dismissed the suit.

1886

SAMAR ALI
v.
KARIM-
UL-LAH.

Mr. *G. E. A. Ross*, for the appellant.

Mr. *C. Dillon*, *Munshi Hanuman Prasad*, and *Munshi Madho Prasad*, for the respondent.

STRAIGHT, Offg. C. J.—This is a suit for the redemption of a mortgage dated the 20th September, 1846. The mortgage was of a usufructuary character, and admittedly under it the mortgagee obtained possession of the property. The plaintiff, who is the representative of the interest of the mortgagor to the extent of a sixth, comes into Court and seeks to redeem his share, upon the allegation that the principal amount and interest due upon the mortgage have been satisfied by enjoyment of profits, and he is entitled to a balance of Rs. 45 over and above what was sufficient to discharge the mortgage. The plaintiff's case is, that both upon the construction of the document and by the law which regulates and affects the operation of that instrument, the amount of money which the defendant derived by way of profits from the property was sufficient to pay off the mortgage-money and its interest at twelve per cent. per annum.

Now the terms of that document have been read to me by Mr. *Ross*, and the learned counsel for the respondent has conceded that they have been accurately rendered. It seems to me that the arrangement between the parties was, that the mortgagee should have possession of the property, and that he should enjoy the profits thereof, so long and until the principal sum was paid, in lieu of interest. It is true that the word "interest" was not specifically used; but it appears to me that this is the natural and reasonable construction of the deed; and such being the nature of the instrument, its effect was to place the mortgagee in possession of the profits of this property, which would enable him to realize annually a larger amount of interest than twelve per cent. per annum. By the Regulation issued by the Governor-General in Council, No. 34 of 1803, it was provided in ss. 9 and 10 that the rate of interest to be allowed to the mortgagee was not to exceed twelve per cent. per annum; and that no matter whether the parties made a contract for the payment of a larger amount of interest, the law would not recognize any contract for payment of a larger amount than twelve per cent. Now this Regulation is applicable to this mortgage

contract of 1846, which is before us, if its provisions have not been disturbed by the operation of any subsequent legislation. If they have not, the matter stands now as it did in 1846, and we are bound by the rules mentioned in that Regulation. The question then to be considered is, whether by Act XXVIII of 1855, or by Act IV of 1882, the provisions of ss. 9 and 10 of Regulation XXXIV of 1803 have been affected or abrogated. Now I do not think that it can be seriously denied that one of the rights affecting the contract of mortgage is the right of the mortgagor to redeem the property mortgaged. Now, as I have said, the contract of mortgage in the present case being subject to the provisions of the Regulation, the charge would have been redeemed as soon as the principal mortgage-money with twelve per cent. interest had been realized by the mortgagee from the profits of the property. I think that those provisions of the Regulation of 1803 were incidents attached to the mortgagor's right, of which he was, and is, entitled to have the benefit. By Act XXVIII of 1855 all the rights conferred by this Regulation were specifically saved, and the same may be said of Act XIV of 1870.

Then with regard to Act IV of 1882, s. 2 of that Act specifically provides that "rights and liabilities arising out of a legal relation constituted before this Act comes into force" shall be saved. This being the view I take of the matter, the appeal must be allowed, and the decree of the Judge being reversed, the case is remanded under s. 562 to the Court below for disposal on the merits.

The costs hitherto incurred in the litigation are to be costs in the cause.

BRODURST, J.—I am of the same opinion.

Appeal allowed.

Before Mr. Justice Tyrrell and Mr. Justice Mahmood.

KHUDA BAKHSH (PLAINTIFF) v SHEO DIN AND ANOTHER (DEFENDANTS)*

Lease—Lease from year to year—Act VIII of 1871 (Registration Act), s. 17 (4)

—Act III of 1877 (Registration Act), s. 49.

In a suit for possession of a piece of land, and for rent of the same, the plaintiff produced in support of his claim two *sarkhats* or *kabuliyats* purporting to be

* Second Appeal No. 1154 of 1885, from a decree of F. E. Elliott, Esq., District Judge of Allahabad, dated the 13th June, 1885, confirming a decree of Pandit Iadar Narain, Munsif of Allahabad, dated the 5th November, 1885.

1886

SAMAR ALI
v.
KARIM-
UL-LAH.

1886

April 20