

KAMINI SUNDARI CHAUDHRANI (DEFENDANT) v. KALI PROSSUNNO
GHOSE AND ANOTHER (PLAINTIFF.)

P. O.*
1885
June 9, 10
11 and 27,

[On appeal from the High Court at Calcutta.]

Remand—Powers of Appellate Court—Property in different districts—Decrees of District Courts, Powers of Appellate Court to amend—Act VIII of 1859, s. 12—Procedure—Unconscionable Bargain—Interest.

Neither under s. 12 of Act VIII of 1859, nor in any other way, has the High Court in its appellate capacity power to give jurisdiction to a District Court to inquire into facts, as upon a remand, in a suit decided in the Court of another district, and relating to lands in the latter.

Of two mortgages, between the same parties, the first comprised four villages, of which three were in district A, and a fourth property was in district B. The second mortgage comprised, in addition to the above, three other villages in district B. Suits brought in both districts by the assignee of the mortgagee against the mortgagor were thus framed, *vis.*, in the suit in district A for possession upon foreclosure of both mortgages, and for a declaration of the plaintiff's right as purchaser of one of the properties; and in the suit in district B, for payment of the debt on the second mortgage. Both suits were dismissed.

The High Court, hearing appeals in both suits together, affirmed the dismissal of the suit in district B, and remanded the other to the Court of first instance in district A, to have the proportionate value of the properties determined, with a view to the apportionment of the liabilities of the parties by way of contribution.

As the defendant who succeeded in both suits in the District Courts raised no question of jurisdiction, each of them might be taken to have had the consent of parties to its hearing the whole suit before it. But no such consent could be deemed to have been given to the order of the High Court made as above stated on contested appeals. This order was, accordingly, unauthorized. Although wide powers of amendment, of framing new issues, and of modifying decrees are conferred upon the High Court by provisions in the Code, of which the plain meaning is not to be narrowed by judicial construction, these powers were exceeded in the change of the suits by the order in question into a suit of a description differing totally from that of either of them, as originally decreed; and this without the consent of the parties.

Fraud apart, a loan to a *purdanashin* woman from her own *mukhtear* at an exorbitant rate of interest, the security being ample, may be a hard and unconscionable bargain on which the contract for such rate of interest will not be enforced. *Beynon v. Cook* (1) referred to and followed.

* *Present*: SIR B. FRASER, SIR R. P. COLLIER, SIR R. COUCH, and SIR A. HOBHOUSE.

1885

KAMINI
SUNDARI
CHAODHRANI
v.
KALI
PROSUNNO
GHOSE.

Two consolidated appeals from two decrees (20th July 1878 and 27th June 1881) of the High Court, by the first of which a decree (1st. March 1877) of the Subordinate Judge of the Nuddea district was affirmed. By the other decree of the High Court, a decree (29th February 1876) of the First Subordinate Judge of the district of the 24-Pergunnahs was reversed.

The questions raised on these appeals related to the mode in which the High Court had disposed of suits brought by the assignee of the rights of a mortgagee under two mortgages, by *kut-kobala*, of interest in land in the possession of a Hindu widow:

After the mortgages, but before the assignment, the assignee had become the purchaser of the interest in part of the property mortgaged, a zemindari in the Nuddea district named Alumpur, at a sale for arrears of Government revenue. How this affected the form of the assignment is explained below.

In 1875 the first of these suits was brought by the assignee in the Court of the First Subordinate Judge of the 24-Pergunnahs, for possession of three villages in that district comprised in the first mortgage, upon foreclosure in conformity with Regulation XVII of 1806, and for a declaration of his right to that part of the property which he had purchased at auction sale, *viz.*, the zemindari of Alumpur in Nuddea. As to this part of the case, among other defences, it was alleged that if the sale and assignment of Alumpur had freed it from liability, then no right to the three other villages in the 24-Pergunnahs, as against the mortgagor, could be enforced; but the proper claim would be a suit for contribution.

In 1876 the second suit was brought in the Court of the Subordinate Judge of Nuddea for Rs. 63,394, due under the second mortgage, which comprised all the property mortgaged in the first, with the addition of three other villages in the Nuddea district. Both suits having been dismissed, appeals were heard on both of them together by a Divisional Bench of the High Court (GARRETT, C.J., and McDONELL, J.) The decree of the Nuddea Court was affirmed, but the other decree was dealt with as explained in the following judgment:

"These appeals have been argued together, and we think it

right, under the circumstances, to dispose of them in one and the same judgment.

"On the 26th of March 1872 the defendant, Srimati Kamini Sundari Dasi, borrowed Rs. 12,000 from Grish Chunder Banerji, and to secure that sum and interest, she mortgaged to him, by way of conditional sale, a half-share in five different properties—Kachiara, Atghara, Dariapur, Chapra, and Alumpur. The loan was re-payable, with interest at 4 per cent. per mensem, within one month from the date of the mortgage.

"On the 9th of May 1872 (the first mortgage being unpaid) the defendant, in consideration of a further loan of Rs. 24,000, gave Grish Chunder another mortgage, by way of conditional sale, of the same five properties as were mortgaged by the former deed, and also of three other properties—Hijli, Turruf Ranaghat, and Dihi Santa.

"This sum of Rs. 24,000 was to be repaid, with interest at Rs. 2-4 per mensem, on the 9th of May 1873; and the deed provided that the mortgagee was to have his remedy, either by foreclosure or sale of the mortgaged properties, or by suit against the mortgagor, for the mortgage money and interest.

"On the 29th of July 1873, no part of the above mortgage debts having been paid, Grish Chunder gave to the defendant the usual notice to foreclose the properties mortgaged by the first deed.

"On the 23rd of March 1874, the defendant's half share in Alumpur was sold for arrears of revenue, and the plaintiff, Kali Prossunno Ghose, became the purchaser, subject to the mortgages then existing upon the property.

"As Alumpur was by far the most valuable of all the mortgaged properties, and as, by the pending foreclosure proceedings, the plaintiff's interest in it was in jeopardy, (his purchase of it having been made subject to the mortgages), he arranged with Grish Chunder Banerji to purchase from him his entire interest in the two mortgages, for the amount of principal and interest then due, and a bonus of Rs. 10,000 in addition.

"Accordingly, on the 3rd of June 1874, an assignment was made, by Grish Chunder, of the mortgaged properties to Bhugwan Chunder Mitter, (the plaintiff No. 2), as trustee for

1885

KAMINI
SUNDARI
CHAODHRANI
v.
KALI
PROSSUNNO
GHOSE.

1885
 KAMINI
 SUNDARI
 CHAUDHRANI
 v.
 KALI
 PROSSUNNO
 GHOSH.

the plaintiff No. 1 Kali Prossunno Ghose; the assignment being expressly thus made to a trustee, to prevent a merger of the mortgagor's interest in that of the mortgagee, as regards the estate of Alumpur.

"Of the five properties which were mortgaged by the first deed, Chapra has been sold on account of a prior mortgage debt; and it is admitted that this property is not available under either mortgage.

"On the 28th of April 1875, the plaintiff brought the first of these suits (making his trustee, Bhugwan Chunder Mitter, a co-plaintiff) for the purpose of obtaining possession of the three properties, Kachiara, Atghara and Dariapur, (mortgaged by the first deed), by force of the foreclosure proceedings; and also to obtain a declaration that he (the plaintiff) was entitled, by virtue of his purchase, as well as of the foreclosure proceedings, to a proprietary right in Alumpur.

"In this suit, the Subordinate Judge held, that as the plaintiff had purchased the mortgagor's interest in Alumpur, and the mortgagee's interest in the whole of the mortgaged properties, he had become both the payer and receiver of the mortgage debts, and that consequently those debts, and the remedies for them, had become extinguished; and he considered that, looking to the real substance of the transaction, the fact of the plaintiff having taken the assignment of the mortgage in the name of a trustee, although he did so expressly to avoid the merger, made no difference in his legal position. He, accordingly, dismissed the plaintiff's suit.

"Meanwhile, on the 7th of February 1876, another suit had been brought by the same plaintiff against the same defendant, to recover the amount of the mortgage debt and interest due under the second mortgage. The suit was tried by the same Subordinate Judge, and was dismissed upon two grounds,—first, that, by purchasing Alumpur, the mortgage debt had become extinguished; and, secondly, that notwithstanding the terms of the mortgage deed the plaintiff could have had no personal remedy against the defendant for the debt, until all his remedies against the property had been exhausted.

" We consider that the view which the lower Court has taken of these cases is not altogether correct.

" In the first place, the Subordinate Judge was wrong in supposing that by taking an assignment of the mortgages *bond fide* in the name of a trustee, the plaintiff could not prevent the merger of the mortgagor's and mortgagee's interests, and, consequently, the extinguishment of the mortgage debt. The assignment was taken in the trustee's name expressly for the purpose of preventing the merger, and keeping alive the two estates; and there is ample authority that this object may properly and legally be carried out by means of an assignment of this nature. [See *Watts v. Symes* (1); *Adams v. Angell* (2).]

" The real objection to these suits, in an equitable point of view, appears to us to be this—that the plaintiff, who is the beneficial owner of Alumpur, subject to the mortgages, and as such liable, conjointly with the owners of the other mortgaged properties, to pay his proportion of the entire mortgage debts, has attempted to foreclose Alumpur and the other properties comprised in the first mortgage for a part only of the mortgage debts (that part which was due under the first mortgage), and has then sued the defendant personally for the remainder, to the payment of which he himself, as the owner of Alumpur, is bound to contribute. We have great doubt whether, under such circumstances, he had any right to foreclose at all under the first mortgage. Grish Chunder, the original mortgagee, had, by accepting the second conditional sale of the properties, consented to charge them with an additional mortgage debt, and having done so, it appears to us that it would have been inequitable on his part to foreclose the property under the first mortgage, and so deprive the defendant of that which both parties had agreed to look to as the primary means of satisfying the sum due upon the second mortgage.

" But even assuming for the sake of argument that the plaintiff could thus have foreclosed under the first mortgage, it is clear that he had no right (being himself the beneficial owner of Alumpur, and, as such, liable to contribute proportionately to

1885

KAMINI
SUNDARI
CHACHERANI
v.
KALI
PROSSUNNO
GHOSE.

(1) 1 DcG. M. and G. 240.

(2) L. R., 5 Ch. D., 684.

1885
 KAMINI
 SUNDARI
 CHAUDHRANI
 v.
 KALI
 PROSSUNNO
 GHOSH.

the payment of both mortgages); to foreclose the first mortgage in order to satisfy the debt due under that, and then to sue the defendant personally for the debt due upon the second mortgage, as though that debt were not a charge upon the mortgaged property at all, and he himself were not liable for his proportion of it. Even assuming that he could have foreclosed the first mortgage, which we much doubt, we are clearly of opinion that he had no right to bring the second suit, and that the bringing of that suit had the effect (by analogy to the English Rule of Equity in such cases, &c.) of re-opening the foreclosure, or preventing the foreclosure proceedings being confirmed; or sanctioned by this Court, and of enabling us to make a decree which will at once secure to the plaintiff his just rights, and at the same time oblige him to do equity as regards the defendant."

The High Court then drew up the terms, as stated in their Lordships' judgment, of the interlocutory decree (20th July 1878), sending the suit by way of remand, for the determination of the values of the properties mortgaged, to the first Subordinate Judge of the 24-Pergunnahs. From this decree the first of the present appeals was preferred in 1879. Meantime the return from the 24-Pergunnahs was made to the High Court, setting forth the principle and results of the valuation which was based on the net annual profits of each estate, and the number of years purchase which the evidence showed that each would probably fetch. The final judgment of the High Court (27th June 1881) approved the findings of the lower Court as to the relative values of the mortgaged estates. The amount of interest to be allowed was also considered, and this question was held to be "governed by the rate stipulated for in the mortgages up to the time of redemption by the mortgagors or realisation of the mortgage money. This appeared to the Court to be in accordance with the ordinary rule." The final order was that the plaintiff was entitled to the proportionate amount of principal and interest in respect of the mortgage debts, the interest being calculated as above stated, and also to certain scheduled sums, with costs in all the Courts. Liberty to redeem within six months from the date of the decree; otherwise, realization by attachment and sale of the mortgaged premises,

The appellant's second appeal was admitted against this decree. 1885

Mr. J. T. Woodroffe, for the appellant, argued that the High Court had exceeded the powers of an Appellate Court in dealing with the decree of the First Subordinate Judge of the 24-Pergunnahs, with a view to the apportionment of liability between the parties, the High Court had altered the frame of the suits, and changed the description of remedy sought. In fact, it had affirmed the dismissal of one of the suits, and to alter the scope of the other in the manner attempted was beyond its powers. Nor had the result been successful in regard to the merits, for the maintenance of the respondent's rights in Alumpur did not correspond with the continuing liability of the other mortgaged properties, and led to an inconsistency between the nature of the case made, and the relief given. Also, the claim in the Court of the 24-Pergunnahs had been made the basis for the decree of the High Court, which in effect involved a decree for payment, notwithstanding that a claim for a mortgagee's remedy, in conformity with Regulation XVII of 1806, could not be made the basis for a money decree. In a suit for possession on foreclosure a decree for money cannot be given.—Macpherson on Mortgages, Chap. IX. Again, as that decree could be supported as originally made, *viz.*, dismissing the suit, on grounds legally tenable, the High Court had no course but to affirm the dismissal by dismissing the appeal.

KAMINI
SUNDARI
CHAODHRANI
v.
KALI
PROSUNNO
GHOSH.

He referred to *Mohanand Chatterjee v. Govindnath Roy* (1); *Zalem Roy v. Deb Shahee* (2); *Roghobar Dyal Singh v. Bhakaree Singh* (3); *Gokul Doss v. Kriparam* (4); *Nugender Chunder Ghose v. Kamini Dossee* (5); *Nawab Azimut Ali Khan v. Jowahir Singh* (6); *Bhuggobutty Dossee v. Shama Charn Bose* (7); *Gokal Das Gopal Das v. Poran Mal Premgukh Das* (8). Next, the rate of interest should be referred to. The plaintiff knew well the value of the property, and how ample was the security. The interest was excessive. He referred to *Earl*

(1) 7 Sel. Rep., 92.

(2) Marsh., 167.

(3) 22 W. R., 472.

(4) 13 E. L. R., 205.

(5) 11 Moore's I. A., 241.

(6) 13 Moore's I. A., 404.

(7) I. L. R., 1 Calc., 337.

(8) I. L. R., 10 Calc., 1035.

1885 of *Aylesford v. Morris* (1), *Nevill v. Snelling* (2), *Kanai Lal Jowhari v. Kamini Debi* (3), citing this last case on the subject of the protection of secluded women.

KAMINI
SUNDARI
CHAODHRANI

v.
KALI
PROSSUNNO
GHOSE.

For the respondent Kali Prossunno Ghose, Mr. *T. H. Cowie*, *Q.C.* and Mr. *R. V. Doyme*, contended that it had been correctly decided by the High Court that the appellant was equitably bound to contribute, proportionally, to the relative value of the mortgaged properties which she claimed to retain, (notwithstanding their foreclosure or liability to foreclosure) to the payment of the mortgage debt charged by the *lut-kobalas* on all the properties. The latter remained liable after the purchase of Alumpur. In regard to the alleged alteration of the frame of the suit, it was originally one for possession supplemental to the relief under the Regulation. The appellant had made no objection to the suits being dealt with as they had been; and he had in no way been surprised or prejudiced. Nor had the alteration exceeded the powers which the Court possessed to amend and modify.

The High Court had rightly allowed interest at the rate agreed upon between the parties, the rate not being necessarily excessive, and the parties having dealt under circumstances that did not indicate any undue influence.

Mr. *J. T. Woodroffe*, in reply, argued that, besides the right on the part of the appellant to insist that the dismissal of the suits should have been upheld, the remand order was irregular, and beyond the Court's powers on account of the situation of the property, partly in Nuddea. The High Court in its appellate jurisdiction could not authorize the Court of the 24-Pergunnahs to deal with a suit in which the property concerned was, in a great part, in another district.

Regarding the rate of interest it was submitted that the case fell within the law relating to unconscionable bargains. Reference was made to *Benyon v. Cook* (4); *Gooroo Doss Dutt v. Oomachurn Roy* (5); *Lal Beharee Awustee v. Bholanath Roy*

(1) L. R., 8 Ch. Ap., 484.

(3) I. B. L. R., O. C. 31 note,

(2) L. R., 15 Ch. D., 679.

(4) L. R., 10 Ch. Ap., 389.

(5) 22 W. R., 525.

Chakladar (1); *Deen Dyal Lall v. Ochoa Singh* (2); *Munshi Buzloor Raheem v. Shamsoonissa Begum* (3); *Greesh Chunder Lahori v. Bhaggobatti Debia* (4); *Ashgar Ali v. Delroos Banoo Begum* (5); *Takoordeen Tewaree v. Nawab Syed Ali Hossein Khan* (6).

1885
 KAMINI
 SUNDARI
 CHAUDHRANI
 v.
 KALI
 PROSUNNO
 GHOSE.

On a subsequent day, June 27th, their Lordships' judgment was delivered by

SIR R. COLLIER.—These appeals are brought from two judgments of the High Court of Calcutta; the first interlocutory, dated 20th July 1878, the second final, dated 27th June 1881, in a suit in which the respondents were the plaintiffs, and the appellants the defendant.

The circumstances which gave rise to the suit, as far as they are material, are as follows: Srimati Kamini (by this short name it may be convenient to designate her) a *parda-nashin* lady, executed a *kut-kobala* of the moiety of five mouzahs, the largest and most valuable of which was named Alumpur, to which she was entitled as widow of Ram Chunder Pal Chowdhry, to secure the repayment, within one month, of Rs. 12,000, with interest at the rate of 4 per cent. per mensem until repayment, in favour of Grish Chunder Bandopadhyaya, who was the *benamidar* of Hari Churn Bose, her *mukhtar*.

One of these mouzahs, being subject to a prior mortgage, has been put out of the question; thus the mouzahs mortgaged may be treated as four.

On the 9th of May 1872, the same lady executed another *kut-kobala* in favour of the same person, whereby the said four mouzahs, together with three others, were hypothecated to secure the repayment, in April 1873, of Rs. 24,000, with compound interest at Rs. 2-4 per mensem (Rs. 27 per annum), calculated at quarterly rests.

On the 29th of June 1873 a notice of foreclosure was served under the first mortgage.

On the 23rd March 1874 Kali Prosunno Ghose (the first respondent) purchased on sale for arrears of revenue the interest

(1) 23 W. R., 48.

(4) 13 Moore's, I. A., 419

(2) 25 W. R., 189.

(5) I. L. R., 8 Cal., 324.

(3) 11 Moore's I. A., 551.

(6) L. R., 1 Ind. Ap., 192; 13 B. L. R., 427.

1885
 KAMINI
 SUNDARI
 CHAUDHURANI
 v.
 KALI
 PROSSUNNO
 GHOSE.

of Mussumat Kamini in mouzah Alumpur. It may be here observed that, on the adequacy of the price given by him (Rs. 70,000) being questioned by the revenue authorities, he represented, by petition, that the mouzah was subject to encumbrances to the amount of Rs. 1,05,000, which he would be liable to discharge.

On the 3rd of June 1874 Grish Chunder assigned for Rs. 83,910-10-9 all his interest under the two *kut-kobalas* to the second respondent upon trust to prevent the merger of his rights under them, and to keep them alive for the benefit of the first respondent, and empowered him to continue and prosecute the pending foreclosure proceedings, and the name of the first respondent was substituted for that of Grish Chunder in the foreclosure proceedings.

On the 24th April 1875, being more than twelve months after the notice of foreclosure had been given by Grish Chunder, the respondents filed their plaint in the present suit in the Court of the Subordinate Judge of the 24-Pergunnahs. That plaint, which relates only to the first mortgage, after stating the facts above recited, prays for an order giving to plaintiff No. 1 (Kali Prossunno Ghose) a proprietary right based upon foreclosure in the three mouzahs other than Alumpur, and with respect to Alumpur for a declaratory decree confirming his possession of it, on a right derived from foreclosure of mortgage.

The defendant, by her written statement, alleged (among other things) that the mortgage had been obtained from her by fraud, denied the right of the plaintiffs to foreclose the mortgage, and asserted that if he had any claim it was to bring a contribution suit.

While this suit was pending, on the 7th February 1876, the plaintiffs brought another suit in the Court of the Subordinate Judge of Nuddea, in which the three additional mouzahs mortgaged by the second *kut-kobala* are situated, against the defendant to recover the principal and interest under that *kut-kobala*. We have not the plaint in this suit in the record, but it must be taken that the claim was against the defendant personally.

The Subordinate Judge of the 24-Pergunnahs, finding against the allegation of fraud, dismissed the first suit on the ground that

by the plaintiffs' purchase of Alumpur, coupled with the assignment which he took of the rights of the mortgagee, the whole mortgage debt became extinguished, a ground of decision manifestly wrong, and properly reversed by the High Court.

The second action was dismissed by the Subordinate Judge of Nuddea, mainly on the ground that the second *kut-kobala* did not give a personal remedy against the defendant. This judgment was affirmed by the High Court. The former judgment was varied in a manner which will be hereafter described.

It is convenient here to consider what were the rights of the parties, and what were the judgments which the lower Courts ought to have pronounced.

The object of the plaintiffs in bringing the separate suits in different jurisdictions seems to have been to foreclose the four mouzahs, including Alumpur, under the first mortgage only, whereby Kali Prosunno Ghose would obtain the mouzahs in respect of a comparatively small debt, and freed from any liability to contribute to the payment of the second mortgage, and he would obtain an absolute estate in Alumpur, subject to an encumbrance amounting, not to Rs. 1,05,000 as he had represented to the Board of Revenue, but probably to something less than Rs. 20,000. He relied on the second mortgage for procuring the whole sum thereby secured by a personal remedy against defendant, *i.e.*, against the mortgaged property and any other she might have.

In their Lordships' opinion the plaintiffs had no right to claim Alumpur, or the three other mouzahs, by foreclosure. The defendant could not have redeemed the three other mouzahs without their liability under the second mortgage being taken into account, nor could the plaintiffs foreclose them, under the first mortgage only, thus depriving the second mortgage of their contribution. With respect to Alumpur, he, having purchased the equity of redemption, was bound to contribute to the payment of both the mortgages in the proportion of the value of Alumpur to the other properties, and he could not free himself from this obligation by foreclosing Alumpur, under the first mortgage only. Their Lordships are therefore of opinion that his suit was rightly dismissed, though not for the reason given by the Subordinate Judge.

1885

KAMINI
SUNDARI
CHAODHRANI
v.
KALI
PROSUNNO
GHOSE.

1885
 KAMINI
 SUNDARI
 CHAUDHRANI
 v.
 KALI
 PROSSUNNO
 GHOSE.

The judgment dismissing the second suit having been affirmed, and no cross appeal having been presented, it cannot now be questioned.

The appellant, therefore, had a right to judgment in both suits.

This being so, we now come to the manner in which the High Court dealt with the case, in the single desire, their Lordships doubt not, to do what they deemed complete justice between the parties.

Having affirmed the decree of dismissal in the second suit, whereby it was ended, they in some sense revive it, and turn both suits into a contribution suit, which they send by way of remand to the Court of the 24-Pergunnahs. They observe :—

“ We think, therefore, that, under the circumstances, the proper decree in both suits will be : *1st.*—That the first suit be dismissed, except as regards Alumpur ; and that the plaintiff's right to Alumpur be decreed, the plaintiff No. 1 and the defendant being subjected to the following conditions : *2nd.*—That as between the plaintiff No. 1 and the defendant, the properties mortgaged by both deeds (except Chapra) be valued by the lower Court. *3rd.*—That the debt secured by the first mortgage be borne by the plaintiff No. 1 and the defendant, in the proportion of the aggregate values of the properties Kachiara, Atghara, and Dariapur to the value of Alumpur. *4th.*—That the debt secured by the second mortgage be borne by the plaintiff No. 1 and the defendant, in the proportion of the aggregate values of all the properties mortgaged by that deed (except Chapra) to the value of Alumpur. *5th.*—That the defendant be at liberty to redeem all the properties except Alumpur, upon repaying the proportion of the mortgage debts and interest due from her, corresponding with the proportionate value of the other mortgaged properties to Alumpur, until fresh proceedings for foreclosure or for sale of the mortgaged properties (except Alumpur) shall have been taken in due course by the plaintiff. *6th.*—That until the mortgage debts and interest shall be fully satisfied the said mortgaged properties in the hands of the defendant shall be considered as charged with the proportion of the mortgage debts, which she is hereby declared liable to pay. *7th.*—That each of the parties do

bear and pay his and her own costs of the first of these suits, and that the costs of the second suit in both Courts be paid by the plaintiff No. 1."

1885

KAMINI
SUNDARI
GHAODHRANI
v.
KALI
PROSSONNO
GHOSH.

To this judgment it is objected,—

1st.—That the High Court, in their appellate capacity, had no power to confer on the Court of the 24-Pergunnahs jurisdiction to deal with a suit in the Nuddea district relating to property situated in Nuddea.

• *2nd.*—That to change the two suits into one contribution suit was beyond their power.

The case of property the subject of suit being situated in two jurisdictions is thus provided for in Act VIII of 1859, the Act governing the procedure in this action. Section 12 is in these terms:—If the property be situate within the limits of different districts, the suit may be brought in any Court otherwise competent to try it within the jurisdiction of which the land or other immoveable property in suit is situate, but in such case the Court in which the suit is brought shall apply to the Sudder Court for authority to proceed in the same."

This section, in their Lordships' judgment, is not applicable to the circumstances of this case. Neither suit comprised the whole property, nor did either District Court apply to the High Court (now substituted for the Sudder) for leave to deal with the whole of it. The plaintiffs intentionally divided their claim, and preferred its parts in different jurisdictions.

Their Lordships are aware of no power of the High Court in its appellate capacity to give jurisdiction to the Court of the 24-Pergunnahs to deal with a suit commenced and prosecuted in Nuddea relating to lands in Nuddea. It may be observed that the Court of the 24-Pergunnahs dealt with Alumpur, which is in Nuddea, and that the Court of Nuddea dealt with the three mouzahs twice mortgaged which were in the 24-Pergunnahs. The defendant, who succeeded in both suits, raised no question upon this, and each of the District Courts must be taken to have tried the whole suit before it by consent. But the order of the High Court now appealed against can in no sense be deemed to have been made by consent.

With respect to the second objection, their Lordships, while

1885
 KAMINI
 SUNDARI
 CHAUDHURANI
 v.
 KALI
 PROSUNNO
 GHOSE.

fully recognizing the advantages to the administration of justice of the wide powers of amendment and modification of decrees, and of framing new issues, conferred upon the High Court by ss. 350, 351, 352, 353, 354, and being by no means disposed to narrow their plain meaning by judicial construction, are nevertheless of opinion that to change (as has been done in this case) two suits, one of which had been dismissed on appeal, into one suit of a totally different description from either of them, and this without consent, exceeds the powers conferred by the Act.

It follows that the judgment of the 20th July 1878 must be reversed. If so, all that followed on that judgment, the remand, and subsequent judgment of 1881 will fall to the ground, and the judgment of the District Courts respectively dismissing both suits will be affirmed. The defendant should have her costs in the High Court as well as in the lower Courts, and the costs of this appeal. Their Lordships will humbly advise Her Majesty to this effect.

This view of the case makes it unnecessary to determine a question which has been argued at the bar, *viz.*, whether the defendant can be relieved from the exorbitant rates of interest stipulated for in the mortgages; but as unfortunately further litigation with respect to the mortgages seems not improbable, their Lordships think it may be useful to intimate the view that they are disposed to take of this question.

The finding of the lower Court against fraud and undue influence must now be accepted; a contrary finding would have avoided the whole transaction.

But assuming the validity of the mortgage, a question arises whether, under the circumstances, the rate of interest exacted did not amount to a hard or unconscionable bargain such as a Court of Equity will give relief against.

The doctrine of equity on this subject was laid down by the Master of the Rolls in *Beynon v. Cook* (1), and his judgment was affirmed by the Court of Appeal. Rhys Beynon was a reversioner or remainder man, Cook was a money-lender who took from him a promissory note for 100*l.*, for which he was charged 15*l.* dis-

(1) 10 L. R., Ch. Ap., 391.

count for six months, and a mortgage of his reversionary interest, with interest at the rate of 5 per cent. per month. The Master of the Rolls made a decree for redemption on payment of the amount advanced, at simple interest at 5 per cent. per annum. He observed: "The point to be considered is, was that a hard bargain? The doctrine has nothing to do with fraud. It has been laid down in case after case that the Court, wherever there is a dealing of this kind, looks at the reasonableness of the bargain, and, if it is what is called a hard bargain, sets it aside. It was obviously a very hard bargain indeed, and one which cannot be treated as being within the rule of reasonableness which has been laid down by so many Judges."

This equitable doctrine appears to have a strong application to the facts of this case, where we have the borrower, a *parda-nashin* lady; the lender, her own *mukhtar*, under the cloak of a *benamidar*; the security an ample one, as abundantly appears; the interest on both mortgages, especially the compound interest on the latter, exorbitant and unconscionable; and a purchaser, with full notice of these circumstances.

C. B.

Appeal allowed.

Solicitors for the appellant: Messrs. *Lambert, Petch, & Shakespear.*

Solicitors for the respondent Kali Prossunno Ghose: *Messrs. Barrow & Rogers.*

THE OFFICIAL TRUSTEE OF BENGAL (PLAINTIFF) *v.* KRISHNA CHANDRA MOZUMDAR AND OTHERS (DEFENDANTS.)

[On appeal from the High Court at Calcutta.]

Appellate Court, Powers of—Power to vary decrees as made in the lower Court—Decree confined to rights in issue between parties—Section 565 of the Code of Civil Procedure, 1877.

After the trial of issues raising the question whether the plaintiff was, or the defendants were, entitled to zemindari rights in certain mehals, a decree was made affirming the title of the plaintiff, the evidence in support of the defendants' case being discredited, and the latter were declared by the decree to be the "plaintiff's under-tenure holders of the said mehals."

* *Present: SIR B. BRACOCK, SIR R. P. COLLIER, SIR R. COYNE, and SIR A. HOBHOUSE.*

1885

KAMINI
SUNDARI
CHAUDHRANI
v.
KALI
PROSSUNNO
GHOSE.

P. O.*

1885.

June 11.

12 and 27.