

PRIVY COUNCIL.

BANARSI PRASAD (DEFENDANT) v. RAM NARAIN AND OTHERS
(REPRESENTATIVES OF THE PLAINTIFFS).

P. C.
1903
February 6.
March 25.

[On appeal from the High Court of Judicature for the North-Western Provinces, Allahabad.]

Mortgage—Usufructuary mortgage—Suit for redemption on ground that mortgage-money has been paid off by usufruct—Accounts—Whether mortgagee liable for gross rental as shown in jamabandi or only for such sums as he actually receives.

In a suit for the redemption of a mortgage with possession as having been paid off by the usufruct, where the mortgage deed was found to partake of the character of an agency or receivership deed as well as of a usufructuary mortgage, the Judicial Committee *held* that under the deed the mortgagor was entitled to call upon the mortgagee to furnish accounts of receipts and payments; and also *held* (reversing the decision of the High Court) that on the true construction of the deed the mortgagee was not responsible for the amount of the gross rental as shown in the rent-roll, but only for such sums as were actually received by him, or on his behalf, and for such sums, if any, as might have been received by him but for his own neglect or fault.

APPEAL from a judgment and decree (23rd November, 1899) of the High Court at Allahabad, which reversed a decree (29th March, 1897) of the District Judge of Bareilly, and restored a decree (11th June, 1896) of the Subordinate Judge of Bareilly in favour of the plaintiffs.

The suit was brought by one Hulas Singh and another against Banarsi Prasad, the present appellant, for the redemption of a mortgage made by the plaintiffs in the defendant's favour on the ground that the mortgage-money had been paid off out of the income of the property mortgaged while it was in the possession of the mortgagee. The proper construction to be placed on this mortgage-deed was the only question in this appeal. The material portions of the deed, which was dated the 8th September, 1884, were as follows:—

After describing the property mortgaged and stating that it was mortgaged to Banarsi Prasad for the period of five years for Rs. 2,551, the deed continued:—

“Having made over possession and enjoyment of the aforesaid mortgaged property, it is stipulated:—

“That after collecting the rent with reference to the rent-roll of the said villages, the Government revenue shall be paid first of all; that out of

Present:—Lord MAONAGHTEN, Lord LINDLEY, SIR ANDREW SCOBLE,
SIR ARTHUR WILSON and SIR JOHN BANSER.

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the remaining sum Rs. 800 shall be applied towards the expenses, the interest due on this bond and the expenses of the villages for the whole of the year; that the balance of the profits shall be paid every six months to (1) Makund Ram, (2) Fakir Chand, Gobind Prasad *alias* Gabbhi Mal, and (3) Gobind Prasad *alias* Gabbhi Mal, on account of interest due to them under the bonds at the rate of thirteen annas four pies per cent., and that the receipt for this amount and their own receipt for the amount of this instrument shall be given to us, the mortgagors. If the interest due to the said Lalas could not be paid out of the balance of the surplus profits, we, the mortgagors, shall pay it out of our pocket: the mortgagee shall have nothing to do with it. If any surplus remains after payment of the interest to the said Lalas, it will also be paid to the said Lalas, and shall be applied towards the discharge of the principal amount. We, the mortgagors, shall be liable for the increase or the decrease in the Government revenue. After the expiration of the term we shall get the mortgage redeemed on payment of the entire amount of the mortgage, that is, after the expiration of seven years, we, the mortgagors, shall have a right to redeem; and after that term, if the mortgagors and the mortgagee so wish, the mortgagee shall remain in possession and enjoyment of the land for the space of five years over and above the aforementioned term. We shall have no objection to this. The mortgagee also shall have power to recover his money on the expiry of the term. He shall have no power to cut the dry or growing trees of any description. But he shall have power to cut, or cause to be cut, the trees for the tenants' instruments of husbandry, as well as for his own use in the village, but he shall not interfere with the *shisham* trees in the said villages, and the trees of any description standing on the road. We shall have power to cut (the trees) in time of need. He or the tenants shall have no power to plant, or cause to be planted, any grove, nor shall the mortgagee have power to reduce the amount of the rent-roll. The arrears in the villages for the last year, &c., with reference to the *wasilbagi* statement prepared by the patwari, shall be realized by the mortgagee, and credit shall be allowed to us for the same at the end of the year. We, the mortgagors, shall realize the arrears that shall be due at the time of redemption, to the mortgagee by the tenants in the villages with reference to the account, and shall pay them off within a year to the mortgagee. If we do not pay them off, the mortgagee may realize the same from us. In future when we effect the redemption, we shall give notice in the month of Baisakh, pay the whole of the amount of this instrument in Asadh, and redeem the mortgaged villages. This mortgaged property has in no way been charged or transferred to any person, except under these instruments, *viz.*, (1st) document, dated the 20th of April, 1880, executed in favour of Makund Prasad; (2nd) document, dated the 13th of July, 1882, executed in favour of Lala Gobind Prasad and Lala Fakir Chand, and (3rd) document, dated the 25th of January, 1884, executed in favour of Lala Gobind Prasad *alias* Gabbhi Mal aforesaid; nor shall we transfer or charge it in future. If anyone will come forward as a partner or a sharer, or a dispute of any kind will arise, we shall be responsible for the defence. The mortgagee shall have

nothing to do with it. Under these circumstances he can recover his money within the prescribed period without any reference to the term. If the amount be not recovered from the mortgaged property, it may be recovered from the other movable or immovable property. We shall have no objection to this. A shop, situate in muhalla Chaudhri, adjoining the dwelling-house facing the west, bounded as below, is hypothecated in the bond. The rights and interests in the town of Shahi Rustamnagar, pargana Mirganj, together with the income arising from the market, have been mortgaged with possession. After collecting the rent with reference to the rent-roll, of the aforesaid villages, the Government revenue, cesses and subscription shall be paid first of all, and out of the balance, after appropriating the money himself, according to the above-mentioned provisions, the aforesaid Sahu shall be paid. We shall be responsible for the surplus or the deficit, the mortgagee shall have nothing to do with this.

"Having agreed to all these particulars we have executed this deed of mortgage with possession, that it may serve as an authority. The conditions entered in this instrument shall hold good and remain in full force until the payment of the whole amount. The mortgagee shall have power like us to enhance the rent. He shall also have power to recover the money from us and the mortgaged and hypothecated property."

The suit was instituted on the 6th of April, 1895, the plaintiffs alleging that the mortgage-money had been wholly paid off in the first year from the profits of the property of which the defendant had been in possession, and praying that they might be declared entitled to redeem the mortgaged property without payment; that the defendant might be ordered to render accounts of the receipts and disbursements of the mortgaged property from the date of his possession to the filing of the suit; and that the defendant might be ordered to reconvey the mortgaged property to the plaintiffs and put them in possession thereof on a date to be fixed by the Court.

The defendant in his written statement alleged that on the expiration of the original term of 7 years he had by consent and in accordance with the conditions of the mortgage deed, entered upon a further term of 5 years which had not expired when the suit was brought, and the suit was therefore premature; that under the mortgage deed the mortgagors were bound to give notice of their intention to redeem on a certain date, and to pay off the mortgage-money and redeem the mortgage at a certain date thereafter, and they could not redeem without such notice; that under the terms of the mortgage deed the defendant had paid himself Rs. 800 a year and had paid the

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balance to the native bankers, and that the allegation of the plaintiffs that whole of the mortgage-money had been realized in the first year was wholly wrong; that the arrears of rent outstanding at the rate of the mortgage had been realized and credited as agreed upon; that the suit for balance of profits, for interest and for an account was wholly wrong, inasmuch as the defendant had never refused to render accounts; and that the suit for redemption without payment of the balance due of the mortgage-money was improperly brought.

The Subordinate Judge was of opinion that the conditions in the mortgage deed as to the length of the term and the giving of the notice by the mortgagors of their intention to redeem were subject to and overruled by the condition at the end of the deed which provided that the condition entered in the deed should "hold good and remain in full force until payment of the whole amount." He further held that under the mortgage, the mortgagee was liable not merely for actual collections but for the sums shown in the gross rent-roll of the mortgaged property, and on that assumption he came to the conclusion that the mortgage-money had been paid off.

The Subordinate Judge therefore gave the plaintiffs a decree with costs.

On appeal by the defendant the District Judge was of opinion that there were three points for decision (a) Is the suit premature because the term of the mortgage is unexpired? (b) Is the suit for redemption bad because the mortgagor was bound to give notice? (c) Should accounts be made up on the basis of actual profits or upon the basis of the gross rent-roll? As to these he said:—

"Then comes the clause on the strength of which the Subordinate Judge has decreed the suit, 'the conditions entered in this deed shall remain in full force until all the mortgage-money has been paid.' The meaning of this seems to me to be that the preceding conditions shall remain unaltered so long as the mortgage subsists: and if so, the clause is unnecessary, but quite intelligible. I do not think that the clause was intended to introduce a new condition, but rather to provide that no new condition should at any time be introduced into the mortgage. The Subordinate Judge appears to think that this clause enables the mortgagors at any time to call for accounts, and in the event of the account showing that the surplus profits equal the amount of the mortgage-money, to demand reconveyance. This does not seem to me to

be the primary meaning of the words used, and the entire instrument shows that it was not contemplated by the parties that the mortgagor should pay himself the mortgage-money from the rents and profits of the property; if, after payment of the Government revenue, the Rs. 800 and the interest due to the bankers, there remained any surplus, then that surplus was to be paid in diminution of the principal debts due by the mortgagors to the said bankers. There is no express provision as to what was to be done with the surplus if or when the bankers were paid off. The mortgage remains in force until all the money secured on it is repaid to the mortgagee, and if the words 'ta ada-i-kul rupiya' merely mean, as I think they do mean, 'so long as the mortgage subsists,' then this clause, although unnecessary, has a perfectly natural and intelligible meaning, and is not inconsistent with the rest of the deed. It was further contemplated between the parties that, whenever the property became liable to redemption, *i.e.* at the end of the original or extended term or thereafter, the mortgagors, if they wish to redeem, should signify their intention in the month of Baisakh and should close the account and redeem two months later. If this is the correct construction of the deed, it is hardly necessary to consider the circumstances of the parties or other extrinsic evidence. This also, however, seems to me to support the construction which I have placed upon the clause, regarding the meaning of which I differ from the Subordinate Judge. The annual rent-roll of mortgaged property was about Rs. 8,900 and the Government revenue was over Rs. 4,800, leaving gross profit of about four thousand rupees. The mortgagors owed to the bankers named in the mortgage-deed Rs. 32,000, carrying an annual interest of Rs. 3,200, so that the payment of this interest and of Rs. 800 to the mortgagee himself would ordinarily absorb all the profits; but if there were any surplus, it was to be paid to the bankers in diminution of the Rs. 32,000. So long, therefore, as the bankers remained unpaid from some other source than the rents and profits of the mortgaged property, there was no chance of the mortgage coming to an end by reason of there being sufficient profits to pay off the mortgage money, and hence the parties did not contemplate, and made no provision for, the mortgagee paying himself the mortgage money from the rent and profits of the property. As the deed has been construed by the Subordinate Judge, it appears to me to involve conditions which no sane man of business would accept. I hold that when this suit was instituted, the usufructuary mortgagee was holding under an unexpired term and that the mortgagors were bound to give notice of their intention to redeem before they can redeem. I therefore find both points for the mortgagee, defendant appellant.

"It is unnecessary for me to record a finding upon the third point."

The District Judge therefore allowed the appeal and dismissed the suit with costs.

The plaintiffs appealed to the High Court. The appeal was heard by a Division Bench (Blair and Burkitt, JJ.), who

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decreed the appeal and restored the decree of the Subordinate Judge. Their judgment was as follows:—

“This is a suit for redemption by the plaintiffs, who went into Court upon the allegation that their mortgagee, who was an usufructuary mortgagee, had already repaid himself out of the usufruct the whole of the mortgage-money due. The Court of first instance found that that was the fact, and it did so upon a construction of the mortgage deed, holding that the mortgagee was to be taken to have collected the jamabandi rent from the tenants and was not answerable only for the sums which he had actually collected. The figures upon that construction are perfectly plain and show that the mortgagee has far more than paid himself the amount due upon his mortgage. It was contended for the mortgagee that he was only answerable in account to the mortgagors for the sums actually collected by him from the tenants, and further, that the sums which he had so collected tallied to a rupee with the amount of the payments which he had to make for the Government revenue, the village expenses, his own interest, and the interest of certain prior mortgagees which he undertook to pay. He had also undertaken to pay towards the principal sum of such last-mentioned debts any residue which might remain after satisfaction of the charges and interest mentioned above. He does not allege that he has paid any part of such principal. The Lower Appellate Court does not seem to have dealt at all, or at least to have dealt properly, with the real question raised. It deals with the question of what ought to have been done had everybody strictly complied with the provisions of the mortgage deed. It does not, at all events explicitly, put upon the mortgage deed a construction conflicting with that of the Court of first instance, but it dismisses the suit of the plaintiffs upon the ground that the defendant mortgagee was entitled to notice of plaintiffs' intention to redeem. The Court below has failed entirely to find whether the mortgagee had or had not in fact paid himself out of the usufruct, in other words, whether he had or had not received and appropriated any sum beyond the charges to be paid by him, the interest of himself and the interest to be paid by him to the prior incumbrancers. Upon the construction of the document which commends itself to our judgment, the mortgagee is responsible for the rents of the tenants as they are to be found in the jamabandi. He cannot cover himself by denying that he had actually collected the whole amount. He was bound to give the mortgagors credit for the gross rents as they appear in the jamabandi. Upon this construction of the deed, it is clear from the judgment of the Court of first instance that the mortgagee had long ago paid himself, and it does not lie in his mouth to claim the advantage of notice of redemption.”

On this appeal, which was heard *ex parte*, Mr. G. E. A. Ross, for the appellant contended that the suit was premature, inasmuch as under the clause in the mortgage-deed allowing a further term of five years, the period for which the appellant was entitled to be in possession had not expired at the institution

of the suit. Moreover, the respondents were not entitled to redeem without payment of the mortgage-money, and were bound under the terms of the mortgage deed to give notice of their intention to redeem before bringing their suit: this they had not done. It was also contended that the High Court was wrong in construing the deed in such a way as to make the appellant liable to account for the rents of the mortgaged property as they appeared in the rent-roll, and without reference to whether he realized them or not: he was only liable to account for rents which he actually collected. As to the accounts in such a case, *Shah Mukhun Lall v. Baboo Sree Kishen Singh* (1) was referred to, and it was submitted that the suit should be remanded for proper accounts to be taken.

1903, *March* 25.—The judgment of their Lordships was delivered by LORD MACNAGHTEN:—

This is an appeal *ex parte* from a decree of the High Court at Allahabad reversing a decree of the District Judge of Bareilly and restoring the decree of the Subordinate Judge.

The plaintiffs, who are now represented by the respondents, claimed to redeem without payment a mortgage held by the appellant over certain villages and a shop which belonged to them.

The mortgage was dated the 8th of September, 1884. It was expressed to be for a term of seven years, with an extension of five years more if both parties agreed. On the execution of the mortgage the mortgagee entered into possession of the mortgaged premises, and continued in possession until apparently a receiver was appointed in the suit. The mortgage deed is a very obscure document, confused throughout and in places contradictory. It partakes of the character of an agency or receivership deed as well as of the character of a usufructuary mortgage. The two purposes of the deed are so mixed up together that it is difficult, if not impossible, to determine the rights of the parties with anything like certainty. The Subordinate Judge and the High Court both came to the conclusion that the meaning of the deed was that the amount of the gross rental as shown in the jamabandi or rent-roll, whether actually

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(1) (1869) 12 Moo., I. A., 157; 2 B. L. R., P. C., 44.

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realized or not, was to be taken as the income for which the mortgagee in possession was to be responsible.

This view does not seem to have been presented by the plaintiffs themselves. Indeed, the point was not taken in the pleadings at all. It appears to have been an inference drawn by the Subordinate Judge from certain expressions found in the mortgage deed, which are by no means clear. On this footing the Subordinate Judge determined that the mortgage had been discharged and gave the plaintiffs a decree without determining the issues raised in the suit. The District Judge, on the other hand, thought that was not the meaning of the document, and went so far as to say that no sane man of business would have assented to such an arrangement. He dismissed the plaint with costs on the ground that the mortgagee was entitled to hold the mortgaged property for the extended term under an agreement alleged, but not proved, and the subject of one of the issues on which no finding was pronounced. He further held that during that extended term the mortgagors were not entitled to any accounts.

Their Lordships are unable to agree either with the District Judge or the High Court. They do not think that the mortgagee was intended to be responsible for the rent-roll in the jamabandi under all circumstances. On the other hand, they cannot doubt that under such a deed as that on which the suit is founded the principal must be entitled to call upon his agent to furnish accounts of receipts and payments.

Possibly if the evidence which appears to have been before the Subordinate Judge had been available on the appeal, their Lordships might have been able to arrive at a decision on the merits. As it is, there is no evidence before their Lordships on which it is possible to come to any conclusion—all their Lordships can do is to express their dissent from the judgment of the High Court as well as from the judgment of the District Judge and to remit the case to the Subordinate Judge with such directions as seem to them to be necessary under the circumstances.

In their Lordships' opinion the proper order will be as follows :—

Order the appellant to bear his own costs of this appeal.

Discharge the decrees of the High Court and of the District Judge without costs.

Discharge the decree of the Subordinate Judge, the costs of the hearing before him to be costs in the cause.

Remit the suit to the Subordinate Judge.

Declare that according to the true construction of the mortgage deed of the 8th of September, 1884, the defendant, the mortgagee, is not responsible for the amount of the gross rental as shown in the jamabandi, but only for such sums as were actually received by him or on his behalf, and such sums, if any, as might have been received by him but for his own neglect or fault.

Take an account of the defendant's receipts and payments under the said mortgage deed, and let the ultimate balance due to or from the defendant be certified.

Enquire what, if anything, was due to or from the defendant in respect of the said mortgage at the date of the commencement of the suit, and what was the amount, if any, in the hands of the defendant at that time.

Let the ultimate balance be paid to the party to whom it shall appear to be due within such time as the Judge shall direct, and let the costs of the suit be borne and paid by the defendant if it shall appear that nothing was due to him in respect of the said mortgage at the date of the commencement of the said suit, but if it shall appear that at that time anything was due to the defendant in respect of the said mortgage, let the costs of the suit be borne and paid by the respondents.

Their Lordships will humbly advise his Majesty accordingly.

Appeal allowed : case remanded.

Solicitors for the appellant—Messrs. *Barrow, Rogers, and Nevill.*

J. V. W.

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