

will humbly advise His Majesty accordingly. The appellant must pay the costs of the appeal.

NOTE.—On the conclusion of the judgment their Lordships intimated that they would withhold their report to His Majesty for three months, to enable the appellant to apply to the Court of the Judicial Commissioner for a certificate that the appeal involved a substantial question of law. The appellant having failed to obtain such certificate, their Lordships, on the 12th November, 1902, intimated that their report would be submitted to His Majesty at the next meeting of the Privy Council.

E. S. HOPE,

Registrar of the Privy Council.

Appeal dismissed.

Solicitors for the appellant—Messrs. *Watkins & Lemprière.*

Solicitors for the respondents—Messrs. *T. L. Wilson & Co.*

J. V. W.

NIDHA SAH AND ANOTHER (DEFENDANTS) v. MURLI DHAR
AND OTHERS (PLAINTIFFS).

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Mortgage—Mortgage with possession for a term certain—Mortgagee unable to obtain possession of part of property mortgaged and consequently failing to recoup money advanced—Suits by mortgagor on expiry of term to recover possession.

The plaintiff representing himself to have absolute proprietary right in certain villages, and in consideration of advances which had been made to him by the defendant, executed what purported to be a mortgage of the villages with possession to the defendant for 14 years, the deed providing that, on "the expiration of the term the mortgagor shall come into possession of the mortgaged villages without settlement of account, that on the expiration of the term the mortgagee shall have no power whatever in respect of the said estate which, after the expiration of the term of this mortgage-deed, shall be returned to the mortgagor without his paying the mortgage money secured under this document." When the term had expired the mortgagee refused to give up possession of such of the villages as he had been able to get possession of on the ground that owing to the misrepresentation of the mortgagor he had not received the full benefit purported to be given him by the mortgage, and had consequently been unable to recoup himself the money he had advanced, and he claimed the right to hold the property until he had so recouped himself. In a suit by the mortgagor to recover possession the above ground was held by both the lower Courts to be well founded; and it was contended that the plaintiff, having broken his part of the contract by failing to give the defendant possession of the entirety of the premises comprised

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in the mortgage, ought not to be allowed to enforce the contract against the mortgagee. *Held* by the Judicial Committee that the plaintiff was entitled to rely and was relying on his proprietary right, and, in the absence of any stipulation express or implied in the mortgage-deed depriving him of the right to recover possession, he was entitled to succeed.

APPEAL from a judgment and decree (14th April, 1896) of the Judicial Commissioner of Oudh confirming a decree (25th October, 1893) of the Subordinate Judge of Bahraich by which the respondent's suit was decreed.

The plaintiffs were the representatives of one Indarjit Lal, who, on 10th July, 1876, executed a mortgage of certain villages in favour of one Ishri Sah, the original defendant in the suit, out of which this appeal arose. The mortgage was executed in consideration of Rs. 11,530-8-0, of which Rs. 244-8-0 were retained by the mortgagee in repayment of money advanced to the mortgagor to cover the costs of conveyance, including stamps and registration, while Rs. 2,085 were set off against antecedent debts due by the mortgagor to the mortgagee, and Rs. 9,201 were left with the mortgagee for the redemption of prior mortgages. The mortgagee was to have possession for a time certain, 14 years; and the rents and profits for this term were to be received by him in full payment of the mortgage money, that is the Rs. 11,530-8-0, nothing being said in the mortgage-deed about interest; and after the expiry of this term the mortgagor was to be entitled to re-enter during the fallow season in the month of *Jeyt* (May and June) without any account of the payment of the said money.

Indarjit Lal died on 2nd September, 1880, leaving two sons, Murli Dhar and Ram Prasad, and a grandson, Gur Prasad, the son of a third son, Bansi Dhar, who had predeceased his father. On the expiration of the term of 14 years Murli Dhar applied for mutation of names by expunging the name of Ishri Sah, the mortgagee, from the register. This application was opposed by the mortgagee and was rejected on 21st December, 1890.

Murli Dhar then on 10th June, 1892, brought a suit in the Court of the Subordinate Judge of Bahraich against the mortgagee for recovery of the mortgaged property, for mesne profits from the expiration of the term to the institution of the suit,

and for an account of the Rs. 9,201 left with the mortgagee for payment of prior incumbrances. In this suit Ram Prasad and Gur Prasad were afterwards joined as co-plaintiffs.

The defendant resisted the claim on the ground that the plaintiff had misrepresented the nature of his interest in some of the villages, and had wrongly deprived him of the possession of others, so that he had not been allowed to retain possession over the whole of the mortgaged lands during the stipulated term; and he disputed the claim to an account on the ground that by the conditions of the mortgage-deed, the right to an account had been expressly waived by the mortgagor.

The Subordinate Judge found that the objections of the mortgagee were well grounded in respect of five of the villages mortgaged, and after referring to the express declaration in the mortgage-deed that "all these villages were the proprietary villages of Indarjit, thus inducing the defendant to believe in that tenure and to act on that belief" he said:—

"As a fact defendant has never had possession of Dewasiapur, and plaintiffs' father took possession of Muhammadpur in Rabi 1283 Fasli, and defendant has not had it for 11½ years of the stipulated period of 14 years. Plaintiffs' father Indarjit, the original mortgagor, dying, the *muaf* Bilaspur was resumed by the grantor in 1290 Fasli, and defendant has not had it for eight years of the stipulated period. The proprietors of patti Dikanli Ratan Singh redeemed the mortgage of that patti in 1290 Fasli, and defendant has not had it eight years of the stipulated period. Similarly they redeemed Aghapur Budainpur in 1293 Fasli and defendant has not had it for five years of the stipulated period. That there was a subsequent agreement a month after the mortgage in respect of Dewasiapur and Mohammadpur is not now denied, but when defendant sued for arrears of rent of those villages, plaintiffs opposed the claim, even asserting that the mortgage had never taken effect. The agreement is not before me, and I can only hold on the deed, dated 10th July, 1876, that plaintiffs have retained the villages without right to do so. The decisions in the rent suits are not binding; they only show that defendant failed to realize rents from plaintiffs, in one case because it was held that Dewasiapur had been given for maintenance, and in the other because the agreement was inadmissible in evidence. Defendant is to blame for not trying to recover these two villages in the Civil Court, and this omission on his part must go against him."

The Subordinate Judge, however, was of opinion that these objections, however well grounded they might be in fact, were, in law, no answer to the plaintiffs' claim, because they might and ought to have brought an action for possession of Dewasiapur

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and Mohammadpur, and actions of damages upon his successive dispossessions from Dikanuli Patti Ratan Singh, Bilnapara and Aghapur Badainpur. In the result he passed a decree in favour of the plaintiffs for redemption and for possession of the mortgaged property.

Against this decision the defendant appealed to the Court of the Judicial Commissioner of Oudh, and that Court (consisting of the Judicial Commissioner and Additional Judicial Commissioner) on 14th April, 1896, gave judgment dismissing the appeal with costs. They accepted the finding of fact by the Subordinate Judge, to which no objection had been made. On the question of law they agreed with the Subordinate Judge. In concluding their judgment they said :—

“ But even if it be conceded that the appellants are not barred by the rule of *res judicata* from raising the question in the present suit whether they or their predecessor in title, the mortgagee have, or has, been prevented from realising the mortgage money in full, from the mortgaged property by being deprived of part of the security, still the appellants have no answer to the respondents' claim, unless they can show that they are entitled to make up the deficiency by retaining possession of the rest of the security beyond the 14 years. And this they cannot show, because there is no such provision in the mortgage-deed, nor is any such provision annexed to, or imported into, the contract by the law.”

The defendants appealed to His Majesty in Council.

On the appeal, which was heard *ex parte*—

Mr. *Mayne* for the appellant contended that the decision of the Judicial Commissioners holding that the respondents had deprived the appellants of the full benefit of the mortgage contract, and yet allowing them to enforce the contract against the appellants, was wrong in law. Where a mortgagor was found to have misrepresented the nature of his interest in some of the mortgaged property, and to have wrongly deprived the mortgagee of the possession of other portions of it, the mortgagee, it was submitted, could plead those circumstances as a defence to a suit for redemption. The cases of *Forbes v. Ameeroonissa Begum* (1) and *Mukhun Lall v. Sreekishen Singh* (2) were cited. When the object of a contract is to form a fund to pay off a debt in a certain time, the period of time allowed being sufficient to pay off the debt, and one party to the contract takes

(1) (1865) 10 Moo. I. A., 340 (347, 356). (2) (1868) 12 Moo. I. A., 157 (186).

away or deteriorates property from which the fund was calculated to be derived, so as to render it less beneficial for the object for which it was intended, and so prevent the fund being formed in the stipulated time, it was submitted that it did not lie in the mouth of such party to insist on the property being restored in the same state as before such taking away or deterioration. The Contract Act, IX of 1872, section 67, was referred to.

The respondents did not appear.

1902 : 3rd December.—Their Lordships' judgment was delivered by SIR JOHN BONSER :—

On the 10th of July, 1876, one Indarjit Lal, representing himself to have absolute proprietary right in certain villages, executed an instrument purporting to be a mortgage of them with possession to one Ishri Sah "for a period of 14 years from 1284 Fasli to 1297 Fasli" by which it was provided that on the expiration of the term the mortgagor "shall come in possession of the mortgaged villages without settlement of accounts . . . that on the expiration of the term . . . the mortgagee shall have no power whatever in respect of the said estate . . . and after the expiration of the term this mortgage-deed . . . shall be returned to the mortgagor without his accounting for (paying) the mortgage money secured under this document."

This instrument, though it is called a mortgage, and though it will be convenient to follow the nomenclature used in the document itself and in the pleadings and judgments in the Courts below, is not a mortgage in any proper sense of the word. It is not a security for the payment of any money or for the performance of any engagement. No accounts were to be rendered or required. There was no provision for redemption expressed or implied. It was simply a grant of land for a fixed term free of rent in consideration of a sum made up of past and present advances.

It appears that the so-called mortgagor had not absolute proprietary rights in all the villages, and that the mortgagee did not get the full benefit purported to be given him by the mortgage.

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At the expiration of the 14 years the representatives of the original mortgagee refused to give up possession of such of the mortgaged property as the mortgagee had been able to get possession of on the ground that, owing to the misrepresentations of the mortgagor, they had been unable to recoup themselves the money they had advanced, and they claimed the right to hold the property until they had so recouped themselves.

The respondents, who are the representatives of the mortgagor, then brought the action out of which this appeal arises to recover the property.

The Subordinate Judge made a decree in favour of the plaintiffs, but deprived them of costs on the ground that the mortgagor had not "dealt honestly" with the mortgagee, and that decree was affirmed by the Court of the Judicial Commissioner of Oudh.

It was contended before their Lordships that the mortgagor having broken his part of the contract by failing to give the mortgagee possession of the entirety of the premises comprised in the mortgage ought not to be allowed to enforce the contract as against the mortgagee, but the answer to this contention appears to their Lordships to be that the plaintiffs are not seeking to enforce the contract; they rely on their proprietary right, and it is for appellant to show some stipulation either express or implied in the mortgage-deed which deprives the plaintiffs of the right to recover possession. This the appellant cannot do and their Lordships will therefore humbly advise His Majesty that the appeal be dismissed. As there was no appearance by the respondents it will not be necessary to make any order as to costs.

Appeal dismissed.

Solicitors for the appellant—Messrs. *Young, Jackson, Beard and King.*

J. V. W.