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Baldeo Singh's daughter and his funeral expenses were paid out of joint family property.

In conclusion the learned Judges say that it was sufficient for them that an agreement was committed to writing, which was clear and definite in its terms, and they add that that agreement has been shown to have been acted upon up to the present time.

Their Lordships agree in the result at which the High Court arrived. Having regard to the agreement of 1873, they think that the case is concluded by authority. The result is entirely in accordance with the principle laid down by this Board in the judgement delivered by Lord Westbury in *Appvier v. Rama Subba Aiyar* (1) and in the more recent cases of *Balkishen Das v. Ram Narain Sahu* (2) and *Parbati v. Naunihal Singh* (3).

Their Lordships will therefore humbly advise His Majesty that these appeals should be dismissed.

The appellants will pay the costs of the appeals.

Appeals dismissed.

Solicitors for the appellants: *Barrow, Rogers & Nevill.*

Solicitors for the respondent: *Runken, Ford, Ford & Chester.*

J. V. W.

*P. C.
1912,
November,
7, 29.

ABDULLAH KHAN (DEFENDANT) v. BASHARAT HUSAIN (PLAINTIFF)
AND ANOTHER APPEAL.

Two appeals consolidated.

[On appeal from the High Court of Judicature at Allahabad.]

Mortgage—Redemption—Construction of mortgage as to the terms of redemption—Mortgage and lease to mortgagor contemporaneously granted—Mortgage executed before Transfer of Property Act (IV of 1882) came into force—Mortgagee's security reduced by portion of property being withdrawn—Section 65(a) of Transfer of Property Act—Right of mortgagee to compensation.

The plaintiff (respondent) mortgaged to the defendant (appellant) certain property by a deed, dated the 25th of August 1880, for Rs. 70,000 for eight years. On the 29th of August (and so practically contemporaneously with the mortgage) a lease of the mortgaged property was executed by the mortgagee, in favour of the mortgagor at an annual rent of Rs. 4,200, which represented interest on the mortgage debt at the rate of 6 per cent. per annum. The mortgage contained a clause that "it is agreed by mutual consent of the parties that the profits of the property

* Present:—Lord Macnaghten, Lord Moulton, Sir John Edge and Mr. Ameer Ali.

(1) (1863) 11 Moo. I. A., 75.

(2) (1903) I. L. R., 30 Calc., 738; L. R., 30 I. A., 139.

(3) (1909) I. L. R., 31 All., 412; L. R., 36 I. A., 71.

mortgaged shall belong to the mortgagee in lieu of the interest on the mortgage money, and I, the mortgagor, shall have no claim for mesne profits. The mortgagee also shall have no right to claim interest on the mortgage money advanced by him." The lease, after reciting the mortgage, referred to a provision in the latter that the mortgagor should be entitled to sell a certain portion of the mortgaged property on condition that he handed over the whole of the proceeds of the sale to the mortgagee in payment of the mortgage debt, and provided that "under the condition whatever sum of money the mortgagor should pay to the mortgagee in a lump sum should be credited and set off against the rent payable under the lease with interest at 8 annas per cent. per mensem." Subsequently three further charges were tacked on to the mortgage, the latest of which was dated the 13th of December 1882. In June 1888, the mortgagor was in arrear with his rent and the mortgagee brought a suit against him on which the mortgagor gave up possession of the property to the mortgagee. In a suit for redemption (the right to redeem not being disputed). *Held* that the mortgagee was entitled under the terms of the mortgage to appropriate the profits of the mortgaged property in lieu of the interest on the mortgage money not paid by the mortgagor. Evidence of preliminary negotiations and previous conversations were not admissible to contradict or vary the terms of the mortgage (Evidence Act, section 92).

Held also that the mortgage and the lease were both parts of one and the same transaction. But there was no inconsistency between the two instruments, nor would there have been any inconsistency if the mortgage itself had contained a provision for granting a lease on the terms upon which the lease was actually granted.

Held further that the original mortgage having been executed before the Transfer of Property Act came into operation, that Act was not applicable, notwithstanding that one of the further charges was executed subsequently to that date. Whatever might be the construction of section 65(a) of that Act (which was cited in support of the mortgagee's claim) he was not on the evidence and under the circumstances of the present case entitled to compensation for any loss or damage occasioned by his security being diminished owing to a portion of the mortgaged property being successfully claimed from the mortgagor.

Two consolidated appeals from a judgement and two decrees (22nd December, 1908) of the High Court at Allahabad, which partly reversed and partly affirmed a judgement and decree (22nd December, 1906) of the Court of the Subordinate Judge of Meerut.

The suit out of which the present appeals arose was one for redemption of a mortgage, in which the right to redeem was not disputed, and the main question was whether the appellant, the mortgagee, who was in possession of the mortgaged property, was entitled to appropriate the profits in lieu of interest under the terms of the mortgage deed, and the circumstances under which it was executed.

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The mortgage deed was dated the 25th of August 1880, and by it the respondent (plaintiff) in consideration of Rs. 70,000 mortgaged a 10 biswa share in mauza Jeola, and a 6 biswa share in mauza Tisang for eight years nominally to Masuma Begam (but really to her husband Husain Ali Khan) now represented by the appellant (defendant). The most important provision of the deed, so far as this appeal is concerned was clause 4, which stipulated that "it is agreed by mutual consent of the parties to this document that the profits of the property mortgaged shall belong to the aforesaid mortgagee in lieu of interest on the mortgage money, and I, the mortgagor, shall have no claim for the mesne profits. The mortgagee shall have no right to claim interest on the mortgage money advanced by him." On the 29th of August 1880, the mortgagee leased the whole of the mortgaged property to the plaintiff for the term of the mortgage at a yearly rental of Rs. 4,200, which represented interest on the mortgage debt at the rate of 6 per cent. per annum.

The lease, after reciting the mortgage, referred to a provision in the latter that the mortgagor should be entitled to sell the abadi of mauza Jeola, on condition that he handed over the whole of the proceeds of the sale to the mortgagee in payment of the mortgage debt, and provided that under that condition "whatever sum of money the mortgagor should pay to the mortgagee in a lump sum, it should be credited and set off against the rent payable under the lease with interest at 8 annas per cent. per mensem."

The mortgage and the lease were both registered on the 2nd of September 1880.

On the 24th of November, 1880, the mortgagor borrowed from the mortgagee Rs. 21,473-8-0 at 12 annas per cent. per mensem in order to purchase a 6 anna share in mauza Tisang. That sum was tacked on to the original mortgage. That purchase was never completed, and the money was attached by one of the judgement-debtors of the mortgagor.

In June, 1881, the mortgagor, being in arrears with payment of his rent, gave up possession under his lease, and the mortgagee re-entered into possession under the terms of the original mortgage deed. According to the mortgagor's case he did this by arrangement with the mortgagee, from whom the mortgagor

received the following letter:—" After compliments, I beg to inform you that as you have according to the mutual agreement entered into between us, already presented a petition to the Revenue department, Musammat Masuma Begam the mortgagee will now collect the rents from tenants of mauzas Jeola and Tisang herself, and after deducting Rs. 4,200, the remainder will go in payment of the principal and interest of the bond tacked on to the mortgage and the principal of the mortgage. The account begins from to-day. Dated the 11th June 1881." This document was neither witnessed nor registered and was held by the Subordinate Judge to be a forgery. The High Court was of opinion it was genuine; but their Lordships of the Judicial Committee held it to be inadmissible on the ground that it was not registered.

Subsequent to the lease being so determined the mortgagor borrowed two further sums from the mortgagee, which were tacked on to the original mortgage and made redeemable with it; namely, on the 25th of April 1882, Rs. 6,000 repayable with interest at 10 annas per cent. per mensem, and on the 13th of December 1882, Rs. 1,000 repayable with interest at 12 annas per cent. per mensem.

The appellant was the successor in title of the original mortgagee under a deed of gift, dated the 9th of September 1890.

The suit was brought on the 30th of June 1906, the plaintiff after stating the facts praying that the defendant should be ordered to render an account, as from the 11th of June 1881, of the rents and profits of the mortgaged property, and that the plaintiff should be credited in such account with all moneys received by the defendant; that, subject to any amount which might be found to be due, a decree be made in the plaintiff's favour for possession of the property, and that if on adjustment of the account any sum should be found due by the defendant, the plaintiff should be granted a decree for it.

The defendant denied that the oral agreements as alleged were entered into and that Husain Ali Jan was any party to the various transactions except in his capacity as general attorney for his wife; that the terms set out in the deeds were the only terms on which the parties agreed to be bound; that any oral or other agreements purporting to qualify the rights and liabilities under the registered deeds, had been entered into by Husain Ali Jan without any authority and were not binding on the mortgagee, nor could they

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affect the rights of the defendant under those deeds; that the lease was admitted and that the plaintiff gave up possession under it; but it had no connexion with nor formed part of the original mortgage, but that on the contrary, it was a distinct and separate transaction, and had, now it had come to an end, no bearing on the rights of the parties, and that at the date the original mortgage was made the plaintiff led the mortgagee to believe that he was the sole owner of the property mortgaged, but that in collusion with his sister he caused her to bring a claim whereby the mortgagee lost possession of a considerable portion of the mortgaged property, and the rents and profits which would have accrued therefrom. Finally the defendant stated that he had no objection to the redemption sued for, on payment of the sums due under the original mortgage and the subsequent amounts tacked on to it, which he estimated to amount to Rs. 2,10,954.

The Subordinate Judge held that the mortgage and the lease were to be treated as separate transactions and that no extraneous evidence was admissible to prove that the mortgagee was only entitled to interest at 6 per cent. per annum under the mortgage deed of the 25th of August 1880; that there was no agreement that the mortgagee would charge interest at 8 annas per cent. per mensem, but that the lease money was to be the profit of the mortgagee as long as the lease should last; that the *rukka* produced in support of the agreement made in June 1881, was a forgery; that if any such agreement had been made it would have been binding on the mortgagee; that the mortgagee was aware that the plaintiff's sister's share was included in the mortgage and the defendant was not entitled to claim any damages by reason of such share having been lost; that all bonds (the principal mortgage bond and the three additional bonds) must be liquidated both as to principal and interest before redemption; and that the mortgagee was entitled to enjoy and appropriate the entire usufruct of the property from July 1881 and onwards, and that he could not be called upon to account for the same.

The decree was consequently partly in favour of the plaintiff and partly in favour of the defendant.

Both parties appealed to the High Court, and the appeals were heard by SIR JOHN STANLEY, C. J. and BANERJI, J. They were

of opinion "that the mortgage and the lease must be read together as forming one transaction the mortgage was in fact usufructuary only in name, and that it was not intended at the date of its execution that the mortgagee should go into possession or receipt of the rents and profits. It was only when the mortgagor failed to pay the rent reserved by the lease that possession was taken Reading the mortgage and the lease together we cannot give to the provision in the mortgage deed as to the acceptance of profits in lieu of interest its literal meaning. The language of this provision must be taken to be controlled by the terms of the lease, which provided that during the subsistence of the mortgage rent at the rate of Rs. 4,200 a year should be payable We think that the mortgage and the lease being one transaction the intention of the parties to be deduced from them was that the mortgagee if in possession, was to receive Rs. 4,200 annually as interest out of the rents and profits, and that the mortgagor should enjoy the balance. It was never the intention of the parties that the mortgagee if he took possession should put into his own pockets at least Rs. 2,000 a year over and above the Rs. 4,200."

The appeal of the plaintiff was consequently allowed and that of the defendant was dismissed.

The defendant appealed from both decrees to His Majesty in Council.

On this appeal.

DeGruyther, K. C., and *G. Considine O'Gorman* for the appellant contended that under the terms of the mortgage deed he was entitled to appropriate the whole of the income from the mortgaged property in lieu of interest; and that the respondent was not entitled to an account of the income. No oral or other evidence was admissible to explain the terms of the mortgage deed, which were quite clear in favour of the appellant's contention. The mortgage deed and the lease were distinct and separate transactions, and the High Court, it was submitted, had wrongly held that they should be read together as forming one transaction. In any case the lease having been determined could now have no bearing on the rights and liabilities of the parties, which must be governed solely by the terms of the mortgage deed. The *rakba*,

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dated the 11th of June 1881, was not proved and the High Court erred in reversing on that point the decision of the Subordinate Judge; but even if it were proved to be genuine, it was, being an unregistered document, not admissible in evidence so as to affect immovable property, and had been wrongly admitted by the High Court. It was also contended that the appellant was entitled to compensation for the loss of income occasioned by the withdrawal of the respondent's sister's share of the mortgaged property. Reference was made to the Evidence Act (I of 1872), section 92; Registration Act (III of 1877) sections 17 and 49; and Transfer of Property Act (IV of 1882), section 65 (a) which, it was contended, was applicable. The decision of the High Court should be reversed, and that of the Subordinate Judge (so far as it was not adverse to the appellant) should be restored.

Sir Erle Richards, K. C., and *B. Dube* for the respondent contended that the mortgage deed and the lease formed together one transaction, and that they should be so treated. The evidence produced to show what was the real intention of the parties was therefore rightly admitted by the High Court in proof of the mode in which the rents and profits of the mortgaged property were to be dealt with. The appellant had only got possession of the property in June 1881. Reference was made to *Jawahir Singh v. Sameshwar Dat* (1) and *Bulkishen Das v. Legge* (2). The *rukka* of the 11th of June 1881, it was submitted, was properly admitted by the High Court. Under the circumstances the appellant had no right to any compensation for any loss or damage occasioned by the reduction of his security owing to a portion of the mortgaged property being found not to belong to the mortgagor. The Transfer of Property Act, it was contended, did not apply, the mortgage having been executed before that Act came into operation.

DeGruyther, K. C., replied.

1912, November 29th:—The judgement of their Lordships was delivered by LORD MACNAGHTEN:—¶ The respondents in these consolidated appeals are the representatives of the late plaintiff Saiyid Basharat Husain, now deceased, who was the owner of valuable zamindari property, subject to a mortgage, dated the 25th of August 1880, and three further charges tacked to it. The mortgage of 1880 and these further charges are now vested in the appellant.

(1) (1905) I. L. R., 28 All., 225.

(2) (1899) I. L. R., 22 All., 148.

The controversy in this case arose out of these mortgage transactions. The original mortgagee was Husain Ali Khan, who made the advances to Basharat Husain, and took the securities in the name of his wife.

Basharat Husain brought a suit for redemption. His right to redeem was not disputed. The only question was as to the terms and conditions on which the decree for redemption should be made.

On the part of the appellant it was maintained that the rights of the parties must be governed by the provisions of the mortgage deed of 1880, which was duly executed and duly registered. On the other hand, the mortgagor contended, (1) that the real intention of the parties was to be gathered, not from the mortgage deed, but from negotiations and conversations alleged to have taken place before the mortgage was executed; and (2) that on the mortgagor relinquishing the mortgaged property, which had been leased to him immediately after the date of the original mortgage, an agreement was come to between the mortgagee and the mortgagor as to the mode in which the rents and profits of the property were to be dealt with. The only evidence produced in support of this alleged agreement was a letter or *rukka*, neither registered nor witnessed, purporting to be dated the 11th of June 1881, and to be signed by the mortgagee (who died in 1886, ten years before the institution of the suit). The Subordinate Judge of Meerut, who was the Trial Judge, came to the conclusion that the document in question was a forgery. The learned Judges of the High Court considered it genuine and gave effect to it. It is not necessary for their Lordships to determine whether the document is genuine or not. By the provisions of the Registration Act (Act III of 1877) such a document being unregistered is inadmissible in evidence.

As regards the first contention on the part of the mortgagor, which appears to have been argued at great length in the Courts below, it seems impossible to support the decision of the High Court. It is no more permissible in India than it is in this country to contradict or vary the express and unambiguous terms of a written instrument by reference to preliminary negotiations or previous conversations. The Indian Evidence Act is clear on the point.

The consideration for the mortgage of 1880, was the sum of Rs. 70,000. The mortgage was expressed to be for the term of

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eight years. The mortgage deed contains the following statement:—

“It is agreed by mutual consent of the parties to this document that the profits of the property mortgaged shall belong to the aforesaid mortgagee in lieu of the interest on the mortgage money, and I, the mortgagor, shall have no claim for mesne profits. The mortgagee also shall have no right to claim interest on the mortgage money advanced by him.”

The mortgagee relied on this provision. The learned Judges of the High Court refused to give it any effect, holding that the mortgage was usufructuary only in form, and that the security was intended to be a simple mortgage carrying interest at the rate of 6 per cent. per annum. In coming to this conclusion the learned Judges seem to have been influenced both by the preliminary negotiations to which the mortgagor and his witnesses deposed, and by the circumstance that by a deed practically contemporaneous with the mortgage, the property was leased to the mortgagor for the period of the mortgage on very favourable terms at a rent which worked out at 6 per cent. per annum on the sum secured. The net profits of the property in mortgage were apparently not less than Rs. 6,000. The rent reserved was only Rs. 4,200. Favourable as the terms were, the mortgagor very soon fell into arrear. The mortgagee brought a suit against him, and he then gave up possession to the mortgagee. It may be that if the mortgage deed means what it says, it would have been better for him to have fought the case out. Such is evidently the view of the High Court. But after all, that is no concern of the Court. It was for the mortgagor to judge what was the wisest course for him to pursue.

Having regard to the eagerness of wealthy money-lenders to obtain security on zamindari property, and the competition among them for a position thought so advantageous, there does not seem to be anything strange in the apparently easy terms of the first mortgage transaction between the lender and the borrower.

Their Lordships agree with the High Court in thinking that the mortgage and the lease were parts of one and the same transaction. But there is no inconsistency between the two instruments. Nor would there have been any if the mortgage itself had contained a provision for granting a lease on the terms upon which the lease was actually granted.

One point was raised by the mortgagee before the Subordinate Judge on which he failed. It was not dealt with by the learned Judges of the High Court because they were against the mortgagee on the main question. The point was raised again before this Board. It was this: Part of the property expressed to be mortgaged was withdrawn from the security in consequence of a successful claim to it by the mortgagor's sister. The mortgagee claimed damages or compensation for the diminution of his security. The Subordinate Judge rejected that claim, being of opinion that the mortgagee when he took his security was aware of the circumstances of the property and the position of the mortgagor's family. Their Lordships think that the Subordinate Judge was right. They consider that the Transfer of Property Act, Act IV of 1882, section 65(a), on which reliance was placed (whatever the construction of that section may be) can have no application to the present case where the mortgage was executed before the date of the Act, though one of the further charges was subsequent to it.

Their Lordships will humbly advise His Majesty that the appeals should be allowed, the orders of the High Court discharged with costs (any costs paid thereunder being repaid), and the order of the Subordinate Judge restored.

The respondents will pay the costs of the appeals.

Appeals allowed.

Solicitors for the appellant :—*Ranken, Ford, Ford & Chester.*

Solicitors for the respondent :—*Barrow, Rogers & Nevill.*

J. V. W.

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