KALYAN DAS AND OTHERS (PLAINTIFFS) *v.* MAQBUL AHMAD AND OTHERS (DEFENDANTS).

P C. * 1918 *February* 28, *March* 1, *April* 18.

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

Privy Council, practice of—Omission to appeal to High Court—Decision of a subordinate court not submitted to High Court—Point taken in grounds of appeal to High Court but not pressed—Postponing appeal from interlocutory decision until appeal from final decree.

It is a well settled rule of practice of the Judicial Committee that an appellant when bringing up the actual decree of the High Court for review, shall not be allowed to ask to have it set aside on the ground that it has wrongly accepted a decision of the subordinate court if he himself has never brought that decision before the High Court for its consideration. Such a request would be fair neither to the Court appealed from, nor to the Board appealed to. The High Court ought not to be liable to have its determination overruled upon matters never submitted to it. The Board ought not to be called on to adjudicate finally upon matters where they have not the advantage of knowing and weighing the view taken by the learned Judges of the High Court. This had nothing to do with waiting to question an interlocutory decision until an appeal is taken from a subsequent final decree.

The same rule applies where, on appeal to the High Court, the point was mentioned in the notice of appeal, but the judgment of the High Court says of it that the appellants' advocate "stated that he did not desire to press it," and so no more is said about it.

Two consolidated appeals 131 and 132 of 1915 from one judgment and two decrees (6th November, 1912) of the High Court at Allahabad, which varied a judgment and decree (28th August, 1909) of the Subordinate Judge of Aligarh.

The main questions for determination on this appeal were whether the appellants are entitled to redeem the property in dispute, and what is the amount of money payable on redemption?

For the purpose of this report the facts are sufficiently stated in the judgement of the Judicial Committee.

The decision appealed from was by Sir H. D. GRIFFIN and E. M. DesC. CHAMIER, JJ. On this appeal—

Sir *W. Garth* for the appellants contended that the rights of Debi Das as mortgagee were merged and extinguished on his purchase of the equity of redemption in 1881, and could not be and were not revived by the proceedings in 1897; and that the respondents having only purchased mortgagees' rights which did

* *Present*—Viscount HALDANE, Lord DUNEDIN, Lord SUMNER, Sir JOHN EDGE, and Mr. AMEER ALI.

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not exist, took nothing whatever by their purchase. The intention of Debi Das to extinguish the mortgage has been found as fact; the mortgagee's rights therefore no longer exist. There are cases where a mortgagee purchasing can keep a mortgage alive, but here his intention to do so was not established and under section 101 of the Transfer of Property Act, it is submitted, the charge was extinguished. Here the purchase was before that Act came into force, but it merely declares the law as it was before the Act. The appellants contend that the respondents took nothing by the sale in 1897. [*DeGruyther, K.C.* "That question is not now open: no appeal on it was preferred to the High Court."] In the High Court it was only a question of taking accounts. The first decree of the Subordinate Judge was an interlocutory decree only. The case was tried before the Civil Procedure Code of 1908 was in force: under the Code of 1882 the appellants could have waited to appeal until the final decree was made. The present appeal is from a final decree.

DeGruyther, K. C., and *B. Dube* for the respondents 1and 2 were not called upon.

1918, *April 18th* :—The judgment of their Lordships was delivered by Lord SUMNER :—

In 1863 Debi Das lent 7,700 rupees to Ram Bakhsh on a usufructuary mortgage of his half-share in a mauza, called Lodha Mai, in the district of Etah. Debi Das died a good many years ago, and the present appellants, the plaintiffs in the suit, are his representatives in interest. A suit was begun in 1877 for redemption of this mortgage, and a decree was made on payment of 6,988 rupees, which sum was brought into court. Debi Das appealed on the ground that this sum was not enough, and it was increased by a further sum of 8,956 rupees. While the appeal was pending he had managed to take the money out of court, and the mortgagors had then got possession. They paid, however, no more, and accordingly, in 1879 their redemption suit stood dismissed. Debi Das then applied to be, and was, replaced in possession, and, having sued for mesne profits during the time he was out of possession, he got a decree in 1881, in execution of which the court sold the mortgagors'

equity of redemption at auction. Debi Das being the buyer, was put into possession as full owner in 1883.

It might have been supposed that this was the end of the mortgage of 1863, but, strange as it may seem, this appeal is now brought to determine upon what terms the appellants, the representatives of Debi Das, are to be allowed to redeem it, as mortgagors, some thirty years after he bought in the mortgagor's equity of redemption, as mortgagee. This paradoxical result has come about as follows :—

Debi Das continued in possession of the property as owner till 1897, and as owner he mortgaged it in 1886 to Sagar Mal. There is no copy of this mortgage forthcoming. Debi Das got behind with his payments, and in 1897, on the application of Sagar Mal, the property was put up for sale. The respondents, the defendants in the suit, or their predecessors in interest, bought it and duly obtained possession.

The proclamation of sale was dated the 27th of February, 1895. Though Debi Das had bought the equity of redemption of the 1863 mortgage in 1881 and had had possession of the property since 1883, his name, from indifference or neglect, continued to be recorded in the revenue papers as mortgagee. This may account for the wording of the proclamation of sale. The entry in the column for the description of the property was " zamindari property in mauza Lodha Mai, out of which the shares entered as holding nos. 1, 2, and 3 are mortgaged with possession to Debi Das, under a mortgage-deed, dated the 5th of February, 1863." The column headed " extent of interest of judgment-debtors in the property as far as it has been ascertained by the court " was filled up thus ; " (*b*) mortgagee right in a 7 biswa share, entered as holding no. 1 in the 10 biswa mahal, patti Debi Das ; (*c*) mortgagee right in a 1 biswa, 9 biswansi, 15 kachwansi share entered as holding no. 2 ; (*d*) ditto, ditto, entered as holding no. 3." These fractions, with another not included in the present proceedings, make up the half share originally mortgaged by Ram Bakhsh. The application for execution of the decree for sale had contained a " specification of the property sought to be sold by auction " in similar terms and the list of bids and the sale certificate, dated the 2nd of August, 1897, followed the same formula.

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It certified that the respondents' predecessor was declared to be the purchaser of property, specified as " mortgagee rights in holdings 1, 2, and 3 in the 10-biswa mahal, patti Debi Das." The documents were all in regular form. There is nothing to show that there was anything in the mortgage to Sagar Mal to account for this mode of describing the subject-matter of the sale, and in the proceedings below Sagar Mal's mortgage is stated to have been secured on the 10-biswa share, of which Debi Das had become proprietor in 1881. Most probably it was the result of slavishly following the entry in the revenue papers, which had ceased for many years past to represent the true position of Debi Das towards the property.

The present suit was begun in 1906, and the plaintiffs prayed, first, a declaration that the court's sale in 1897 was a nullity, as it was inoperative to pass the proprietary rights of Debi Das and he had no mortgagee's rights to be passed, and, secondly, in the alternative, for redemption of the mortgagee rights sold, *videlicet*, the rights of Debi Das as mortgagee under the mortgage of 1863, being the only mortgage he ever held. This was the beginning of perplexity.

The assumption was that Sagar Mal, in enforcing a simple mortgage of his own, had prevailed on the court to sell his mortgagor's rights, as mortgagee under a usufructuary mortgage, to which he was a stranger. The plaintiffs asked the court to allow them to redeem a mortgage which had ceased to exist nearly a quarter of a century before, and to redeem it as against persons who had never been parties to it, and in the process of redemption their interest would be to contest what their predecessor, Debi Das, himself had done, and, as his representatives, to require the defendants to account, as if they were the parties who really represented him. In a word, Debi Das prayed to be allowed to redeem Debi Das and to have him decreed to account as mortgagee for the benefit of himself as mortgagor.

This suit has been thrice before the Subordinate Judge, and has twice been appealed to the High Court. On the first occasion the Subordinate Judge dismissed the plaintiffs' first claim for a declaration of the nullity of the sale and granted the second, the claim for redemption. He subsequently heard evidence, took

the accounts, and made a decree for a final sum. From this the plaintiffs appealed, but on questions of account only. The dismissal of their claim to have the sale of 1897 declared a nullity they did not contest. The High Court, on the first occasion, remitted the case to have the accounts re-taken, subject to certain directions which they gave. Again the account was taken, and again it was appealed. The present appeal to their Lordships' Board is against both judgments of the High Court, both the first and the second.

Their Lordships are not surprised to find in the judgments of the High Court plain evidence of the embarrassment which the learned Judges felt in affirming a decree for redemption of an extinct mortgage by the mortgagee's representatives against persons, who had only this much to do with it that they had managed to procure the court to sell something for their benefit, which was nothing but a memory of the past. The choice which the parties laid before the High Court was a limited one. The present respondents asked that the transaction of 1897 should be construed as a sale of the whole proprietary interest of Debi Das. The present appellants did not ask to have it declared a nullity, as being a sale of non-existent interests. They accepted the judgment of the Subordinate Judge that they should be allowed to redeem these interests, whatever that might mean. The High Court not unnaturally thought that they could not hold the sale to have really been a sale of the entire proprietary interest in the half-share, when every document connected with it described the subject-matter as being the specific rights of a mortgagee in that half-share, but they were careful to go no further. Had they been free to deal with the argument of the present appellants, had they heard it contended that in effect nothing was sold at all, their decision might have been otherwise.

Before their Lordships the appellants' points have been five. First, on the whole matter, they say that the respondents' predecessor took nothing by his purchase in 1897. The rest of the argument is on the accounts. The second point is that certain patwari's accounts were improperly accepted and relied on; the third that an insufficient sum was allowed to the appellants for malikana under a condition in the mortgage that the mortgagee

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should make a certain malikana allowance; the fourth that credit should be given to the appellants in respect of payments of enhanced revenue cesses upon the property, and the fifth that interest ought to be allowed them on the 6,988 rupees, which Debi Das took out of court in 1878.

It is a well-settled rule of practice of their Lordships' Board that an appellant, when bringing up the actual decree of the High Court for review, shall not be allowed to ask to have it set aside on the ground that it has wrongly accepted a decision of the subordinate court, if he himself has never brought that decision before the High Court for its consideration. Such a request would be fair neither to the court appealed from nor to the Board appealed to. The High Court ought not to be liable to have its determinations overruled upon matters never submitted to it. Their Lordships ought not to be called on to adjudicate finally upon matters where they have not the advantage of knowing and weighing the view taken by the learned Judges of the High Court. This has nothing to do with waiting to question an interlocutory decision until an appeal is taken from a subsequent final decree. The appellants' first point therefore cannot now be raised.

The second point fails *in limine*, because by the terms of the mortgage of 1863 the appellants were bound to accept the patwari's accounts, whether they were merely made up on materials furnished to him, as was the case, or were the fruits of his own independent inquiry, which probably never happens. The third was disposed of by an agreement between counsel that an additional sum of 1,000 rupees should be credited to the appellants in the account over and above what had been allowed by the decree under appeal, the question of costs not to be affected by this concession. From the fourth point the appellants are barred on much the same grounds as apply to the first. It appears that on the second appeal to the High Court this point was mentioned in the notice of appeal, and the judgments say of it that the appellants' advocate "stated that he did not desire to press it," and so no more is said about it. Their Lordships think that they must accept this statement. It is true that the same learned gentleman included this point again in the present

appellants' petition for leave to appeal to His Majesty in Council, which is dated on the very day on which the judgment of the High Court was given, but in the absence of any evidence that the judgment was erroneous on this point the appellants must accept it, and cannot raise here, by way of exception to the High Court's decree, a point which they elected not to advance for the High Court's determination.

The fifth point remains. If any regard is had to the true facts this argument is not easy to state. In effect it is this. Debi Das now claims to receive from the respondents interest on a sum of money, which he himself had and enjoyed ever since 1878 and which they never had, or owed, or had anything to do with at all. Only by forgetting the facts and fixing the mind on the notional mortgage, which by a fiction is being redeemed in the present proceedings, is the point intelligible at all. It seems to amount to what follows. In 1878 the mortgagees under the mortgage of 1863 got 6,988 rupees on account of a redemption, which is only now taking place ; therefore they received it over thirty years too soon ; therefore they should not only allow it in account, which they have done, but should allow over thirty years' interest on it too. Alternatively, since 1878 the principal mortgage moneys under the mortgage of 1863 must be deemed to have been paid off in the proportion of 6,988 to 15,944, and as the enjoyment of the usufruct by the mortgagees was conceded only in consideration of the continuance of the mortgage loan, the enjoyment should be reduced *pro tanto* from that date; in strictness, on redemption a part of the rents and profits collected should be returned or credited in account to the mortgagors in the above proportion, but for simplicity's sake interest at a sufficient rate will do as well. One cannot, however, help remembering here that the persons who are asked to repay these profits are the respondents, whose predecessors never collected them or had anything to do with them, and that the persons to whom they are to be repaid are the successors of Debi Das, who collected and enjoyed them and probably bequeathed them to the appellants, but this inconvenient reminiscence is for present purposes outside the hypothesis.

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To the first way of putting the matter their Lordships reply, as the High Court replied, that interest depends on contract, express or implied, or on some rule of law allowing it. Here there is no express contract for interest and none can be implied, and no circumstances less capable of justifying the allowance of interest as matter of law can be imagined. The mortgage of 1863 is the answer to the second view. It treats the usufruct as a whole, as a remuneration for the loan or any part of it, so long as it remains outstanding. The words are—

"Interest on the mortgage money has been agreed to be considered equal to the amount of profits, *i. e.*, the mortgagee shall not claim interest on the mortgage money, nor shall I, the mortgagor, claim profits of the village. . . The mortgagee shall be the owner of profits, and liable for loss after payment of the Government revenue, patwari rate, chaukidar cess, and village expenses, and, with the exception of the 'malikana' allowance mentioned above, I shall not at all claim anything else. When I pay the whole of the mortgage money in a lump sum . . . the property shall be redeemed. During the period (of the mortgage) I shall in no way raise any dispute or offer any obstruction to the mortgagee in making collections from the tenants of the village"

Their Lordships will humbly advise His Majesty that, by consent of the parties, the decree of the High Court, dated the 6th of November, 1912, should be varied by allowing credit to the appellants for an additional sum of 1,000 rupees, but that otherwise the decrees under appeal should be affirmed, and that these appeals should be dismissed with costs.

Solicitor for the appellants:—*Douglas Grant.*

Solicitors for the first and second respondents:—*Barrow, Rogers, and Nevill.*

J. V. W.