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there was some consideration for the bond sued upon in the present suit, and the terms of the bond were that if a claim should be put forward and the discharge which Kanhaia Ram was purporting to give should prove not sufficient, then Kanhaia Ram would indemnify the plaintiff from any further money he had to pay. We have already held that under the circumstances of the present case the granting of a mortgage-decree against the plaintiff was equivalent to payment. We may mention here that the appellant has produced before us a certified copy of the certificate recording payment of the amount of the mortgage-decree. We allow the appeal, set aside the decree of the learned Judge of this Court and restore the decree of the lower appellate court. The appellant will have his costs of both hearings in this Court.

Appeal allowed.

Before Mr. Justice Piggott and Mr. Justice Walsh.

KADMA PASIN (JUDGMENT-DEBTOR) *v.* MUHAMMAD ALI (DECREE-HOLDER)*

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Civil Procedure Code (1908), *order XXXIV, rule 14—Usufructuary mortgage comprising* (1) *a fixed rate holding and* (2) *a right to receive offerings at a temple—Subsequent agreement between mortgagor and mortgagee for payment by former of a fixed sum instead of the offerings—Decree for arrears—Execution of decree—"Claim arising under the mortgage."*

The property comprised in a usufructuary mortgage consisted of (1) a fixed rate holding and (2) of the right to receive certain offerings at a temple. Inasmuch, however, as the mortgagee was a Muhammadan, a subsequent agreement was entered into between the parties whereby the mortgagor bound herself to pay annually a fixed sum of money in lieu of the offerings, and also, in case of default, to pay interest thereon. Default having been made, the mortgagee sued on this agreement and obtained a decree for money against the mortgagor. In execution of this decree he attached the mortgaged property and sought to have it sold. Upon objection by the mortgagor, judgment-debtor, *held* that the mortgagee could not bring the mortgaged property to sale in execution of the decree, as the claim under the subsequent agreement was one arising under the original contract of mortgage within the meaning of order XXXIV, rule 14, of the Code of Civil Procedure. *Haribans Rai* v. *Sri Niwas Naik* (1) distinguished.

* Second Appeal No. 493 of 1918 from a decree of F. D. Simpson, District Judge of Allahabad, dated the 14th of March, 1918, reversing a decree of H. G. Smith, Subordinate Judge of Mirzapur, dated the 30th of January, 1917.

(1) (1913) I. L. R., 35 All., 518.

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THE facts of this case were as follows :—

One Musammat Kadma executed, on the 22nd of June, 1909, a usufructuary mortgrge for Rs. 8,000 in favour of Muhammad Ali. The property mortgaged consisted of a certain fixed rate holding and the right to receive the offerings made at a temple at Bindachal for 14 days out of each year. Possession over the fixed rate holding was obtained by the mortgagee ; as regards the temple offerings, he, being a Muhammadan and therefore not personally in a position to make the collections, entered into an agreement with Musammat Kadma on the 10th of August, 1909, by which she was to make the actual collections and to pay over to him a fixed sum of Rs. 700 per annum. The agreement also provided for interest at the rate of one per cent. per mensem on any arrears which might become due from her. Musammat Kadma having made default in payment of the sum agreed upon, Muhammad Ali sued upon the agreement and obtained against her decree on the 27th of May, 1915, for Rs. 3,762-6-0 with costs and future interest. In execution of this decree he attached the mortgaged property and sought to have it sold. The judgment-debtor objected that under order XXXIV, rule 14, of the Code of Civil Procedure, the mortgagee could not bring the property to sale except by bringing a suit on the mortgage itself. The Subordinate Judge gave effect to this objection, but it was reversed on appeal by the District Judge. The judgment-debtor then appealed to the High Court.

Mr. *Ibn Ahmad*, for the appellant :—

It is submitted that by reason of order XXXIV, rule 14, of the Code of Civil Procedure, the mortgagee is not entitled, in execution of the simple money decree which he has obtained on the agreement, to attach and bring the mortgaged property to sale without bringing a suit for sale in enforcement of the mortgage. I am fully supported by the case of *Azim-ullah* v. *Najm-un-nissa* (1) and by the principle of the decision in the case of *Altaf Ali Khan* v. *Lalta Prasad* (2), in which the usufructuary mortgagees had leased the mortgaged property to the mortgagor, and the mortgagor having made default in payment of the rent due on the lease, it was held that the mortgagees' correct remedy was to institute a suit for a sale in enforcement of the mortgage.

(1) (1894) I. L. R., 16 All., 415. (2) (1897) I. L. R., 19 All., 493.

In the present case the decree is one for money in satisfaction of "a claim arising under the mortgage" within the meaning of the clause in order XXXIV, rule 14. The agreement amounted, in effect, to a lease to the mortgagor of the right to collect the temple dues, and was executed under circumstances which clearly show that it was entered into simply to provide a means for realizing those dues and giving effect to the terms of the mortgage. The case is analogous to that in *Altaf Ali Khan* v. *Lalta Prasad* (1) and, as was there observed, the relation between the parties continued to be that of mortgagor and mortgagee, in respect of the money which had fallen due. The claim to that money was one arising under the mortgage transaction, and not a claim arising out of a transaction independent of the mortgage.

The effect of the alteration in the language introduced by order XXXIV, rule 14, was considered in the case of *Tarak Nath Adhikari* v. *Bhubaneshwar Mitra* (2), and the view expressed was that under the said rule a mortgagee was competent to have the mortgaged property sold in satisfaction of any claim which was *unconnected* with the mortgage. In the present case it would be impossible to say that the claim for which the decree was obtained was *unconnected* with the mortgage.

The lower appellate court has relied upon the case of *Haribans Rai* v. *Sri Nivas Naik* (3), but that case is distinguishable. There the usufructuary mortgagees sued for possession of the mortgaged property, and the suit was decreed with costs. In execution of the decree for costs they sought to sell the mortgaged property, and it was held that they could do so, inasmuch as the claim for the costs did not arise under the mortgage but by virtue of the decree for costs. It was pointed out that the terms of the mortgage did not in any way embrace those costs. Those costs could not have been recovered in a suit for sale on the mortgage; whereas, in the present case, the money payable on account of the temple dues could have been so recovered. The alteration in the language was also considered in the case of *Ram Das* v. *Munna* (4). The case of *Ganesh Singh* v. *Debi Singh* (5) was peculiar. There, a suit for possession by a usufructuary

(1) (1897) I. L. R., 19 All., 496.
(2) (1914) I. L. R., 42 Calc., 780.
(3) (1913) I. L. R., 35 All., 518.
(4) (1912) 18 Indian Cases, 201.
(5) (1910) I. L. R., 32 All., 377.

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mortgagee was compromised and a simple money decree was passed. Not only was the mortgage merged in the compromise, but the decree was a consent decree and the judgment-debtors were estopped from raising any objections. The phrase "a claim arising under the mortgage" must have a wider scope and meaning than if the words were "the claim to recover the mortgage-money."

Munshi *Shiva Prasad Sinha* (for Munshi *Nawal Kishore*), for the respondent :—

Apart from the provisions of order XXXIV, rule 14, there is nothing to preclude a mortgagee from purchasing the equity of redemption in execution of a simple money decree. There is no inherent disability in a mortgagee in this respect ; *Muhammad Abdul Rashid Khan* v. *Dilsukh Rai* (1). The provisions of order XXXIV, rule 14, being restrictive of the ordinary rights of a decree-holder to proceed against any property of his judgment-debtor, should, therefore, be strictly and narrowly interpreted. Bearing this in mind, can it be said in the present case that the decree was in respect of a claim "arising under the mortgage"? The Legislature has deliberately narrowed the scope of this restriction. The words used in section 99 of the Transfer of the property Act were ". . . any claim whether arising under the mortgage or not." The restriction is now confined to the case of a claim arising under the mortgage, and the policy of the law has been brought into accordance with the principle enunciated by the Privy Council expressed in the case of *Khiarajmal* v. *Daim* (2). This was pointed out in the case of *Sardar Singh* v. *Ratan Lal* (3). Even if a money claim "arising under the mortgage" be regarded as not being confined to a claim for the realization of the mortgage-debt, in the present case the decree, at all events, can not be deemed to be one in satisfaction of a claim arising under the mortgage. The agreement on the basis of which the decree was obtained was a quite distinct and separate transaction, and independent of the mortgage. Unlike the facts of the case in *Altaf Ali Khan* v. *Lalta Prasad* (4) there was a long interval between the two deeds; the amount reserved by the latter deed

(1) (1905) I. L. R., 27 All., 517 (524). (3) (1914) I. L. R., 36 All., 516 (523).

(2) (1904) I. L. R., 32 Calc., 296. (4) (1897) I. L. R., 19 All., 496.

was not the same as that due to the mortgagee under the deed of mortgage, and any balance remaining unpaid out of the money payable under the latter deed was not to form an addition to the mortgage money or a charge upon the mortgaged property. Under these circumstances the two deeds cannot be regarded as forming one transaction, but two distinct and independent transactions. On this part of the case I am strongly supported by the view taken in *Chimman Lal* v. *Bahadur Singh* (1) and S. A. No. 1112 of 1894, (2). There, a usufructuary mortgage was executed, and on the same date the mortgaged property was leased to the mortgagor, the rent payable being equal to the amount of interest on the mortgage-money, and the period of the lease being expressed to be until redemption of the mortgage. Yet the contention that the object of the lease was simply to provide a mode for realizing the interest and that the lease formed part of the mortgage transaction was repelled, and it was held that the lease was a distinct and independent transaction and created the relationship of landlord and tenant between the parties. The present appellant's case is a much weaker one. If Musammat Kadma failed to pay the Rs. 700 annually, the plaintiff would have a cause of action under the agreement alone, and not under the mortgage. If in a particular year the share of the actual temple collections amounted only to Rs. 500, the plaintiff would have a cause of action for the remaining Rs. 200 on the basis of the agreement; on the mortgage-deed itself he would not have any claim to the Rs. 200. It is clear, therefore, that a claim on the agreement is quite distinct from and independent of the mortgage, and does not arise under the mortgage. Section 68 of the Transfer of Property Act enumerates the money claims arising under a mortgage. The claim on which the decree was obtained does not come within these. The mortgagee is in possession of the right to collect the temple dues, through his lessee Musammat Kadma. The true test is whether the mortgagee could have added the amount due under the agreement to the mortgage money, and whether the arrears were a charge upon the mortgaged property. The answer being in the negative, the claim was not one arising

(1) (1901) I. L. R., 23 All., 338. (2) (1897) I.L.R., 23 All., 341 (Foot note).

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under the mortgage. In the case of *Sardar Singh* v. *Ratan Lal* (1) the decree was in a suit brought upon the mortgage deed for the mortgage-debt itself. Also, the sale was held when section 99 was in force. The actual decision in the case of *Tarak Nath Adhikari* v. *Bhubaneshwar Mitra* (2) was in the mortgagee's favour, although the word " unconnected " was rather loosely used in the course of the judgment.

Mr. *Ibn Ahmad* replied.

PIGGOTT, J. :—In this case the two courts below have differed upon a question of law of some difficulty regarding the application of the provisions of order XXXIV, rule 14, of the Code of Civil Procedure to the facts of this particular case. The respondent obtained from the original judgment-debtor appellant a possessory mortgage in respect of certain property. That property comprised a fixed-rate holding and also the right to collect a portion of the dues received at a certain temple. Under the terms of the mortgage the mortgagee was entitled to possession over the holding and to realize for himself the share of the temple dues specified in the document. We are informed that he obtained possession over the fixed-rate holding. With regard to the temple dues the respondent, who is a Muhammadan, seems to have found some difficulty about realizing them himself. He entered into a further contract with his mortgagor which may be described as a lease or farm of the right secured to the mortgagee of collecting these dues. The mortgagor undertook to pay to the mortgagee a sum of Rs. 700 a year in return for the latter's permission to realize what she could for herself out of the dues in question. The mortgagor having made default, a suit was brought on the basis of this contract of farm or lease, and a decree obtained. In execution of this decree the respondent has attached, and seeks to bring to sale, the equity of redemption in respect of the whole of the property which formed the subject-matter of the original mortgage in his favour. The question is whether an order for the sale of this property is or is not forbidden by order XXXIV, rule 14, of the Code of Civil Procedure. The court of first instance held that, on the plain words of the said

(1) (1914) I. L. R., 36 All., 516. (2) (1914) I. L. R., 42 Calc., 780.

rule, the decree for money obtained by the respondent was a decree for the payment of money in satisfaction of a claim arising under the mortgage and that the sale of the equity of redemption in the mortgaged property was therefore prohibited under the terms of the rule. The learned District Judge has reversed this finding on appeal, being evidently influenced by the decision of this Court in *Haribans Rai* v. *Sri Niwas Naik* (1). That case undoubtedly comes very close to the case now before us, and I am not surprised that the learned District Judge felt obliged to treat it as a decisive authority in favour of the decree-holder. At the same time the present case is distinguishable on the facts, and I very much doubt whether the learned Judges who decided the case of *Haribans Rai* v. *Sri Niwas Naik* (1) would have been in favour of the respondent in the appeal now before us. They seem to have held that the decree for costs which was sought to be executed in the case then before them represented, not money due to the decree-holder as mortgagee, but merely a sum of money to which he was entitled as a successful litigant. They, therefore, held that the decree in the case then before them was not one for the payment of money in satisfaction of a claim arising under the mortgage. It must be remembered that there has been an alteration in the law since the provisions of order XXXIV, rule 14, of the present Code of Civil Procedure (Act No. V of 1908) were substituted for those of section 99 of the Transfer of Property Act (No. IV of 1882). It is, therefore, of very little use to refer to rulings anterior in date to this change in the law. For instance, there has been considerable controversy before us as to the bearing on the present case of the principles laid down by learned Judges of this Court in two cases, one reported in *Altaf Ali Khan* v. *Lalta Prasad* (2) and the other in *Chimman Lal* v. *Bahadur Singh* (3). The former case is relied upon by the appellant and the latter by the respondent. It seems sufficient to say that both these cases were decided at a time when the mortgagee could in no event have brought the mortgaged property to sale in execution of a decree for the satisfaction

(1) (1913) I. L. R., 35 All., 518. (2) (1897) I. L. R., 19 All., 496.

(3) (1901) I. L. R., 23 All., 338.

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of any claim, whether arising under the mortgage or not. The question which we have now to consider was, therefore, not present to the minds of the learned Judges who decided those two cases. They had to determine whether, under particular circumstances, the remedy of a particular mortgagee was or was not confined to a suit for sale upon his mortgage and whether or not it was open to him, at least as an alternative relief, to obtain a simple money decree, by way of arrears of rent or the like, against his mortgagor. No question could be raised under the law as it then stood as to the right of the mortgee to execute such decree, when obtained, by attachment and sale of the mortgaged property. Apart from the case which the learned District Judge has treated as decisive, there seem to be only two other decisions since the passing of Act No. V of 1908 which deserve notice. One of these is the case of *Ganesh Singh* v. *Debi Singh* (1) and the other is *Tarak Nath Adhikari* v. *Bhubaneshwar Mitra* (2). Both these cases seem to me a good deal in favour of the appellant. In the former it is true that the usufructuary mortgagee there concerned was permitted to bring the mortgaged property to sale in execution of a simple money decree. The learned Judges, however, laid particular stress on the fact that the decree then in question was passed upon a compromise. In effect, as it seems to me, they regarded the compromise decree under which the mortgagor became liable to the mortgagee for the payment of a certain sum of money as a contract superseding and abolishing the previous contract of mortgage. On this view of the case there remained no mortgage in existence which could be set up by the judgment-debtor so as to invoke the provisions of order XXXIV, rule 14, of the Code of Civil Procedure. I think that the way in which the learned Judges laid stress upon the fact that the decree in the case before them had been passed upon a compromise, and was therefore the result of a fresh agreement or contract between the parties, suggests that their decision would have been different if they had had to deal with a decree for money passed after contest. The Calcutta case

(1) (1910) I. L. R., 32 All., 377. (2) (1914) I. L. R., 42 Calc., 780.

was the converse of the present one and as a matter of fact resulted in an order in favour of the decree-holder, but the principle laid down by the learned Judges was that the prohibition contained in order XXXIV, rule 14, would operate in respect of any decree of which it could not be said that it was unconnected with the mortgage. In the case now before us the money for which this decree was obtained represented the usufruct of the mortgaged property to which the mortgagee was entitled as part of his contract of mortgage. His right to receive this money rested upon his position as mortgagee. The mortgagor had become liable to pay the mortgagee this money in consequence of an agreement entered into between the parties subsequent to the mortgage : but it seems to me, in the first place, that the money for which the decree was passed was an essential part of the mortgage money, just as much as arrears of interest, which, if falling due on a contract of simple mortgage, become part of the mortgage money; in the second place it seems to me that it would be doing violence to the plain language of the rule to say that the claim in satisfaction of which this decree was passed was not a claim arising under the original contract of mortgage. The learned District Judge has interpreted the principle laid down in the decision of *Haribans Rai* v. *Sri Niwas Naik* (1), as if the learned Judges had intended to lay down that the true test was whether or not the money for which a decree had been obtained was money which could have been claimed in a suit for sale upon the mortgage.

This goes, I think, a little beyond the actual *ratio decidendi* of the case in question. Moreover, although the test may be a satisfactory one in the case of claims arising out of a simple mortgage, it is not so easy to apply it to the case of a usufructuary mortgage. The provisions of the Transfer of Property Act assume that a person in whose favour a contract of usufructuary mortgage has been entered into has either been put in possession of the mortgaged property or has not. In the latter event he would have a right to sue for his money under section 68, clause (*c*), of the Transfer of Property Act (No. IV of 1882).

(1) (1913) I. L. R., 35 All., 518.

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In the former event it is presumed that he would be in full enjoyment of all his rights in respect of the usufruct of the mortgaged property. Difficulties may arise, however, in applying this principle where the mortgagor has entered into a subsidiary agreement with the usufructuary mortgagee, so that it may be said that the mortgagee is constructively in possession by virtue of his subsidiary contract with the mortgagor, but the latter is nevertheless withholding from the mortgagee the money which he had covenanted to pay. I think that this is a risk which a usufructuary mortgagee must be content to run when he chooses to enter into a transaction the effect of which is to replace the mortgagor in actual possession over the mortgaged property, or any part of it. There is nothing in law to prevent the parties to a mortgage from entering into such an agreement, but the fact that the mortgagor has become liable by reason of such subsidiary contract to make certain payments to the mortgagee does not affect the consideration that the money so agreed to be paid represents the usufruct of the property to which the mortgagee was entitled by virtue of the possessory mortgage in his favour. If the mortgagee chooses to enter into a contract of this nature, and the mortgagor fails to carry out his part of such contract, the remedy of the mortgagee is to obtain a simple money decree for the money due to him. I think, however, that is would be doing violence, both to the letter of order XXXIV, rule 14, of the Code of Civil Procedure, and to the principle on which that rule is based, to allow the mortgagee to take advantage of a decree of this nature in order to bring to sale the equity of redemption and deprive the mortgagor of his right to redeem the original mortgage. The courts are bound to hold that the money in respect of which the decree was passed represents, in substance, the usufruct of the mortgaged property; and that the claim to it was a claim arising under the mortgage. In my opinion, therefore, the decree of the lower appellate court must be set aside and that of the court of the first instance restored, with costs throughout.

WALSH, J.:—I have arrived at the same conclusion. Although the circumstances of this arrangement are somewhat peculiar, as I shall mention in a moment, I think they raise in the clearest

possible form the question what is the right interpretation of the words "a claim arising under the mortgage" used in the new order XXXIV, rule 14? The case has been extremely well argued on both sides, and I do not think any relevant consideration or existing authority has been omitted from the discussion.

The mortgage was a usufructuary mortgage to secure a debt of Rs. 8,000 in which a certain fixed-rate tenancy was hypothecated, and also a right during fourteen days in each year to collect certain dues at a temple which had been bequeathed to the mortgagor by her paramour. The mortgagor was *Pasi* by caste and the mistress of the *Panda* who bequeathed this right. The mortgagee was a Muhammadan, and the difficulties not unnaturally consequent upon his making such collections, were got over by an agreement made six months after the original mortgage, under which the woman gave to the mortgagee in lieu of the usufruct of the collections of the dues an undertaking or covenant to pay a fixed sum of Rs. 700 a year. In addition to this the agreement provided that upon default being made in the payment of that fixed sum interest should run upon the arrears at 12 per cent. per annum. Inasmuch as the mortgagee was in possession of the fixed-rate holding, although we know nothing about the actual proceeds of this security, it is obvious that such an arrangement made by the woman in discharge of her obligations under the mortgage was a most improvident bargain. These circumstances do not affect my judgment in the interpretation at which I feel myself obliged to arrive, but they do point to the necessity of holding fast to the old principle upon which this restriction imposed upon mortgagees is based and not straining the language in order to extend the mortgagee's rights over the equity of redemption. The mortgagee obtained a decree for Rs. 3,762-6-0 with costs and *pendente lite* interest and future interest, and the question before us is whether he can execute that decree upon the property mortgaged.

I have come to the conclusion that he cannot. In whatever way the matter is regarded, it seems to me that a suit to enforce the agreement by which the parties stipulated how that part

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of the usufruct which concerned the collection of dues should be met can only be described as "a claim arising under the mortgage." "A" in this connection must mean "any." The point really cannot be better put than it is put in the learned Subordinate Judge's judgment where he says:—"It seems to me to be drawing an unjustifiably subtle distinction to say that the claim arose, not under the mortgage, but under the separate agreement, when that agreement was made as a direct consequence of the mortgage, and as a means of giving effect to the conditions of the mortgage."

The language formerly in operation under section 99 of the Transfer of Property Act was "whether arising under the mortgage or not." The change effected by order XXXIV, rule 14, was clearly intended to improve the mortgagee's position and to remove to some extent the existing restriction but it must be taken that it was not intended by the Legislature, otherwise very different language would certainly have been adopted, to affect the principle long established by equity courts and always acted upon in India and reiterated by the Privy Council in *Khairaj Mal* v. *Daim* (1), "that the mortgagee cannot by obtaining a money decree for the mortgage debt and taking the equity of redemption in execution, relieve himself of his obligations as mortgagee, or deprive the mortgagor of his right to redeem on accounts taken, and with the other safeguards usual in a suit on the mortgage." In my opinion the mortgagee's claim in this case, if successful, would offend against this principle. The existing rule does not confine the restriction imposed upon the mortgagee to a claim to enforce the mortgage-debt as such, but expressly provides that it shall include claim arising under the mortgage. In construing such a proviso we are bound to look at the authorities which laid down the principles by which the courts were guided and which the Code was intended to codify. To escape the mischief aimed at by those principles and by this legislation the claim of the mortgagee must be distinct from, that is to say, in my opinion, unconnected with the mortgage transaction. This is the view taken by the Calcutta Bench in the decision of *Tarak Nath Adhikari* v. *Bhubaneshwar Mitra* (2),

(1) (1904) I. L. R., 32 Calc., 296. (2) (1914) I. L. R., 42 Calc., 780.

to which my brother has referred in which, although the Judges were dealing with the converse case, the language they use clearly applies to this case and in my opinion, is correct. The same view is taken in notes to order XXXIV, rule 14, in the last edition of Woodroffe and Ameer Ali's Commentary on the Code, and it is there pointed out that if the restriction were confined to cases of what, to use the English expression, are known as, "judgments on the covenant" the benefit of the equity of redemption given to the mortgagor would be lost in respect of claims under the mortgage, and it seems to me that the Legislature has been careful to use language avoiding that result. Whether or not I should have come to the same decision as the Bench of this Court in the authority *Haribans Rai* v. *Sri Niwas Naik* (1), to which my brother has referred and which the learned District Judge in this case not unnaturally used to persuade himself as to the interpretation which he adopted, does not matter. The view which they took in that case undoubtedly was that a claim for costs arising out of a decree stood upon a footing of its own. The decree of a court on the claim of the mortgagee under his mortgage, and the costs in execution of its order for which the mortgagee made application, might, no doubt, be said to arise, not under the mortgage, but under the unsuccessful resistance made by the mortgagor, in the original claim which the mortgagee made against him. I do not think that case can be treated as having decided anything more than that, and it does not govern the wider question which is raised in the appeal before us. I agree with the order proposed.

BY THE COURT.—The appeal is allowed, the decree of the lower appellate court set aside and that of the court of first instance restored with costs throughout.

Appeal allowed.

(1) (1913) I. L. R., 35 All, 518.