

1882  
March 11.

Before Mr. Justice Oldfield and Mr. Justice Tyrrell.

DHONDHA RAI AND OTHERS (DEFENDANTS) v. MEGHU RAI  
AND OTHERS (PLAINTIFFS).\*

*Mortgage—Foreclosure—Agreement between mortgagor and mortgagee—Breach by mortgagor—Right of mortgagee to fall back on mortgage-rights.*

The mortgagee of certain shares of certain villages applied for foreclosure under Regulation XVII of 1806. While the year of grace was running and shortly before its expiration the mortgagor and the mortgagee came to a compromise in the matter of the mortgage. It was agreed by the mortgagor to transfer by sale to the mortgagee the shares of three of the villages, in lieu of the mortgage-money, and that he should not assert his right under s. 7 of Act XVIII of 1873, as ex-proprietor, to retain the sir-lands appertaining to such shares. The mortgagee agreed to relinquish his claim on the remaining shares arising out of the mortgage and the foreclosure proceedings. It was further agreed that, if the mortgagor asserted the right mentioned above, the mortgagee should be entitled to assert his right in respect of all the shares as a mortgagee who had foreclosed. The mortgagor subsequently, in breach of his agreement, asserted his right under s. 7 of Act XVIII of 1873 to the sir-lands appertaining to the shares transferred to the mortgagee. Thereupon the mortgagee sued the mortgagor for possession of all the shares by virtue of the foreclosure proceedings. *Held*, following *Lall Dhur Rai v. Gunput Rai* (1), that, on the failure of the mortgagor to give effect to the compromise transaction, the mortgagee was entitled to fall back on his equities under his mortgage and the foreclosure proceedings take thereunder.

THE plaintiffs in this suit claimed possession of certain shares of certain villages by virtue of mortgages by conditional sale, which had been foreclosed. It appeared that on the 20th August, 1869, and on the 6th December, 1876, the defendants mortgaged by conditional sale the shares in question to the plaintiffs. In 1877 the plaintiffs applied under Regulation XVII of 1806 to have the mortgages foreclosed. On the 12th July, 1878, while the year of grace was running and shortly before its expiration, the plaintiffs and the defendants came to a compromise. By this compromise it was agreed by the defendants that they should transfer to the plaintiffs by sale, in consideration of the money due to them, the shares in three of the villages, and that they should not assert their right under s. 7 of Act XVIII of 1873, as ex-proprietors, to retain the sir-lands appertaining to such shares, and that the plaintiffs should relinquish their claim on the

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\* First Appeal, No. 11 of 1881, from a decree of J. W. Power, Esq., Judge of Ghazipur, dated the 2nd September, 1880.

(1) N.-W. P. H. C. Rep. 1869, p. 22.

shares of the remaining villages arising out of their mortgages and the foreclosure proceedings. It was further agreed that if the defendants preferred a claim to retain the sir-lands appertaining to the shares thus transferred to the plaintiffs, the compromise should be considered void, and the plaintiffs should be entitled to assert their rights in respect of all the shares as mortgagees who had foreclosed. The defendants subsequently, in breach of this agreement, asserted their right, as ex-proprietors, to retain the sir-lands appertaining to the shares transferred to the plaintiffs, and succeeded in obtaining a recognition of such right in the Revenue Court. Upon this, in February, 1880, the plaintiffs instituted the present suit against the defendants, in which they claimed possession of all the shares mortgaged to them, by virtue of the foreclosure proceedings. The Court of first instance held that, under the circumstances above stated, both parties reverted to the position held by them before the compromise was entered into, and gave the plaintiffs a decree.

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The defendants appealed to the High Court, contending, *inter alia*, that the compromise put an end to the foreclosure proceedings, and the breach of their agreement by the defendants could not revive those proceedings.

Messrs. *Conlan* and *Howard*, for the appellants.

Mr. *Colvin*, the *Senior Government Pleader* (Lala *Juala Prasad*), and Mr. *Simeon*, for the respondents.

The judgment of the Court (OLDFIELD, J. and TYRRELL, J.) was delivered by

TYRRELL, J.—The decree of the Court is not open to any of the objections taken in this appeal. The plaintiffs-respondents on the failure of the appellants to give effect to the compromise transaction of the 12th July, 1878, were clearly entitled to fall back on their equities under their conditional deed of sale, and the foreclosure proceedings taken thereunder. This, and no more than this, has been awarded to the respondents by the lower Court's judgment and decree which we approve and affirm. A ruling of this Court in *Lall Dhur Rai v. Gunput Rai* (1) has been cited to

(1) N.-W. P. H. C. Rep. 1869, p. 22.

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us by counsel for the respondents. It is quite in point and the principle therein adopted is that which has been applied to the case before us. The appeal is dismissed with costs.

*Appeal dismissed.*

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March 11.

*Before Mr. Justice Oldfield and Mr. Justice Brodhurst.*

NIGHTINGALE (DEFENDANT) v. FAIZ-ULLA AND ANOTHER (PLAINTIFFS).\*

*Bill of exchange—Mistake—Void agreement—Act IX. of 1872 (Contract Act), ss. 13, 20—Laches.*

On the 3rd March 1881 *N* drew a bill in English at Cawnpore in favour of *F* on a Calcutta firm and gave it to *F*'s agent, who did not understand English. *F*'s agent kept the bill till the 10th March 1881 without ascertaining its nature. On that date the Calcutta firm on which the bill was drawn became insolvent. *F* subsequently sued *N* for the money he had paid for the bill on the ground that his agent had asked *N* for a bill drawn on himself and not one drawn on the Calcutta firm. *N* asserted in defence to the suit that *F*'s agent had not asked for a bill drawn on himself but merely for a bill on Calcutta,

*Held* that, assuming that the sale of the bill was void by reason of both parties being under a mistake as to the bill, yet *F* could not recover the amount of the bill from *N*, because his agent had been guilty of gross negligence in taking the bill and keeping it so long without ascertaining its nature and applying for redress.

THE plaintiffs in this suit stated in their plaint in effect that on the 3rd March, 1881, at Cawnpore, the defendant Nightingale drew a hundi for Rs. 2,500 on the firm of Rushton Brothers, carrying on business at Calcutta, as agent of that firm, and sold it to Jhamman, their agent, concealing the fact that it was drawn not on himself, but on that firm; that the hundi was written in English, and their agent Jhamman, who was not acquainted with that language, took it believing that it was drawn by the defendant Nightingale on himself; that on the 10th March, 1881, it became known at Cawnpore that the firm of Rushton Brothers had failed and consequently the hundi was not presented for acceptance; that by reason of the failure of the firm of Rushton Brothers the right of action had accrued before the hundi became payable; and that the cause of action arose on the 10th March, 1881. The plaintiffs accordingly claimed to recover Rs. 2,500 from the defendant Nightingale personally, and as a

\* First Appeal, No. 96 of 1881, from a decree of W. Barry, Esq., Judge of Cawnpore, dated the 10th August, 1881.