

on the 4th January, 1881. It appears to me that the word "made" must be construed to include a hearing and determination of the application for review, and to adopt any other interpretation would be to treat the provision as an absurd and useless one. Such being the views I entertain, I have no alternative but to hold that the Officiating Judge acted without jurisdiction in admitting the respondent's application for review, and that this appeal must be decreed with costs.

BRODHURST, J.—I am of opinion that the appellant's plea is valid. Under the provisions of s. 624 of Act X of 1877, the Officiating Judge, Mr. Alexander, was not, I think, competent in the present case to grant the application for review of the judgment of his predecessor Mr. Tyrrell. He could only entertain an application for review of Mr. Tyrrell's judgment on the ground of the discovery of new and important evidence, as alluded to in the preceding section, or on the ground of some clerical error apparent on the face of the decree. Reading ss. 623 and 624 of the Code together, it is I consider palpable that Mr. Alexander was precluded from referring to the record to see if his predecessor had through an oversight or otherwise committed any mistake, for the only mistake or error Mr. Alexander was, under the provisions of s. 624, empowered to notice was that mentioned above, *viz.*, a clerical error apparent on the face of the decree. I therefore concur with my colleague Mr. Justice Straight in decreeing the appeal with costs.

Appeal allowed.

Before Mr. Justice Straight and Mr. Justice Brodhurst.

SHEO NARAIN (PLAINTIFF) v. JAI GOBIND AND OTHERS (DEFENDANTS).*

Usufructuary mortgage—Suit to enforce hypothecation—Compensation for breach of contract—Money lent—Money had and received for plaintiff's use.

An instrument of mortgage provided that the mortgagors should deliver possession of the mortgaged property to the mortgagee, and the latter should retain possession, setting-off profits against interest, until the former should redeem, by payment of the principal sum, which they were at liberty to do in the month of Jaith in any year they pleased. The mortgagors having failed to deliver possession of the mortgaged property, the mortgagee sued them for the principal sum and

* Second Appeal, No. 738 of 1881, from a decree of M. S. Howell, Esq., Judge of Jaunpur, dated the 12th March, 1881, affirming a decree of Babu Kashi Nath Biswas, Subordinate Judge of Jaunpur, dated the 13th December, 1879.

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interest, asking for enforcement of lien. The instrument of mortgage did not contain an hypothecation of the property. *Held* that although the suit, so far as it sought enforcement of lien, wholly failed, there being no hypothecation of the property, yet it was not equitable or proper that, as regards the money-claim, the mortgagee should be relegated to a fresh suit, inasmuch as a cause of action was disclosed, whether the suit was regarded as one for compensation in damages for breach of contract, or for money had and received for the plaintiff's use, or for money lent, and the suit should be determined on its merits (1).

THE plaintiff in this suit sued for Rs. 1,769, claiming the same as the principal and interest due on an instrument of usufructuary mortgage, dated the 3rd February, 1874, and asking for enforcement of lien. The instrument on which the suit was founded provided that the mortgagee should hold possession of the mortgaged land, setting-off profits against interest, until the mortgagors should redeem the land by payment of the principal sum, which they were at liberty to do in the month of Jaith in any year they pleased. The plaintiff's cause of action was the failure of the mortgagors to deliver possession of the land as agreed. The Court of first instance gave the plaintiff a decree, directing, *inter alia*, the sale of the property. The lower appellate Court dismissed the suit on the ground that the instrument of mortgage did not contain an hypothecation of the land, and consequently the suit was not maintainable. In second appeal by the plaintiff it was contended on his behalf that, in consequence of the breach by the defendants of their contract to deliver possession, he was entitled to a money-decree against them personally.

The *Senior Government Pleader* (Lala Juala Prasad), for the appellant.

Babu Barodha Prasad Ghose and Lala Jokhu Lal, for the respondents.

The judgment of the Court (STRAIGHT, J. and BRODHURST, J.) was delivered by

STRAIGHT, J.—We concur in the view of the Judge that the usufructuary mortgage executed by the defendants-respondents in favour of the plaintiff-appellant does not contain any hypothecation of the land. The claim of the appellant, therefore, in so far as it sought enforcement of lien, was unsustainable and wholly failed.

(1) See also *Maresh Singh v. Chauharja Singh*, ante p. 245.

But as regards his money claim, assuming that the consideration was paid as alleged by him, we do not think it equitable or proper that he should be relegated to a fresh suit. The whole of the circumstances on the strength of which the appellant founds his cause of action are fully disclosed in the plaint, and if supported by evidence go to establish the justice of his demand, whether we regard it in the light of a suit for compensation in damages for breach of the contract, or for money had and received for the plaintiff's use, or for money lent. The case must be remanded to the Judge, under s. 562 of the Procedure Code, in order that he may determine it upon the merits. The Judge will of course in hearing the appeal not consider the case in respect of those defendants who did not question the decision of the first Court by appealing. Costs of this appeal will be costs in the cause.

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Cause remanded.

CIVIL JURISDICTION.

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Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Straight, and Mr. Justice Oldfield.

BHAGIRATH (PLAINTIFF) v. RAM GHULAM (DEFENDANT).*

Arbitration—Evidence given by party on oath proposed by opposite party—Award in accordance with such evidence—Judgment in accordance with award—Validity of award—Appeal—Act X of 1877 (Civil Procedure Code), ss. 520, 521, 522—Act X of 1873 (Oaths Act).

The plaintiff in a suit, which had been referred to arbitration, offered before the arbitrator to be bound by the evidence of the defendant given on a certain oath. With the arbitrator's consent the defendant accepted such offer, and gave evidence on such oath. The arbitrator made an award in accordance with the evidence so given. The plaintiff objected to the award, not on any of the grounds mentioned in ss. 520 and 521 of the Civil Procedure Code, but on the ground that the procedure of the arbitrator had been illegal. The Court disallowed this objection, and gave a judgment and decree in accordance with the award.

Held by STRAIGHT, J., that such decree, being in accordance with the award, was not appealable.

Held by STUART, C. J., that the award not being open to objection on any of the grounds mentioned in ss. 520 and 521 of the Civil Procedure Code, and the decree being in accordance with the award, the decree was not appealable.

* Application, No. 179 of 1881, for revision under s. 622 of Act X of 1877 of a decree of H. A. HARRISON, Esq., Judge of Farukhabad, dated the 25th July, 1881, reversing a decree of Pandit Gopal Sahai, Munsif of Farukhabad, dated the 14th June, 1881.