

was not competent to revoke his previous order of the 23rd December; and (ii) that the reasons given for the second order failed to support it.

Mr. *Colvin*, for the petitioner.

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

OLDFIELD, J.—This is an application to the Court to revise under s. 622, Civil Procedure Code, an order of the Judge of the Small Cause Court of Cawnpore, cancelling a previous order which he had made granting his sanction to the applicant to institute a complaint of an offence under s. 193, Indian Penal Code, alleged to have been committed in the course of a suit decided in his Court. It is contended that it was illegal to cancel the order giving sanction. We are of opinion that this is not a case to which the provisions of s. 622 are intended to apply. The cases referred to in that section are those where “the Court by which the case was decided appears to have exercised a jurisdiction not vested in it by law, or to have failed to exercise a jurisdiction so vested, or to have acted in the exercise of its jurisdiction illegally or with material irregularity.” The section contemplates the revision of an error committed in the course of deciding a case. The provisions of this section would not appear to be applicable to a matter relating to the exercise of the discretionary power of a Court in the granting or withholding sanction to a criminal prosecution. Moreover, considering the Judge of the Small Cause Court had a discretion as to the grant of sanction, and that it is still within the power of the applicant to apply for sanction to the superior Court, we should be indisposed to interfere by way of revision. The application is dismissed.

## APPELLATE CIVIL.

*Before Mr. Justice Pearson and Mr. Justice Spankie.*

IMDAD HUSAIN (DEFENDANT) v. MANNU LAL AND ANOTHER (PLAINTIFFS).\*

*Conditional sale—Foreclosure of mortgage—Regulation XVII of 1806, s. 8.*

An instrument of conditional sale provided that the conditional vendor should retain possession of the property to which it related, paying interest on the principal

\* Second Appeal, No. 551 of 1880, from a decree of J. H. Prinsep, Esq., Judge of Cawnpore, dated the 4th May, 1880, reversing a decree of Babu Kam Kali Chaudhri, Subordinate Judge of Cawnpore, dated the 24th December, 1879.

1881  
IN THE M  
TTER OF TU  
PETITION  
MADHO  
PRASAD

1881  
February

1881

IMDAD  
HUSAIN  
v.  
ANNU LAL.

sum lent annually at twelve per cent., and should repay the principal sum lent within seven years; that (by the fourth clause thereof, in the event of default of payment of interest in any year, the term of seven years should be cancelled, and the conditional sale should at once become absolute; and that (by the fifth clause thereof), in the event of the principal sum lent not being repaid at the end of seven years, the conditional sale should become absolute. Default having been made in the payment of interest annually as stipulated, the conditional vendee, the term of seven years not having expired, took proceedings to foreclose, in pursuance of the condition contained in the fourth clause of the deed, and the conditional sale was declared absolute. The conditional vendee then sued for possession of the property. *Held that the fifth clause of the deed did not dispense with the necessity of complying with the provisions of s. 8 of Regulation XVII of 1806 and was compatible with them, and on or after the expiry of the stipulated period application for the foreclosure of the mortgage and rendering the conditional sale absolute in the manner prescribed by that Regulation might and must be made; that the condition contained in the fourth clause of the deed in effect defeated and violated the provisions of that Regulation, and summarily converted a conditional into an absolute sale in disregard and defiance thereof, and the foreclosure proceedings taken by the conditional vendee before the expiry of the period stipulated for the repayment of the principal sum lent were irregular, and the sale could only be rendered conclusive in the manner prescribed by that Regulation in pursuance of the fifth clause of the deed; and that accordingly such suit was not maintainable.*

THE plaintiffs in this suit claimed an eight-anna share of a certain village, by virtue of a deed of conditional sale bearing date the 14th May, 1874, and a foreclosure proceeding dated the 13th July, 1878. By this deed the defendant mortgaged such share to the plaintiffs for Rs. 2,000 for a term of seven years, the deed containing the following stipulations:—“(iii). That the mortgagor should retain possession of the property, paying interest at one per cent. per mensem, and should repay Rs. 2,000, the principal sum, within seven years, and then get the property redeemed, and this deed returned: (iv) that, if in any year he (mortgagor) failed to pay the interest, then the principal sum and the remaining interest should become the sale-consideration, and the term fixed should be cancelled, and this mortgage-deed should be deemed a sale-deed: (v) that if he (mortgagor) failed to repay the principal sum within seven years, then after the expiry of that term this deed should become an absolute sale-deed; and the mortgage-consideration the sale-consideration, to which he or his heirs should not have any claim.” On the 23rd April, 1877, the term of the mortgage not having expired, the plaintiffs applied for foreclosure on the ground that since the date of the execution of the deed of conditional sale the defendant

had not paid any interest. Notice of foreclosure was served on the defendant on the 13th May, 1877, and on the 13th July, 1878, the year of grace having expired, the mortgage was declared foreclosed. The defendant set up as a defence to the suit that the plaintiffs were not entitled to apply for foreclosure under Regulation XVII of 1806, by reason that he had failed to pay interest as stipulated in the deed of conditional sale, and the foreclosure proceedings were consequently invalid, and the suit was not maintainable. The Court of first instance allowed this contention, its reasons for so doing being as follows:—"S. 8 of Regulation XVII of 1806 prescribes a certain course of procedure for a mortgagee, if he is desirous of foreclosing the mortgage and rendering the sale conclusive on the expiration of the stipulated period: in the mortgage-deed in suit the stipulated period for the discharge of the principal of the mortgage loan is seven years from the 14th May, 1874, the date of the deed: it also stipulates that the conditional sale should become absolute, if within the said period the defendant failed to pay interest on the loan in any year: the question is, whether the plaintiffs were justified by law in applying for foreclosure when the defendant failed to pay interest for nearly the first three years after the execution of the said mortgage-deed, or should have waited for the whole of the said stipulated period of seven years before having recourse to taking any step for foreclosing the mortgage: the words 'stipulated period' used in the said s. 8 are interpreted in the decision of the Calcutta High Court in the case of *Srimati Sarasibala Debi v. Nand Lal Sen* (1) 'to be the whole period prescribed by the mortgage contract for the performance of the conditions, upon the fulfilment of which the mortgagor to be entitled to a reconveyance': this interpretation, which is further amplified in the said decision, allowed, in my opinion, no right to the plaintiffs in the present case to foreclose the mortgage at any time before the expiry of the said period of seven years from the 14th May, 1874, the date of the mortgage-deed in suit: consequently the foreclosure proceedings they took in 1877, in the Judge's Court, are bad in law, and have not the effect of rendering the conditional sale connected with the deed in suit absolute: they are therefore not entitled to have proprietary possession of the

1881

 IMDAI  
 HUSAI  
 v.  
 MANNU

(1) 5 B. L. R., 389.

1881

IMDAD  
MUSAIN  
v.  
ANU LAL.

share in dispute : this finding renders it needless for me to go into the other issues: the plaintiff's suit is accordingly dismissed." On appeal by the plaintiffs the lower appellate Court reversed the decision of the first Court and gave the plaintiffs a decree, its reasons for so doing being as follows:—" In appeal it is urged the precedent relied upon by the lower Court is inapplicable for the reason that the mortgage-deed referred to therein did not recite a separate contract in respect of the interest, that is to say, it did not set forth that the stipulated period of payment of the principal should be altered on default of payment of the interest, but the first penalty should be the charge of compound interest, and after that the mortgagee should be at liberty to make the sale absolute, whereas in the present case there is a stipulated period for the principal and another for the interest, and on default being made the stipulated period becomes cancelled by the express terms of the covenant, and another period commences during which the mortgagors become liable to the call for payment and the mortgagees hold the right to foreclose: in the Calcutta case—*Srimati Sarasibala Debi v. Nand Lal Sen* (1)—the mortgage-deed, although written in the English form, was held to fall within the operation of Regulation XVII of 1806, and the suit having been instituted before expiry of the period stipulated for repayment of the principal sum, it was pronounced to be premature: that case alike with the present one was brought on account of the mortgagors making default in payment of interest, and the discussion extended to the proper meaning to be attached to the words 'stipulated period' referred to in Regulation XVII of 1806; they were held to mean 'the whole period prescribed by the mortgage contract for the performance of the conditions, upon the fulfilment of which the mortgagor is to be entitled to a reconveyance'; that is to say, it embraces the period of grace allowed for taking out foreclosure proceedings by mortgagees: the question did not turn on the effect of default in payment of interest: in the present instance there is a separate liability involved in the due observance of the contract as regards payment of interest, and the penalty in default thereof is equally binding and equally severe as upon the non-payment of the principal within their respective stipulated periods, with this difference, that the

(1) 5 B. L. R., 389.

1881

---

 IMDAD  
 HUSAIN  
 v.  
 MANNU L<sup>S</sup>

stipulated period for the principal is seven years, and for the interest the period is each recurring year of those seven years separately: if the conditions of the contract are to be adhered to, then the remedy must be held to be due to the mortgagees (plaintiffs) the moment there is a default in the payment of interest, and upon their coming forward to see it enforced they appear to me to be at liberty either to call upon the mortgagor either to exercise the equity of redemption, or themselves to demand foreclosure in the terms of the contract: this would seem to be the opinion of the Calcutta Court in *Prosardoss Dutt v. Ramdhone Mullick* (1), where it was held, *inter alia*, 'that the assignee of a mortgagee had a right to foreclose on default of payment of an instalment of interest before the date on which the principal was made payable': again in the Full Bench ruling in *Buldeen v. Gulab Koomer* (2), the principles then enunciated favour this view, for it was then held: 'On the construction of the mortgage-deed the mortgagee was not limited thereby to foreclosure as soon as the first default in payment of instalments occurred and not afterwards, but that the mortgagee was authorized in proceeding to foreclose if there were subsequent default, any previous default notwithstanding, in fact there is nothing in law to limit the time within which a mortgagee may foreclose, if notwithstanding one or more defaults the mortgagee's right is not repudiated but recognised': the right is fully recognised in this suit on the disposal of the technical point: were a contrary view to the above maintained, there would be no advantage in contracting a penalty in default of payment of interest, the terms of the covenant *quoad* the interest would have to remain a dead letter, and as it is to the conditions of a contract we have to look, there is nothing repugnant to the claim to foreclose in the deed before us and the right of suit exists: the appeal is accordingly decreed in the terms of the plaint, which relates to proprietary rights only, with costs, in reversal of the lower Court's order." The defendant appealed to the High Court.

Messrs. *Chatterji* and *Amir-ud-din*, for the appellant.

The *Senior Government Pleader* (*Lala Juala Prasad*) and *Lala Lalia Prasad*, for the respondents.

(1) 1 *Indian Jurist* (1866), 255. (2) *N. W. P. H. C. Rep., F. B.*, 1866-67, p. 102.

1881

IMDAD  
HUSAIN  
v.  
ANNU LAL.

The Court (PEARSON J., and SPANKIE J.,) delivered the following

JUDGMENT.—The fifth clause of the deed in question which declared that, in the event of the principal sum lent not being repaid at the end of seven years, the conditional sale shall become absolute, does not dispense with the necessity of complying with the provisions of s. 8, Regulation XVII of 1806, and is compatible with them. On or after the expiry of the stipulated period, application for the foreclosure of the mortgage and rendering the sale absolute in the manner prescribed by the Regulation may and must be made. But the fourth clause, which declares that, in the event of default of payment of interest in any year, the term of seven years shall be cancelled and the conditional sale shall at once become absolute, without substituting any new term for the repayment of the principal sum lent, on or after the expiration of which proceedings of the nature contemplated in s. 8, Regulation XVII of 1806, may be taken, does in effect defeat and violate the provisions of that law, and summarily convert a conditional into an absolute sale in disregard and defiance thereof. The foreclosure proceedings taken by the plaintiff in this case before the expiration of a period stipulated for the repayment of the principal sum lent were irregular; and it would seem that the sale can only be rendered conclusive in the manner prescribed by the Regulation in pursuance of the fifth clause of the deed. Accordingly we decree the appeal with costs, reverse the lower appellate Court's decree, and restore that of the Court of first instance.

*Appeal allowed.*

1881  
February 8.

*Before Mr. Justice Pearson and Mr. Justice Spankie.*

AHMAD ALI (PLAINTIFF) v. HAFIZA BIBI AND ANOTHER (DEFENDANTS).\*

*Bond payable by instalments—Limitation—Waiver.*

On the 24th May, 1866, *H* gave *A* a bond payable by instalments which provided that, if default were made in the payment of one instalment, the whole should be due. The first default was made on the 23th June, 1866. No payment was made after Act IX of 1871, sch. ii, No. 75, came into force. *Held*, in a suit

\* Second Appeal, No. 865 of 1880, from a decree of W. Tyrrell, Esq., Judge of Allahabad, dated the 28th May, 1880, affirming a decree of Rai Makhan Lal, Subordinate Judge of Allahabad, dated the 22nd April, 1880.