mencing foreclosure proceedings, and that the demand must therefore necessarily be made before the mortgagee has the right of applying for foreclosure, and it follows that the omission to make such a demand would vitiate the foreclosure proceedings altogether. We are fortified in placing such a construction upon the section by the language of the preamble of the Regulation, which clearly shows that it was passed for the protection of mortgagors and for imposing restrictions upon the power formerly possessed by *bai-i-bilwafa* mortgagees in respect of foreclosure.

Under this view of the law it is necessary to ascertain whether, before initiating the foreclosure proceedings, the defendants mortgagees duly demanded payment of the mortgage-money from the plaintiff mortgagor. But this point, though distinctly alleged in the plaint, was not made the subject of an issue by the Court of first instance, and has not been noticed by the lower appellate Court.

We remand the case to the lower appellate Court under s. 566 of the Civil Procedure Code for the trial of the following issue:—Did the defendants mortgagees demand payment of the mortgage-money from the plaintiff mortgagor before applying for issue of the notice of foreclosure?

On the submission of the finding ten days will be allowed to the parties for objections under s. 567 of the Civil Procedure Code.

Issues remitted.

Before Mr. Justice Brodhurst and Mr. Justice Mahmood.

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KANHIA LAL AND ANOTHER (DEFENDANTS) *v.* MUHAMMAD HUSAIN KHAN (PLAINTIFF)*

Mortgage—Charge on immoveable property—Ambiguity.

A, to whom the Government had made a grant of certain villages, executed an instrument in favour of his brother charging the payment of an annual allowance to him and his heirs for ever on the "granted villages." The instrument did not name the villages which had been granted to *A*, but there was no doubt as to the particular villages which had been granted to him. *Held* that the fact that such instrument did not specify the villages which had been granted to *A* did not constitute such an ambiguity in such instrument as to render the charge created

* Second Appeal, No. 1504 of 1881, from a decree of Maulvi Muhammad Abdul Qayum Khan, Subordinate Judge of Bareilly, dated the 23rd June, 1881, reversing a decree of Maulvi Muhammad Aziz-ud-din, Munsif of Pilibhit, dated the 28th March, 1881.

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thereby invalid. *Deojit* v. *Pitambar* (1) distinguished: *Rae Manik Chund* v. *Beharee Lal* (2) followed.

THE facts of this case were as follows:—In the year 1860 the Government made a grant to two persons jointly, one of whom was called Abdul Rahman, of certain shares in six villages called Samaria Anup, Hasannagar, Karnapur, Partabpur, Khujauria, and Bhudari, and of two entire villages, called Guhna and Purasi, as a reward for services rendered in the Mutiny. The grantees divided the property, and Samaria Anup, Hasannagar, Guhna, Karnapur, and Partabpur fell to the share of Abdul Rahman. On the 12th November, 1862, Abdul Rahman executed an instrument in favour of his brother Ghulam Husain called an "*ikrar-nama*," or instrument of agreement, the material portion of which was as follows:—"As in lieu of loyal services rendered by me, the Government has kindly granted zamindari villages to me in perpetuity, therefore I have willingly and as a thanksgiving fixed an annual allowance of Rs. 100 in cash in perpetuity out of the profits of the said villages for my elder brother, Ghulam Husain, with his consent, and as his brotherly right.....After me my representatives and heirs, who may be in possession of this granted property, shall continue to pay to the said Ghulam Husain and his lawful descendants and heirs the amount above-mentioned." This instrument did not specify the villages which had been granted to the executant as a reward for his loyal services. The instrument was duly registered.

In June, 1881, Muhammad Husain Khan, one of the heirs to Ghulam Husain, brought the present suit to recover his share of the arrears of the allowance from the defendants personally, and by the sale of the villages Samaria Anup, Hasannagar, Karnapur, Partabpur, and Guhna, which had been granted to Abdul Rahman. He alleged that the allowance had been regularly paid to Ghulam Husain and his heirs while Abdul Rahman was alive, but that on the latter's death his heirs had ceased to pay it. He made defendants to the suit the heirs of Abdul Rahman and certain persons in possession under private transfers of different portions of the property on which he sought to enforce a charge for the payment of the allowance, and the purchasers of the share in the village of

(1) I. L. R., 1 All., 275. (2) N.-W. P. H. C. Rep., 1870, p. 263.

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Partabpur at a sale in execution of a decree against the heirs of Abdul Rahman. The defendants generally set up as a defence to the suit that the agreement of the 12th November, 1862, did not create a charge on the particular villages on which the plaintiff sought to enforce a charge. The Court of first instance allowed this defence, on the ground that the villages granted to Abdul Rahman were not specified in the agreement, and consequently no charge was created on them or any of them, and dismissed the suit. On appeal by the plaintiff the lower appellate Court held that the villages on which the plaintiff sought to enforce a charge, and which had been granted to Abdul Rahman, were charged with the payment of the allowance, and gave the plaintiff a decree.

The auction-purchasers of the share in Partabpur, defendants, appealed to the High Court, contending that the terms of the agreement were too indefinite to create a charge on that village.

Lala *Lalta Prasad*, for the appellants.

Munshi *Hanuman Prasad* and Mir *Zahur Husain*, for the respondent.

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

MAHMOOD, J.—The only question raised by the grounds of appeal in the case relates to the construction of the *ikrar-nama* of 12th November, 1862. It is contended on behalf of the appellants that the terms of that instrument are too uncertain to create a charge upon the immoveable property purchased by them. The terms of the deed so far as the question now before us is concerned are as follows:—"As in lieu of loyal services rendered by me, the Government has kindly granted zamindari villages to me in perpetuity, therefore I have willingly and as a thanksgiving fixed an annual allowance of Rs. 100 in cash in perpetuity out of the profits of the said villages for my elder brother Ghulam Husain Khan Sahib, with his consent and as his brotherly right..... After me my representatives and heirs who may be in possession of this granted property shall continue to pay to the said Ghulam Husain Khan and his lawful descendants and heirs the amount above-mentioned."

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The *ikrar-nama*, however, does not specify the names of the villages which had been granted to the executant by Government; and it is contended on behalf of the appellant that this circumstance alone introduces an element of uncertainty which renders the charge invalid. In support of this contention we are referred to a ruling of a Division Bench of this Court—*Deojit* v. *Pitambar* (1)—but in our opinion that case is clearly distinguishable from the present one. In that case the property was absolutely indefinite and the deed contained no specification of the property. In the present case the *ikrar-nama* describes the property to be the villages granted to the executant by Government in lieu of loyal services. It is not contended that there is any uncertainty in regard to the property actually granted by the Government, and indeed it is not disputed that the property purchased by the defendants-appellants forms part of the property which had been granted by the Government to the executant of the *ikrar-nama*. We are therefore of opinion that the present case is governed by the maxim *certum est quod certum reddi potest*, and that there is no such ambiguity in the *ikrar-nama* as renders the charge created by it invalid. Our view is supported by a ruling of this Court in the case of *Rae Manik Chund* v. *Beharee Lal* (2). The appeal is dismissed with costs.

Appeal dismissed.

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Before Mr. Justice Straight and Mr. Justice Tyrrell

SHEO RATAN AND OTHERS (PLAINTIFFS) *v.* LAPPU KUAR AND ANOTHER (DEFENDANTS)*

Review of judgment—Act X of 1877 (*Civil Procedure Code*), *ss.* 565, 623—*Reasons for applying for review—Error in fact or law—Second appeal—Applicability of s.* 565.

A Divisional Bench of the High Court, sitting as a Court of second appeal, being of opinion that the Court of first appeal had omitted to determine a certain issue of fact, determined such issue itself and decided the appeal in accordance with its determination of such issue. An application for review of judgment was made on two grounds, *viz.*, (i) that the Bench was wrong in thinking that such issue had not been determined by the Court of first appeal, and (ii) that the Bench, sitting as a Court of second appeal, was not empowered to determine an issue of

* Application for review of judgment, No. 40 of 1882.

(1) I. L. R., 1 All., 275. (2) N.-W. P. H. C. Rep., 1870, p. 263.