

APPELLATE CIVIL

1882
July 11.*Before Mr. Justice Brodhurst and Mr. Justice Mahmood.*

KARAN SINGH (PLAINTIFF) v. MOHAN LAL (DEFENDANT)*

Mortgage—Foreclosure—Demand for payment of mortgage-money—Regulation XVII of 1806, s. 8.

S. 8 of Regulation XVII of 1806 contemplates a previous demand of payment of the mortgage-money, and non-compliance therewith as a kind of cause of action for commencing foreclosure proceedings, and such demand must therefore necessarily be made before the mortgagee has the right of applying for foreclosure, and the omission to make such demand vitiates the foreclosure proceedings altogether. *Behari Lal v. Beni Lal* (1) followed.

THE appellant sued to have a notice of foreclosure issued under Regulation XVII of 1806 set aside, among other reasons, because it had been issued without any demand having been previously made on him for the mortgage-money as required by s. 8 of that Regulation. The principal question in the appeal was whether a notice of foreclosure issued under Regulation XVII of 1806 was invalid, where a demand for the mortgage-money had not been made previously to the issue of the notice.

Munshi *Hanuman Prasad* and *Munshi ...*, for the appellant.

Mr. *Conlan* and the *Junior Nath Banarji*), for the respondents.

The Court (BRODHURST, J. and ...)

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at *Dwarka*

The following

MAHMOOD, J.—The plaintiff in this case sued the defendants, *bai-i-bilwafa* mortgagees, for a declaration that the notice of foreclosure issued by them was irregular and ineffective, *first*, by reason of no previous demand having been made as required by s. 8, Regulation XVII of 1806, and *secondly*, by reason of the notice requiring payment of a far larger sum than was actually due.

The latter point has been found by both the lower Courts against the plaintiff, and we do not see any reason to interfere upon that point, which forms the subject of the second ground of

* Second Appeal, No. 1451 of 1881, from a decree of T. R. Redfern, Esq., Judge of Mainpuri, dated the 29th August, 1881, affirming a decree of Maulvi Nasir Ali Khau, Subordinate Judge of Mainpuri, dated the 24th June, 1881.

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appeal. But the question raised by the first ground of appeal deserves consideration. It is argued by the learned pleader for the appellant that under the provisions of s. 8, Regulation XVII of 1806, the *bai-i-bilwafa* mortgagee is absolutely bound to demand payment of the mortgage-money from the mortgagor, and the omission to make such a demand vitiates all foreclosure proceedings which the mortgagee may subsequently take. In support of this contention the learned pleader has referred us to p. 211, Macpherson on Mortgages, where the learned author states the law in the following terms:—"The first thing to be done by a mortgagee by conditional sale wishing to foreclose, that is to say, to have the sale to him declared absolute, is to demand payment of what is due on the mortgage from the borrower or his representative." The same view appears to have been taken by a Divisional Bench of this Court in *Behari Lal v. Beni Lal* (1), in which Straight, J. held that "the mere fact that the period limited by the bond had expired, without its being satisfied, did not absolve the mortgagee from the obligation of making a demand for its payment, and having failed to do so the foreclosure proceedings were ill founded and should be ineffective. They will therefore have to be recommenced *de novo*."

It is urged by the learned pleader for the respondent that this view of the law imposes unnecessary restrictions upon the mortgagee, that the nature of foreclosure has the same effect as a private demand would have had, and that foreclosure proceedings otherwise regular cannot be vitiated solely on account of no previous demand having been made.

We are of opinion that this contention is not sound. The construction which the learned pleader for the respondent desires us to place on s. 8, Regulation XVII of 1806, would render the use of the words "after demanding payment from the borrower or his representative" wholly superfluous in that section. We cannot adopt a construction which has the effect of rendering the express language of the statute nugatory and superfluous. It appears to us that the section contemplates a previous demand of payment, and the non-compliance therewith as a kind of cause of action for com-

(1) L. L. R., 3 All. 408.

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 Bradhurst and Mr. Justice Mahmood.

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

1882
July 19.

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 A'udul 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.