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grant a new trial. If it had granted a new trial, there can be no doubt that the hearing on the new trial would have been a hearing within Act XI. of 1865, section 22 ; and then the Judge might have asked our opinion on a point of law. If the hearing of a new trial would have been a hearing within the meaning of section 22 of the Act, the application for a new trial was a point in the proceedings previous to the hearing of the case. If we were to hold that an application for a new trial was not a point in the proceedings previous to a hearing, unless the application should result on a hearing, we should compel the Judge to grant a new trial, in order that upon the hearing under it he might ask the opinion of the Court on a point of law, which, if he could have asked it on the application for a new trial, might have saved the necessity of granting it.

It appears to me that that would be putting a very restricted meaning on the words of the Act and one which was never intended, if we were to hold that the Judge could not ask our opinion on a question of law upon an application for a new trial.

Before Mr. Justice Kemp and Mr. Justice Glover.

SAKRIMAN DICHUT AND OTHERS (DEFENDANTS) *v.* DHARAM NATH TEWARI AND OTHERS (PLAINTIFFS.)*

1869
May 26.

Deposit of Mortgage Debt— Conditional Sale—Reg. I. of 1798, s. 2—Regulation XVII. of 1806, s. 7.

Under section 7, Regulation XVII. of 1806, if a mortgagee has obtained possession at any time before a final foreclosure of the mortgage the mortgagor's payment or tender of the principal sum, due under the mortgage debt, saves his equity of redemption.

Held, that the section applies where the mortgagee has obtained a decree for possession and wasilat, whether he executes it or not.

THIS suit was brought in the Court of the Moonsiff of Chowki Sewan in the district of Sarun, to obtain possession as absolute owner of 5 annas and 4 pie, out of the entire 16 annas of Mauza Pertabpore in Pergunna Puchlukha, under a deed of absolute

* Special Appeal, No. 435 of 1869, from a decree of the Subordinate Judge of Sarun dated the 28th November 1868, affirming a decree of the Moonsiff of that district, dated the 27th February 1868.

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sale, dated 14th May 1858, and executed by Mussamut Kuthona Kunwar deceased; and further to obtain possession of one anna and nine pie of the above-named Mauza, under a deed of mortgage and conditional sale, dated 2nd February 1850, on the ground of having deposited in Court, as representing the mortgagor, on the 10th February 1863, under Regulation I, of 1798 section 2 (1), the amount of Rs. 1,600-10, being the principal sum due to the former mortgagees under that deed.

The principal issue was :—Whether the deposit which the plaintiff has made of a sum of Rs. 1,600-10, the principal

(1) *Regulation I. of* 1798, *sec.* 2 —"In all instances of the loan of money on bai-bill-waffa, or on the condition sale of landed property, as explained in the preamble to this Regulation, however denominated, the borrower, who may be desirous to redeem his land by the payment of the money lent upon it, with any interest due thereon, within the stipulated period, is at liberty, on or before the date stipulated, either to tender and pay to *the lender the amount due to him,* taking such precautions as he may think necessary to establish such tender and payment, if evaded or denied, or without any tender to the lender to deposit the amount due to him, on or before the stipulated date in the Dewanny Adawlut of the City or Zilla in which the land may be situated: and the Judge receiving the same, shall furnish the party with a written receipt for the amount, specifying on what date and for what purpose, such deposit may have been made. He shall also, at the same time, cause a written notice of such deposit to be delivered to the lender: and on the application of the latter and his surrender of the conditional bill of sale, or showing satisfactory cause why it cannot be surrendered, shall pay him the amount deposited, and take his acknowledgment to remain among the records of the Court. That there may be no doubt to what amount the deposit in question is to be made, it is required to be as follows; When the lender has not obtained possession of the land, the deposit is to be the principal sum lent with the stipulated interest thereon, but extending the legal rate of twelve per cent per annum; or if interest be payable, and no rate has been stipulated, with interest at the established rate of twelve per cent; but if the lender has held possession of *the land,* the principal sum borrowed only need be deposited, leaving the interest to be settled on an adjustment of the lender's receipts and disbursements during the period he has been in possession. In either case a deposit made as above required, shall be considered to preserve to the borrower his full right of redemption; and if the land be in the possession of the lender, shall entitle him to demand the immediate recovery thereof, subject to the adjustment of accounts specified in the following section. Provided, however, that if the borrower in any case shall deposit a less sum than above required, alleging that the sum so deposited is the total amount due to the lender for principal and interest after deducting the proceeds of the lands in his possession, or otherwise, such deposit shall be received, and notice given to the lender as above direced: and if the amount so deposited be admitted by the lender, or be establish ed, on investigation, to be the total amount due to him, the right of redemption shall be considered to have been fully preserved to the borrower, who will not, however in such cases, be entitled to to the recovery of his lands, until it be admitted or established that he has payed the full amount due from him."

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of the deed of conditional sale, is sufficient for the redemption of that mortgage, or whether it was necessary to deposit both the principal and interest of the mortgage debts, and in default of such deposit, the property transferred by the conditional sale has been absolutely vested in the mortgagees.

The facts of the case sufficiently appear in the judgment of the lower Appellate Court, which supported the decision of the Moonsiff, and was as follows :—"It appears, on a perusal of the bond, that the deed of conditional sale set up by the appellants (defendants), and dated the 2nd February 1850, conveyed possession of the property to the mortgagees ; that under the terms of that deed the mortgagees brought a suit and recovered a decree for possession on the 21st December of the same year ; but that, in execution of the decree, they did not succeed in obtaining possession, owing to the objection of the zuripeshgidars, Deo Dutt Misser and others ; and thereupon, each of the mortgagees instituted a separate suit against the zuripeshgidars for his own share in the property, and prayed for possession and mesne profits of the same, in redemption of the zuripeshgi mortgage ; and that they, accordingly, obtained, on the 14th July 1862, decrees for possession, together with mesne profits from the date of suit to that of delivery of seizure. These facts are borne out by the transcript decrees attached to the record. It is likewise clear from the admission of the conditional tenders that they are in possession of 14 bigas 10 cottas of land, out of the entire properties mortgaged. Thus, when the possession of the mortgagees over a portion of the mortgaged property, and the adjudgment to them of mesne profits of the residue of the same for the period of their ouster, are proved for the reasons detailed above, they have not the least right to receive interest upon the amouut of the mortgage debt, inasmuch as interest and mesne profits cannot be awarded for the same period. Hence the deposit of the principal of the mortgage debt by the plaintiff within the time allowed by the perwana, issued under Regulation XVII. of 1806, is sufficient to redeem the mortgage, and I do not, therefore, see the necessity of disturbing the decision of the Moonsiff."

The defendants then appealed to the High Court.

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Messrs. *R. T. Allan* and *C. Gregory*, and Baboo *Debendra Narayan Bose* for appellants.

Baboos *Mahes Chandra Chowdhry* and *Chandra Madhab Ghose* for respondents.

KEMP, J. (GLOVER, J., concurring).—The point for decision in this appeal is, whether the plaintiff, the mortgagor, by depositing the principal amount due, has saved his equity of redemption or not, it being admitted that the deposit was made within the year of grace. The question turns, upon section 7, Regulation XVII. of 1806 (1). It is clear, that under that section if the mortgagee has obtained possession at any time before a final foreclosure of the mortgage, the mortgagor's payment or established tender of the principal is sufficient. Now it is clear, that the mortgagees, the special appellants, obtained a decree for possession and wasilat, and that they

(1) *Regulation XVII. of* 1806, *sec.* 7 — "In addition to the provisions made in the Provinces of Bengal, Behar, Orissa, and Benares, by Regulation I. of 1798, and in the Ceded and Conquered Provinces by Regulation XXXIV. of 1803, for the redemption of mortgages and conditional sales of land under deeds of bai-bill-waffa, kut-kabala on any similar designation, it is hereby provided, that when the mortgagee, may have obtained possession of the land, on execution of the mortgage deed, or at any time before a final foreclosure of the mortgage, the payment or established tender of the sum lent under any such deed of mortgage and conditional sale, or of the balance due, if any part of the principal amount shall have been discharged, or when the mortgagee may not have been put in possession of the mortgaged property, the payment or established tender of the principal sum lent, with any interest due thereupon, shall entitle the mortgagor and owner of such property, or his legal representative, to the redemption of his property, before the mortgage is finally foreclosed, in the manner provided for by the following section that is to say, at any time within one year (Bengal, Fusli and Willaiti, according to the era current where the mortgage may take place), from and after the application of the mortgagee to th Zilla or City Court of Dewanny Adawlut, for foreclosing the mortgage and rendering the sale conclusive, in conformity with section 8 of this Regulation. Provided that such payment or tender be clearly proved to have been made to the lender and mortgagee, or his legal representative; or that the amount due be deposited, within the time above specified, in the Dewanny Adawlut of the Zilla or City in which the mortgaged property may be situated, as allowed for the security of the borrower and mortgagor, in such cases, by section 2, Regulation I. of 1798, and section 12, Regulation XXXIV., 1803, the whole of the provisions contained in which sections, as applied therein to the stipulated period of redemption, are declared to be equally applicable to the extended period of one year, granted for an equitable right of redemption by this Regulation."

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did give a receipt admitting possession; but it is said that they really never got possession, and that they were opposed by certain Zuripeshgidars. Be this as it may, it is clear that it was their own fault if they did not execute their decree for possession and wasilat. It is also admitted, and found by both the lower Courts, that the special appellants are in possession of, at all events fourteen bigas, if not of the whole land, from 1862, and we do not find any ground of special appeal distinctly questioning this finding of fact. We are therefore of opinion that the lower Courts have come to a right decision, and that the plaintiffs have not forfeited their equity of redemption. Whether anything is due by them to the mortgagees is another matter which can be decided between them when the mortgagees bring them to account.

The special appeal is therefore dimissed with costs.

Before Mr. Justic Loch and Mr Justice Milter.

1869
May 11.

TARINI CHARAN CHOWDHRY (DEFENDANT) *v.* SARODA SUNDARI DASI, MOTHER AND GUARDIAN OF SITAL CHANDRA DHAR, MINOR (PLAINTIFF.)

AND

ANAND CHANDRA CHOWDHRY AND ANOTHER (DEFENDANTS) *v.* SARODA SUNDARI DASI, MOTHER AND GUARDIAN OF SITAL CHANDRA DHAR, MINOR (PLAINTIFF.)*

Hindu Law—Adoption—Accruing of Cause of Action—Unborn Son—Cross-Examination of Witness called by the Court—Onus Probandi.

A Hindu died leaving a son (who afterwards died a minor and unmarried) a widow and three daughters. On the death of the minor, the widow succeeded to the property, and under a will of her late husband adopted in 1851 a son of her husband's brother. The widow died in 1866. One of the daughters as guardian of her infant son born in 1853 brought a suit to set aside the will and with it the adoption, and for recovery of possession of the property left by her minor brother; the defence set up was that the will was genuine, that the planitiff should have sued within 12 years from the adoption, and that she had in 1851 admitted the adoption in having accepted a darpatni from the guardian of the adopted son.

* Reglar Appeals, Nos, 187 and 188 of 1868, from the decrees of the Subordinate Judge of Jessore, dated the 6th July 1868.