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dismiss the appeal and I uphold the decision of the Moonsiff as construed by me."

It would be better that he should alter the Moonsiff's decree according to what he says is the proper construction of it, so as to make the right declared more defined and precise, but the parties may make an application to him to amend his decree and to word it so that it may be in accordance with what he holds to be the proper construction of the lower Court's decree. It is not a matter for which a special appeal was necessary, and therefore this appeal must be dismissed with costs.

Before Mr. Justice Loch and Justice Sir C. P. Hobhouse, Bart.

1870
May 18.

LALIT PANDAY (DEFENDANT *v.* SRIDHAR DEO NARAYAN SING (PLAINTIFF).*

Hindu Law—Part of Money borrowed paid in relief of Legal Necessity—Mortgage Deed.

The daughter of a Hindu, while in possession of the paternal estate, borrowed a large sum of money under a mortgage of a portion of the estate. Part only of the money borrowed was devoted by her to the relief of legal necessity. After her death, the next heir sued the mortgagee to recover the property mortgaged, and to set aside the mortgage deed. The Courts below gave a decree for possession to the plaintiff, upon re-payment of the amount actually spent in the relief of legal necessity. Such decree upheld on appeal.

THE plaintiff, Baboo Sridhar Deo Narayan Sing, sued to recover possession of a 4-anna share of the property in dispute, by setting aside a deed of *zur-i-peshgi* executed, while in possession of the paternal estate, by Mussamat Sheoraj Koer, the daughter of Tulsi Narayan, deceased, in favor of the defendant, dated 19th August 1863, for the sum of rupees 9,500. Mussamat Sheoraj Koer died in 1865. The plaintiff claimed as legal heir of Tulsi Narayan. The main point in the case was whether or not the mortgage deed could be held valid when the money borrowed by Mussamat Sheoraj Koer, a Hindu widow, the mortgagor, had been applied, in part only, to the discharge of such legal necessities as would justify the alienation.

* Special Appeal, No. 2738 of 1869, from a decree of the Subordinate Judge of Sarun, dated the 31st July 1869, affirming a decree of the Moonsiff of that district, dated the 29th December 1868.

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On the facts, the Court of first instance held that it was clear that, out of the sum of rupees 9,500 borrowed by Sheoraj Koer, rupees 6,921 and 5 annas was applied to the relief of legal necessity; that "the plaintiff and the property "in dispute must be liable for" the last-mentioned sum, "and "not for the remaining rupees 2,578-11, which was borrowed "and appropriated by Sheoraj Koer during her life-time." He ordered "that the suit be decreed to the effect that "the disputed deed of *zûr-i-peshgi*, dated 19th August 1863, "executed by Sheoraj Koer, be confirmed in respect of rupees "6,921-5, and cancelled in respect of the sum of rupees 2,578-11. "The plaintiff can, if he be so advised, take possession of the "property in dispute on paying rupees 6,921-5; that until the "above sum is paid, the answering defendant will continue "in possession of the property in dispute under the said deed "of *zur-i-peshgi*; that one-fourth of the costs incurred by the "plaintiff will be borne by the answering defendant, and three-"fourths of the costs incurred by the defendant will be borne "by plaintiff."

The defendant appealed to the Subordinate Judge, who "saw "no reason whatever to interfere" with the above decision.

The defendant then appealed specially to the High Court on the grounds, *inter alia*, that it being evident that the major portion of the money was borrowed under legal necessity, the *zur-i-peshgi* deed must be upheld in its entirety; that the defendant who had advanced the money *bonâ fide*, after making all proper enquiries as to the existence of legal necessity, could not be prejudiced by this claim of the reversioner.

Munshi *Mahomed Yusaff*, for appellant, cited the cases of *Hanooman Persaud Panday* v. *Mussamut Babooee Munraj Koonwaree* (1) and *Rajaram Tewari* v. *Lachman Prasad* (2).

Baboo *Tarack Nath Dutt* for respondent.

The judgment of the Court was delivered by

LOCH, J., (who after briefly stating the facts continued) :— The first ground taken in special appeal related to the parties

(1) 6 Moore's I. A., 399. (2) 4 B. L. R., A. C., 118

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being legal heirs of the deceased, Tulsi Narayan. As, however, this point was not urged in the lower Appellate Court, and is a question of fact, we cannot allow it to be urged now. Secondly, that as the Courts have found that there was a legal necessity, the deed should have been held good in its entirety; and, thirdly, that the mortgagee having enquired and used due precaution to ascertain the existence of the necessity, he cannot be prejudiced by the manner in which the money was spent.

The pleader for the special appellant has endeavored to show us that, whether the transaction be one simply creating a lien, or whether it be one absolutely transferring the proprietary right to another, the law in either case is the same. We think, however, that there is a great difference between the two cases. The decisions quoted to us by the pleader for the appellant all relate to cases of sale, and are, therefore, not applicable to the case before us. Where it is found necessary to create a mortgage, it is clearly the duty of the party borrowing the money, if that party has but limited interest, to borrow only to the extent of that necessity. He has no right to create a lien upon the property larger than that which is needful to remove the pressing necessity: and the lender, when making enquires, is bound, it appears to me, to ascertain what is the extent of that necessity before making the loan. It would be no good answer if a lender were to say "it was proved to me that there was a necessity for rupees 500, and therefore I have lent rupees 2,000." The lender can only be protected if he has ascertained the extent of the necessity and lends money up to that extent only (1).

With regard to the third objection taken, no doubt that was the point which should have been enquired into. But the special appellant did not put it in issue, and it appears to me that it is now too late to raise this objection, and ask us to send the case back for a re-trial on this point.

We think, therefore, that the special appeal should be dismissed with costs.

(1) On this point see *Rajaram Tewari* 118. Particularly the remarks of PEA- v. *Lachman Prasad*, 4 B. L. R., A. C., COCK, C. J., pp 125 *et seqq.*

[IN THE INSOLVENT COURT.]

Before Mr. Justice Norman.

IN THE MATTER OF RAMSEBAK MISSER.

1870
May. 26.

11 & 12 *Vict., c.* 21, *s.* 73—*Act VIII of* 1859, *s.* 342—*Appeal from Commissioner of Insolvent Court.*

Section 342 of Act VIII of 1859 does not apply to appeals from the orders of a Judge sitting as a Commissioner of the Insolvent Court. The right of appeal is given by section 73 of the Indian Insolvent Act, and the Court cannot impose on the appellant a condition that he shall give security for the costs of such an appeal.

See also 15 B. L. R. App. 11.

THIS was an application that security might be given for the costs of an appeal which had been preferred by certain persons from an order of Mr. Justice Phear sitting as Commissioner of the Insolvent Court. The application was supported by the affidavit of A. B. Miller, Official Assignee, and was made on his behalf.

Mr. *Ingram*, for the Official Assignee, contended that the apppeal was to be governed by section 342 of Act VIII of 1859. He referred to the cases of *Monohur Doss* v. *Khodrum Begum* (1), *Cazee Muzhur Hossain* v. *Denobundo Sen* (2).

Mr. *Woodroffe contra.*—Section 342 does not apply to appeals from orders of a Commissioner of the Insolvent Court. Such appeals are governed by section 73 of the Indian Insolvent Act—*In re Gholam Rasul Khan* (3). The Insolvent Court has a totally distinct jurisdiction. It is not mentioned in the Charter which gives jurisdiction in other respects; and section 18 of the Letters Patent, 1865, the only provision with respect to Commissioners in insolvency, provides that they shall exercise their powers under the law for insolvent debtors, which is the Indian Insolvent Act, 11 & 12 Vict., c. 21. The appeal lies to the High Court as a Court administering the Insolvent Act. An analogous case is that of appeals under section 15 of

(1) Bourke's Rep., 110.
(2) *Id.*, 119; S. C., on appeal, *Id.*, A. O. C., 40.
(3) 1 B. L. R., O. C., 130.

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the Charter, of which it has been held, in the case of *Roy Nandipat Mahata* v. *Alexander Shaw Urquhart* (1), that the ordinary rules of appeals do not apply to them, but they are confined to the point on which the Judges differ.

Mr. *Ingram* in reply.—Section 73 gives an appeal to the Supreme Court, now the High Court; but on appeal the cases are to be governed by the procedure under Act VIII of 1859. [NORMAN, J., referred to the wording of Rule 2, on page 92 of the Apendix to Broughton's Act VIII of 1859, in which the Insolvent jurisdiction is not mentioned (2).] That shows that the Insolvent jurisdiction was the same as that under Act VIII, and that the others mentioned there were different.

NORMAN, J.—It appears to me that Mr. Woodroffe's argument is unanswered. The appeal from an order of a Commissioner is given by section 73 of the Insolvent Act, and no law or practice of the Court has been shown which qualifies that right, or which brings such an appeal under section 342 of Act VIII of 1859. It appears to me that that section does not apply to appeals from a Commissioner of the Insolvent Court. The costs of this application to be those of the appellants if they succeed in the appeal.

(1) 4 B. L. R., A. C., 181.

(2) "The procedure in civil cases, which shall be brought before the Court in the exercise of its admiralty, Vice-Admiralty or Martrimonial Jurisdiction, shall be regulated so far as the circumstances of the case will admit by Act VIII of 1859 and Act XXIII of 1861."