PRIVY COUNCIL.

P. C.*
1872
January 22.

RADHABENODE MISSER (PLAINTIFF) *v.* KRIPAMOYEE DABEE (DEFENDANT)

[On appeal from the High Court of Judicature at Fort William in Bengal.]

Mortgagee in Possession—Account—Regulation XV of 1793.

In taking the accounts as between a mortgagor and a mortgagee in possession, the interest may be set-off from time to time against the rents and profits, the mortgagee only accounting to the mortgagor for any rents, profits, and interest on the same which he may have received over and above the interest due to him upon the debt.

THIS was an appeal from a decree of the High Court of the 6th October 1863, reversing a decision of the Principal Sudder Ameen of Dinagepore of the 4th July 1861.

Nundololl Surma Roy borrowed Rs. 11,000, with interest at 12 per cent. on the 22nd March 1830, from Kalee Persaud Shome Roy, and as security he executed a *kobalah* of his zemindaree purporting to sell it absolutely. At the same time the parties executed *ikrarnamahs* to each other, of which the following was executed by Nundololl :—

I having sold half of the aforesaid *turruffs* in my own zemindaree on the 10th Chyte 1236 (22nd March 1830) into the hands of Kalee Persaud Shome Roy, zemindar of the *kismuts* of the aforesaid pergunnah, executed an absolute deed of sale, and having at once received the value mentioned in the said deed of sale, in cash, granted a receipt for the same : and, that I have had an *ikrarnamah*, with similar conditions as those contained in the present *ikrarnamah*, executed by Kallee Persaud Shome Roy, the said purchaser, for a term of ten years, from 10th Chyte 1236 (22nd March 1830) to 30th Chyte 1246 (11th April 1840) under the following paragraphs, with a view that, if at any time I recant from any of the stipulations in the following paragraphs, then that limited *ikrarnamah* executed by the purchaser, which is in my hands, will become futile and unfit for hearing :—

* *Present* :—THE RIGHT HON'BLE SIR JAMES COLVILE, SIR M. SMITH, SIR Q. COLLIER, and SIR LAWRENCE PEEL.

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1*st Para.*—More or less the *dhakhil-kharij* and registry expenses are at my (the vendor's) risk, the purchaser has no concern with it,

2*nd Para.*—If, after the expiry of the term set forth in the other *ikranamah*, I, the vendor, on paying up the entire value mentioned in the *bynamah* (deed of sale) with interest, take back the *kobalah* (deed of sale) and receipt during that time, the *dakhil-kharij* expenses and the value of papers, &c., will all be in my (the vendor's) hands. The purchaser shall have no connection with it.

3*rd Para.*—Regarding the arrangement of the mehals mentioned in the said *bynamah*, the purchaser can dismiss or entertain amlâhs on my (the vendor's) approval.

4*th Para.*—The rent of the mehals mentioned in the said *bynamah* will remain in the trust of the purchaser, and the Government revenue will be sent to the Collectorate by the purchaser. I (the vendor) shall have no connection with it.

5*th Para.*—The mohurir, peon, and others that will be employed for realizing the collections, &c., will get their stated salary. &c., according to the separate list with my (the vendor's) consent, from the purchaser, from the collections of the mehals inserted in the said *bynamah*.

6*th Para.*—After sending the rents of the mehals inserted in the said *bynamah* into the Collectorate, and after the deduction of salary, expenses, consummation, &c., of the entire year, whatever profits will be left, when I (the vendor) will liquidate the principal and interest, then I (the vendor) will receive the said money which is deposited, with interest at 12 annas per cent.

7*th Para.*—I have sold the mehals for Rs. 12,000 into the hands of the purchaser for a term of ten years; after the expiry of the term, when I (the vendor) will pay up in one lump sum the principal, with interest at 1 per cent., then I will take back the mehals inserted in the said *bynamah*.

8*th Para*—The profits and losses of the mehals inserted in the said *bynamah* are in my (the vendor's) trust; the purchaser shall have no concern with it.

9*th Para.*—Before the expiry of the term mentioned in the attested *ikrarnamah* of the purchaser, when I, the vendor, in one lump sum, pay the real value inserted in the *kobalah*, with interest, then I will take back those mehals.

10*th Para.*—For the purpose of realizing the rents of the mehals inserted in the *bynamah*, a mohurir will be employed, and the said mohurir shall yearly adjust the *jumma-kurch* accounts to me (the

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vendor); and (the vendor) shall write my acknowledgment on the aforesaid *jumma-kurch*, the purchaser shall have nothing to do with the balance of rents, it will be in my hands.

11*th Para.*—From the whole of the mehals inserted in the said *bynamah*, if any civil or criminal suit or boundary dispute should arise, the expenses of the losses incurred thereby will be in my (the vendor's) responsibility, the purchaser shall have no connection with it.

12*th Para.*—Whatever paper out of the description and *jumma* papers of the mehals inserted in the said *bynamah*, I will make over to the purchaser in that paper; If I conceal under any excuse, any mouzah, or lands, or trees, fruitful or unfruitful, when it is known and found out of the said mouzah or lands, &c, I (vendor) will, without any excuse whatever, give into the hands of the purchaser the produce, with interest, expended from that time.

Dated the 10th Chyte 1236 (22nd March 1830).

Both deeds were registered, and Kalee Persaud was put in possession of the estates, and remained in possession till his death. and he was succeeded in such possession by his heiress the respondent.

No accounts ever were settled or made out.

On the 29th June 1852, the appellant, as the heir of Nundololl (he was in fact only the heir in reversion, but the tenant for life assigned her rights in his favor), sued to recover the property on the ground that the debt and interest had been paid off out of the rents; he admitted that he had not depositad the mortgage-money, being unable to do so, and the debt being in fact wiped off. He assumed that no more could be recovered by the mortgagee as interest, than the amount of the principal.

The Principal Sudder Ameen, after going into accounts to show that the net yearly profit received by the mortgagee was Rs. 924-6-4, and that a deduction had to be made in respect of one mouzah which for a time had been in the possession of the mortgagor's heiress, proceeded thus :—

"We have only to determine now how the interest shall be calculated. Plaintiff asks for a sum equal to the principal that may have accumulated. Defendant contends that the collection was not enough to pay the interest of the loan, and that he is entitled to interest on the loan for the entire period of twenty-nine years.

Mr. Macpherson, basing his opinion on the precedents of the Sudder

Court, states that, 'in taking the accounts, interest is, as a general rule, allowed on the payments of both parties. There are two modes in either of which the accounts may be made up. They may be permitted to run on from the date of the loan to the date of the settlement, interest being allowed to the one party on the whole sum lent, and to the other on the sums realized over and above the interest to which the mortgagee is entitled, from the date of realization :—or the amount collected by the mortgagee in possession may be carried first to interest, and after paying that, to the liquidation of the principal, the account being closed at the end of each year, and there being allowed from year to year only reduced interest on the reduced principal' (1). Mr. Macpherson adds that 'any agreement made by the parties as to the manner of accounting will be enforced, if not in itself illegal' (2).

Referring to the contract between the parties, we find it stipulated that, 'after paying the Government revenue and deducting the expenses, the seller shall return the purchase-money with interest, then the seller shall receive whatever may have gathered or accumulated of the profits, with interest at the rate of 12 annas per cent.'

The account, therefore, should be drawn up in accordance with the conditions adopted by the parties—that is, to give plaintiff interest on his profits for the entire period, and to give defendants interest for the entire period; but the Court is precluded by law—s. 6, Regulation XV of 1793—from awarding in any case whatever a greater sum for interest than the amount of the principal. Holding therefore, to the original stipulation made between the parties, except in so far as it may contravene the law, the amounts will be as follows :—

Due to plaintiff, calculating the profits at Rs. 924-6-4-3 from 1237 (1830) to 15th Assar 1266 (28th June 1859)	Rs,	26	999	14 3 2
Interest on the profits from 1237 (1833) to 1254 (1847), being equal to the principal Rs. 16,639, 0 5				
Interst on the profits from 1255 (1848) to 1266 (1859) ... ... "		4,575	6	10
	Rs.	21,214	6	15 0
Carried over ...	Rs.	48,214	4	19

(1) Macpherson on Mortgages, 204, 5th Ed.

(2) Macpherson on Mortgages, 205, 5th Ed.

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Brought over ...			Rs. 48,214	4 19
Deduct for Mohenderpore from 1246 (1839), the date on which the estate came into Pran Money's possession—				
Principal	Rs. 1,388	7 10		
Interest	„ 1,212	5 5		
			Rs. 2,600	12 15
			Rs. 45,613	8 4
Due to defendants—				
Principal	Rs. 11,000	0 0		
Interest	11,000	0 0		
			Rs. 22,000	0 0
Due to plaintiff			Rs. 23,613	8 4

If defendant suffers in consequence, it is her own fault, as she might in 1247 (1840), as soon as the term of the contract expired, have applied for the foreclosure of the mortgage, instead of suffering it to go on for twenty years longer, heedless of the law which barred her against claiming interest after the interest had equalled the principal.

I therefore decree that plaintiff receive possession of the estate claimed; that Kalee Persaud's heirs, the defendants, pay to plaintiff Rs. 23,613-8-4; that he also receive wasilat from date of suit to date of possession, and interest from each ensuing year, with interest on the total sum decreed at 1 per cent. per mensem."

The case having come on appeal to the High Court, a Division Bench (Bayley and Roberts, JJ.), after disposing of a technical objection, proceeded thus :—

"The next question to decide is whether the transaction was a mortgage to which the law and rulings of this Court, as to accounting in cases of mortgage, can apply? If this be a mortgage, then the argument of defendant, appellant, arising from the contention that it is a loan and deposit only, and that repayment by deposit in money is a condition precedent to any right accruing to plaintiff, must fall, and further the calculation of interest due, and payment made, must be in the manner laid down by this Court for cases of mortgage.

We think the following passage from Macpherson on mortgage, 3rd edition, indicates a fair test and guide to the answering the question whether the transaction was a mortgage or not:—"So long as the nature of a transaction is naturally such as to stamp it as belonging to a particular class of mortgage, the mere calling it by a different name, will not transfer it to another class. In one case, where there

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was an absolute sale, but the purchaser gave an *ikrarnamah* with a condition that, if the vendor repaid the purchase-money and interest by a fixed day, the purchaser would re-convey the estate to him, it was contended that this was a redeemable sale only, and not a mortgage by conditional sale, nor governed by the rules applicable to such mortgages. But the Court held 'redeemable sales' and 'mortgages by conditional sales' were in their nature identical, and merely different modes of expressing the same thing, and that therefore a redeemable sale could be foreclosed only in the same manner as a mortgage by conditional sale" (1).

Applying this rule to the facts of this case, we have here the plaintiff borrowing from defendants Rs. 11,000, and making an absolute deed of sale, varied by another *ikrar* (which is the most common practice in this country for providing an equity of redemption), and making the transaction unmistakeably nothing but a redeemable sale, identical with a mortgage. Although there is the expression that the Rs. 11,000 be repaid by a deposit of the amount with interest, and the profits are to accumulate at interest, until the loan be repaid, and then refunded to the borrowers, we look upon this as nothing that can alter the essential and substantial character of the transaction—that of a redeemable sale.

Thus, under the facts of this case, and the rule above cited, which in our view is applicable to these facts, this transaction is of the character of a mortgage, and not, as urged by defendant, in his appeal, a loan to be repaid by a deposit of cash, and in no way of the character of a mortgage. The case must therefore be governed on this point, as also in regard to the principle of accounting and crediting payments first to interest, by the law and rulings of this Court on these points. That law and those rulings are so clearly laid down in the 3rd edition of Macpherson on Mortgage, pp. 248 to 254, and in respect to the calculation of interest in pages 243 and 244, that we need only refer the Principal Sudder Ameen to those passages, and desire him to re-adjust the account according to those rules. The realization should be first credited to interest, and then the account made up as laid down in the above-cited rules. In this account, the defendant to get credit by deductions, on account of Mohenderpore, as found to be set apart for the maintenance of both widows."

They then remanded the case with power to make a local enquiry as to the value.

(1) Macpherson on Mortgage, 40, 5th Ed.

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An application for review having been unsuccessful, the heir of the mortgagor now appealed to her Majesty in Council.

Sir *R. Palmer*, Q. C., and Mr. *Leith* for the appellant.—The rules laid down in the passages referred to in Macpherson on Mortgages are variable according to the terms of the contract. The express terms of this agreement made it optional with the mortgagor after the expiration of ten years to redeem on paying principal and interest; and if he claimed his right the mortgagee was answerable for profits and interest; and as the mortgagor showed that he received more than enough to pay the debt, no tender was necessary. The express terms of the agreement point out how the account is to be taken, *viz.*, on one hand, the mortgage-debt with interest, which however cannot, according to Regulation XV of 1793, exceed the principal, on the other hand, the accumulated profits out of the rents with interest thereon. The express terms exclude the intention of taking the account in the usual way.

Mr. *Doyne* for the respondent.—The net profits were not equal to the annual interest, and the method proposed would be most inequitable. [Their Lordships, after hearing Mr. Doyne for a short time, said they were in favor of the respondents contention.]

Sir *R. Palmer* in reply.

Their LORDSHIPS delivered the following judgment:—

In this case the question admits of being very shortly stated. It was this, whether the ordinary rules applicable to mortgages expressed in the passage in Mr. Macpherson's book on Mortgages, referred to by the High Court, do or do not apply to the present case? It was contended that they did not apply to the present case, because their application is expressly excluded by an agreement between the parties; and if their Lordships had come to this conclusion, they would undoubtedly have given effect to that agreement.

The construction of the agreement which is contended for on the part of the appellant is this, that the mortgagee on his

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part is entitled to the payment of the principal and of the interst on the debt, but that the payments of interest which properly would accrue, at all events annually, carry no interest themselves, which no doubt is the ordinary rule. On the other hand it is said that the mortgagor is entitled to call the mortgagee to account for the whole of the annual proceeds of the property less a few expenses of collection, and that each of the annual payments of the proceeds of the property is chargeable with interest; so that, while on the one hand, the mortgagor can charge the mortgagee with all the annual proceeds of the estate, those annual proceeds carrying interest, the mortgagee on the other hand can only charge the mortgagor with the debt and the interest, the latter not carrying interest, the result of which is certainly somewhat extraordinary—that, whereas in this case it appears very clear that the mortgaged property was an insufficient security, and that the proceeds of it fall short by some Rs. 400 a year of the interest, nevertheless, after a long period of time, the mortgagor, not having paid a farthing of the principal or interest, is entitled to a large balance on the part of the mortgagee. Of course, the parties might have so agreed if they pleased, but their Lordships would be loth to put such a construction upon the agreement, unless they were compelled to do so by very plain words.

On looking at this agreement, more especially at the 6th and 10th paragraphs, which have been often referred to, and to the precise terms of which it is not necessary to refer again, their Lordships on the whole think that these paragraphs and the agreement generally, which is drawn by no means clearly, are not inconsistent with the supposition that the parties intended that the interest might be set off from time to time against the rents and profits, and that the mortgagee was only to account to the mortgagor for any rents and profits and interest on the same which he may have received over and above the interest due to him upon the debt. Their Lordships being of opinion that that interpretation is not inconsistent with the contract according to the best construction they can give to it, it follows that the rule stated by Macpherson in general terms is not excluded by the terms of this contract.

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Their Lordships think it right also to say that, even assuming the construction which has been contentended for on the part of the appellant, certainly an unusual one in documents of this kind, their Lordships are not prepared to say that the High Court was wrong in determining that such a construction was applicable only to the first ten years; and that if the mortgagor chose at the expiration of that period to avail himself of the Regulations which permit the redemption of mortgages after the expiration of the term stipulated for, he must come in under the general terms of those Regulations which prescribe the equitable conditions required to be satisfied. Their Lordships are also of opinion that Regulation XV of 1793, s, 7, does not apply to transactions of this kind.

Under these circumstances their Lordships will humbly advise Her Majesty that the decision of the Court below ought to be affirmed, and this appeal dismissed with costs.

Appeal dismissed.

Agent for appellant : Mr. *Barrow.*

Agent for respondent : Mr. *Mortimer.*

APPELLATE CIVIL.

1873
April 2.

Before Mr. Justice Phear and Mr. Justice Ainslie.

IN THE MATT OF THE PETITION OF HADJEE ABDOOLLA AND ANOTHER.*

Indian Registration Act (VIII of 1871,) s. 76.—*Review—Act* XXIII *of* 1861, *s.* 38.

A District Judge has no power to review an order passed under s. 73, Act VIII of 1871.

ONE Mussamut Noorun died on the 18th December 1871. After her death, her son-in-law, Reassut Hossein applied to the Sub-Registrar of Gya for registration of a deed of gift, dated

* Rule *Nisi*, No. 46 of 1873, against an order of the Judge of Gya, dated the 4th January 1873.

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19th November 1871, from the deceased in favor of her grandchildren. Hajee Abdoolla and Burratee, the heirs according to Mahomedan law of Mussamut Noorun, objected to the registration of the deed on the ground that it had not been executed by Mussamut Noorun. The sub-registrar refused to register the deed. Reassut Hossein applied to the Judge under s. 73, Act VIII of 1871, to establish his right to have the deed registered. The Judge, Mr. Taylor, rejected the application on the ground that the execution of the deed was not satisfactorily proved. Reassut Hossein applied for a review of this judgment, and the then Judge of Gya (Mr. Craster) passed the following order :—

"I think the case may be admitted to argument. As a general rule every Court has power to review its own order, and as, at present advised, I see no reason for believing that this Court has not power to review its order in the present case, although no special provision for such procedure appears to have been made in the Act under which the order was passed. I direct that the case be placed upon the review file and be argued."

Mr. *Twidale*, for Hadjee Abdoola and Burratee, moved the High Court (Phear and Ainslie, JJ.) for, and obtained, a rule calling upon Reassut Hossein "to show cause why the order of the Judge admitting the review should not be set aside on the ground that it was made without jurisdiction."

The rule now came on for hearing.

Mr. *Twidale* and Baboo *Romesh Chunder Mitter* in support of the rule.

Mr. *C. Gregory* and Moonshee *Mahomed Yusoof* for Reassut Hossein.

Moonshee *Mahomed Yusoof*, in showing cause, contended that the Judge had jurisdiction to review the order passed by him. Under s. 38, Act XXIII of 1861, the procedure, as prescribed in Act VIII of 1859, is to be followed in all miscellaneous cases. S. 376, Act VIII of 1859, applies not only to decrees, but to orders also. S. 76, Act VIII of 1871, lays down that no appeal shall lie from an order passed under that section. But there are

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no express words in the Act taking away from the Court the power to review its own judgment. S. 26, Act XXIII of 1861, expressly takes away the power of review in certain cases. The power to review its own judgment is inherent in every Court.

Mr. *Twidale*, in support of the rule, contended that there was no section in Act VIII of 1871 which authorized a Court to review its judgment. S. 76 of the Act renders the order final. The whole of the procedure of Act VIII of 1869 has not been imported.

The judgment of the Court was delivered by

PHEAR, J.—We think that in this case the rule must be made absolute. The judgment of Mr. Craster in admitting the review is very short. He says (*reads*).

It appears to me that the Judge has taken an erroneous view of the extent of his jurisdiction in this matter. If he were right, the consequence would be that, whereas in regular civil suits, in suits before the Collector's Court under Act X of 1859, and in suits which are dependent upon the provisions of Bengal Act VIII of 1869, the procedure for review is strictly laid down and limited in respect to the time and the cause, yet in a summary case like the present, the Court would be unrestricted in every way. It would not be obliged to confine its review to matter which was new since the former hearing, or to any of those points which are prescribed in the general Civil Procedure Code. The Judge might in fact on review hear an appeal from the decision of his predecessor upon precisely the same materials as those upon which his predecessor formed his judgment, and he might do this without any limit, as far as I see, with regard to time; and again his own decision upon review might be reviewed thereafter equally without limits as to time. The consequence would be that we should have here a perfectly unrestrained system of appeal upon appeal without any sort of limitation. And, indeed, as far as I understand the present case the review which has been admitted is of the nature of an appeal from the judgment of Mr. Taylor. No doubt, every Court has so far the power to review its own decision as may be necessory

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for the purpose of making that decision in terms accord with the intention of the Court entertained at the time of passing it: for instance, to correct verbal errors, or otherwise to make the formal decree an accurate expression of the judgment which the Court intended to pass. But I am of opinion that an inferior Court of limited jurisdiction does not possess the general power of reviewing its own decision which the Judge appears to think that every Court necessarily does possess. I may say that even the Court of Chancery in England, whose powers are as general as the powers of a Civil Court well can be, does not exercise the power of reviewing its own judgment except when error of law is apparent on the face of the judgment, or when new matter is brought to its notice which could not have been adduced before it at the time when the decree was made (1).

On the whole then it seems to me as I have already said that the Zilliah Courts have not got the general power of reviewing their own judgments which would be necessary in order to support the exercise of jurisdiction which the Judge here has affected to make. It follows therefore that the admitting of the review was in this respect *ultra vires*, and the rule setting aside the order will be made absolute with costs.

Rule absolute.

Before Mr. Justice Mitter and Mr. Justice Birch.

SANTIRAM PANJA AND OTHERS (PLAINTIFFS) *v.* BYCUNT PANJA AND OTHERS (DEFENDANTS).*

1875 *March* 7 & 15.

Right of a Shareholder in Land to Measurement—Beng. Act VIII of 1869, *ss.* 25, 37, *and* 38.

A shareholder in a joint undivided estate cannot bring a suit under s. 37 of Beng. Act VIII of 1869 for the measurement of his share.

THIS was a suit for measurement of certain lands under s. 37 of Beng. Act VIII of 1869. The plaintiffs held their share

(1) See *Perry* v. *Phelips*, 17 Ves., 178 ; Mitford on Pleading, 90 ; and Smith's Chancery Practice, 712 and 811.

* Special Appeal, No. 866 of 1872, from the decree of the Judge of Midnapore, dated the 14th March 1872, reversing a decree of the Additional Sudder Munsif of that district, dated the 22nd September 1871.