

The 4th September 1865.

Present :

The Hon'ble Shumbhooonath Pundit and J. B. Phear, *Puisne Judges.*

Mortgage—Priority.

Cases Nos. 1254 and 1265 of 1865.

Special Appeals from decisions passed by Mr. F. Tucker, Judge of Shahabad, dated the 11th February 1865, reversing a decision of the Principal Sudder Ameen of that District, dated the 28th July 1864.

No. 1254.

Musst. Soujharee Coomar (Defendant),
Appellant,

versus

Rameshur Panda (Plaintiff), *Respondent.*

Mr. C. Gregory, Baboo Kali Mohun Doss, and Moulvie Aftabooddeen Mahomed for Appellant.

Baboo Mohinee Mohun Roy for Respondent.

No. 1265.

Rameshur Panda and others (Plaintiffs),
Appellants,

versus

Musst. Soujharee Coomar (Defendant),
Respondent.

Mr. R. T. Allan and Baboos Onoocool Chunder Mookerjee, Dwarkanath Mitter, Unnodapersaud Banerjee, Kissen Succa Mookerjee, and Mohesh Chunder Chowdhry for Appellants.

Mr. C. Gregory, Baboo Kali Mohun Doss, and Moulvie Aftabooddeen Mahomed for Respondent.

Where a plaint asks for the realization of a mortgage, and the judgment, although it does not in terms order the sale of the mortgaged property, yet directs that the plaintiff's claim should be granted, the sale which follows in execution of the decree passes to the plaintiff the actual property which was mortgaged.

This special appeal No. 1254, and the cross-appeal No. 1265, present to us a case of considerable complexity. The numerous dealings of the different parties to the suit with the property in question, taking some variety of form, and extending over at least ten years of time, have been ably put before us by the advocates of both sides; but the conclusions to which we have been led are such as to render it unnecessary for us now to notice them *in extenso*. For our present purpose, the case may be concisely stated as follows :—

In 1843 the disputed property belonged to several owners, who, on 30th December of that year, all joined in mortgaging it to one Shusahai, and eventually Shusahai's interests passed to defendants 2 to 7. After having so mortgaged the property, defendants 11 to 14 (being some of the mortgagors), by a bond, dated the 1st April 1861, mortgaged their rights and interests, *viz.*, their equity of redemption, to the first plaintiff. Default was made in the payments due under this mortgage, and proceedings were taken by the first plaintiff, which ended in the subject of this mortgage being sold on the 1st December 1862, by execution, under a decree of Court made the 20th May 1862. All the plaintiffs were the purchasers at that sale, and, under the title which they thus obtained, they claim the right to redeem as against defendants 2 to 7 to the extent of their share. They have obtained possession by redemption of a portion of this share; but their right to redeem the remainder is resisted by some of the mortgagees and others of the defendants claiming title through them. This suit is brought to procure mutation of names, in regard to the portions of which the plaintiffs have obtained possession, and a declaration of right to redeem with consequential relief in regard to the remainder.

The additional facts alleged by the defendants, and relied upon by them, are substantially that, long before the execution of the bond of the 1st April 1861, namely, in the year 1856, the makers of that bond passed all their interest in the equity of redemption to certain of the defendants; and that, although the transaction of 1856 has been declared by a competent Court, in a suit to which the makers of that bond and the material defendants were parties, to be void and of no effect, still both parties to that suit by a compromise come to *before* the judgment was delivered, but put into writing and executed afterwards, namely, on 3rd February 1862, declared themselves bound by that transaction of 1856, whatever might be the judgment of the Court, and indeed agreed to ask that judgment might be passed on the footing of their compromise. Taking this state of facts, they first urge that the sale in execution of the decree of 20th May 1862 only passed the rights of the makers of the mortgage-bond as they existed at the actual date of the sale in December 1862; which amounted to nothing, because (as the defendants maintain) the *ikrar* of February 1862 had certainly passed away all that the mortgagors might have previously possessed.

On looking at the record of the suit which terminated in the decree of May 1862, we observe that the plaint asked for the realization of the mortgage, and, although the judgment did not in terms order the sale of the mortgaged property, it directed that the plaintiff's claim should be granted; we have, therefore, no hesitation in holding against the defendants that the sale which followed in execution of the decree passed to the plaintiffs the actual property which was mortgaged. Next, the defendants say that the plaintiffs, mortgagors, are bound by the compromise of February 1862, which set up the transaction of 1856; and that the plaintiffs who take under them cannot be in a better position. This would be so, no doubt, if the transfer to the plaintiffs of the mortgagor's interest dated after the making of the ikrar. But this is not the case as between the plaintiffs and the makers of the mortgage bond in question; the title of the former goes back to the date of the bond in April 1861, while the ikrar was not effected at earliest till December 1861. Under all the circumstances of the case, we think that the plaintiffs are entitled to avail themselves of the judgment of the 4th January 1862, for they would have been bound by it had it gone against the interests of their so-called mortgagors, inasmuch as the suit in which it was made was instituted before the bond was executed; and, as we have already said, these mortgagors have no authority to bind them by the ikrar. The plaintiffs' special appeal is upheld, and that of the defendants is dismissed in each case with costs, and the decree in the original suit must be given with costs in favor of the plaintiffs.

The 4th September 1865.

Present:

The Hon'ble C. Steer and J. B. Phear,
Puisne Judges.

Judgment of Lower Appellate Court—Reasons
for reversing judgment of first Court.

Case No. 1516 of 1865.

*Special Appeal from a decision passed by Mr.
W. H. Brodhurst, Judge of Sarun, dated the
13th December 1864, affirming a decision pass-*

*ed by Moulvie Itrut Hossein Khan, Principal
Sudder Ameen of that District, dated the 27th
August 1862.*

Moolchand Shah (Defendant), *Appellant,*

versus

Baboo Thakoor Doss Dutt (Plaintiff),
Respondent.

Baboo Sreenath Banerjee for Appellant.

Baboo Kishen Succa Mookerjee for
Respondent.

The remand of a case to a Lower Appellate Court, for the purpose of stating good and substantial reasons for reversing a careful and clear judgment of the first Court, is no warrant to the Lower Appellate Court to suppose that the case was remanded to it for the purpose of confirming the judgment of the first Court.

THE plaintiff sued the defendant for a balance due to him on an account.

The defendant's pleas were not indebted, a partnership by which a balance was claimed in favor of the defendant, and a denial of the authenticity of the accounts filed by the plaintiff.

The Principal Sudder Ameen found that the account had been proved by the evidence of the writer, and showed a balance in favor of the plaintiff. He found from the fact of an arbitration, which took place subsequent to the filing of the suit, that the defendant, admitting the balance, had agreed to pay it by instalments, and had agreed to file a deed of compromise, which fact, proved by the evidence, he thought was corroborative of the truth of the claim. On these grounds he decreed the suit in favor of the plaintiff.

The Judge in a short decision reversed the order of the Lower Court. He first found that the accounts put in by the plaintiff having been removed from the Court of the Principal Sudder Ameen before the writer was called as a witness to prove them, the investigation into these accounts had been defective. Any further enquiry, however, he thought unnecessary, inasmuch as the plaintiff had alleged that there had been an arbitration on the matter of the debt, and that the defendant admitting it had given a kistbundee. Why, the Judge asks, was not this kistbundee filed when all the other documents were filed? Distrusting the existence of any such document, he distrusted the claim altogether, and dismissed the plaintiff's suit.