

The 21st November 1871.

Present :

Sir James W. Colville, Sir Joseph Napier.
Sir Montague Smith, and Sir Lawrence Peel.

*Recovery of possession — Enam — Mortgage —
Long enjoyment — Evidence.*

On Appeal from the High Court at
Bombay.

Ramrudeegowda

versus :

Dessai Saheb.

This was a dispute, which arose in 1823, between two branches of a family respecting a Mahratta village. The plaintiffs (appellants) claimed the property on the allegation that the respondents held it as mortgagees, and that they (appellants) were entitled to redeem. The respondents claimed to have held the village in question as an *enam* free from the payment of Government revenue; and as they had held it on this title since 1824 up to the commencement of the suit, the Privy Council refused to disturb their title, thus fortified by long enjoyment, without clear and unmistakable proof of the alleged mortgage.

THE suit in this case was brought by the appellants to recover a village called Amravatee, which appears to have been part of a larger estate or *wuttun*, and also certain allowances, of which very little has been said in argument, and very little explanation given, but which may be assumed to be certain profits incident to the right of the manager of one of these Mahratta villages. Mr. Doyne in his reply has dwelt principally upon the fact, which may perhaps be taken to be admitted upon these proceedings, that the respondent who has held this village so long does not pay the Government revenue in respect of it, that being paid by the owner of the whole *wuttun*. He has also dwelt, more slightly, upon the suggestion made in the Courts below, that by reason of some adoption the respondent's ancestor was taken out of the family of the original owners of the *wuttun*, and transferred to another family. There has been no finding with respect to the last point in any of the three Courts below, and it may therefore be left out of consideration.

We have not had much explanation of the nature of these tenures; but certainly it has not been supposed in any of those Courts that the first point dwelt upon by Mr. Doyne,—namely, that relating to the payment of the Government revenue,—was at all inconsistent with the respondent's case; and it appears to their Lordships to be quite conceivable that, if such a transaction

as that on which the respondent relies really took place, the village may have been transferred to the respondent's family as an *enam* held, as far as the general owners of the *wuttun* are concerned, free from any contribution to the Government revenue, although upon the whole *wuttun* Government revenue may have been assessed either before or after the acquisition of these territories by the East India Company. Therefore it seems to their Lordships that the determination of this appeal depends upon the question whether any evidence has been given to prove the mortgage title upon which the appellant relies.

It appears that in 1823 the present contention first arose between the two branches of this family. Those whom the respondent represents then held this village; and it appears by Mr. Thackeray's order that they then claimed to have held it for nearly 16 years upon the title set forth at page 3 in the recital of Mr. Munroe's order. On the other hand, the persons whom the appellant represents then came forward, asserting that the other party held it as mortgagee, and that he was entitled to redeem. In that state of things Mr. Munroe made the order, which in point of form was certainly an irregular order,—namely, that the other party should give up possession of the village alleged to have been pledged or mortgaged,—upon an undertaking of the plaintiff to pay what might ultimately be found due.

That order went by appeal from Mr. Munroe, who was the Deputy Collector, to the Collector, Mr. Thackeray; and if the question raised were a question of jurisdiction there could be no doubt in their Lordships' minds that according to the known and ordinary course in these non-regulation provinces, in fact, it may be said throughout the territories of the East India Company, where there is jurisdiction in a Deputy Collector there would be an appeal to the next superior officer in the Revenue Department,—namely, to the Collector, and so on, as it appears in this case there was, from the Collector to the Commissioner.

A question is then raised touching the prosecution of this appeal to Mr. Thackeray and the regularity of this order. But the presumption is *omnia rite acta fuisse*; and the evidence shows that both parties were heard, and that everything was done as regularly as things are done in a country governed as that country then was.

The papers were put up to Mr. Thackeray. It is admitted in three documents that his decision was passed in the presence of both parties, that the respondent before him had an opportunity of being heard; and the result was the reversal of Mr. Munroe's order, and a direction that restitution of the village should be made to the appellant, which was done.

Whether that was a conclusive determination upon the title or not, it seems to their Lordships hardly necessary to decide. It was a clear adjudication of the right of possession at that time; and whether title could have been tried, as in regulation provinces, afterwards by a regular suit, it is not necessary to determine. But there was a clear adjudication that the possession upon the asserted title was in the respondents, the possession taken from them was restored, and there was (which is the essential thing to be considered) a clear reversal of whatever was found by the order of Mr. Munroe in favor of the alleged mortgage which is the foundation of the appellant's title.

It appears then that since the year 1824 up to the commencement of the suit the estate had been held by the respondent's branch of the family on the title on which they rely. The only way in which their title thus fortified by long enjoyment can be disturbed is by clear and unmistakable proof of the alleged mortgage.

There is really, when Mr. Munroe's order is out of the case, not the slightest evidence that the village was held upon a mortgage title.

Under these circumstances, their Lordships think that the attempt to disturb the concurrent judgments of the Courts below wholly fails, and they must humbly recommend Her Majesty to dismiss the appeal, with costs.

The 24th November 1871

Present :

Sir James W. Colvile, Sir Joseph Napier,
Sir Montague Smith, and Sir Lawrence Peel.

Mortgage—Proof of Bona fides.

On Appeal from the High Court of Bengal,

Woomesh Chunder Roy

versus

Gooroodoss Roy and others.

Suit by mortgagee (respondent) after foreclosure of mortgage against mortgagors, incumbancers, and present appellant who was in possession of part of the mortgaged property as purchaser at an execution sale. Mortgagors admitted plaintiff's title. Appellant pleaded that the mortgage was a collusive transaction between mortgagors and mortgagee in fraud of creditors. The Principal Sudder Ameen found that the mortgage was not a *bona fide* transaction, but the High Court reversed his decision; and the Privy Council, upon a consideration of the evidence, came to the conclusion that the Principal Sudder Ameen was right, because it was not only necessary for, but also in the power of, the respondent to adduce better evidence than he had given in this case in order to make out the reality and *bona fide* of the transaction on which he relied.

The respondent in this case brought a suit to recover possession of the property included in his mortgage deed, having perfected his title under that deed by the usual proceedings in foreclosure. He brought the suit against the mortgagors, against some other incumbancers whose case it is unnecessary now to consider, and against the present appellant, who was in possession of part of the mortgaged property as purchaser at an execution sale. The mortgagors admitted the title of the plaintiff the respondent. The appellant, however, defended his possession by insisting that the mortgage was from the first a collusive transaction, an arrangement between the mortgagors and the mortgagee designed to protect the property of the mortgagors from the claims of their creditors. One of the issues framed in the suit is whether that proposition is correct or whether the mortgage transaction was *bona fide*? The Principal Sudder Ameen, the Judge of First Instance, found that issue in favor of the appellant, but a division bench of the High Court reversed his decision. It does not appear to their Lordships to be necessary to consider upon whom the burden of proof in such a case must fall, because they think that in the present case the facts are such,

* On appeal from the judgment of Koch and Sethu-Krishna J.J., in Regular Appeal No. 271 of 1864, decided 5th December 1864.—I. W. R. Civ. Rul. 272.