IN EQUITY.

MUTTY LOLL SEAL *v.* JOYGOPAUL CHATTERJEE. (*July* 1. *Thursday.*)

Mortgage Foreclosure Receipt by Mortgagee of rents and profits—Account by Registrar—Decree thereon—Irregularity of.

A Mortgagee, (having previously entered into receipt of the rents and profits of the mortgaged premises) took the usual account of debt and interest by the *Registrar*, who appointed that day six months for payment thereof. The Defendant having made default, the decree for foreclosure was made absolute.

Held, that such decree was erroneous, and that there should have been a reference to the Master to take an account of the rents and profits received by the Mortgagee.

MOTION (on Notice)—"That the Decree made in the above Cause on the 25th day of March 1846, and the order, bearing date the 2nd of November 1846, be respectively set aside for irregularity with costs:—and that it be referred to the Master to take an account of what was due and owing by the defendants to the complainant for the principal, interest, and costs on the mortgage securities; and also of the rents, issues, and profits received by the complainant since his possession of the mortgaged premises;—and that upon payment by defendants of what might be reported to be due from them to complainant, by a day to be appointed by the Master, the mortgaged premises might be reconveyed.

The defendant Joygopaul, (being entitled under his father's will to one undivided fifth share of a certain talook), purchased from two of his brothers their undivided fifth shares, and then mortgaged the same, together with his own share to them, for the purpose of paying the purchase money.

The mortgage was subsequently assigned to the com-**[106]**plainant Mutty Loll Seal, who, in August 1845, filed a bill of foreclosure against the defendant; and cotemporaneously therewith, brought an action of ejectment in respect of the same mortgaged premises. This action being undefended, the plaintiff obtained a verdict, and judgment ex parte; and thereunder, about the early part of January 1846, entered into possession of the mortgaged premises, and the receipts of the rents and profits thereof. The bill of complaint was taken pro-confesso in the month of February following; and on the 25th March, the complainant obtained a decree of foreclosure, whereby (among other things) it was ordered that defendant should that day six months pay to complainant what might be found due upon taking the usual account by the *Registrar*. The Registrar certified that the sum of Co.'s Rs. 6,831 was due, for principal, interest, and costs in respect of the mortgage, and directed the same to be paid in the mode specified by the decree. No application was made by the defendant for an extension of the time for payment, but on the 15th of September, (10 days before the expiration of the prescribed period) the defendant's Attorney wrote a letter to the complainant's Attorney to the following effect:

Dear Sirs,

In this case, your client, in December last, obtained possession of the talook and premises mortgaged to Gungadhur Chatterjee and Hurreehur

Chatterjee, and has, since then, been in the receipt of the rents and profits, for which he must of course account to the defendant, who is prepared to pay the amount of debt and costs, less what your client has collected. I shall, therefore, feel obliged by your furnishing me with a statement of what is actually due to your client.

Yours faithfully,

W. N. HEDGER.

15th September, 1846.

To Messrs. Higgins and Son.

[107] To which the following answer, dated 24th September, 1846, was returned :—

SIR,

With reference to your letter of the 15th instant, we beg to annex a copy of an account, exhibiting a balance in favor of the complainant of Co.'s Rs. 7,967-15-4 on receipt of which sum the complainant will be ready to deliver up possession of the mortgaged premises to your client, and to execute the necessary reconveyance, on your preparing such conveyance, and submitting the same, through us, for approval and execution by the complainant, and paying our costs for the same.

Yours obediently,

HIGGINS AND SON.

To W. N. Hedger, Esqr.

The day after the receipt of the above letter, viz. on the 25th of September 1846, at the verandah of the Court-house, being the time and place appointed, one John Hughes attended on behalf of Mutty Loll Seal, but neither the defendant nor any one on his behalf then appeared to pay the sum to be due in the certificate of the registrar. On the 16th of November 1846, the complainant obtained the final order for making the decree nisi for foreclosure absolute; and on the 26th of May 1847, notice of motion was given to set aside the last mentioned decree.

The affidavit in support of the motion, (in addition to the above facts) stated that the mortgaged premises were worth five times the amount of the principal sum advanced, and that the complainant, since entering into possession, had received large sums of money in respect of the rents and profits thereof, for which he had not accounted to the defendant, nor credited in the account made up and certified to be due by the registrar; and that he still continued in possession. That the defendant believed the complainant's claim against him to be **[108]** considerably diminished by such receipts, and that he had used every exertion to raise by the appointed day a sum sufficient to repay the complainant (after proper deductions) but had been unsuccessful.

Mr. *Taylor* and Mr. *Ritchie* in support of the motion cited *Renvoise* v. *Cooper* (a) *Jones* v. *Creswicke* (b) and the cases of *Nanfan* v. *Perkins*, *Crompton*

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[108] (a) 1 Sim. & St. 364 (b) 9 Sim. 304; 9 Law. J.N.S. Ch. 113.

v. *Earl of Effingham*, *Joachim* v. *Macdonal*, *Lee* v. *Heath*, and the other cases there cited.

Mr. *Clarke*, Mr. *Dickens*, and Mr. *Morton*, contra. An order by which a matter has been referred to the registrar cannot be modified by directing a reference to the master. The affidavit of the gomastah (who collected the rents on behalf of the complainant,) clearly shows, that the account delivered to the defendant's attorney (which was not disputed, and therefore may be taken to be acquiesced in) was correct, and that the payments for government revenue, together with the costs, have greatly exceeded the receipts and collections, so that the complainant has derived no advantage or profit from his possession of the mortgaged premises. It is also stated that the talook in question, (of which the mortgaged premises form a portion) in consequence of default on the part of the other shareholders in payment of the government revenue, has been since sold on that account, and the purchaser put into possession. Besides the defendant is now too late in his application, after having been served with full notice of all the proceedings adopted in the suit by the complainant. At all events the decree cannot be altered on a mere motion. The defendant should have filed a supplemental bill in the nature of a bill of review. The cases cited are distinguishable from the present.

[109] SIR L. PEEL, C.J. We think that so much of this motion as asks to set aside this decree, ought to be granted. A reference to the registrar is merely for the purpose of computing the amount of the principal debt and interest. It seems that previous to the reference to the registrar, the mortgagee had taken possession of the mortgaged premises. It has been contended, that this is not material, because the mortgagee had not obtained any actual profit or advantage from his possession. But the mortgagor is not necessarily cognisant of that, nor can the fact be presumed to be within his knowledge. It appears that *some* rents and profits were received by the mortgagee, subsequent to his possession; whether large or small, it is immaterial to consider. His possession entitles the mortgagor to an account. The bill in this instance was taken pro-confesso; and in such a case it behoves a complainant to be strictly regular in his proceedings. It is his duty to obtain a proper order from the Court. When the mortgagor entered into the receipt of the rents and profits, it became necessary that a reference should be made to the master to take an account of such receipts and profits, as that is a proceeding not within the scope of the duty or authority of the registrar; for the fact of such receipts rendered a computation by the latter inapplicable to the case. It has been decided, that where there has been a receipt of fresh rents and profits by a mortgagee in possession, subsequent to the taking of an account by the master, there must be a reference back to him, for the purpose of ascertaining the amount of those subsequent receipts. The only question is whether there has been a waiver of the defendant's right. We think not. The letter of the 15th September proceeds upon the notion that the mortgagor had a right as of course to an account. When the account required is given, the defendant is silent, and takes no notice of it, and that to some slight extent may be

[110] presumed to be acquiescence ; but he clearly does not thereby acquiesce in the *correctness* of that account. No such presumption should be made against a party without manifest grounds for so doing. There is nothing here to preclude the defendant from his right to an account. It appears to us therefore that the decree was erroneous and defective. It has been argued that the matter should have been brought forward by a supplemental bill in the nature of a bill of review. We do not consider the present case to consist of supplemental matter at all ; nor subscribe to the argument that this decree cannot be set aside by motion. It was taken pro-confesso, which proceeds upon process of contempt. The only remaining question is upon what terms the defendant is to have the relief asked for. There are circumstances here which disentitle him to costs. It would have been but proper and candid on his part to have given the complainant notice of his intention to dispute the account. Independently of this, a considerable lapse of time has taken place since the order was made absolute. We therefore refuse costs. If this had been a question merely of *irregularity*, this application perhaps might have been too late. But this is a case between mortgagor and mortgagee. The precise value of the estate is not mentioned, but there is reason to suppose it is much more valuable than the debt. In cases between mortgagor and mortgagee the Court is always desirous to give the party simply what he contracted for ; and so long as this decree of foreclosure stands, it must operate as a bar.

Decree set aside without costs.

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[111] *IN EQUITY.*

RAJINDRO MULLICK *v.* RAMGOPAUL CHUND AND OTHERS.

(1847. *July 1st. Thursday*).

Practice ; injunction to stay trial at law. Bill of discovery.

In the case made by this motion, the injunction goes until answer, and cannot be opposed by affidavit.

INJUNCTION moved for (on motion) to restrain the defendants in equity from proceeding to trial in an action of ejectment (brought by them against the plaintiff in equity) until answer or further order.

Mr. *Dickens*, Mr. *Morton* and Mr. *Ritchie* appeared in support of the motion, which was supported by affidavit, stating the bill to have been filed for discovery, as well as to ascertain the existence of certain deeds relative to the property in question, without which discovery the defendant alleged he could not safely defend the action at law.

Mr. *Cochrane* and Mr. *Taylor* contra urged, that the complainant had not on his own affidavit disclosed a case for the allowance of the injunction, and proceeded to read affidavits in answer.

It was objected that affidavits could not on this motion be read as an answer and *O'Dowda against Rajah Dabeekistno* (a) was referred to as an authority to that effect.

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[111] (a) Montriou's Sup. Ct. Decisions, 66.