

HUSSEIN ALI KHAN, NUSRUT ALI KHAN, AND SHUJAUT ALI KHAN,
(HEIRS OF SHUHAMUT ALI KHAN, DECEASED), *Appellants v. MUSSUMMAUT
PHOOL BAS KOOR, (WIDOW OF BABOO JEY PERKASH SAHY), Respondent.*
(1825. Jan. 12th.)

A case of redemption of mortgage, under a deed of mortgage and conditional sale, the equity of redemption being saved by repayment of the money borrowed on the mortgage, within the period of one year from the receipt by the mortgagor of the notice to pay issued under regulation 17, 1806, as required in such notice.

THIS suit was instituted in the Provincial Court of Patna, by Baboo Jye Perkash Sahy, the deceased husband of the respondent, against Shuhamut Ali Khan, the deceased father of the appellants, to obtain possession of a moiety of mouza Godna, *Usille* and *Dakhille*, and *ayma mehal* of pergunna Manjee, Zillah Sarun, under a deed of mortgage and conditional sale for the sum of 6,781 rupees, payable within one year from the date of the deed, rendered absolute by the failure of the defendant, to pay off the mortgage within the period allowed by the regulations of Government. The amount of action was laid at 24,750 rupees 18 years' produce of the moiety in question.

The point at issue was whether the mortgagor had, under the circumstances of the case, forfeited his right of redemption or not. The plaintiff stated, that as the defendant had allowed the period of one year, conditioned in the deed of mortgage, to elapse without payment, he petitioned the Zillah Judge to issue a *purwanna* to the defendant, under section 8, regulation 17, 1806, calling on him to [7] pay the sum due within one year; that the Judge issued a *purwanna* on the 28th of June 1814; that the defendant, on the 30th of October 1815, deposited in Court a sum stated by him to be the whole sum due under the deed, and the Judge ordered it to be received, and issued a *purwanna* to him (plaintiff) calling on him to receive the said sum. He pleaded, that as the sum due to him was neither paid him, nor deposited in Court, by the 28th of June 1815, the Zillah Judge was not authorized to receive it as a deposit, and that the defendant had forfeited his right of redemption. He therefore instituted this suit to obtain possession of the mortgaged property. The defendant stated, that although the notice was dated 28th of June, it was not served on him till the 9th of October 1814; and that it enjoined him to pay the sum of 6,781 rupees within the term of one year from the receipt thereof: and pleaded, that if it should appear that he had either tendered the said sum to the plaintiff, or deposited it in Court before the 9th of October 1815, his right of redemption was not forfeited. He stated that he had tendered to the plaintiff, in lieu of cash, a bond executed by Bhyroo Nath, a respectable *muhajun*, for the full amount due: but that the plaintiff told him that he was in no hurry for his money, and would allow the debt to run on, if he, defendant, would execute a fresh deed of mortgage on the same property for the consolidated sum of principal and interest of the debt; that on his tendering a fresh bond, the plaintiff evaded the acceptance thereof, which induced him to think he was endeavouring to spin out the period of one year allowed

by the notice, in order to foreclose the mortgage; that he, to save his estate, presented a petition through his *vakeels* to the Zillah Court, on the 30th of June 1815, (as would be proved by the endorsement of the *serishtadar* thereon) praying that the sum of 7,747 rupees, being the principal sum lent, with interest thereon, might be received, according to the custom, as a deposit that circumstances beyond his control delayed the reading of the petition till the 19th of September 1815, when the Zillah Judge ordered the immediate deposit of the whole sum: that his *vakeels* immediately paid into the treasury 6,000 rupees, and afterwards, in the course of the same day, the remaining portion (1,747 rupees): which sum of 7,747 rupees was remitted to the Collector's Treasury on the 28th of the same month; that the Judge, on the 7th of October, having re-drawn the said sum, ordered that it should be paid back to his *vakeels*, but subse-[8] quently, (on the 28th of October) he passed an order on a petition presented by the said *vakeels*, directing the re-deposit of the said sum; that this was done on the 30th of the same month, when the usual order was issued to the lender, informing him of the circumstance, and desiring him to receive the money. He contended, that as, under the wording of the notice the term of one year did not close till the 9th of October 1815, the payment of the money in September barred the forfeiture of his right of redemption, although the Judge did once order the money to be returned to him.

Both parties filed documents in support of their respective pleas, and dying before the decision of the suit, were succeeded, the plaintiff by his widow, and the defendant by his sons.

The Third Judge of the Patna Provincial Court (J. Sanford) after perusing the whole of the pleadings and documents, was of opinion, that as the mortgagor had neither paid the money due under the deed of conditional sale, to the mortgagee, nor deposited it in Court within the period of one year from the date of the notice served on him under the provisions of section 8, regulation 17, 1806, his right of redemption was forfeited. He did not consider the tender of a bond a legal tender of payment, and held that the negotiation regarding the execution of a new deed of mortgage was entirely extraneous, and in no way affecting the ultimate decision of the case. He accordingly did not allow the defendants to prove that point: but passed a final judgment, on the 7th of March 1821, awarding to the widow possession of the moiety of mouza Godna, which had been sold under the deed of mortgage and conditional sale by Shuhamat Ali Khan. The costs were charged to the defendants.

The defendants appealed from this decision to the Court of Sudder Dewanny Adawlut: the pleas of the parties were similar to those urged by them in the Provincial Court.

The case came on, in the first instance, before the Second Judge (C. Smith), who, after considering the whole of the circumstances, was of opinion that the matter for the decision of the Court was, whether the borrower had actually paid the sum due within the period of one year as directed by the notice, he observed, that the notice, which was dated the 28th of June 1814, was not

issued till the 19th of September, or served on the borrower until the 9th of October following, and that he was thereby [9] directed to pay within the period of one year from the receipt thereof, the sum of 6,781 rupees, the principal sum lent, without mention of interest, under penalty of forfeiting his right of redemption : and it was proved by the documents, that he paid into Court, before the expiration of one year from the date on which the notice was served on him, not only the principal, but also what he considered to be the interest due up to the date when he first presented his petition to the Civil Court by his *vakeels*, viz., the 30th of June 1815, so that, under the strict terms of the notice, he had done all and more than was required from him by the notice : and that even if it should be held incumbent on him to have paid interest, as well as principal, as directed by section 7, regulation 17, 1806, still as he had paid the interest due on the sum borrowed up to the date on which his petition was first presented with the exception of about 30 rupees, it was not consonant with the spirit of the above regulation to deprive him of his property for so small a sum. He also observed, that if the date on which the term of one year was to commence, was held to be the date of the issue of the notice, it would appear that the full period of one year had not elapsed ; for it might be presumed, that the notice would not have been delivered to the *piyada*, who was to serve it, before nearly the close of the 19th of September 1814 ; and also that the money was paid into the treasury before the close of the 19th of September 1815 : and that until the opposite fact was proved beyond doubt by the lender, the presumption was in favour of the borrower. Hence he held the right of the borrower reserved, even under the section above quoted, as construed by the Court's circular order of the 9th of April 1817, which declares that all notices, if not issued the same day the order for the issue thereof is passed, shall bear the date of the day on which they are actually issued : this circular order, however, was not passed when those transactions occurred (in A. D. 1814 and 1815), the borrowers in *bye-bil-wafa* being then guided by the precedent laid down in a decision passed by Mr. James Stuart, former Third Judge of this Court, on the 24th of July 1813, in the case of Lukput Rai, petitioner, wherein it was laid down that the term of one year was to be reckoned from the day on which the notice was served on the borrower. He therefore recorded it as his opinion, on the 6th of December 1824, that the original plaintiff was not entitled to claim possession of the estate, and that [10] the decision of the Provincial Court of Patna should be reversed ; and that had the above mentioned circumstances not been conclusive in favour of the appellants, they would have been entitled to prove the negotiation regarding the fresh deeds.

The Officiating Chief Judge (J. H. Harington) recorded it as his opinion, that as the borrower had been ordered by the notice, to pay the principal sum within one year from the receipt of the notice, and as it was proved that he had done so, he had saved his right of redemption. He also thought the sum of 6,781 rupees, a very inadequate consideration for the sale of the estate in question, which was estimated to be worth 24,750 rupees.

In concurrence, therefore, with the opinion of the Second Judge, he passed a judgment, on the 12th of January 1825, reversing the decision of the

Provincial Court of Patna, dated the 7th of March 1821, and dismissed the claim of the respondent to the moiety in question. As the respondent had obtained possession thereof in execution of the decision of the Provincial Court, it was ordered that possession should be immediately restored to the appellants; that the respondent should account to them for the mesne profits for the time she had possession, that she should receive the sum deposited in the Zillah Court; that the appellants should pay to her the balance due for interest up to the 19th of September 1815, and that the respondent should pay the costs of suit.

ABEH NUNDEE MUSTOFEE, *Appellant v.* DOORGA DOSS AND KASHI
GUTTEE (HEIRS OF JUGMOHUN SING, DECEASED), *Respondents.*

(1825. Jan. 15th.)

The respondent repaired an embankment whereby the land of the appellant was laid under water. On the suit of the latter, it appearing that the embankment was not in existence when the parties purchased their estates, the Sudder Dewanny Adawlut decreed that the embankment should be broken down, and awarded damages to the appellant.

THIS suit was instituted by Abeh Nundee Mustofee, in the Zillah Court of Beerbhoom, to compel Jugmohan Sing, Zemindar of pergunna Aleenugur, to cut a *bund*. or embankment which, by confining the water, inundated 12 beegas, 9 cottas of land belonging to mouza Suthurea, his estate, thereby depriving him of the produce of the said land, and to recover the sum of 25 rupees, 6 anas, 15 gundas the produce of the said land for the year 1222, B. S. He pleaded that the former Zemindar [11] had allowed the *bund* to fall to decay about 50 or 55 years before, and that the defendant had no right to repair it to his prejudice. The defendant stated that he had built up the *bund* on the site of an old embankment: and contended that his right to build it, though dormant, was not extinct: and that as he had done so with a view to his own profit, and not to injure the plaintiff's property, his right to do so was unquestionable.

The Zillah Registrar being of opinion that the defendant had a right to restore the embankment, dismissed the claim of the plaintiff with costs.

The plaintiff appealed from this decision, but as the Registrar had been appointed Judge of the district, the appeal was removed to the Provincial Court of Moorshedabad, under the provisions of section 14, regulation 2, 1805. In addition to his former pleas, the appellant stated that the respondent had so far acknowledged his right to demand the demolition of the bund, as to offer him a portion of land equivalent to that which had been inundated: and that this offer had induced him to delay the institution of the suit: but on the respondent retracting his offer, he had instituted the present action. This was positively denied by the respondent.

The Provincial Court of Moorshedabad seeing no reason to alter the decision of the Registrar of the Zillah Court, confirmed it; and dismissed the appeal with costs.