Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Nawab Azimut Ali Khan v. *Jowahir Sing and others, from the late Sudder Dewanny Adawlut, at Agra, North-West Provinces of Bengal; delivered* 12*th July*, 1870.

Present:

THE MASTER OF THE ROLLS.
SIR JAMES W. COLVILE.
SIR JOSEPH NAPIER.

SIR LAWRENCE PEEL.

THE original Appellant in this case was in April 1846 the mortgagee of an estate comprising sixteen different mouzahs, and known as Talook Bhainsee. This estate had been originally mortgaged (it is said by way of usufructuary mortgage) by its then owner, Vuzeer Ali, for 26,400 rupees, to one Bhowany Pershad, who may be taken to have transferred, in 1822 or 1823, his interest as mortgagee to the Appellant Further sums, amounting to 15,700 rupees in all. were afterwards advanced by the Appellant on the security of the estate, upon terms which will be afterwards considered. In 1839 the representatives of the mortgagor brought a redemption suit, which was finally dismissed by the Sudder Court of the North-West Provinces on the 1st August, 1843, by a Decree, which is one of the exhibits in this cause. On the 8th April, 1846, the estate was sold, subject to the mortgage, under process of execution, in satisfaction of Decrees against the original mortgagor or his representatives. It was sold in different parcels. One mouzah (Hosseinpore) was purchased by Jowahir Singh and the four other persons who, with him, are the Plaintiffs in this cause; Mouzah

Jeetpore was purchased by Buhal Singh and Bustee Ram; Mouzah Rookunpore by Hosein Ali Khan and two other persons; and one-fourth of Mouzah Chundharee by Mussumat Imamee Begum. The residue of the estate was purchased by the Appellant; and the result of the sale was, consequently, that whilst he retained the rights of mortgagee over the whole property, he became the owner of the equity of redemption in twelve and three-quarters of the sixteen mouzahs of which it was composed.

In 1862 the Plaintiffs, as the owners of the equity of redemption in Mouzah Hosseinpore, brought a suit against the Appellant for the redemption of their mouzah on payment of 4,737 rupees 7 annas, which they alleged to be the rateable share of the mortgage debt payable by them. This suit was tried first by the Principal Sudder Ameen, and afterwards, on appeal, by the Zillah Judge. The latter held that the Plaintiffs were entitled to redeem their mouzah on payment of an additional sum of 1,212 rupees 13 annas. But his decision was reversed, and this suit finally dismissed by the Sudder Court on Special Appeal on the 29th April, 1864, principally, if not wholly, on the ground that the purchasers of the other three parcels of land should have been made parties, and that the Plaintiffs should at least have offered to redeem those parcels, by paying their proportionate part of the mortgage debt attributable to them. The Decree affirmed the principle established by a previous case in the Court, that the Plaintiffs were at liberty to redeem their mouzah without bringing into Court that portion of the mortgage debt which was attributable to the mouzahs, wherein the equity of redemption had been purchased by the mortgagee.

On the 22nd of December, 1864, the Plaintiffs instituted their present suit. It was framed in the manner indicated by the last stated Decree. The purchasers of the parcels, other then those purchased by the Appellant, or the Plaintiffs, were made parties on the record; and the Plaintiffs having paid into Court a sum which they alleged to be sufficient to cover the proportion of the mortgage debt attributable to those parcels, as well as to their own village, claimed absolutely to redeem the latter, and to recover possession of that and the three other parcels with mesne profits, from the date of the

institution of the suit. This suit, like the former one, was tried in the first instance by the Principal Sudder Ameen, who decreed in favour of the Plaintiffs; and his decision was affirmed on regular Appeal by the Zillah Judge, and afterwards on special Appeal by the Sudder Dewanny Adawlut at Agra. The present Appeal, which has been heard *exparte*, is against these Decrees.

The Appellant does not, as their Lordships understand, contest the proposition that the Plaintiffs, as purchasers of the equity of redemption in a portion of the mortgaged premises, are entitled to redeem that portion on payment of *some* proportion of the mortgage debt. His objections to the Decrees may be divided into three classes:—First, objections to the mode in which the rateable share of the debt payable in respect of Hosseinpore has been calculated; secondly, objections to the mode in which the gross amount of the mortgage debt to be apportioned has been ascertained; and, thirdly, to the mode in which the Decrees deal, with the villages whereof the equity of redemption belongs, or is alleged to belong to the other Defendants on the record.

Under the first head of objection it was strongly argued, that the principle upon which the debt was apportioned amongst the different villages was erroneous; that the apportionment should have been made according to the actual and ascertained values of the several mouzahs, and not according to the amount of revenue assessed on, and payable in respect of such mouzahs to Government.

Their Lordships do not deny that there is some force in this objection.

The proportion of the debt chargeable on each village ought to vary according to the actual value of the village; and the amount of Government revenue assessed on a village may not always be a correct criterion of its actual value.

On the other hand, there might be a difficulty in applying the principle contended for by the Appellant to cases in which the amount payable by a mortgagor seeking to redeem, is not ascertained as in this country by inquiry and account: but must be calculated and tendered or brought into Court by him before the commencement of the suit. Their Lordships, however, do not feel called upon to affirm the correctness of the principle adopted in

the Courts below, or to give any opinion which may have the effect of sanctioning its adoption in other cases, because they are clearly of opinion that the objection is not one which this Appellant is now entitled to take. They cannot find any trace of its having been taken in the Courts below. The written statement of the Appellant does not raise the question. On the contrary, he seems, in coming to the conclusion, that 27,387 rupees 6 annas 6 pie was the amount which the Plaintiffs ought to have brought into Court to have adopted the same principle of apportionment, as will be seen by referring to his own Petition and the account annexed thereto at pp. 5 and 6 of the Record: though the latter account claims something more than the 27,387 rupees 6 annas 6 pie as the sum payable in respect of all the four villiages.

It is questionable whether the Appellant has lost anything by reason of the principle of apportionment of which he now complains; but it is certain that by yielding to the objection now for the first time taken, and reopening the whole account, their Lordships would do great injustice to the Respondents; and make a very dangerous precedent.

It is true that the Appellant's written statement did object to the particular application of the principle, on the ground that the revenue assessed on Hosseinpore was taken at somewhat less than its real amount; and contended that consequently the amount brought into Court by the Plaintiffs was less by a few rupees than even on their calculation it ought to have been. But this objection does not seem to have been pressed in the Courts below—certainly not in the two Appellate Courts. And their Lordships are of opinion that the Decrees, if otherwise correct, ought not to be disturbed on that ground.

The next question is, whether the gross amount of the debt to be apportioned has been correctly ascertained in the Courts below. Mr. Leith, in the course of his argument, remarked strongly on the scantiness of the evidence on which those Courts have proceeded. It is, however, to be observed that for this and any consequences that may have followed from it the Appellant is chiefly responsible.

The Plaintiffs are mere purchasers of the equity

of redemption in a portion of the estate at an execution sale, and are not likely to have a single document relating to it except the bill of sale of their particular village. On the other hand, almost every document of title relating to the property or to the mortgage debt incurred upon it is presumably in the possession or power of the Appellant, who has been in actual possession of the estate since 1823. In truth, both the parties and the Courts have been content to proceed upon certain findings in the Decree of the 1st August, 1843, which dismissed the redemption suit of the representatives of the original mortgagor. On these findings it has been taken as proved that the principal money secured by the mortgage amounts to 42,100 rupees, and that that sum consists of 26.400 rupees, advanced in two sums on two different occasions to Vuzeer Ali, upon usufructuary mortgages of the property, of a sum of 5,000 rupees advanced to his representatives, and bearing no interest on condition of their agreeing not to sue for redemption for twenty years, and of a number of different sums advanced to several of those representatives on their respective bonds at interest, and aggregating 10,700 rupees. These were all held by the Decree of the 1st August, 1843, to be charged on the estate; and the suit in which that Decree was made was dismissed on the ground that the Plaintiffs had not tendered or deposited a sum sufficient to cover those charges.

The following is the manner in which the Courts below have dealt with the questions of interest on these items. They have treated the interest on the 26,400 rupees as satisfied by the rents and profits of the property of which the mortgagee has been in possession, no account of those rents and profits having been required from or rendered by the mortgagee. They have held that no interest ran upon the 5,000 rupees; and that, under sec. 5 of Regulation 34 of 1803 no larger sum could be recovered in respect of interest on the 10,700 rupees than the amount of the principal. The result of taking the account would be to make the whole mortgage debt apportionable amongst the different villages 52,800 rupees.

The original contention, however, of the Appellant seems to have been this: — He treated the Decree of the 1st August, 1843, as having conclu-

sively determined, as between the mortgagors and the mortgagee that the mortgage debt from that date was to be taken to be 42,100 rupees, carrying interest at the rate of 12 per cent. per annum. He calculated the amount of such interest for twenty-one years and some months at 108,093 rupees 12 annas, and insisted that the amount due on the mortgage at the date of the commencement of this suit must be taken to be 150,193 rupees 12 annas, of which the proportion attributable to Hosseinpore and the other premises sought to be redeemed was 27,387 rupees 6 annas 6 pice. This mode of calculation, which does not give credit for one rupee in respect of the rents and profits realised from the property during more than twenty-one years is obviously erroneous.

Moreover, the whole argument is based upon a misconception of the nature and effect of the Decree of the 1st August, 1843. That Decree in fact, did nothing but dismiss the then pending suit for redemption on the ground that the full and entire amount of the mortgage money had not been deposited (the sums tendered being being only 26,400 rupees and 400 rupees). According to the course and practice of the Court in India the only point to be determined in such a suit is whether the mortgage debt has been fully satisfied after taking into account the sum tendered or deposited; nor is the finding of any particular amount as still due conclusive against the mortgagee in a subsequent suit. But in truth this Decree, after dismissing the suit, merely said that the Plaintiffs would not be entitled to redeem until they should liquidate the whole of the money due to the Appellant, both on account of the past and the present, according to the conditions set out in the various deeds. If, therefore, according to the terms of the original contract no interest was to run upon the 5,000, rupees, this decree would not convert that loan into a loan bearing interest. Nor would it alter the rights or liabilities of the parties in respect of the other sums which made up the 42,100 rupees.

The question now under consideration, viz., the amount of the whole mortgage debt to be apportioned between the different mouzahs, may be treated without reference to apportionment, and as if it arose between a sole mortgagor and the mortgagee.

It is also to be considered with reference both to the sufficiency of the tender or deposit, and to the actual sum payable on redemption.

It was clearly not necessary for the mortgagor to deposit anything by way of interest on the 26,400 rupees, if, as seems to be assumed, that sum was secured by usufructuary mortgages. He had a right to assume until the contrary was shown, by taking an account, that that interest was covered by the rents and profits. Again, he was under no obligation to deposit anything in respect of the 5,000 rupees if no interest was chargeable on that loan. The question of sufficiency is, therefore, reduced to this: Was he or was he not justified in the assumption that the mortgagee was not entitled to recover by way of interest on the 10,700 rupees more than the principal, and in limiting the deposit in respect of interest to that sum.

The contracts on which this liability arose were entered into long before the passing of Act XXVIII of 1855, and *primâ facie* fall within the rule enacted by the 5th section of Regulation xxxiv of 1803. The contention on the part of the Appellant is that they are taken out of the scope of that rule by the application of Construction No. 359 to the facts of this case, and in particular to the two former suits for redemption which were dismissed by the Decrees of the 1st of August, 1843, and the 29th of April, 1864. Their Lordships are, however, of opinion that the Courts below have correctly held that the Construction in question does not apply to this case. The effect of it is that when the creditor sues for his principal and interest (the latter being equal or more than equal at the time of the commencement of the suit to the amount of principal), he is not debarred from charging subsequent interest for the period during which he is kept out of his money by his debtor's resistance of the demand. Neither the rule nor the reason of the rule seem to their Lordships to apply to a case in which a mortgagee in possession is not a party suing for the money, but the party resisting by every means in his power a claim to redemption, and the final settlement of the account.

Their Lordships are therefore of opinion that the sum to be apportioned between the different villages

has for the purposes of deposit been correctly taken to be 52,800 rupees.

With respect to the final adjustment of the account their Lordships have to observe that if the suit had been conducted in the ordinary way the mortgagee must have accounted for the rents and profits received by him whilst in possession. The result of such an account would not improbably have been considerably in favour of the mortgagor, who does not, however, complain that it has not been taken. But, however that may be, the mortgagee, whose duty it was to render such an account, who has the best means of knowing what would be the result of such an account, if taken, and who does not suggest that he has been prejudiced by the omission to take it, cannot be heard to complain of these Decrees in so far as they treat the interest on the 26,100 rupees as satisfied by the rents and profits. And what has been already stated shows that in their Lordships' opinion he is not entitled to claim any interest in respect of the 5,000 rupees, or interest on the 10,700 rupees in excess of the principal.

The remaining question is what upon the facts found by the Courts below ought to have been their Decree. The Appellant now complains that the Plaintiffs have been allowed to redeem as against him the villages other than their own village of Hosseinpore, *i.e.*, to put themselves in his shoes as mortgagee in respect of these villages; and further that the Decrees was wrong in refusing to treat him as the owner under a subsequent purchase of three-fourths of Rookunpore.

The first objection does not come with a good grace from the Appellant, who defeated the Plaintiffs' former suit on the ground that they had not offered to redeem the villages in question, and who in this very suit has included in his calculation of the amount which, as he alleged, ought to have been brought into Court the shares of the mortgage debt which he said were chargeable on those villages. The Courts below, however, seem to their Lordships to have mistaken the effect of the former decision of the Sudder Court. It merely ruled that the Plaintiffs were bound to offer to redeem the villages in question, it did not rule that they were entitled to do so, or to acquire the interest of the mortgagee

in them against his will. It is unnecessary to determine in this suit whether in the peculiar circumstances of this case the former proposition is correct. Their Lordships are of opinion that the latter cannot be supported. They think that Appellant, if desirous of retaining *possession* of these villages as mortgagee, is entitled to do so against the Plaintiffs, whose right in that case is limited to the redemption and recovery of their village of Hosseinpore upon payment of so much of the sum deposited in Court as represents the portion of the mortgage debt chargeable on that village. On this view of the case it is unnecessary to consider whether the Appellant had or had not given sufficient evidence of his alleged purchase of three-fourths of the equity of redemption in Rookunpore.

Their Lordships are nevertheless of opinion that the Appellant was properly condemned in the costs of the suit, and ought not, any variation in the Decree notwithstanding, to be relieved from them. His defence in the former suit, which is inconsistent with his present contention, defeated that suit, rendered the present suit necessary, and invited the claim on the part of the Plaintiffs which he now resists. In this suit he ought at the earliest stage to have submitted to the redemption of Hosseinpore alone on payment of that portion of the sum deposited which represented the debt due in respect of that village. Instead of doing so he raised issues touching the sufficiency of the deposit, which have been determined against him. It is the course of practice in India that the costs of this kind of suit follow the result of the finding on such an issue, and are not, as in an English redemption suit, added to the mortgage debt. And their Lordships are of opinion that this rule has, in the present case, been most properly applied to a mortgagee who has so long, and by so many expedients, inequitably and vexatiously resisted the right of redemption. Their Lordships will therefore, if the Appellant desires it, humbly recommend to Her Majesty that the Decree of the Principal Sudder Ameen be varied by declaring that the Appellant is entitled to receive 5,947 rupees 1 anna, part of the 9,654 rupees deposit, and that the balance of that sum be returned to the Plaintiffs;

and that the Plaintiffs are entitled to redeem and recover possession of the village of Hosseinpore with mesne profits, from the date of the commencement of this suit until the date of the delivery of possession; and that the Appellant should pay his own and the Plaintiffs' costs in the Court below. The Plaintiffs have not appeared on this Appeal, and their Lordships give no costs of the Appeal.

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