Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Gokuldas and another v. *Kirparam and others from the Court of the Judicial Commissioner of the Central Provinces, India, delivered Friday, 27th June* 1873.

Present:

SIR JAMES W. COLVILE.
SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.

SIR LAWRENCE PEEL.

THIS is an appeal from the central provinces of India; and the question is, whether the decree of the Judicial Commissioner of those provinces was right in holding that the Respondents were entitled to redeem a certain village, in which the Appellants contended that, though they were originally mortgagees, they had acquired an absolute interest. The nature of the property is somewhat peculiar. On the face of the mortgage, the mortgagor, one Gujraj, is described as malguzar of the village, and, it appears, that previous to and at the date of the instrument, the interest of a malguzar was not exactly that of proprietor. Five days, however, after the execution of the mortgage, that is to say, on the 15th September 1870, the law having been modified, Gujraj was declared, by the revenue authorities, to have the proprietary interest, and we must, therefore, assume that his interest in the village was capable of being disposed of either by mortgage or sale. The

title of the Respondents is founded on a deed of sale executed by Gujraj, on the 12th August 1868, and having thus acquired whatever interest then remained in him, they brought the present suit to redeem the mortgage; and the only substantial question between the parties is, whether by reason of the proceedings which are about to be reviewed, the Appellants had acquired the absolute interest in the property, so that at the date of the sale to the Respondents there was no right of redemption capable of passing from Gujraj to them. Their Lordships think it will be convenient, before they consider this question on its merits, to dispose of two preliminary points, in the nature of issues in bar of the suit, which were raised in the courts below, but have not been pressed very strongly here at the bar. The first was in the nature of a plea of *res judicata*, being in effect that in the course of the miscellaneous proceedings had in execution of the decree of the 3rd of November, 1860, there had been such an adjudication upon the rights of the parties, that under section 2 of Act VIII of 1859 the present suit was not cognizable by the court. This was decided in the first instance in favour of the Appellants, but the decision of the officiating Deputy Commissioner, though affirmed by the Commissioner, was, on special appeal, reversed, and, in their Lordships judgment, correctly reversed by the Judicial Commissioner. They entirely concur with the last-named officer in the opinion that the present cause of action, viz., the right to redeem, was not heard and determined in the course of the proceedings in question; and, consequently, that whatever may be the effect of the latter, they did not constitute a bar to the hearing of the present suit within the meaning of the second section of Act VIII of 1859. The other point raised was in effect that a settlement

of the village made by the revenue officers with the father of the Appellants had so taken the proprietorship of the village out of Gujraj and vested it in the other party, as to make the sale by the former to the Appellants utterly invalid. This point, after repeated remands and appeals, was ultimately disposed of in favour of the Respondents, and, as their Lordships think, was correctly decided in their favour. It is unnecessary to go at any length into the consideration of this question, because one of the judges, a Mr. Grant, who seems to have had considerable experience as a settlement officer, and whose decision was generally in favour of the Appellants, fairly admitted not only that it had been conclusively disposed of by the Judicial Commissioner, but that the settlement proceeding, in his opinion, could have afforded no bar to the suit, inasmuch as the settlement officers have no power to determine question of title. Therefore that point may also be treated as out of the present appeal. Upon the merits the first question to be considered is what was the effect, and what the true construction of the instrument of mortgage? It has been treated by several of the judges in the courts below as a bibilwuffa, or deed of conditional sale, and that is the construction which the learned counsel at the bar have to day put upon it. Their Lordships, however, are by no means satisfied that it is a security of that character. The word sale is never used throughout the instrument. The security is described in terms as a mortgage of the village of Gobra, and the only passage from which any inference that it was in the nature of a deed of conditional sale can be drawn is the final sentence, "that "if I fail to pay the money as stipulated, I and "my heirs shall without objection cause the "settlement of the said village of Gobra to be "made with you." Now, upon that it is to be

observed that when the deed was executed, the consent of the revenue officers would have been required in order to carry out such a stipulation ; that the proprietary right of the mortgagor had not then been declared in the terms in which it was afterwards declared; and that, supposing it had been so declared, the instrument would not, like an ordinary deed of conditional sale, have imported in terms a sale of the interest of the party which was to become absolute and conclusive, upon his failure to pay the stipulated sum at a certain date. Such a contract would, independently of any rule of law to the contrary, execute itself, and the remedy of the party upon it would, if he were out of possession, be a suit for possession. Their Lordships, therefore, in construing this instrument, incline to the opinion that the effect of the document was to create a simple mortgage hypothecating the right of the party in the village of Gobra, and that the deed was not meant to operate by way of conditional sale. That this was the construction originally put upon the instrument by the mortgagees themselves, seems to their Lordships perfectly clear from the first proceeding which they took to enforce it. They brought a suit for the recovery of the mortgage debt and obtained a decree for the satisfaction of the amount decreed either by the Defendant himself or out of the mortgaged property. That is the only construction which their Lordships can put upon the decree at pages six and seven of the Record. The decree, however, was not executed in that way. After two years delay, the mortgagees applied for execution of their decree, but in a different way. After stating that the money had not been paid according to the decree, they say the enforcement of the condition of the bond is now just, and therefore they pray that the full possession of the village may be given to them in perpetuity and

the Defendant be released from liability under the decree. These proceedings differ entirely from those which would have been had by parties entitled under a deed of conditional sale to an absolute interest. If the law did not impose upon them the necessity of taking proceedings for foreclosure, they would have brought their suit for the possession of the estate. If the law required them to take proceedings for foreclosure they would have taken such proceedings, and after foreclosure would have sued for possession; or, possibly, having regard to the nature of the property and the terms of the instrument, they might have sued to compel a specific performance of the undertaking of the mortgagor to cause a settlement of the village to be made with them. But they certainly would not have sued for the mortgage debt, or take a decree in the form of that of the 3rd of November 1860. It is, however, argued that the substantial effect of the proceedings, taken in execution of this decree, was to destroy any right of redemption which may previously have existed. It is not necessary to go in detail through those voluminous proceedings. Their Lordships are not prepared to say that it was not the intention of the mortgagees to obtain, or even of the authorities who executed the decree to make, by means of those proceedings, such a permanent transfer as would extinguish to the mortgagees of the village the right of redemption. But their Lordships fully concur with the Judicial Commissioner in the conclusion that the decree did not warrant such a permanent transfer to the Respondents; and that the courts, in executing the decree, did not and could not effectually make such a transfer. If the construction which they are disposed to put upon the instrument is correct, if the security was in the nature of a simple mortgage, the proper course for the mortgagees to

pursue was to raise the amount for which they had obtained a decree by the sale of the village, paying the surplus proceeds, if any, to the mortgagor. They could not make such a decree the foundation of a transfer which should destroy the right of redemption, supposing the right of redemption existed. Again, assuming that Mr. Forsyth's construction of the instrument is the correct one, and that it is to be treated as a bibilwutha, their Lordships would have equal difficulty in saying that the interest under that bibilwutha has become absolute as Mr. Forsyth contends it has. The argument indeed involved this proposition, that inasmuch as the Bengal Regulations have not been introduced generally into the central provinces, a conditional sale must be taken to become absolute on the failure of the mortgagor to pay the mortgage debt on the day fixed, and that the mortgagee is under no obligation to take any proceedings by way of foreclosure. In support of that proposition Mr. Forsyth relied upon the decision of this board in the case of Pattabhairamier v. Vencatarow Naicken, 13 Moore's, I.A., page 560. If this contention were correct it would be unnecessary to consider whether the proceedings actually taken had the effect of destroying the equity of redemption, since after the day fixed for the payment of the mortgage money, the interest of the mortgagees had *ipso facto* become absolute, and there was no such equity to destroy. It has already been observed that in such a case their proper remedy was a suit for possession, and not such a suit as that which they actually brought. But their Lordships have also to observe, that the case cited by no means laid down broadly that out of the regulation provinces of Bengal—those provinces to which the Bengal regulation law strictly and in all its fullness applies—the rule laid down was to be adopted. It is said

distinctly at the end of the judgment "It must " not be supposed that in allowing this Appeal " their Lordships design to disturb any rule of " property established by judicial decision so as " to form part of the law of the forum wherever " such may prevail, or to affect any title founded " thereon." In the province of Madras, which is governed by a body of regulations of its own, it may well have been assumed that if those regulations do not prescribe forms of foreclosure similar to those of Bengal, no such forms have been introduced. But the Judicial Commissioner who decided this case in his judgment clearly assumes that the law of foreclosure, as it obtains in the regulation provinces, is so far adopted that it is the course of the courts in the central provinces to allow a time for foreclosure, and that some proceedings must be taken in order to obtain an absolute foreclose. And it lay upon those who came to impeach his decision to show that his ruling was inaccurate. They have referred us to no law to that effect, and inasmuch as it is notorious that in the non-regulation provinces a certain discretion is given to the courts to apply the principles which prevail in the regulation provinces in the administration of justice, according to the rules of equity and good conscience; their Lordships must, until the contrary is shown, presume that the law has been correctly declared by the Judicial Commissioner, who is the highest legal authority in this particular province. And, if that be so, it is perfectly clear that there had been no proceedings before the assignment to the present Respondents which could in any possible way operate as a foreclosure of a mortgage by way of conditional sale. A decree was obtained which was a mere money decree; there were then proceedings in execution irregular and inconsistent with that decree, but there was nothing which really gave the mort-

gagor the opportunity of coming in and redeeming; or notice that he would stand foreclosed if he did not redeem before a certain time.

It appears, therefore, that upon either view of the instrument the Appellants have failed to show that they had before the assignment to the present Respondents acquired the absolute interest in this village, and that the decision of the Judicial Commissioner and of the court of first instance in this suit that the Respondents are entitled to redeem on payment of the sum found due, is correct.

Their Lordships must, therefore, humbly advise Her Majesty to affirm the decree of the Judicial Commissioner and dismiss this Appeal.