Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Rajah Kishendatt Ram v. *Rajah Mumtaz Ali Khan, from the Court of the Judicial Commis- of Oude, delivered 28th March* 1879.

Present :

Sir James W. Colville.
Sir Barnes Peacock.
Sir Montague E. Smith.
Sir Robert P. Collier.

THE facts of this case, though some of them were originally contested, are now hardly in dispute, and may be shortly stated.

On the 22nd of May 1846, Raja Umrao Ali Khan, described as the Zemindar of Haka Utraoli (the father of the Respondent), executed in favour of Pande Ramdutt Ram (who is now represented by his brother the Appellant) the instrument of mortgage which is at p. 2 of the record. The nature of the interest so mortgaged, or intended to be mortgaged, will be afterwards considered. At present it is sufficient to state that the deed purported to be a usufructuary mortgage of the villages specified in the schedule to it, redeemable on the repayment, at a certain season of the year, of Rs. 36,000, the principal sum secured; the mortgagee entering into possession, and taking, until redemption, the rents and profits of the mortgaged property, in lieu of interest. Of those villages, two, viz., Panipur and Mubarakpur, have in some way ceased to belong to the estate; the others have, at p. 129 of the record,

been conveniently divided into seven separate classes or groups.

Immediately after the execution of the deed, the mortgagee attempted to enter into the actual receipt of the collections from the lands comprised in the mortgage, but was encountered by the opposition of a number of persons, who claimed to hold all or most of those villages under various birt tenures, the effect of which was to make each of them the zemindar of the villages comprised in his tenure, rendering only some small dues and payments to the Raja of Utraola. The resistance of the birtias seems to have been in a great measure successful; and it must now be taken to have been found in the suit that the birts were valid and subsisting sub-tenures at the date of the mortgage; and that the rights of the birtias in the different villages comprised in the 1st, 3rd, 4th, and 6th of the seven classes or groups above referred to were purchased by the mortgagee sometime in or before the year 1849. The birt right (if any) in the villages comprised in the remaining three groups remained in the original birtias or their representatives. Thus stood the rights of the parties at the time of the annexation of Oudh.

At the summary settlement, posterior to Lord Canning's proclamation, the mortgagee appears to have been allowed to engage for all the villages contained in the seven groups, and thenceforward to have held them as a taluq, subject of course to the right of any subordinate zemindar, or other sub-tenant, to a sub-settlement.

In December 1870, and in the course of the regular settlement of the province, the Respondent, as the son and representative of the original mortgagor, asserted by the present proceedings his right to redeem. That right, though at first disputed, is now admitted, and the only questions that remain open between the parties are what

are the nature and extent of the redeemable interest, and on what terms is the right of redemption to be exercised. These questions have received three different solutions in the course of the voluminous proceedings that have been had in the cause.

Captain Forbes, the settlement officer, in his proceeding of the 5th November 1873, found that at the time the mortgage deed was executed, the mortgagor's right and interest in the property mortgaged was limited to the annual levy of a village tax, called "bhent," and of certain market dues, to the occasional levy of a cess known as "Sharakatana," and to a reversionary right in all lapsed birt estates, the title in which had been derived from the mortgagor's family; that the taxes thus levied were of the nature of feudal or manorial tribute, and though necessarily fluctuating in amount, may be held to be represented by a sum equivalent, as nearly as possible, on an average to 10 per cent. of the rental taken as the standard for assessment of the Government demand, and that the right and interest thus defined was all that the Raja of Utraola was competent to convey, and all that was conveyed under the mortgage deed.

This proceeding being under a remand, Captain Forbes was not competent to determine the case judicially; but, from the above finding, it may be inferred that, in his opinion, all that the mortgagor was entitled to redeem was the superior title as above described, subject to the birt interests whether vested in the mortgagee or others.

The Commissioner, by his final judgment of the 20th of June 1874, decided that what was conveyed by the mortgage and was then redeemable by the mortgagor was, as between him and the mortgagee, the full and unrestricted proprietary title in the estates covered by the deed

of mortgage. He treated the acquisition of the birts by the mortgagee as made on behalf of the mortgagor, and apparently proposed to allow the former nothing for what he had expended on such acquisitions.

This judgment was on appeal varied by the Judicial Commissioner, whose order of the 9th of February 1875, was in the following terms :—

" The right of redeeming the mortgage on the estate of Itwa Khera, executed in 1253 Fusli by Umrao Ali Khan, ancestor of Plaintiff, in favour of Defendant, is decreed in favour of Plaintiff on payment of Rs. 36,000, and if the Plaintiff at the time of redemption pays to Defendant the further sum of Rs. 3,139, he will be entitled to re-enter on the estate with all the rights and privileges now enjoyed by the Defendant, but if he fail to pay the further sum of Rs. 3,139 at the time of redeeming the mortgage, Defendant will be entitled to retain the rights and interests of the birtia zemindars purchased by him in the estates of Khera Dih, Bankata Ganeshpur, Sanapar and Itwa, and will retain these rights as an absolute under proprietary tenure in subordination to Plaintiff, paying to the Plaintiff a rent equivalent to the Government demand for the time being, with an addition of 10 per cent."

Against this order the present appeal is preferred. There is no cross appeal, and therefore the contention between the parties is narrowed to this, can the mortgagor, upon paying the purchase money of the birts, plus the original mortgage money, redeem the estate as it is now enjoyed by the mortgagee; or is the latter entitled in any case to retain the rights and interests of the birtia Zemindars purchased by him as an absolute under proprietary tenure in subordination to the taluqdar, and to have a subsettlement on that basis.

The issue thus evolved from this lengthy liti-

gation is a narrow, but a nice and somewhat difficult one.

The Appellant originally insisted that what was mortgaged was the mere right to receive a malikanah allowance; and he still insists that the mortgage must be taken to have been made subject to the birts; that those birts, though held in some sense under the Raja of Utraola, were distinct estates; that the Plaintiff is not entitled to redeem more than his ancestor mortgaged, and that the Appellant or his brother was, notwithstanding the relation of mortgagor and mortgagee, entitled to purchase, and must be deemed to have purchased, the birts bought by him in his own right, and for his own benefit.

Their Lordships are not prepared to affirm the broad proposition that every purchase by a mortgagee of a sub-tenure existing at the date of the mortgage must be taken to have been made for the benefit of the mortgagor, so as to enhance the value of the mortgaged property, and make the whole, including the sub-tenure, subject to the right of redemption upon equitable terms.

It may well be that when the estate mortgaged is a zemindary in Lower Bengal, out of which a putnee tenure has been granted, or one within the ambit of which there is an ancient mocurreree istimrari tenure, a mortgagee of the zemindary, though in possession, might purchase with his own funds and keep alive for his own benefit that putnee or mocurreree. In such cases the mortgagee can hardly be said to have derived from his mortgagor any peculiar means or facilities for making the purchase, which would not be possessed by a stranger, and may therefore be held entitled, equally with a stranger, to make it for his own benefit. In such cases also the putnee, if the putneedar failed to fulfil his obligations, would not be resumable by the zemindar, and

the zemindary would always have been held subject to the mocurreree.

Their Lordships nevertheless have come to the conclusion, though not without some doubt and difficulty, that the decision of the Judicial Commissioner was, in the peculiar circumstances of this case, correct, and ought to be affirmed.

The first point to be considered is what is the true construction of the original contract, and what were the intentions and understanding of the parties to it. The deed was not in terms made subject to recognized birts, for it contains no reference to them. On the face of it it is a mortgage of the ilaka or ilakas, consisting of the 35 villages, one piece of land, and one jote, "including all the internal and external rights "which had descended to the mortgagor from his "ancestors." And it is expressed to be upon the following conditions, viz. :—"That the said "Pande is allowed to take possession of the said "villages, and enter into engagement with the "Government for the payment of revenue. I "(the mortgagor) shall have nothing to do with "the profits of the estate, or to stop the injuries "which may be done to it. I shall be entitled to "redeem the estate when I pay the said sum "(the Rs. 36,000) in one lump to the Pande "in the month of Baisakh, when there are no "crops standing on the ground." "If any one "appears to lay claim to the said estate, it will "be my duty to defend the suit, with which the "Pande shall have nothing to do." The last stipulation obviously points to a possible claim by title paramount to the whole zemindary, and is in the nature of a covenant for title. The other stipulations plainly indicate that the mortgagee, until redemption, was to be the zemindar *de facto* of the estate, with all the rights, privileges, and powers of a zemindar, as between him and the sub-tenants; that he was to

take the profits of it, and defend it against the injuries done to it; and, further, that it was in the contemplation of both parties that he might take possession of the villages, and receive the collections from them. This construction is consistent with the decisions of all the Courts that have dealt with the case. All have negatived the original contention of the Defendant, that the Plaintiff had no other right than that of redeeming a malikanah allowance, and have held that the subject of the mortgage was the talukdari interest, with all its incidents, whatever that might include.

The next point to be considered is what was the nature of the birt tenure, and what the relations between the birtias and the superior zemindar. Upon this point their Lordships were referred by Mr. Doyne to the Settlement Circular of the 29th of January 1861, being an official paper issued by the then Chief Commissioner of Oudh by way of instructions relative to the regular settlement of the province then about to be made.

The material paragraphs of the paper are the 18th to the 25th, both inclusive.

The 18th says that birts were given for whole mauzahs, or patches of lands in mauzahs, and proposes in the first instance to deal with the latter. The 19th says, "These tenures, when "granted by the talukdar for money received, "will be maintained as representing the pro- "prietary rights of the birtias, who by purchase "have acquired the position of intermediate "holders, and as constituting the portion of "profits left them by the talukdar." And then, after distinguishing between birts given by talukdars, and those given by mere thekedars, and treating the latter as not entitled to be maintained, it says, "Birts given by the original "zemindars before the village was incorporated

" in the talukah will be upheld, unless the " talukdar resumed them prior to 1262–63." The 21st paragraph says, " Birts of entire mauzahs " are very common in Gondah and Gorakpore. " They originated in purchases from needy " talukdars, and sometimes in clearing leases of " jungle land. In the Utraula and Batui per- " gunnahs of the Gondah districts, the birtias had " been in many instances admitted to direct " engagements with the Native Government for " years previous to the annexation, and, of course, " were settled with, and should have been so at " the late summary settlement, on the principle " that we are not bound to restore to the taluk- " dars what they had lost before our rule com- " menced." The 22nd paragraph says, " In " other instances the birtias held under the " talukdar on the terms of their birt pattahs. " These generally were, that 10 per cent., or " dyhak, as it was called, on the amount of the " pattahs, should be returned to them; that, " while they held on their pattahs, the entire " control of the village rested with them; and, " if they threw them up rather than accept en- " hanced terms, they were entitled to 10 per cent. " on the collections. Sometimes the birtia's " proprietary profits were shown in holding a " portion of the area 'nankar.'" The 23rd paragraph says, " In other instances, the birtias had " been stripped of every vestige of proprietary " right, for embarrassed talukdars would sell the " birt of a village several times over, and nothing " was more common than to see several claimants " to the birt of a village, each with his pattah in " correct form." Paragraph 24 says, " Where " the birtia has lost possession, there is no more " to be said. We are not to restore it to him, " but the Chief Commissioner is clearly of opinion " that the birtias who were found in direct " engagement with the State at annexation, or

" who have uninterruptedly held whole villages " on the terms of their pattahs under the taluk- " dars, must be maintained in the full enjoyment " of their rights in subordination to the talukdars. " It is no argument that the talukdar may not " realize more than 10 per cent. above the " Government demand. Such birt tenures must " be considered an intermediate interest between " the talukdar and the ryot, and, as such, entitled " to be maintained." The 25th paragraph says, " The meaning of the term 'birt' is a 'cession.' " It is the purchase of the proprietary rights sub- " ordinate to the talukdars on certain conditions " as to payment of rent, which were held to be " binding, though undoubtedly often violated by " superior power. In Gorakpore the birtias were " generally admitted to direct engagements, " though charged with a malikhana of 20 per " cent. to the talukdar. Here he must deal " with the superior party."

The result of what has been cited seems to be that, under the nuwabi, these birt tenures were presumably carved out of the talukdar's or superior zemindar's estate; that they were held under him upon terms varying according to the terms of the particular pattah or contract, and possibly according to the custom of a particular district; that they did not necessarily entitle the holders of them to engage directly with the Government for the revenue; that when such direct engagements took place malikhana was payable to the talukdar; that they were sometimes resumable, and when resumed would fall into the parent estate; and that in all cases the relation of superior lord and tenant subsisted between the zemindar and the birtias, a relation which, in an unsettled state of society like that of Oudh under the nuwabi, would probably involve more or less of power in the former over the latter, and, in dealings between them, give to the

zemindar advantages which would not be possessed by a stranger. On the other hand it is clear that birts still subsisting are tenures which would entitle their holders to sub-settlement under "The Oudh Sub-settlement Act of 1866."

The question, however, remains, what was the effect as between the mortgagor and the mortgagee of the purchases by the latter of the birts in question. To determine this it is desirable to consider, somewhat more in detail, what has been his course of action.

Upon the evidence in the cause it would seem that, in and after the year 1254 F. (probably the first settlement after the execution of the mortgage), the mortgagee was permitted to engage for the whole estate, although some at least of the birtias had, in former years, been allowed to engage, for the particular villages comprised in their tenures, directly with the Government, and that he continued so to do up to the time of annexation. The first summary settlement after that event seems, however, in accordance with the policy that then prevailed, to have been made with some at least of the birtias, including even those of Itwa, who are now said to have previously parted with all their birt interests.

It has also been proved that, immediately after the execution of the mortgage, the mortgagee attempted to enter into the direct receipt of the collections of all the villages by force of his talukdari title, and was only prevented from doing so by the resistance of the birtias, and the interposition, with or without jurisdiction, of the officer called the nazim. Here, then, the talukdar, *de facto*, was in open conflict with tenants of the estate claiming to be birtias, There is no proof of any regular trial and determination, by a civil court, of the disputed right. The nazim may have taken action merely as a

matter of police, and to prevent disturbance. Then follow the purchases in 1256 F. and 1257 F., and the execution of the deeds by virtue of which the birtias, for very inconsiderable sums, conveyed their interests in the birts in question nominally to Pande Ram Dutt Ram. There is, however, no evidence of the negotiations which led to these contracts; nothing which shows upon what basis they proceeded; how far, in making the purchases, the Pande was acting in the character, and using the powers, of talukdar, or how far, in doing so, he was compromising alleged rights which might otherwise have been successfully asserted for the benefit of the estate. The apparent inadequacy of the consideration money affords a strong argument for supposing that the transactions may have been in the nature of compromises, which the powers of talukdar were exerted to effect on favourable terms.

Again, what followed on the purchases? Had they been made by or on behalf of a talukdar holding under an absolute, as distinguished from a mortgage, title, the tenures would, as a matter of course, have merged in the taluk. The mortgagee seems, until the institution of these proceedings, to have treated them as so merged. He is not shown to have taken any steps to keep them alive, as distinct sub-tenures, for his own benefit. On the contrary, at the time of the first summary settlement after annexation he never sought to engage for these villages as birtia, and on the summary settlement after Lord Canning's proclamation, he did in fact engage for them as talukdar, and as parcel of the taluk. His conduct is not surprising. He probably did not contemplate redemption (in this very suit he disputed the right to redeem), and he therefore not unnaturally dealt with the birts as merged in the taluk, thereby enhancing the

value of the mortgaged estate, of which he expected to become absolute proprietor.

Again, had the mortgagor redeemed before these purchases he would have resumed his position as talukdar, with the means of dealing on favourable terms with birtias who have proved to have been willing to part with their interests for very inconsiderable sums. The mortgagee, taking advantage of his position of talukdar *de facto*, has so acquired the birts and allowed them to merge in the taluka. To allow him now to revive these birts for his own benefit, with the certainty of tenure and increased value which the regular settlement will give them, would obviously alter the position of the mortgagor for the worse, by reducing the redeemable estate *pro tanto* to a mere right to malikana, and possibly rendering the taluka no longer worth redemption.

Their Lordships are therefore of opinion that the Judicial Commissioner had strong grounds for applying the principle, which he explains by his subsequent Minutes of the 26th of January and the 9th of February 1875, he intended to affirm in his order of remand of the 26th of March 1873. In his final judgment he says that his intention in sending the case back to the Commissioner's Court was to ascertain whether the Defendant could prove that he had increased the value of the estate by buying up certain incumbrances, and, if so, whether he had any claim on the Plaintiff in respect of his expenditure on this account.

There was some discussion at the bar on the English decisions upon similar questions between mortgagor and mortgagee. If the principle invoked depended upon any technical rule of English law, it would of course be inapplicable to a case determinable, like this, on the broad principles of equity and good conscience. It is

only applicable because it is agreeable to general equity and good conscience. And, again, if it possesses that character, the limits of its applicability are not to be taken as rigidly defined by the course of English decisions, although those decisions are undoubtedly valuable, in so far as they recognize the general equity of the principle, and show how it has been applied by the Courts of this country. It is therefore desirable shortly to notice the arguments on this point. It seems to their Lordships that, although some of the earlier cases may have been qualified by more recent decisions, the general principle is still recognized by English law to this extent, viz., that most acquisitions by a mortgagor enure for the benefit of the mortgagee, increasing thereby the value of his security; and that, on the other hand, many acquisitions by the mortgagee are in like manner treated as accretions to the mortgaged property, or substitutions for it, and, therefore, subject to redemption. The law laid down in Rakestraw *v.* Brewer, 2, P. W. 511, as to the renewal of a term obtained by the mortgagee of the expired term, being, "as "coming from the same root," subject to the same equity, has never been impeached. The English case which in its circumstances comes nearest to the present is that of Doe *v.* Pott and others, 2 Doug. 709, in which the principle was enforced against a mortgagor. It was there held that if the lord of a manor mortgage it in fee, and afterwards, pending the security, purchase and take surrenders to himself in fee of copyholds held of the manor, they shall enure to the mortgagee's benefit, and the lord cannot lessen the security by alienating them. It is difficult to see why, as in the case of a renewable lease, the same equity should not attach to the mortgagee, particularly if by reason of his position as mortgagee in possession he has had peculiar

facilities for obtaining the surrenders. Some stress was laid upon the case of Shaw *v.* Bunny, 33 Beav., 494, in which Lord Romilly, Master of the Rolls, held that a second mortgagee was entitled, equally with a stranger, to purchase for his own benefit the mortgaged estate when sold under a power of sale contained in the first mortgage. An opinion to the same effect had previously been expressed by Vice Chancellor Kindersley, in Parkinson *v.* Hanbury, 1 De Gex and Smale, though he decided that case against the second mortgagee on the ground of his having had actual notice of an irregularity in the sale. These authorities, however, do not seem to their Lordships to touch the present case. The effect of a sale under a power of sale is to destroy the equity of redemption in the land, and to constitute the mortgagee exercising the power a trustee of the surplus proceeds, after satisfying his own charge, first for the subsequent incumbrancers, and ultimately for the mortgagor. The estate, if purchased by a stranger, passes into his hands free from all the incumbrances. There seems to be no reason why the second mortgagee, who might certainly have bought the equity of redemption from the mortgagor, should not, equally with a stranger, purchase the estate when sold under a power of sale created by the mortgagor. Upon the whole, then, their Lordships are of opinion that the decision of the Judicial Commissioner is equitable and correct, and they will humbly advise Her Majesty to affirm it, and to dismiss this appeal with costs.

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