Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of the Deputy Commissioner of Rae Bareli v. *Rajah Rampal Singh, from the Court of the Judicial Commissioner of Oudh; delivered* 14*th November* 1884.

Present:

LORD FITZGERALD.
SIR BARNES PEACOCK.
SIR ROBERT P. COLLIER.
SIR RICHARD COUCH.
SIR ARTHUR HOBHOUSE.

THE suit in this case was brought by the present Appellant. The plaint prayed that under the terms of an instrument of mortgage, dated the 10th March 1874, possession as mortgagee of 31 villages specified in that instrument of mortgage should be awarded to the Plaintiff. At the time of filing the plaint the Respondent Rajah Rampal Singh was not in possession of the villages. The person in possession was Dirgaj Kunwar, his mother. Rampal Singh was made a Defendant on the ground that under the circumstances which were stated in the plaint he was liable to pay the original debt, and was the real owner of the mortgaged villages. Dirgaj Kunwar was made a Defendant as being the party in possession. The plaint was filed on the 31st March 1880. On the 11th June 1880 there were proceedings for mutation of names. It is not necessary to go into the particulars of those proceedings, the result of which was that Rampal Singh came into possession, and on the 14th June, in his written statement in the suit, he defended it as being in possession, and Dirgaj Kunwar in fact

A 15063. 125.—12/84. Wt. 2475. E. & S. A

41

became no longer a real party to it. The contest is between the present Appellant and Rampal Singh. The only question which is now raised is upon the construction of the mortgage of the 10th March 1874.

The terms of that mortgage, after reciting particulars showing how it came to be entered into, are these :—After stating that there was to be a mortgage for Rs. 50,000, with a promise to pay it up in five years, from 1875 to 1879, it proceeds,—" Therefore I, while enjoying " sound health and proper senses, do hereby " mortgage without possession to the Shahzada, " in lieu of Rs. 50,000, being the balance of the " consideration of the above-mentioned decree, " the following villages, as per boundaries given " below, situate in the above-named Pargana " and district, together with all vested and " contingent rights, the gross rental of which " is Rs. 18,253 12 3, and the Government " revenue, Rs. 7,986; my husband having gifted " them to me by a deed of gift dated 2nd June " 1873, with power to sell, or mortgage or " transfer in every way the proprietary right, " and I holding possession thereof: Rajah Han- " want Singh, my father-in-law, has also recog- " nised the fact by the decree dated 7th Septem- " ber 1871; and in case of change of heirs from " time to time this property cannot be taken out " of my possession; and I covenant as follows :— " 1. I will pay Rs. 10,000 per annum at both " crops to the Shazada Sahib, and out of that " amount his servants will first deduct the " interest, whatever it may come to by calcula- " tion, and then credit the balance towards the " principal: and in case of any disorder which " may cause default in payment of the instal- " ment the servants of the Shahzadar Sahib " Bahadur, taking complete possession of the " mortgaged estate, will hold themselves liable

" for the payment of the Government revenue, " including land revenue and cesses of all sorts, " and having first deducted from the savings " the cost of making collections at the rate of " 10 per cent. on the gross rental on account of " the pay of servants, will credit the balance " towards the instalment money; at the end of " each year, in the months of May, June, Novem- " ber, and December, having made up accounts, " they will note the date of realisation. Till the " time the accounts are not made up there will " be no claim or objection on my part to set off " the interest against the amount collected; on " the other hand the amount collected will be " considered as amount in deposit." To stop here for the present, there is here a distinct provision that upon default in payment of an instalment the mortgagee by his servants was to take possession of the mortgaged property, and to collect the revenue, and apply it towards the payment of the instalment. The words are:— " The servants taking complete possession." That evidently shows that possession was to be taken; the mortgagee was to have power to take possession on the nonpayment of an instalment. What is said by the District Judge in his judgement is very pertinent to this part of the instrument. He says, " The question involved in " the 5th issue now remains to be determined, " viz., whether under the terms of the deed of " mortgage the Plaintiff is entitled to sue for " possession. The words of the deed, so far as " they bear upon this point, have been carefully " read and considered by me in the original " Hindustani, and a literal translation has been " given above in this judgement. There is no " doubt that there is some ambiguity in the " language of the deed. That a breach of the " condition as to regular payment of instalment " has taken place is not denied on behalf of the

" defence ; but it is contended that such breach " having taken place the Plaintiff's only remedy " is to sue for the recovery of the mortgage debt, " and that the Plaintiff's right to enter into " possession was intended to be contingent upon " the wish of the mortgagor. For this contention " the defence relies upon these words of the " deed :—' And if this be not agreeable to me " then immediately on the happening of the " breach of promise, after the end of the year, " they may realise the entire instalment money, " &c.' It is contended by the defence that the " word ' this ' (*yeh*), used in the above sentence, " applies to all the preceding conditions in the " deed, and that it makes the condition of taking " possession entirely dependent upon the mort- " gagor's wish. But I am of opinion that this is " not a fair construction of the Hindustani words " as they are used in the deed. The language of " the deed shows that the power of obtaining " possession on failure of regular and full pay- " ment of instalments was given absolutely, the " words used being, ' *kabya karke* ' (having taken " possession), and emphasised by the words ' *usi* " *wakt*,' at once, which, read together, indicate " absolute power to take possession." Therefore we have in the first part of this instrument an absolute power on the part of the mortgagee to take possession on nonpayment of an instal- ment. That this was contemplated is shown also by the provision at the end of the instrument, which says :—" Should, on the expiry of the " term of this instrument, any money remain " due, then, till the payment thereof, posses- " sion will continue according to the terms " herein set out." Then, after the passage which has been read, comes the part upon which the Respondent relies. " If I do not accept this, then " as soon as the breach of promise occurs they " will at the end of the year realise the whole

" amount of instalment by sale of the villages and " of other moveable and immoveable property " belonging to me. Should in any way any " objection be raised by me, or by my husband, " as between us or in Court, it will be void." The contention on the part of the Respondent, is that these words apply to all the previous part of the deed, and that the mortgagee could not take possession, except at the option of the mortgagor, and if the mortgagor thought fit to say that the mortgagee should not take possession but should realise the amount of the instalment by sale of the villages, that course must be adopted, and a suit for possession could not be maintained. Now the consequence of putting such a construction as that on this part of the instrument would be to make it not consistent with the former part, which gives a power to take absolute possession. The instrument must be taken as a whole, and that construction must be put upon it which will be a reasonable one, and will give effect to all the parts of it. A construction which will give effect to all is that the words, "If I do not accept this" may be referred to the part which immediately precedes that passage, namely, that which provides for the setting off the interest against the amount collected by the mortgagee when in possession. The other construction would not only not give the proper effect to the first part of the instrument, but it would also involve what could scarcely have been contemplated by the parties, viz., that the only security, the only remedy which the mortgagee would have if the mortgagor thought fit to insist upon it, would be that upon default in payment of an instalment he would be obliged to sell a portion of the property so as to realise the amount of that instalment. That can scarcely have been in the contemplation of the parties. The instrument must be looked at as a whole, and in their Lord-

ships' opinion the reasonable construction is that there was an absolute power to the mortgagee to take possession on default in payment of an instalment, but if the mortgagor objected to the mortgagee applying the rents in reduction of the principal and interest, the mortgagee might sell the mortgaged property and the other property which was brought into the security, in order to satisfy the debt. This seems to their Lordships be the reasonable construction of the instrument. It is the construction which the District Judge put upon it, but which the Judicial Commissioner thought was wrong, and therefore reversed his judgement.

Their Lordships will humbly advise Her Majesty to reverse the decree of the Judicial Commissioner, leaving the judgement of the District Judge to stand, and the Respondent will pay the costs of this Appeal, and the costs of the Appeal in the Court of the Judicial Commissioner.

Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of Bishenmun Singh and others v. *the Land Mortgage Bank of India, from the High Court of Judicature at Fort William in Bengal; delivered November* 18*th*, 1884.

Present:

LORD FITZGERALD.
SIR BARNES PEACOCK.
SIR ROBERT COLLIER.
SIR RICHARD COUCH.
SIR ARTHUR HOBHOUSE.

THE question raised in this Appeal relates to the propriety of a sale effected on the 6th November 1880, under the order of the District Judge of Bhagulpore. The Appellants are the Judgment debtors of the Respondents, and the debt was secured by a mortgage. A suit was instituted by the Respondents before the Subordinate Judge of Bhagulpore, for the purpose of realising that mortgage, and on the 8th January 1877 a decree was made, under which the property comprised in the mortgage was to be sold. Before the sale was effected certain objectors appeared, and then it turned out that the Appellants had assumed to include in this mortgage certain property which, by a previous family arrangement, had passed to other members of the family. But at the same time, and by the same arrangement, the Appellants had received other properties which were not included in the mortgage. The Respondents then instituted another suit, also in the Court of the Subordinate Judge of Bhagulpore, for the purpose of bringing within the influence of the mortgage the property which

A 15082. 125.—11/84. Wt. 2475. E. & S.

42

by the family arrangement had been substituted for the property that was professedly mortgaged, but did not belong to the mortgagors. That suit was called up by the District Judge into his Court, and in that suit a decree was made on the 6th August 1879 by the District Judge, which has now to be construed.

The decree was made by the consent of the debtors, and the effect of it was this: The Court declared that the substituted properties were fit to be sold by auction in execution of the decree of the creditors (that is the decree of the 8th January 1877), and that for the purpose of that auction sale this suit ought to be taken as supplemental to the former suit. Then it directed that the mortgage given by the debtors to the creditors, and the aforesaid decree of the 8th January 1877, should be amended according to the previous declaration. Another term of the consent decree was that the debtors should have six months time, from the date of the decree in the new suit, for making arrangements for payment of the amount due.

Those were the main terms agreed upon, and embodied in the decree. The six months elapsed, and some time after they had elapsed the creditors, the Respondents, presented a petition for execution of the decree in the second suit. It has been disputed whether it was a petition for the execution of the decrees in both suits. Part of the petition looks one way and part the other, but it may be taken to be as the Appellants contend, that it was a petition for the execution of the decrees in both suits. Now it is a very odd thing that there is not in this record any copy of the order made upon that petition. All their Lordships find is that an order was made fixing the sale for the 5th November 1880, and that an application was made by the Appellants for a postponement of that sale. The

application seems to have been made on the very day for which the sale was fixed. The Judge refused that application. The sale took place. The Appellants say they are aggrieved by that sale, and they seek by this Appeal in some way to disturb the sale. It is difficult to say what they seek because they now rest their case upon the allegation that the execution proceedings should have been carried into effect by the Subordinate Judge, and that the District Judge had no such power. If so, the order by which the Appellants are aggrieved is the order which was made in answer to the petition for execution, and which ordered the sale; and that order is not appealed from. The order that is appealed from is the order made by the District Judge refusing the application to postpone the sale, which was a totally different question. It would be exceedingly difficult for the Appellants to succeed, even if there were no jurisdiction, because they have never taken the proper course to complain on the ground of want of jurisdiction. They complain only of that which is discretionary in the Judge, of ordering the sale to take place at the time fixed or to postpone it. That is the ground of appeal to the High Court, and the ground of their appeal here.

But their Lordships do not desire to rest their decision upon that point. They think on the point which has been argued at the bar here, though it is not properly raised by the petition of appeal, that the Appellants have shown no case for disturbing the order made by the District Judge. It is quite clear that in applying to the District Court for execution of the decree in the new suit the parties must have considered that the decree was one of the District Judge, and to be carried out by the District Judge; and though unfortunately we have not got the order made on the petition for execution, the District

Judge himself must have so considered because he made the order for the sale, and the sole question is whether the decree of the 6th August 1879 was the decree of the District Judge.

Now, like other decrees of Indian Courts, this is not drawn in the most artistic form; and it might be open to argument whether in saying the decree of the Subordinate Judge should be amended that decree still remained the decree of the Subordinate Judge; but their Lordships think that, even construing the language of the decree strictly, the better construction is that it was intended the decree should be that of the District Judge, and they think that in point of procedure it was more proper to make it the decree of the District Judge than the decree of the Subordinate Judge. If then it was desired that the Subordinate Judge should execute the decree, there should have been an order made by the District Judge ordering the Subordinate Court to carry the decree into execution. The District Judge did not take that view. He carried his own decree into execution, and their Lordships consider that the decree which he carried into execution drew up into itself the decree of the Court below, and that it was in effect a decree for a sale of the whole of the property which the new suit approved to be the property affected by the mortgage. It may be observed in construing that decree that there is certainly one term in it which applies to the whole property; that which was originally well mortgaged, and that which was substituted into the mortgage, namely, that six months time should be allowed to the Appellants to make arrangements. Their Lordships think that on the broad construction of this decree the sensible view of it is to hold that it was the decree of the District Judge, that it affected the whole property mortgaged, and that his jurisdiction to order execution was clear.