

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Banarsi Parshad v. Ram Narain and Others, from the High Court of Judicature for the North-Western Provinces, Allahabad; delivered the 25th March 1903.*

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Present at the Hearing :

LORD MACNAGHTEN.

LORD LINDLEY.

SIR ANDREW SCOBLE.

SIR ARTHUR WILSON.

SIR JOHN BONSER.

[*Delivered by Lord Macnaghten.*]

This is an Appeal *ex parte* from a Decree of the High Court at Allahabad reversing a Decree of the District Judge of Bareilly and restoring the Decree of the Subordinate Judge.

The Plaintiffs, who are now represented by the Respondents, claimed to redeem without payment a mortgage held by the Appellant over certain villages and a shop which belonged to them.

The mortgage was dated the 8th of September 1884. It was expressed to be for a term of seven years, with an extension of five years more if both parties agreed. On the execution of the mortgage the mortgagee entered into possession of the mortgaged premises, and continued in possession until apparently a receiver was appointed in the suit. The mortgage deed is a very obscure document, confused throughout and

in places contradictory. It partakes of the character of an agency or receivership deed as well as of the character of a usufructuary mortgage. The two purposes of the deed are so mixed up together that it is difficult, if not impossible, to determine the rights of the parties with anything like certainty. The Subordinate Judge and the High Court both came to the conclusion that the meaning of the deed was that the amount of the gross rental as shown in the *jamabandi* or rent-roll, whether actually realized or not, was to be taken as the income for which the mortgagee in possession was to be responsible.

This view does not seem to have been presented by the Plaintiffs themselves. Indeed, the point was not taken in the pleadings at all. It appears to have been an inference drawn by the Subordinate Judge from certain expressions found in the mortgage deed, which are by no means clear. On this footing the Subordinate Judge determined that the mortgage had been discharged and gave the Plaintiffs a decree without determining the issues raised in the suit. The District Judge, on the other hand, thought that was not the meaning of the document, and went so far as to say that no sane man of business would have assented to such an arrangement. He dismissed the plaint with costs on the ground that the mortgagee was entitled to hold the mortgaged property for the extended term under an agreement alleged, but not proved, and the subject of one of the issues on which no finding was pronounced. He further held that during that extended term the mortgagors were not entitled to any accounts.

Their Lordships are unable to agree either with the District Judge or the High Court. They do not think that the mortgagee was

intended to be responsible for the rent-roll in the *jamabandi* under all circumstances. On the other hand, they cannot doubt that under such a deed as that on which the suit is founded the principal must be entitled to call upon his agent to furnish accounts of receipts and payments.

Possibly if the evidence which appears to have been before the Subordinate Judge had been available on the appeal their Lordships might have been able to arrive at a decision on the merits. As it is, there is no evidence before their Lordships on which it is possible to come to any conclusion—all their Lordships can do is to express their dissent from the Judgment of the High Court as well as from the Judgment of the District Judge and to remit the case to the Subordinate Judge with such directions as seem to them to be necessary under the circumstances.

In their Lordships' opinion the proper Order will be as follows :—

Order the Appellant to bear his own costs of this Appeal.

Discharge the Decrees of the High Court and of the District Judge without costs.

Discharge the Decree of the Subordinate Judge, the costs of the hearing before him to be costs in the cause.

Remit the suit to the Subordinate Judge.

Declare that according to the true construction of the mortgage deed of the 8th of September 1884, the Defendant, the mortgagee, is not responsible for the amount of the gross rental as shewn in the *jamabandi*, but only for such sums as were actually received by him or on his behalf, and such sums, if any, as might have been received by him but for his own neglect or fault.

Take an account of the Defendant's receipts and payments under the said mortgage deed, and let the ultimate balance due to or from the Defendant be certified.

Enquire what, if anything, was due to or from the Defendant in respect of the said mortgage at the date of the commencement of the suit, and what was the amount, if any, in the hands of the Defendant at that time.

Let the ultimate balance be paid to the party to whom it shall appear to be due within such time as the Judge shall direct, and let the costs of the suit be borne and paid by the Defendant if it shall appear that nothing was due to him in respect of the said mortgage at the date of the commencement of the said suit, but if it shall appear that at that time anything was due to the Defendant in respect of the said mortgage, let the costs of the suit be borne and paid by the Respondents.

Their Lordships will humbly advise his Majesty accordingly.

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