

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Consolidated Appeals of Muhammad Naseem v. Mirza Muhammad Abbas Ali Khan; and of Muhammad Naseem v. Mirza Muhammad Abbas Ali Khan; and of Mirza Muhammad Abbas Ali Khan v. Muhammad Naseem, from the Court of the Judicial Commissioner of Oudh; delivered the 11th December 1907.*

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Present at the Hearing:

LORD ROBERTSON.

LORD COLLINS.

SIR ARTHUR WILSON.

[*Delivered by Lord Collins.*]

These are consolidated Appeals from two Decrees of the Court of the Judicial Commissioner of Oudh. The principal Appellant obtained leave to appeal in India in the usual way. The Cross-Appellant obtained from His Majesty in Council special leave to appeal.

The questions in these Appeals turn upon the construction of a deed of mortgage and relate to the terms upon which the mortgagor was entitled to redeem. The mortgage was executed by one Chaudhri Imdad Ashraf in favour of the Respondent on 30th September 1885. The material parts of the deed are set out in the Record and are abstracted in the judgments below, and need not be here repeated. The mortgage money was Rs. 29,000, and the rate of interest 10 per cent. per annum. By the 15th September 1902 the mortgagor had paid in all Rs. 13,461 on account of interest. On the 4th of November 1886 he paid Rs. 2,699 on

account of principal. Afterwards he made default in paying interest, and the mortgagee instituted a suit for possession, and on 18th September 1893 got a decree under which he was put in possession on the 27th January 1894. The mortgagor on 21st December 1899 sold a portion of the mortgaged property to the Appellant, Chaudhri Muhammad Naseem, who, on the 5th June 1900, tendered to the mortgagee a sum of Rs. 37,000 in redemption of the mortgage. The tender was refused, and this Suit for redemption was instituted by the Appellant and the mortgagor. One of the chief matters in controversy was whether compound interest was in the circumstances payable by the mortgagor. This point was decided by the Subordinate Judge in favour of the mortgagee, but on appeal the Judicial Commissioners took a different view and disallowed it. There were also other items in the account as to which disputes arose which were decided by both Courts in favour of the mortgagee. The result was that on an account taken on the basis of the interpretation and findings adopted by the Judicial Commissioners, it appeared that the sum of Rs. 37,000, which on the 5th June 1900 had been tendered by the mortgagor and refused by the mortgagee as the sum payable to entitle the former to redeem, was less than the true amount as ascertained by the judgment of the Judicial Commissioners by about Rs. 200. Against this decision both sides have appealed, after having first been heard on motions to vary in certain respects the terms of the decrees. Naturally, on the hearing of the Appeals before this Board, each side tried to vary the account in his favour by attacking particular items so as to establish or destroy the sufficiency of the tender.

A number of these controverted items had involved inquiry into the facts in the Court of first instance, and were accordingly reported

upon by a commissioner appointed by the Subordinate Judge, who made the report the basis of his decision. It is, of course, impossible for this Board to review findings of fact on such materials, nor were they invited to do so, but it will be found that the real controversy narrows itself down to some two or three questions of principle, which have been discussed and decided in the Courts below. These questions would appear to be—

1. On the true construction of the Agreement, is the mortgagor liable for compound interest since the mortgagee entered into possession of the mortgaged premises?
2. Is the mortgagee entitled to get from the mortgagor over and above the usufruct of the mortgaged property the amount paid by him on account of maintenance and enhanced Government revenue?
3. Is the mortgagee entitled against the mortgagor to arrears of rent due from tenants even where such arrears are statute-barred as against the tenants?
4. Is the mortgagee entitled to credit for the whole of the profits during the period when, in consequence of part payment, the whole debt was no longer due?
5. Is the mortgagor entitled, on the taking of accounts, to interest on payments made by him in discharge of the principal?

Their Lordships will consider these points in their order:—

First, as to compound interest. This turns upon the construction of clause 4 of the Agreement. On this point their Lordships agree with the reasoning and interpretation of the Judicial Commissioners.

Secondly, as to maintenance and enhanced revenue, even if the point as to maintenance is still open to the mortgagor, which is doubtful, their Lordships adopt

the construction of the Agreement on these points in which both the Courts below concurred.

Thirdly, as to statute-barred rent, their Lordships agree that this point, as held by the Subordinate Judge, is met by the express language of the 10th clause of the Mortgage Deed.

Points 4 and 5 were not taken by the mortgagor either before the Subordinate Judge or the Judicial Commissioners, and are not now open to the mortgagors, neither is there anything to be found in the Agreement to support them.

With regard to the "reasons" put by the mortgagee for his Cross-Appeal to His Majesty in Council, their Lordships adopt the conclusions and reasons of the Court below on the 1st, 3rd, and 4th of those "reasons." The 2nd reason raises the question of compound interest, which has already been dealt with. The fifth is not open to the mortgagee; the fact that he abstained from taking it is made the subject of comment by the Commissioners.

The result is that, in the opinion of their Lordships, the Appeals and the Cross-Appeal all fail, and they will therefore humbly advise His Majesty that they should be dismissed.

The costs of the Appeals will be borne by the respective Appellants.

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