

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Radhabenode Misser v. Kripa Moyee Debia from the High Court of Judicature at Fort William in Bengal; delivered 22nd January 1872.*

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Present :

SIR JAMES W. COLVILLE.  
SIR MONTAGUE SMITH.  
SIR ROBERT P. COLLIER.

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SIR LAWRENCE PEEL.

IN this case the question admits of being very shortly stated. It was this, whether the ordinary rules applicable to mortgages expressed in the passage in Mr. Macpherson's book on Mortgages, referred to by the High Court, do or do not apply to the present case? It was contended that they did not apply to the present case because their application is expressly excluded by an agreement between the parties; and if their Lordships had come to this conclusion they would undoubtedly have given effect to that agreement.

The construction of the agreement which is contended for on the part of the Appellant is this, that the mortgagee on his part is entitled to the payment of the principal and of the interest on the debt, but that the payments of interest which properly would accrue, at all events annually, carry no interest themselves, which no doubt is the ordinary rule. On the other hand it is said that the mortgagor is entitled to call the mortgagee to account for the whole of the annual proceeds of the property less a few expenses of collection, and that each of the annual payments of the proceeds of the property is

chargeable with interest; so that while on the one hand the mortgagor can charge the mortgagee with all the annual proceeds of the estate, those annual proceeds carrying interest, the mortgagee on the other hand can only charge the mortgagor with the debt and the interest, the latter not carrying interest, the result of which is certainly somewhat extraordinary—that whereas in this case it appears very clear that the mortgaged property was an insufficient security, and that the proceeds of it fall short by some Rs. 400 a year of the interest, nevertheless, after a long period of time, the mortgagor, not having paid a farthing of the principal or interest, is entitled to a large balance on the part of the mortgagee. Of course the parties might have so agreed if they pleased, but their Lordships would be loth to put such a construction upon the agreement unless they were compelled to do so by very plain words.

On looking at this agreement, more especially at the 6th and 10th paragraphs, which have been often referred to, and to the precise terms of which it is not necessary to refer again, their Lordships on the whole think that these paragraphs and the agreement generally, which is drawn by no means clearly, are not inconsistent with the supposition that the parties intended that the interest might be set off from time to time against the rents and profits, and that the mortgagee was only to account to the mortgagor for any rents and profits and interest on the same which he may have received over and above the interest due to him upon the debt.

Their Lordships being of opinion that that interpretation is not inconsistent with the contract according to the best construction they can give to it, it follows that the rule stated by Macpherson in general terms is not excluded by the terms of this contract.

Their Lordships think it right also to say that even assuming the construction which has been contended for on the part of the Appellant, cer-

tainly an unusual one in documents of this kind, their Lordships are not prepared to say that the High Court was wrong in determining that such a construction was applicable only to the first ten years, and that if the mortgagor chose at the expiration of that period to avail himself of the regulations which permit the redemption of mortgages after the expiration of the term stipulated for, he must come in under the general terms of those regulations which prescribe the equitable conditions required to be satisfied.

Their Lordships are also of opinion that Regulation 15 of 1793, section 7, does not apply to transactions of this kind.

Under these circumstances their Lordships will humbly advise Her Majesty that the decision of the Court below ought to be affirmed, and this appeal dismissed with costs.

