

*Judgment of the Lords of the Judicial Committee
of the Privy Council on the Appeal of Agha
Hussun Khan Bahadoor v. Mussumat Janee
Begum, from the Court of the Financial Com-
missioner of Oudh; delivered 21st November
1872.*

Present :

SIR JAMES W. COLVILLE.
SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.

SIR LAWRENCE PEEL.

IN this case their Lordships are of opinion that it is their duty to advise Her Majesty to affirm the decrees which are under Appeal.

The contest in the Courts below was almost limited to the question, whether the true contract between the parties was that embodied in the copy set forth at page 5 of the record, which the Respondent alleges to be a copy of a true copy of the original mortgage, or whether, as alleged by the Appellant, it was in the nature of a *hybilwufa* or deed of conditional sale, containing a stipulation, that in default of payment within one year the interest of the mortgagee should become absolute ?

That question was imperfectly tried in the first instance, and the result was a remand by the Financial Commissioner to the Court of first instance, in order that it should be tried again upon evidence. The settlement officer, who exercised the functions of the Court of first instance, after hearing the evidence on both sides came to the conclusion that the contention of the Respondent was correct, and that the mort-

gage was, as she represented it to have been, a mortgage in the terms of the copy she produced. The findings upon those issues which had been directed by the Financial Commissioner on the original Appeal to him went back to him in order that he might pronounce a final order on the Appeal. Objections were taken by the Appellant to the findings and, upon the consideration of those objections, the Financial Commissioner thought that the findings were right, and gave effect to them. There was a subsequent application for a review before the Judicial Commissioner upon which it is unnecessary to comment, as he was of opinion that there were no grounds for review.

In this state of things, their Lordships, as they have already stated, are of opinion that the case comes distinctly within the general rule which they have laid down, viz., that they will not on light grounds disturb the finding of two concurrent Courts on questions of fact. It was urged that the Financial Commissioner had not given due effect to the evidence, and that it could not be held to be a finding of fact on his part; but looking at the proceeding before him as set forth at page 22, and giving to him, as their Lordships are bound to give, the benefit of the presumption that he did his duty as a judge, their Lordships can only understand that proceeding as importing that he had fully considered the evidence; and that having considered it, he accepted the finding of the settlement officer on the question of fact as correct. He expressly says:—"The Financial Commissioner
" entirely concurs with the settlement officer in
" holding that the mortgagee has totally failed to
" prove his allegation, that allegation being that
" the mortgage ceased to be redeemable after the
" expiration of one year."

Their Lordships are further of opinion that upon the evidence before them the two Courts came to a correct conclusion. The Appellant's vakeels at first suggested that the copy produced by the

Respondent was not a true copy of the copy which had been filed in a former proceeding by the then agent of the Appellant. This may have been a misunderstanding on the part of the vakeels for the Appellant, and they may have meant to say that it was not a copy of the original, as was pointed out by Mr. Leith; but whether that were so or not, it is clear that the original ought to have been, and would naturally have been in the possession of the mortgagee. He says, that it was destroyed in the mutiny. Giving him credit for the truth of that allegation, we then have secondary evidence of the contents of the document given by the production of this copy of the copy, which is unquestionably proved to have been a correct copy of the copy filed in another suit by a person who was then his agent. There is a suggestion that that agent had been acting in connivance with the Respondent, the Plaintiff in the suit, but for that there is not the slightest ground, except the fact that the man who was at one time in his service, and had left his service, was acting as mooktear for the Respondent. On the other hand, there is a body of oral evidence taken on both sides, and the settlement officer, weighing the conflict of evidence, gave credit to a witness whom he states to be a very respectable man in the district; and that witness says that he was an attesting witness to the original mortgage, and that it did not contain the stipulation which the mortgagee asserts it did contain, viz., a stipulation which would turn the contract from one of pledge into a contract of bybilwufa or conditional sale.

Their Lordships, therefore, are of opinion that the contract between the parties must be taken to be that set forth in the copy produced by the Respondent; and they have only further to consider the objections which have been taken to the form of the relief given upon the facts found by the Courts below.

It has been argued, first, that the Respondent

is not entitled to a decree for anything more than that which is alleged to be her share in this estate. This objection is wider than I, at least, at first conceived it to be; for it is not confined to the absence from the record of the sisters of the Respondent who joined in making the mortgage, but is founded on the alleged interest of other persons said to claim shares in the estate by title paramount to or conflicting with the title of the mortgagors; and the depositions, to which it has been urged due weight has not been given, are depositions not of the sisters of the Respondent, but of these persons described as the heirs of one Bukshoolla Beg.

Their Lordships are of opinion that in a suit of this kind, between mortgagor and mortgagee, in which the only question is whether the mortgagors have power to redeem, the mortgagee is not at liberty to set up by way of defence the title of third persons to a part of the mortgaged property. He took the mortgage from persons claiming on the face of the instrument to have the whole interest in the estate, and he cannot be allowed afterwards to dispute the title of his mortgagors and to allege not only that he is irredeemable, which was the question tried, but that even if redeemable he holds part of the estate which he has so taken by another and independent title. The effect of not making the other mortgagees parties to the suit is of course a different question. It was only raised in the Courts below by a plea to the whole suit, viz., that the Appellant was not bound to give any answer to the suit of one of the mortgagors. That plea was overruled on the authority of a passage in Mr. Macpherson's treatise on mortgages, which seems to their Lordships correctly to state the general law.

It has been argued that inasmuch as the contract was entered into when the province of Oudh was an independent kingdom, this question was to be governed by pure Mohamedan law, but it has not been shown to us that there is

anything in the Mohamedan law which conflicts with what has been decided in the Courts below.

Then, lastly, a point was taken at the bar which is admitted to have been taken here for the first time, viz., that assuming this document at page 5 of the record to be a true copy of the original instrument, the interest of the mortgagee nevertheless became absolute after the reaping of the first rubbee harvest which followed the execution of that instrument. There is nothing against which their Lordships, according to my experience, have more constantly set their faces than the raising here on Appeal of points which have never been taken or discussed in the Court below. If the point had been taken the Court below would probably have been better able than we are to construe the stipulation on which it is raised. It seems to their Lordships, looking at the contract as one of pledge and not as a bybilwufa or deed of conditional sale, which is what has been found, the construction which the Appellant now seeks to put on the clause in question cannot be supported. According to the literal sense of the words, they may be very well read as importing a stipulation that the mortgage should not be redeemed until after the reaping of the rubbee harvest, thereby giving the usufructuary mortgagee the profits of that harvest; but it does not follow from that that unless the redemption followed immediately after the reaping of the first rubbee harvest the mortgagors should lose their right of redemption. It is perfectly inconceivable that if that were the true construction and import of such an agreement, that case should not have been put forward, that the Appellant would not have accepted a copy of the instrument as giving him the rights to which he says he was entitled rather than set up what now must be taken on the finding of the Court to have been a false case, viz., that the original instrument was in a wholly different form.

For these reasons their Lordships think that no sufficient ground has been established for dis-

turbing the judgment of the Court below. If by reason of this party suing alone there are any other reasons on which the Appellant might have relief as against her, that relief must be obtained in a different proceeding. It has not been shown to us that he has any interest to which this tribunal can give effect, and we must accordingly advise Her Majesty to dismiss this Appeal, with costs.