Judgment of the Lords of the Judicial Committee of the Privy Council on the appeal of Norender Narain Singh v. *Dwarka Lal Mundur and others, from the High Court of Judicature at Fort William in Bengal; delivered November 22nd*, 1877.

Present:

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

THIS is an appeal in a suit brought by the heirs of Rajah Tek Narain Singh against certain parties, who may be described as the family of Dass, forming one set of Defendants, and persons called Mundur who formed another set, the latter being purchasers of the property in question from the Dasses. The suit was brought for possession and for registration of names, (as stated in the plaint,) " with respect to 3 annas 7 gundas " 3 cowries 1 krant out of 5 annas 3 gundas " 1 cowrie 1 krant, of Mouzah Dooram Mudeh-" poore 'usli' with 'dakhili' Pergunnah Nesing-" pore Koora, the property referred to in the " deed of conditional sale, after deducting " 1 anna 15 gundas 2 cowries, the right and " interest of Sri Narain Dass, Bachee Lal Dass, " Rajah Ram Dass, Muhtab Dass, alias Laljee " Dass, and Chunehal Kishore Dass, purchased " by your petitioner's ancestor, and the right " and interest of Shunker Batti purchased at " auction on the 10th of January 1868, subse-" quent to acquiring the deed of conditional " purchase, at an execution sale by your " petitioner." The conclusion of the plaint is " Since the principal and interest of the mort-

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" gage was neither deposited nor paid by the " vendors pursuant to the terms of the mortgage " bond, the foreclosure in accordance with the " Regulation XVII. of 1806 was formally effected " in the Judge's Court at Bhaugulpore by a " proceeding dated the 23rd of June 1867, " and the period of one year fixed by the " above law expired on the 27th February " 1868, and within that period the amount " entered in the bond and interest were not paid, " and the conditional sale aforesaid became " absolute on the 27th of February 1868, corre- " sponding with the 19th Falgoon 1275 F.S., " and the cause of action for possession and " mesne profit arose from the same date."

This action, therefore, is brought after proceedings for foreclosure had been taken upon the deed of conditional sale referred to in the plaint, and to give effect to those proceedings. This deed is dated the 30th of November 1858; it is from numerous members of the family of Dass, in all 19; the deed states that they had "sold " and transferred all and every the 5 annas " 3 gundas 1 cowrie 1 krant of the entire " 16 annas original with dependencies in Mouzah " Dorum Mudehpoora," in lieu of Rs. 5,000 which had been advanced by Rajah Tek Narain Sing. The further statement is, "We have " received the consideration money in full in one " lump sum in cash from the said vendee, and " brought the same into our possession and " enjoyment. We execute this deed of condi- " tional sale for two years in lieu of the said " consideration, and delivering it to the vendee " hereby declare and give in writing that the " said vendee shall enter into possession and " occupancy of the property sold by right of " purchase as proprietor. We promise that in the " space of two years from the date of this deed " of sale we shall pay the consideration money

"in question in cash in one lump sum to the
"vendee aforesaid, and take this deed of sale
"back. In case we do not repay the considera-
"tion in question the vendee shall, after the
"expiration of the time, be at liberty to foreclose
"and complete the sale under the provisions of
"Regulation XVII. of 1806 A.D., and enter into
"possession and occupancy of the property sold,
"and to have his own name registered in the
"Government Records in the column of pro-
"prietor."

It seems that the Rajah did not take possession, and no interest appears to have been paid or demanded until proceedings were taken after the Rajah's death by the present Plaintiffs to foreclose the property, under the eighth section of Regulation XVII of 1806.

The first question which arises (being the question upon which the High Court have decided the case in favour of the Defendants) is whether the directions in that section have been fulfilled. The High Court held that there was no sufficient proof of notification made to the Defendants of the petition of the Plaintiffs claiming foreclosure, and, that being the question, it will be right to look at the terms of the eighth clause. The enactment is, "Whenever the receiver or
"holder of a deed of mortgage and conditional
"sale, such as is described in the preamble and
'preceding sections of this regulation, may be
"desirous of foreclosing the mortgage, and
"rendering the sale conclusive on the expiration
"of the stipulated period, or at any time sub-
"sequent before the sum lent is repaid, he shall
"(after demanding payment from the borrower
"or his representative) apply for that purpose
"by a written petition, to be presented by him-
"self or by one of the authorised vakeels of the
"Court to the Judge of the zillah or city in
"which the mortgaged land or other property

" may be situated. The Judge, on receiving
" such written application, shall cause the mort-
" gagor or his legal representative to be furnished
" as soon as possible with a copy of it, and shall
" at the same time notify to him by a perwannah,
" under his seal and official signature, that if he
" shall not redeem the property mortgaged in
" the manner provided for by the foregoing
" section within one year from the date of the
" notification, the mortgage will be finally fore-
" closed, and the conditional sale will become
" conclusive."

The condition of foreclosure required by that section is that the mortgagor should be furnished with a copy of the petition, and should have a notification from the Judge, in order that he may within a year from the time of such notice redeem the property; and in an action of this kind, which is brought to recover possession as upon a foreclosure, it is essential for the Plaintiff to satisfy the Court that this condition has been complied with.

It has been contended on the part of the Appellant that it is within the province of the Judge of the Zillah Court to determine whether the notice has been duly served or not, and, although it has not been urged, or only very faintly urged, that his finding would be conclusive on the point, it has been strongly insisted that a finding of the Judge, recorded by him in the proceedings upon the foreclosure petition, would, at the least, be *primâ facie* evidence of the fact of service.

The general nature of the proceedings under the above Regulation was succinctly stated in a judgment of this Committee, in which it was pointed out that the functions of the Judge under sec. 8 are purely ministerial, (Forbes *v.* Ameeroonissa Begum, 10 Moore I. A. 350).

Their Lordships, considering that the duties of the Zillah Judge in the matter of a foreclosure

are of a ministerial nature, considering the vast importance to mortgagors of the notification, and the consequences which follow, if they do not redeem within the prescribed time, are of opinion that the service of it should be estab lished by evidence in a suit like the present, which is brought, in fact, to enforce the foreclosure. The proceedings of the Judge are *ex parte*, and even if the Judge examined the Nazir or person who served the notice, it would be unsatisfactory that the estate of the mortgagor should depend upon his opinion. The argument indeed was not pressed that it would be conclusive, but it would be going far to say that it is of such authority as to be *primâ facie* evidence, which should shift the onus of proof upon such an important point, and relieve the mortgagee from giving affirmative proof of the due performance of a condition necessary to be established before the foreclosure can attach upon the estate.

In the present instance, however, the case shows that the Judge had no proof, properly so called, of the service. It is plain from the manner in which the entry of the service is made, that nothing more occurred than this, that the Nazir having received the perwannah, made a return, as it is called, on the back of it stating what he had done with it. The substance of the return is stated in the proceedings of the Judge. After recording that "notices and copies of the petition for foreclosure "of mortgage addressed to the opposite party, "dated the 27th of February 1866 A.D., were "delivered to the Nazir under a perwannah to "serve on the opposite party," it goes on, "thereupon the Nazir submitted a return on "the back of the perwannah to the effect that "he could not meet the opposite party, and "that he had stuck up a copy of the notice

"and of the petition to the houses of each of "the opposite party, along with two receipts "in the Hindi character severally dated 13th "and 14th Cheyt 1273 F.S., written by Bunsi "Chowki Dar and Bochal Chamar 'Poneas,' "inhabitants of Mouzah Khoksisyam, Pergunnah "Nesingpore Koora, which were annexed on the "record." Then it goes on, "Today the record "of the case was brought up, and on a reference "to the return submitted by the Nazir it ap-"peared that the notice had been duly served." Therefore we have on the face of this document, what the Judge considered to be proof of the notice, namely, the return of the Nazir, which is a mere statement of that officer, without apparently any verification upon oath, or any examination of the Nazir by the Judge.

Upon the trial no proof whatever was given by the Plaintiffs of the service of the notification. They appear to have relied on the recorded return of the Nazir. But it was contended that the want of proof is immaterial, in consequence of certain admissions contained in two petitions filed on the part of the mortgagors, the Dasses. One is a petition signed by five, and the other by six. They were originally 19 in number, and the remainder do not appear to have petitioned or to have made any admission. The first petition refers in this way, and in this way only, to the service: "The applicants caused a "notice under Regulation XVII. of 1806 to be "issued on the 27th February 1866, clandestinely "served with out the knowledge and information "of your petitioners. Now your petitioners "having come to the knowledge of the case from "some out-of-the-way sources, offer objections on "the following grounds." This petition appears to have been presented a short time only before the end of the year of grace, and contains no admission of the time, or sufficiency of the service.

Their Lordships, therefore, consider that it does not amount to an admission that the notice had been properly served upon them at the time at which the mortgagee alleges it to have been, or that they had knowledge of it at a time which would have justified the foreclosure.

The other petition no doubt does contain an admission. There is this statement in it: "The " petitioners have under a deed of conditional " sale, dated the 9th Aughan 1266 F.S., for " Rs. 5,000, had notice under Regulation XVII. " of 1806, in respect of 5 annas 3 gundas 1 cow- " rie 1 krant of Mouzah Dorum Mundehpoora, " Pergunnah Nesingpore Koora, Zillah Bhagul- " pore, issued to us. Therefore we beg to submit " our objections." It is true they do not in terms admit the time at which they had notice, but with regard to those petitioners a judge would not be wrong in holding that there was an admission by them of due service. But this petition is the petition of six only out of the 19 mortgagors.

The importance of requiring proof of the service of the notice and not trusting to a bare statement that notice had been duly served is enhanced by the consideration that it has been hold by a declsion of the full Bench of the High Court of Bengal that the year during which the mortgagor may redeem his property runs, not from the date of the perwannah or the issuing of it by the Judge, but from the time of service. (Mohesk Chunder Pein *v.* Mussamut Tarinee, 10 W.R. 27.) This decision overruled some cases in the late Sudder Courts, in which it had been held that the year was to run from the date of the notification. Their Lordships are quite prepared to adopt the decision of the High Court. It is obvious that if the year is to run from the date of the perwannah, the negligence of the Nazir,

or other circumstances, may prevent its service for a considerable time after its date, and so the mortgagor would lose the benefit of the full time which it was intended by the Regulation to give him.

The necessity of proving service of the notice has recently been decided by two Courts in India, one a Division Court of the High Court of Bengal, and another a division Court of the North-Western Provinces. In both it has been held that the service should be proved in the action which is brought to enforce the foreclosure (Synd Eusuf Ali Khan *v.* Mussumat Azumtooissa, Weekly Reporter, 1864, page 49. The case in the North-Western Provinces is in the 3d High Court Reports of that Province, page 323.)

What their Lordships have held with regard to the service of the notice would be sufficient to dispose of the case against the Appellants, but for the fact, to which allusion has already been made, of the admission by some of the Defendants that they had received the notice. This opens the question whether the foreclosure is complete as against all or any of the mortgagors. The High Court has held that the omission to serve any one of the mortgagors would be fatal to the validity of the foreclosure. Their Lordships think that in the circumstances of this case service upon those only of the mortgagors, whose petition admitted service, would be insufficient to warrant the foreclosure of the whole property or of any of it.

This is a mortgage for one entire sum, and the property, although held in certain shares, was mortgaged as a whole to the extent of five annas and a fraction, and was redeemable only upon payment of the entire sum. Each and every one of the mortgagors was interested in the payment of that money and the redemption of the estate, and each and every one of them

had a right by payment of the money to redeem the estate, seeking his contribution from the others. The equity of redemption of those who were not summoned, and who had no notice that the mortgagee was demanding his money, cannot be foreclosed, because those who have been served have omitted to redeem. It is impossible for the mortgagee to obtain a foreclosure of the whole of the estate upon a service on some only of the mortgagors. Then with respect to the mortgagors who have admitted notice, it is to be observed that it was not sought to foreclose the individual shares of each as against each, but to foreclose the whole estate, as upon one mortgage, one debt, and one entire right against all.

Further, the Mundurs, the Defendants of the second class, purchased some share of some of the Dasses before the foreclosure proceedings took place. It appears that in February 1861, two or three years after the conditional sale, and before the notice of foreclosure, two gundas and two cowries was sold to the Mundurs. It is said that they did not take possession, but they had become by this purchase the owners of the equity of redemption of the purchased shares, and notice of foreclosure ought to have been served upon them. Mr. Doyne has argued that a purchaser who has not taken possession need not be served. Their Lordships, however, think that that argument cannot be sustained. The mortgagee, when he seeks to foreclose, must discover and serve the persons who are the then owners of the estate.

A question of this sort came before this tribunal in the case of Mohun Lall Sookool *v.* Goluck Chunder Dutt, 10th Moore, page 14. Their Lordships say upon it, "It is quite clear upon " the authorities, that if the sale had taken place " before the notice of foreclosure was filed, that

" notice, to be effectual, must have been served on
" the purchaser, and in the circumstances above
" stated their Lordships conceive that it ought
" to have been served upon the decree holder.
" Yet there is no evidence of any attempt to serve
" it upon anyone except the widow and heiress
" of the original mortgagor."

There are subsequent cases in India which show that the view taken by their Lordships has been followed in practice.

Without saying that there may not be cases of mortgages of separate shares, in which, by proceedings properly framed, foreclosure may take place in respect of some of such shares only, their Lordships think the proceedings in this case are not such as will sustain the present action as against any of the Defendants.

What their Lordships have said is enough to dispose of this case, but they think it right to advert to the main question which arose upon the merits, whether this conditional sale was intended between the parties to be really operative as a *bonâ fide* instrument.

It seems that Rajah Tek Narain was a patron of the family of the Dasses. They were involved in debt, and he probably advanced money to them from time to time. But with regard to this particular instrument there is strong evidence, arising from the history of the case and from facts which are beyond dispute, for presuming that it was not intended to be acted upon by Rajah Tek Narain. The deed is dated the 30th November 1858. In its terms it provides for immediate possession. A question, indeed, was raised whether that was so. It was said that the construction was at the least doubtful, and that it was not intended that the Rajah should have possession until the two years mentioned in the deed for the payment of the money had elapsed. However this may be, possession was not taken.

No provision is made in the deed for payment of interest, and none was demanded. The two years given by the deed for the payment of the money expired on the 30th November 1860. The petition to foreclose was not filed until the 2nd of January 1866, and up to this date it is plain that the Rajah had not entered into possession, had received no interest, nor apparently had asked for any. He obtained what is called the order of foreclosure on the 14th September 1867. The note of the Judge that the foreclosure was "sanctioned" cannot indeed be properly regarded in the light of an order. He takes certain proceedings, and makes a record of them, but he can give no judgment in any way binding on the parties. However, the proceedings in his Court were complete on the 24th September 1867. Again no action is taken; possession is left where it was, no interest apparently is demanded, and this suit is not brought until the 1st of October 1872, nearly 14 years after the mortgage, and five years after the foreclosure proceedings came to an end.

Then the property is dealt with by the Rajah himself, in a manner which seems quite inconsistent with his having a deed of conditional sale which was intended to be acted upon. In 1861 a lease was granted by the Dasses to the Rajah (in the name of his servant Bijoz Dass) of six annas and certain fractions of annas of the same Mouzah. Those annas must have included the whole of the shares which had been mortgaged—it appears to have included more; it is an ordinary lease, and part of the rent was to be deducted on account of a former Zurpeshgi. Again in 1867, after the Rajah's death, his sons obtained decrees against the Dasses, and the right and interest of the Dasses in this estate were notified for sale under those decrees. It appears that just before the days when the sale was to take place the Dasses

sold their shares to the Mundurs, who alone appear here as Respondents, obtained a large sum of money from them, and paid over that money in discharge of the judgment debt. Those circumstances are not referred to to show that the conditional sale did not exist, but they are inconsistent with its existence as a document which was intended to be acted upon. Throughout the above transactions there is no trace that it was referred to, or that any notice was given of it, or that anybody knew anything of it. Again, the Rajah, after the conditional sale, as admitted in the Plaint, purchased some of the shares of the Dasses which had been mortgaged. They are sales as if the Dasses had the absolute ownership. The deeds in no way refer to the mortgage, nor was any provision made respecting the mortgage debt.

It is not necessary for their Lordships to go further into these transactions. They have adverted to them because they were desirous of expressing the opinion they entertain of the extreme doubt, to say the least, which rests upon the *bona fides* of the conditional sale. They do not desire to impute fraud to either the Rajah or the Dasses. The Rajah had probably taken this deed from them to act upon it in case he should think it right, but did not think it right to do so; and having kept it for so long a time without acting upon it, there is strong evidence in this and in the other circumstances of the case which have been adverted to, leading to the conclusion that it is not a *bonâ fide* conveyance as against *bonâ fide* purchasers, which the Defendants, the Mundurs, are.

On the whole case, therefore, their Lordships will humbly advise Her Majesty to affirm the judgment of the Court below, and to dismiss this appeal with costs.