

*Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of Madho Pershad v. Gajadhar and others, from the Court of the Judicial Commissioner of Oudh, delivered 12th July 1884.*

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Present :

LORD WATSON.  
SIR BARNES PEACOCK.  
SIR ROBERT P. COLLIER.  
SIR RICHARD COUCH.  
SIR ARTHUR HOBHOUSE.

This is an appeal from a judgement of the Judicial Commissioner of Oudh, reversing a judgement of the District Judge of Lucknow.

The Plaintiff, a banker, sued to recover proprietary possession of a village on the completion of foreclosure proceedings with respect to a mortgage of it. The mortgage was dated 3rd May 1863, 17 years before the commencement of the suit; of the mortgagors, 17 in number, 11 survived, the remaining Defendants being representatives of those who had died. The mortgagee was Rajah Behari Lal, the father of the Plaintiff. The deed of mortgage purports to be a security for the repayment within five years of Rs. 4,851, with 12 per cent. interest, the receipt of which sum is acknowledged, and it declares that if the principal and interest are not repaid within five years the instrument shall operate as an absolute deed of sale.

The principal sum is stated to be made up of

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debts due by the mortgagors, or otherwise secured by former mortgages, which they were to be provided with money to pay, of a balance due to the Bank, and an advance of Rs. 1,356 "for necessary expenses."

The Plaintiff alleged default in the payment of the mortgage money, that the proper proceedings for foreclosure had been taken, and claimed possession of the land.

The Defendants denied that any consideration was given for the bond, and alleged that it was given only to secure advances which might be made to pay the costs to which the Plaintiff might be put by the prosecution of an appeal by two persons who had brought a suit against them, and failed in the Lower Court; that no appeal was preferred, and that nothing was advanced.

The issues stated were:—

(1.) Did the Defendants receive no consideration?

(2.) Were the Defendants induced to execute the deed by fraud and misrepresentation?

On the part of the Plaintiff the mortgage was duly proved, which undoubtedly threw upon the Defendants the burden of proving absence of consideration.

The Plaintiff further called witnesses to the actual payment of the consideration money when the mortgage was executed. He put in the former mortgages. He showed an entry in his books whereby it appeared that the sums due on the former mortgages were either advanced to the Defendants or paid for them; that they owed the balance to the Bank stated in the mortgage deed, and received the amount stated to have been paid to them. Against this evidence the Defendants called two witnesses who swore that they were present on the examination of the deeds, and that no money passed, but none of the mortgagors, of whom 11 were living, were called

to prove want of consideration, the pendency of the litigation, to meet the possible cost of which they alleged the mortgage to have been given, or indeed any part of their case, which involved a charge of gross fraud against the bankers. The District Judge believed the evidence of the Plaintiff, and gave judgement in his favour.

This judgement was reversed by the Judicial Commissioners on two grounds:—1st, that the mortgage was without consideration; 2nd, that the proper proceedings had not been taken to effect foreclosure.

The finding of the Judicial Commissioner on the first point seems to have been mainly based on three considerations:—

1. That the entries in the books of the Plaintiff contradict his story. Their Lordships have already intimated that in their view these entries confirm it.

2. That the money was said to be advanced before the deed was registered. It is to be observed here that the transaction occurred in 1863, a year before the Registration Act of 1864 came into force, which, for the first time, provided that payment of the consideration of deeds might be made in the presence of the Registrar at the time of registration and recorded by him; a practice which has since become common. As the banker was not a party to the deed, his presence before the Registrar was not necessary, while that of the Defendants was. If there is some force in the observation that it is strange that he should after parting with his money have entrusted the deed to the Defendants to have it registered and receive it back from the Registrar, on the other hand it is to be observed that the deed must at some time have been returned to the banker, as he produced it at the trial.

3. The absence of any demand of interest from the time of the mortgage money being due to the

date of the suit, nearly 12 years, an observation certainly of some weight.

On the whole, however, their Lordships are of opinion that the evidence preponderates on the side of some consideration having been received by the Defendants, though how much was actually advanced to them in cash may admit of doubt.

The second ground on which the Judicial Commissioner reversed the judgement of the District Judge presents a question of more difficulty. It was contended on the part of the Appellant that inasmuch as the Defendants had in the Court below rested their case solely on the absence of consideration for the mortgage, and had admitted in their written statement that they received some notice of foreclosure, and no issue as to the validity of the foreclosure had been raised in the Court of the District Judge, the Defendants were precluded from questioning the regularity of the foreclosure proceedings before the Judicial Commissioner, although they took the point in their grounds of appeal; and that the Commissioner had no power to inquire into those proceedings.

The proceedings necessary to effect foreclosure are thus prescribed in Section 8 of Reg. 17 of 1806:—

“ Whenever the receiver or holder of a deed of mortgage and conditional sale may be desirous of foreclosing the mortgage, and rendering the sale conclusive on the expiration of the stipulated period, at any time subsequent 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 himself or by one of the authorized 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 mortgagor 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 foreclosed, and the conditional sale will become conclusive."

These provisions are not merely directory but imperative, prescribing conditions precedent to the right of the mortgagee to enforce forfeiture of the estate of the mortgagor, and have for their object to protect mortgagors, who are often (as in the present case) poor and ignorant men, from fraud and oppression on the part of money lenders. Accordingly, both in the Courts of India and by this Board, it has been held that the prescribed procedure must be strictly observed. In the case of *Norender Narain Singh v. Dwarka Lal Mundur and others* (5 L. R., I.A., p. 18), it was held that the finding of the Zillah Judge, in the foreclosure proceedings, that notice had been duly given to the mortgagors, was not even *primá facie* evidence of the regulation having been complied with, and that the service of the petition for foreclosure and the perwannah of the Judge in the form directed by the regulation must be strictly proved. To construe the pleadings in the District Court as a binding admission that the Respondents had received due notice, according to the Regulation of 1806, in the foreclosure proceedings, would be to apply to pleadings in India a stricter construction than is usual.

The Judicial Commissioner had the subject brought before him by the grounds of appeal; he had power to take additional evidence, or to frame a new issue, which it is to be presumed that he would have done had it been necessary, and had the parties desired it. In their Lordships' judgement he had, at the least, a discretion to inquire into the subject if he thought fit, and they are not prepared to say that he exercised that discretion so wrongly that his judgement ought to be reversed.

Although the vakeel for the mortgagors appeared before the Judicial Commissioner, argued the question of foreclosure, and adduced evidence upon it, it does not appear that any application was made for the settlement of an issue on this question, nor was it suggested, nor is it now suggested, that further evidence of the regularity of the foreclosure proceedings was obtainable.

The question remains whether, in the foreclosure proceedings, the provisions of the Regulation of 1806, with respect to the notification to be made to the mortgagor, were or were not duly observed.

Several documents were put in, of which the following is a specimen :—

“ Translation of Notice to Ishri, dated 30th March 1876.  
 “ (Signed) H. B. H.

“ Madho Parshad, son of Raja Beharilal, Bahadur,  
 Sahukar (banker) and Talukdar of Maurawan,  
 &c. - - - - - Plaintiff,  
*versus*

“ 1. Gajadhar, 2. Jagan, 3. Matadin, son of Thakur, 4. Ishri, son of Dhaukal; 5. Janki, son of Jewrakhan; 6. Lalta, 7. Badloo, and 8. Bhagwandin, sons of Madari; 9. Sheo Charan, 10. Gauri, 11. Janki, and 12. Mathura, sons of Pem, 13. Kusahar, son of Baji; 14. Kalidin, 15. Rajwa, and 16. Sheo Singh, sons of Badri, 17. Sankata, Minor, son of Ram Sahai, under the guardianship of his mother, and 18. Bala, son of Bhawanidin, Brahmins, residents, and co-sharers of Mouzah Bhadin, Pargana and Tahsil Purwa, in the District of Unao, mortgagors - - - Defendants.

“ Claim.—Foreclosure of mortgage of the entire village Bhadin in the Pargana and Tahsil Purwa, in the Unao District, under the terms of the deed of mortgage by conditional sale dated 3rd May 1863 A.D. for an amount noted below :—

“ Notice.

“ To Ishri, son of Dhaukal, caste Brahmin, resident and sharer of Mouzah Bhadin.

“ Whereas Plaintiff has filed in the Court an application for foreclosure of mortgage in respect of village Bhadin described in the deed of mortgage by conditional sale dated 3rd May

1863, owing to non-performance of the conditions entered therein, notice of one year's currency is hereby given to you, as laid down in Section 8, Regulation XVII. of 1806, that if you will not pay up the mortgage money with interest within twelve months and redeem the mortgaged property, the mortgagee shall, at the expiration of the period stipulated for, become in virtue of the condition as regards non-receipt of the mortgage money and interest the absolute proprietor of the said village, and no objection whatever will thereafter be attended to.

	R.	A.	P.
"Principal mortgage money - - - -	4,851	0	0
Interest - - - - -	6,932	4	0
Future interest for one year - - - -	582	2	0
Costs - - - - -	8	4	0
Total - - - -	Rs. 12,373	10	0

" Dated the 30th March 1876.

" In Hindi.

" (Signed) ISHRI, Lumberdar, with pen  
of Gauri, Patwari. Witnessed  
by Gauri, Patwari.

H. B. H, are said to be the initials of the District Judge.

The signature at the bottom is said to represent the receipt of the document by Ishri, one of the Defendants, but when and where he received it is not very certain.

The following is a sample of another set of notices, dated the 26th of April 1876 :—

" By Order of the Deputy Commissioner of Unao.

" Notice of Foreclosure of Mortgage.

" No. 59. Miscellaneous, Civil.

" Madho Pershad, son of Raja Behari Lal.  
Bahadur, Banker, and Talukdar of  
Maurawan, &c. - - - - - Plaintiff,

" *versus*

" Gajadhar, &c. (18 persons), residents of  
Mauzah Bhadin, Pargana and Tahsil  
Purwa - - - - - Defendants.

" Claim.—Foreclosure of mortgage by conditional sale of the entire village Bhadin in lieu of Rs. 12,365. 6 in all.

" Notice to Sheo Charan, Defendant.

" Whereas the Plaintiff named above has put in a petition in this Court, requesting that a notice of foreclosure of mortgage be issued to you, you are therefore directed to attend this Court, on 18th May of the current year, and take away the

aforesaid notices, filed by the Plaintiff after understanding their full purport ; consider this urgent.

“ Dated this 26th day of April 1876, A.D.

“ (L.S.)

(Signed)

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It would appear by this that the Defendants are summoned to attend the Court on the 18th May, in order to receive a notice of foreclosure, and that consequently they had not received notice before.

Accordingly on the 18th of May they attend the Court.

The proceedings before the Court are headed :—

“ Claim to foreclosure of mortgage of village Bhadin in lieu of Rs. 12,366. 6. Application for the issue of notice of foreclosure for the term of one year.”

The Defendants objected to receiving the notice, on the ground of want of consideration for the mortgage.

A Minute of the Court of the Deputy Commissioner, dated 19th December 1876, is in these terms :—

“ Parties are present, *i.e.*, the Defendants, who were sent for, have appeared in person, while the Plaintiff's pleader is present for him ; notice has been delivered.”

It has been contended that on that day at least the notices were delivered to the Defendants, and that on that occasion they signed their names as having received them.

But what did they receive ? The document of 30th March ; none other is suggested, unless it be the document of the 26th of April, which is less favourable to the Plaintiff.

This document of the 30th of March, however, is not a compliance with the Regulation. It is not a perwannah under the seal and official signature of the Judge ; it does not notify from what date the year during which redemption shall be made begins to run, and it neither was nor purports to be a copy of the petition for

foreclosure, the furnishing which to the mortgagor is declared by this Board in the case before cited to be essential. Their Lordships are therefore of opinion that the Judicial Commissioner was right in holding that the requirements of the Regulation had not been complied with, and they will humbly advise Her Majesty that his judgement be affirmed.

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