

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Nidha Sah (since deceased), and Sant Din v. Murli Dhar and others, from the Court of The Judicial Commissioner of Oudh; delivered the 3rd December 1902.*

Present at the Hearing :

LORD MACNAGHTEN.

LORD LINDLEY.

SIR ANDREW SCOBLE.

SIR ARTHUR WILSON.

SIR JOHN BONSER.

[*Delivered by Sir John Bonser.*]

On the 10th of July 1876 one Indarjit Lal, representing himself to have absolute proprietary rights in certain villages, executed an instrument purporting to be a mortgage of them with possession to one Ishri Sah "for a period of 14 years from 1284 Fasli to 1297 Fasli" by which it was provided that on the expiration of the term the mortgagor "shall come in possession of " the mortgaged villages without settlement of " accounts . . . that on the expiration of " the term . . . the mortgagee shall have " no power whatever in respect of the said " estate . . . . and after the expiration " of the term this mortgage deed . . . . " shall be returned to the mortgagor without his " accounting for (paying) the mortgage money " secured under this document."

This instrument, though it is called a mortgage, and though it will be convenient to follow the nomenclature used in the document itself and in

the pleadings and judgments in the Courts below, is not a mortgage in any proper sense of the word. It is not a security for the payment of any money or for the performance of any engagement. No accounts were to be rendered or required. There was no provision for redemption expressed or implied. It was simply a grant of land for a fixed term free of rent in consideration of a sum made out of past and present advances.

It appears that the so-called mortgagor had not absolute proprietary rights in all the villages and that the mortgagee did not get the full benefit purported to be given him by the mortgage.

At the expiration of the 14 years the representatives of the original mortgagee refused to give up possession of such of the mortgaged property as the mortgagee had been able to get possession of on the ground that, owing to the misrepresentations of the mortgagor, they had been unable to recoup themselves the money they had advanced, and they claimed the right to hold the property until they had so recouped themselves.

The Respondents, who are the representatives of the mortgagor, then brought the action out of which this Appeal arises to recover the property.

The Subordinate Judge made a Decree in favour of the Plaintiffs, but deprived them of costs on the ground that the mortgagor had not "dealt honestly" with the mortgagee, and that Decree was affirmed by the Court of the Judicial Commissioner of Oudh.

It was contended before their Lordships that the mortgagor having broken his part of the contract by failing to give the mortgagee possession of the entirety of the premises comprised in the mortgage ought not to be allowed

to enforce the contract as against the mortgagee, but the answer to this contention appears to their Lordships to be that the Plaintiffs are not seeking to enforce the contract; they rely on their proprietary right, and it is for the Appellant to shew some stipulation either express or implied in the mortgage deed which deprives the Plaintiffs of the right to recover possession. This the Appellant cannot do and their Lordships will therefore humbly advise His Majesty that the Appeal be dismissed. As there was no appearance by the Respondents it will not be necessary to make any Order as to costs.

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