

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Shankar Din and others v. Munshi Gokul Prasad and others from the Court of the Judicial Commissioner of Oudh, delivered the 18th July 1912.*

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PRESENT AT THE HEARING :

LORD SHAW.

SIR JOHN EDGE.

MR. AMEER ALI.

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[DELIVERED BY MR. AMEER ALI.]

The sole question for determination in this Appeal is whether the Plaintiffs are entitled in this action to a decree for redemption in respect of certain property mortgaged so long ago as 1846 by their ancestor Ahlad Singh to one Daryao Singh, whom the Defendants represent.

The suit was brought in the Court of the Munsif of Biswan in the Province of Oudh in respect of two villages, Pipri and Gathia. This officer dismissed the claim in respect of Gathia for failure on the part of the Plaintiffs to serve sufficient notice on the Court of Wards, who held the village for one of the Defendants. But he made a decree for redemption in respect of Pipri, and his decision was affirmed on the appeal of the Defendants by the Subordinate Judge. On second appeal to the Court of the Judicial Commissioner of Oudh this decree has been reversed and the suit dismissed with costs. The present proceedings refer only to Pipri.

The Plaintiffs have appealed to His Majesty in Council, and their main contention before this Board is that, having regard to the admitted position of the parties as mortgagors and mortgagees, the learned Judges have taken a wrong view of their relative rights.

In the view their Lordships take of the case they do not deem it necessary to set out at any length the facts on which the parties proceeded to trial. It is not disputed that in 1846 Ahlad Singh mortgaged the two villages in question to Daryao Singh and that since then the mortgagee and his representatives have been in possession. As the transaction took place ten years before the annexation of Oudh, it came within the purview of the Oudh Estates Act of 1869, section 6 of which imposed certain restrictions on the right of redemption in respect of properties held by the Talukdars on mortgage.

The Plaintiffs were naturally unable to produce the deed of mortgage, and the Defendants would not produce it on the ground that it was lost. The onus was thus cast on the Plaintiffs to shew that they had, in view of section 6 of the Oudh Estates Act, the right to redeem. To discharge this burden and to prove the contract as stated by them in their plaint they relied in part on certain oral evidence and in part on proceedings *inter partes* which took place in 1870 in the course of settlement disputes regarding the lands of which they were in possession under the terms of the mortgage in question. In the course of those proceedings certain *razinamahs* or deeds of compromise were entered into between the parties and filed in the Court of the Extra Assistant Commissioner who, on the 17th of January 1870, made the following order: "With the consent of the parties the Court decrees the claim subject to the conditions set forth in the *razinamahs*." These documents clearly show that

although the right of redemption was admitted as subsisting it was subjected to certain conditions. The Plaintiffs' right to the possession of the lands and to the enjoyment of the annuity reserved to them under the deed of 1846 together with various other rights were admitted, some further lands were conceded, and then followed an important covenant which in the document executed by the Plaintiffs' ancestors is in these terms :

“ Should Anant Singh or any of his descendents resume  
“ the under-proprietary tenure, then we the executants may  
“ at first obtain a decree in respect of the said proprietary  
“ tenure.

“ Should they even after the decree fail to deliver  
“ possession, then we the executants and our heirs shall be  
“ at liberty to take back the villages Pipri and Gathia  
“ according to the terms of the deed executed by Ahlad  
“ Singh and others in favour of Thakur Daryao Singh after  
“ compliance with the said terms.

The same covenant in almost identical language is to be found in the deed of compromise executed by the persons who then represented the mortgagee. They say as follows :—

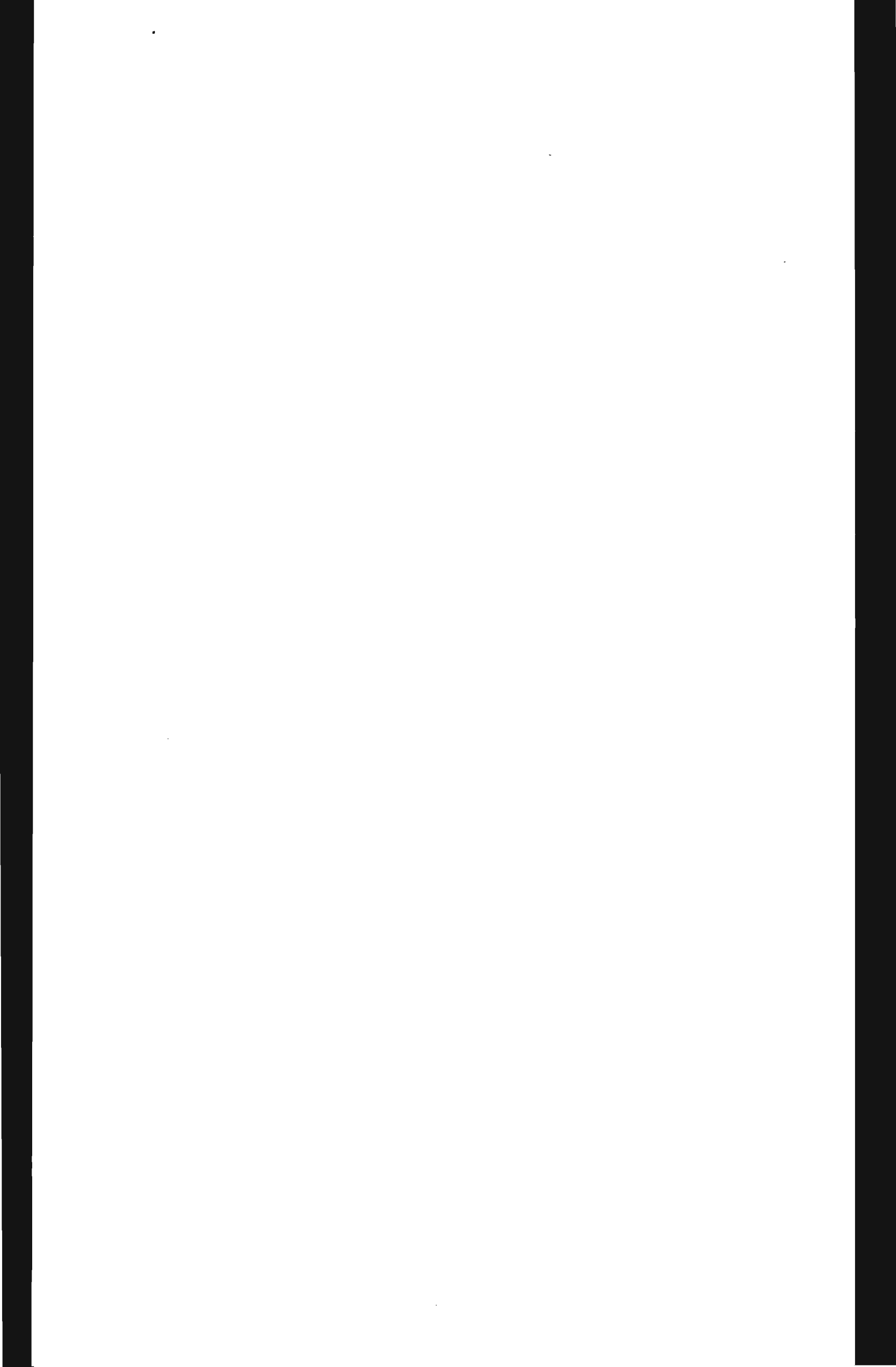
“ Whenever they convert the same into an agricultural  
“ land they should pay rent therefor. Wherefore we with  
“ our own volition do record that neither we nor our heirs  
“ shall, generation after generation, resume the under-  
“ proprietary land. And in case we or our heirs resume  
“ the same, the said Madho Singh and others may by suing  
“ in Court obtain a decree.

“ If we fail to deliver the land after such a decree then  
“ Madho Singh and others and their heirs shall be com-  
“ petent to take back, recover the villages of Pipri and  
“ Gathia after complying with the provision of the deed  
“ executed by Ahlad Singh and others in favour of Thakur  
“ Daryao Singh, our deceased father.’

In their Lordships' judgment the arrangement arrived at in 1870 is conclusive as regards the present action. Whatever may have been the mortgagor's right under the deed of 1846, the parties deliberately came to a settlement in 1870 by which his representatives for certain additional benefit reserved to them under the *razinamahs*,

agreed to subject their right of redemption to certain conditions. There is nothing in law to prevent the parties to a mortgage from coming to any arrangement afterwards qualifying the right to redeem. In the present case it is not alleged that the action is brought upon a breach of the covenant contained in the deed of compromise. Their Lordships are therefore of opinion that the suit was rightly dismissed by the Judicial Commissioners, and they will humbly advise His Majesty to dismiss this Appeal with costs.

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In the Privy Council.

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SHANKAR DIN AND OTHERS

v.

MUNSHI GOKUL PRASAD AND OTHERS.

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DELIVERED BY MR. AMEER ALI.

LONDON :

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PRINTERS TO THE KING'S MOST EXCELLENT MAJESTY.

1912.