

*Judgment of the Lords of the Judicial Committee  
of the Privy Council on the Appeal of  
Habeeboollah Khan v. Unroodh Singh and  
another, from the Court of the Financial  
Commissioner, Oude; delivered on the 3rd  
April 1873.*

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Present :

SIR JAMES W. COLVILLE.

SIR BARNES PEACOCK.

SIR MONTAGUE E. SMITH.

SIR ROBERT P. COLLIER.

THIS was a suit brought by mortgagees to recover possession of a mortgaged property, on the ground that the mortgage had not been redeemed. The Defendants contended that the mortgage had been redeemed, and that was the sole question.

The case came first before the extra Assistant Commissioner, who found in favour of the Plaintiffs. Upon appeal, the case went before the Deputy Commissioner, who reversed that decision, and found in favour of the Defendants. The finding, indeed, is not very clearly expressed, but their Lordships understand him to have found that according to the customs which prevailed in Oude, where the mortgage was made, before its annexation, the redemption of the mortgage was complete, and he found that that redemption had taken place in the year 1256 Fuslee, and that the Defendants had held uninterruptedly ever since. A special appeal from this decision was brought before the Financial Commissioner. In the first instance, the Financial Commissioner, Colonel Barrow, experiencing some legal difficulties, submitted a case to the Judicial Commissioner for his opinion. The Judicial Commissioner gave a short opinion upon the questions of law which

appear to have been submitted to him to this effect, that there is no distinction between mortgages and pledges under the Mahomedan law prevailing at the time of the transfer; and further, he gave his opinion, "that if the redemption money was made over to a third party at the request or with the assent of the mortgagees, the transaction must be regarded as having been legal and binding."

Upon that the whole case was heard again upon special appeal before the then officiating Financial Commissioner, and the officiating Financial Commissioner reversed the decision of the Deputy Commissioner. In reading this judgment of the officiating Financial Commissioner, it is not, indeed, very easy to separate into questions of fact and questions of law some portions of the judgment; but their Lordships understand the ground of decision to have been contained in these words: "Has the lien been discharged by payment of the value to the mortgagee or to any third party with his consent?" "Of this there is no proof, nor is it alleged that special Respondent holds any acknowledgment receipt," and so on. He says that there is no proof in fact of the redemption of the mortgage. It was a question of law whether or not there was any proof; but it would be a question of fact whether or not, supposing that there was some proof, the finding was in accordance with the evidence.

Their Lordships now having to pronounce the judgment which the officiating Financial Commissioner ought to have pronounced, are not able to reverse the decree of the Deputy Commissioner, unless they find that the Deputy Commissioner made some mistake in the law. The sole question appears to be, whether or not he was right in holding that there was evidence of the redemption of the mortgage. Their Lordships have come to the conclusion that he was right in so holding, and in order to show that

there was such evidence, it is only necessary very shortly to refer to the facts of the case.

The mortgage was made in the year 1847. It appears it was a mortgage bearing no interest, what may be called a usufructory mortgage, on which the mortgagees had possession of the property and were able to pay themselves the interest of the debt out of the rents and profits. It appears by the case of the Plaintiffs that they took possession under this mortgage, and retained possession for a year or thereabouts, but they allege that they were deprived of possession by the collusion of the Defendants with one Lonee Singh, about a year after the execution of the mortgage, and they admit that from that time to the time of bringing the action they never were in possession. They have failed to prove that they were dispossessed by any collusion such as they allege; but the fact remains that possession was changed about a year after the mortgage. They give no proof that the change was violent, that it was one which they resisted, or one against which they made any remonstrance; and it must be taken upon the evidence, in their Lordships' opinion, that the possession was changed by their own consent.

If there had been no more in the case than this, that possession had been so changed, that the Defendant had held uninterrupted possession for 18 years between that date and the commencement of the suit, or 20 years, if the amended plaint be taken as the commencement of the suit, if that had so stood without more, without proof that any interest on the mortgage was at any time demanded, or that any remonstrance had been made against the continuance of this possession, their Lordships would have been of opinion that payment might have been presumed, and that the fact of the Plaintiffs continuing to hold the mortgage deed would not have been a sufficient rebuttal of that presumption.

But the case does not altogether rest there. The Defendant gives evidence to this effect.

That although the mortgage was for a sum of 18,000 rupees, he maintained that the sum actually due was less, and made some petition or remonstrance to the Grand Vizier of the King of Oude; that the Grand Vizier appointed a man of considerable power at that time, Monorooddowlah, to arbitrate between the parties; that Monorooddowlah did set on foot an arbitration, and that an award was made in the year 1848, whereby it was adjudicated that, instead of 18,000 rupees being due, the sum actually due was 15,000 rupees. That award has been proved. In fact there is no doubt and no dispute as to the genuineness of the award, and in their Lordships' opinion, evidence has also been given which is entitled to considerable weight, that the Plaintiffs were parties to this award, and were actually represented before the arbitrators. The Defendant goes on further to show that he paid a considerable sum under this award and in pursuance of it. He does not indeed prove the payment of the whole sum of 15,000 rupees, but he gives evidence of the payment of a considerable portion of it, as much as about 11,000 rupees. He does not indeed allege that this sum was paid directly to the Plaintiffs, but he says that it was paid to Monorooddowlah in respect of revenue which was due by the Plaintiffs, and that it was paid to Monorooddowlah is proved. It is true that there is not direct evidence in the case, (evidence which at the time possibly might have been forthcoming, but which may now be lost,) of the assent of the Plaintiffs to this arrangement and of their adoption or ratification of this payment as made on their behalf; but their Lordships are of opinion that such assent, or at all events, such ratification or adoption may be assumed from the following circumstances, viz., the change of possession, which is not shown to have been otherwise than with their consent, in about a year after the mortgage and very shortly after the award, the fact that the Defendant soon after that dealt with the property

as owner and mortgaged a portion of it to another person, one Lonee Singh, that this Lonee Singh remained until the annexation of Oude in uninterrupted possession of this property unquestioned by the Plaintiffs, that in the year 1856, upon the annexation of Oude, a careful inquiry was held with regard to this property and the title to it, (that is, the proportion of the property which was in possession of Lonee Singh,) that various persons made claims to settlement in respect of it with regard to various holdings, and that at that time the Plaintiffs made no claim of any description to it. It has been indeed alleged that before the annexation of Oude they were overawed by more powerful talookdars, and were afraid to assert their rights. But that allegation does not explain their acquiescence after Oude was annexed, and there is no reason of that description to be suggested why they should not have come forward to assert some claim during the investigation which took place before Mr. Thomason in July 1856, if really they believed that they had a claim. It appears that Lonee Singh, who at that time was treated by the Government as the proprietor of 30 out of 60 of the villages mortgaged, became a rebel, and that his property was confiscated by Government. Then, in the year 1859, for the first time the Plaintiffs laid some claim to this property, and indeed to the whole of the 61 villages, and an order was made upon their petition of the 23rd July 1859 to this effect: "Ordered that petitioners may be informed that they can lay their claim in Civil Court on filing of stamp paper." They might, therefore, immediately after this claim, if they had a case, have instituted a suit in the Civil Court, but they did not institute any suit until seven years afterwards, in the year 1866, and they have not given any explanation whatever of the delay.

Under these circumstances, their Lordships are of opinion, that what may be considered the

missing link in the Defendants' case, viz., direct evidence of the Plaintiffs' actual adoption or ratification of the payment, is supplied by the conduct of the Plaintiffs, which appears to their Lordships inconsistent with any other supposition than that the mortgage had been in fact redeemed somewhere about the time when they delivered over possession to the Defendants.

Under these circumstances, their Lordships are of opinion that there was evidence on which the Deputy Commissioner was justified in arriving at the conclusion which he came to; and their Lordships go further, and say that if they were sitting as a Court of First Instance, they would be disposed to arrive at the same conclusion.

Their Lordships will therefore humbly advise Her Majesty that the judgment of the Officiating Financial Commissioner be reversed, that the judgment of the Deputy Commissioner be affirmed, and that the Appellants have the costs of their Appeal before the Officiating Financial Commissioner, and of this Appeal.