Judgment of the Lords of the Judicial Committee of the Privy Council, on the Appeal of Harendra Lal Roy Chowdhry, v. *Maharani Dasi (widow of Ram Churn Saha Poddar) and others from the High Court of Judicature at Fort William, in Bengal; delivered 22nd February* 1901.

Present:

LORD HOBHOUSE.
LORD DAVEY.
LORD LINDLEY.
SIR RICHARD COUCH.

[*Delivered by Lord Davey.*]

THIS is an appeal by a money lender in Bengal, who held a mortgage from Ram Churn Saha Poddar, and Madan Mohun Saha Poddar, brothers, for a sum which it is unnecessary to mention. Suffice it to say, that in the early part of the year 1888 the Appellant instituted a suit in the Court of the Subordinate Judge of Backergunge against the Respondents to recover the sum of Rs. 49,855·14. The mortgage covered 90 different lots of land, some of them, apparently, from the description in the schedule, being of small value, and others of larger value, but apparently not lying contiguous to each other. After the suit was commenced a compromise was come to, and that compromise is to be found in the Consent Decree at page 18 of the record. The effect of that decree was this, that the Defendants consented to judgment for the entire amount asked by the plaint, but subject to this proviso, that if, on a day which is the same as the 14th of August 1889, the Defendants should pay to the Plaintiff the sum of Rs. 35,000, the decree should be considered as satisfied, and the

a (22)15872. [4.] 125.—3/01. Wt. 4157. E. & S. *A*

balance of the money should be considered as remitted. Out of the sum of Rs. 35,000 the Defendants were to pay to the Plaintiff the sum of Rs. 700 before the 15th of October 1888, and the remaining Rs. 34,300 before the 14th of August 1889. The decree provided that if they failed to pay the sum of Rs. 700 within the month of Assin—that is October—next, then the aforesaid sum of Rs. 700 should bear interest at the rate of 5 per cent. per month from the month of Kartick next. It then contained a clause, which is No. 7 in the decree, and according to the translation given in the record is as follows—the learned Judges of the High Court had it re-translated, but in substance, and for any material purpose, it does not appear to their Lordships that the version given in the Judgment of the High Court differs from that in the record (p. 34) :—" If for the payment of the afore-
" said sum of Rs. 35,000 it should be necessary for
" the Defendants to transfer the mortgaged
" properties, or any plots or portions of them,
" or grant pottahs on receipt of salami "—that is, a premium or bonus for the lease—" then the
" Defendants shall, on settling who are to receive
" (the properties), give the Plaintiff the sthit
" papers in relation to whatever properties they
" may from time to time determine to sell or
" lease, before the 30th Assar 1296 "—that is the 13th July 1889.—" Within 30 days from
" that day the Plaintiff shall, at the Defendant's
" expense, make appraisement of the sthit in the
" mofussil, and after crediting the proper price,
" or the proper salami, against the Defendants'
" debt, shall at the Defendants' expense duly
" execute a deed of release or deed of consent.
" The Defendants shall not be able to alienate the
" mortgaged properties, or any portion of them,
" or confer any right therein by pottah to any
" one without a written deed of release or consent

" from the plaintiff, and if they do any act " contrary to this such act shall be of no effect." The meaning of that clause appears to their Lordships to be reasonably plain. No doubt the Respondents, who appear to be a widow lady and her sons, would find a difficulty in raising the money for the purpose of paying the mortgage debt to the decree holder except by sale, as opportunity offered, of the mortgaged properties themselves. The clause provides means for doing so. But of course the Plaintiff would quite rightly secure himself against any improvident alienation, or any alienation, of the property comprised in his mortgage at an inadequate price, and for that purpose the arrangement is that whenever from time to time the Defendants, the Mortgagors, should determine to sell or release they should send to the Plaintiff the particulars, in order to enable him to judge of the propriety of the sale, or the adequacy of the price of any sale, or the bonus if a lease. Then there is an absolute obligation upon him. It is not left to his option. There is an absolute obligation upon him within 30 days from the day he receives the papers and particulars, to make an appraisement, and if the price is approved, and credited to him against the debt, he is then to execute a deed of release, or deed of consent. On the face of this clause there is not the slightest pretence for saying that the decree holder was at liberty to postpone the appraisement of the properties which the Respondents proposed to sell from time to time until sales were proposed of a sufficient amount to pay the whole of the debt. On the contrary it is expressly contemplated that the Respondents may from " time to time " determine to sell or release; and from the nature of the property, consisting, as has been said, of 90 small lots, it is apparent that they would be more likely to sell in separate parcels than in

bulk, so as to raise the whole amount at once. Nor is there any ground for saying, as Mr. Branson suggested, that the Plaintiff, the decree holder, is not bound to execute a deed of release, or a deed of consent, until the whole debt is paid off. The deed of release, or deed of consent, which is referred to in this clause, is obviously a deed of release, or a deed of consent to the mortgagor selling, in favour of the purchaser. The High Court's observation is, their Lordships think, entitled to great weight, that if the construction which the decree holder, the Appellant, put upon this clause, that he was not bound to do anything until the whole of his money was forthcoming, was a right construction, they might just as well have had no clause at all; because, of course, if the whole of his money was forthcoming, and they were ready to pay him off the whole of his money, it was perfectly immaterial to him what prices they obtained.

What took place on this decree was this. The Rs. 700 were paid in the time stipulated; about that, there is no controversy; leaving, therefore, Rs. 34,300 to be paid before the 14th of August 1889. The present Respondents did arrange for a sale of various lots, and without reading the whole of the correspondence, it is sufficient to take the first letter, which is dated the 7th of Bysack 1296, equivalent to the 19th April 1889, as a specimen. This is from the Respondent Bindubasini Dasi, the widow. She writes this to the present Appellant:—"I have already written "two letters to you, but owing to my misfortune "you have not, up to this time, given any reply "to them. I have been trying to pay up your "money by the sale of properties. The matter "has not yet been settled with the purchasers, "but the sale of the properties Nos. 55, 82, 68 of "the mortgage bond at thirty times the profit."—

that is probably 30 years' purchase—" has been " arranged for with Gobind Chunder Saha and " others, and the property No. 79 at thirty times " the profit with Judhistir Saha, and the earnest " moneys have been taken from both. I send " the sthit papers of those properties to you per " book post;" and then she points out, which is an obvious observation, that " people fear many ' things before they purchase, and if one trans- ' action is completed with one person, others " will be encouraged to enter into (similar) " transactions." Or the sentence might have been put in a negative form: if it is found that these transactions will not go off, and you will not give your consent to my selling these properties as I have agreed to do, then other persons will be shy of entering into contracts for the remainder of the property. Then she asks him in accordance with this contract to " send " a man as soon as you can to make an appraise- " ment of * * * those four properties." What was the answer to that? His answer was dated the 29th of Bysack, which would be equivalent to some day in April or May 1889, about ten days afterwards: " It will be very troublesome to make " an appraisement if you arrange for the sale of " properties in this way. You have in this way " procured only Rs. 3138–8 annas; but you " have not said what is to be done about the " remaining money. Procure the whole of the " money, then an appraisement shall be made of " all the properties together, and a deed of " release will be executed." That was a plain breach of the contract which the Appellant had entered into. He had, as has been already pointed out, entered into a contract that 30 days after receiving the particulars of sales made from time to time, he would send a man to appraise; but in this letter he refuses to send a man to make the appraisement until the whole of the

money is procured, and an appraisement can be made of all the properties together, when a deed of release will be executed. That, therefore, was a complete breach of his contract, and the consequence was that those sales could not be carried out. Then there are subsequent letters to the same effect, and he gives the same answer, that she cannot get a release "until the whole amount "is procured according to the terms of the "settlement"; and he says it wastes time trying to sell piecemeal. Ultimately she sends a registered letter on the 29th of Assar 1296; that is, the 12th July 1889. She had previously sent her servants to personally expostulate with the Appellant, and she now writes him a letter begging him to send a man to appraise the properties which she had undertaken to sell. He replies, "Nothing can be done unless the whole "of the money is procured, and it is of no use "to worry me repeatedly. Still, as you say you "have secured purchasers for some of the "properties mortgaged to me, and of some other "properties, for Rs. 23,000, I sent my officer "Jagat Chunder Chuckerbutty to make an "appraisement. Have the consideration money "of those among the mortgaged properties for "the sale of which you have arranged deposited "by the purchasers with some trustworthy "pleaders, and Mokhtar of Madaripore, and "after getting the appraisement made within "three days you will pay up the remaining "money within the time fixed by the Solehnama." In other words he says, "Out of grace and favour "to you I will send my officer to make an "appraisement, but I make the condition that "the consideration money of the mortgaged "properties," for the sale of which the Respondent had arranged, "shall be first deposited by "the purchasers, and also that the appraisement "shall be made within three days, and you will

" thereupon pay up the remaining money." The man apparently was sent. There is some difference in the evidence as to what took place, but the learned Subordinate Judge has expressed his opinion as to the result of the evidence, and the High Court concur in the view which he takes of the evidence upon that point. It amounts to this: that the man did go, but refused to appraise, and the reason why he refused to appraise was because in accordance, no doubt, with the instructions he had received he required the whole amount of the purchase money to be deposited by the purchasers before he would make the appraisement, which was, of course, a perfectly unreasonable condition, and one which he had no right to make; and he also required the appraisement to be made in three days, which the learned Subordinate Judge says made it practically impossible to carry it out.

Under the circumstances it is not surprising that the Respondents were not able to find the money on the stipulated day, and thereupon the present Appellant presented a petition for realisation of his entire decree by sale of the mortgaged properties. That was resisted by a statement put in on behalf of the Respondents, showing in substance, but not in the detail in which their Lordships have stated them, the facts which have been referred to. The learned Subordinate Judge in the first instance gave the Appellant execution for the whole amount of his decree on the ground that there was nothing in the compromise decree, the Solehnama, which requires the Appellant to give his consent to the sale of any of the property. There was an appeal, and the learned Judges in the Court of Appeal expressed their opinion of the construction of the Solehnama, and remanded it back to the learned Judge to inquire whether in substance the Appellant had placed unreasonable obstruc-

tions in the way of the Respondents realising the mortgage money by sale of the mortgaged properties. The learned Subordinate Judge took evidence on the point, and gave his judgment on the 31st of August 1892. After very carefully examining the evidence he says :—" Considering " all these facts and circumstances of the case " I find that the decree holder did render it " practically impossible for the judgment debtors " to sell some of the mortgaged properties within " Srabun 1296 for enough to meet the reduced " claim, and therefore, according to the terms " of the Solehnama as interpreted by the High " Court, he is not entitled to get more than " Rs. 34,300 for his mortgage decree." It should be mentioned that there was evidence which satisfied the Subordinate Judge, and the High Court also, that if the Appellant had done that which he had contracted to do, and made an appraisement, and given a deed of release of the properties which were proposed to be sold by the mortgagors within the time stipulated for, the Respondents had made arrangements through which, by the sale of other property, including their jewellery, they would have been in a position to pay Rs. 35,000 before the date when it ought to have been paid according to the Solehnama.

There was an Appeal from this judgment of the Subordinate Judge. The Appeal Court again went very fully into the case, and they came to the conclusion that the Subordinate Judge was right in the view which he had taken of the facts of the case, and that the Appellant had not performed the contract which he had undertaken to perform, and had rendered it impossible for the Respondent to find the money within the time fixed. They thereupon confirmed the Decree of the Subordinate Judge. In other words the substance of their Decree is this:

that as the Appellant in breach of his contract had prevented the Respondents from paying the sum of Rs. 35,000, as they could have done, and would otherwise have done within the time stipulated for by the Solehnama, he must be put into the same position as if that sum had been tendered to him within that time, and he had refused the tender. Their Lordships think that that is the principle of the Decree, and that in the circumstances of the case it is a sound principle. It follows that the Appellant cannot get any interest on his Rs. 34,300. The learned Subordinate Judge has taken that view, and the High Court also have taken the same view on that question as was taken by the Subordinate Judge.

In the result their Lordships will humbly advise His Majesty that the Decree of the High Court should be affirmed, and the Appeal dismissed; and the Appellant will pay the costs of it.