Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Narain Singh and others v. *Shimbhoo Singh and others, from the High Court of Judicature, North-western Provinces, Allahabad; delivered 4th November* 1876.

Present:

Sir J. W. Colvile.
Sir Barnes Peacock.
Sir Robert P. Collier.

IN this case the Plaintiffs, as sons and heirs of Pohup Singh, a mortgagee, seek to recover possession of 20 biswahs of the zemindary right of Mouzah Lallpore. The Defendants in the suit are the representatives of the mortgagor. The Plaintiffs state that they claim to establish their right as mortgagees in virtue of their title as heirs of their defunct father, Pohup Singh, "in that, under a mortgage deed, dated Phagoon "Badi, 7th Sumbut 1896, Poohup Singh, the "ancestor of the Plaintiffs, having obtained a "decree from the Sudder Ameen's Court, was "put in possession on the 31st August 1846." Most of the Defendants admit the claim, but the Defendants, Man Singh, Shimbhoo Girdharee, and Motee put in an answer; by the second paragraph of which they admitted that under the former decree the Plaintiffs ancestor was in possession for upwards of a year; but they set up, in the fourth paragraph of the same written statement, that "the mortgage alleged by the "Plaintiffs is wholly unfounded. The Defen-"dants' ancestor did not receive the mortgage "money from the ancestor of the Plaintiffs; "and Poohoop Singh, the ancestor of the Plain-

" tiffs, was a person notorious for his expertness " in court affairs. He had, with a view to " deprive Asaram and Sheololl of their mortgage " money, obtained by deception a decree on the " mortgage deed in suit; and the Defendants' " father had, according to the Shasters, no right " to transfer and waste the Defendants' ancestral " property without any legal necessity to satisfy " illegal demands. Hence, under the Shasters " also, the mortgage alleged by the Plaintiffs is " invalid, and the claim is unjust."

Now, having admitted that the Plaintiff did obtain possession by virtue of a decreee, and that he remained in possession for a year, the Defendants also, in the same written statement, alleged that the mortgage was collusive and a benamee transaction. But although the written statement must be taken altogether, it does not necessarily follow that the whole of the Defendants' statement is to be taken as proved in their favour, if they offer no evidence whatever in respect of the allegation that the mortgage was a fraudulent transaction.

It appears, then, that the Plaintiffs' ancestor did get into possession on the 31st August 1846. In 1847 he was dispossessed in a suit which was brought against him by the first mortgagees, Asaram and Sheololl. He was then turned out of possession, and remained out of possession from 1847 down to the year 1870. The precise terms of the mortgage deed do not appear, but, as far as can be collected at page 33, it was a mortgage bond, by which it was stipulated that in the event of the nonpayment of the mortgage debt within five years, the mortgagors would cause a mutation of names, and the Plaintiffs to be put into possession.

It appears that the Plaintiffs' ancestor did get possession under that document, and it appears to their Lordships that the decree

obtained upon that document gave the Plaintiffs as mortgagees a title to the land as against the Defendants, but it gave them no title as against the prior mortgagees, Asaram and Sheololl. When Asarum and Sheololl turned the Plaintiffs' ancestor out of possession, it did not destroy his title and right to the land. It may have given him a right of action as against the mortgagors for having mortgaged to him when they had previously mortgaged to Asarum and Sheololl, but it did not destroy the right which the Plaintiffs obtained against the Defendants by virtue of the mortgage and of the judgment which they had obtained upon it.

The first Court laid down certain issues :—first, whether the original mortgagors executed the mortgage deed in respect of the property in suit on receiving the full mortgage consideration, or whether it was collusively secured without payment of any mortgage consideration, and whether the mortgage deed could take effect against the Defendants according to the Hindu law. The Judge says in his judgment, "It is "apparent that Plaintiff's predecessor on the "former occasion obtained a decree for pos- "session on proving the mortgage deed, and "the payment of mortgage consideration; and "the fact of the decree having been made is "admitted by Defendants. Again, all the "Defendants, excepting four, two of whom "have made no defence, confess the claim, "which is further supported by the evidence "of Moulvie Inayut Alli, pleader, Choonnee "Loll, putwaree, and two other persons, both "named Hoolasee, witnesses for Plaintiffs. The "plea urged by Defendants must therefore be "overruled; and they have failed to refute the "claim." He therefore gave a decree in favour of the Plaintiffs.

Upon that an appeal was preferred by Shun-

bhoo alone to the High Court; and one of his grounds of appeal is that there was "no cause " of action and foundation for the Plaintiff's " suit; neither the deed of mortgage nor the " decree has been produced; the conditions " agreed upon between the parties cannot be " ascertained." The High Court, having heard the case argued, gave judgment, and reversed the decision of the first Court. They say that "the " High Court's order of the 1st April 1872 could " not give any legitimate cause of action. Nor " did any right of action accrue to the Plaintiff's " by reason of the satisfaction of the debt of " Asarum and Sheololl, and the recovery of pos- " session of the estate by the mortgagors or their " heirs." It appears to their Lordships that there was a mistake on the part of the High Court in holding that no cause of action accrued to the Plaintiff, by reason of the satisfaction of the debt of Asarum and Sheololl, and the recovery of possession of the estate by the mortgagors or their heirs. It appears to their Lordships that when the first mortgage was paid off in 1870 the title of the Plaintiffs, which had all along been a good title as against the mortgagors, was a valid title as against every one. Then when their title became a valid and a good title the mortgagors had no right to enter upon the possession of their land. But the mortgagors did enter into possession of it, and keep the possession from the Plaintiffs; and it appears to their Lordships, that having the right and title to the land when the first mortgage was paid off, the entry of the mortgagors upon that land to which the Plaintiffs had obtained a right under the second mortgage gave them a cause of action against the mortgagors, the Defendants. The Court proceed:—"The right of the Plaintiffs or " their forefather to possession was created by " the mortgage deed of 1840, and was capable of

" being legally enforced within a period of " twelve years. It was the subject of a former " suit and of a decree which was fully executed." So it was; but then that decree gave the Plaintiffs a title. The High Court proceeded: "The " dispossession of Poohoop Singh after the " execution of that decree was not an *illegal* " proceeding." It is true it was not an illegal proceeding, because he was dispossessed by persons who had better title; namely, the first mortgagees. The Court go on: "Although he was " thereby deprived of the right he had obtained, " he had a remedy, of which he might have " availed himself, by suing within the proper " period for the recovery of the money lent by " him to the mortgagors. The present suit is " clearly inadmissible, and cannot be decreed " even against the confessing Defendants." The High Court held that the Plaintiffs' suit was barred by limitation.

It appears, however, to their Lordships, that the Plaintiffs having a good title when the first mortgagees were paid off in 1870, their cause of action accrued when the Plaintiffs after that period entered into possession of the estate to which they had no title. It appears, therefore, to their Lordships, that there was an error in the decision of the High Court so far as it regards the question of limitation.

But it is said that there was no sufficient evidence that the decree had been obtained by Poohoop Singh, the Plaintiffs' ancestor. In the first place, as already stated, the written statement of the Defendants admits that there was that former decree. They say that "under the " former decree the Plaintiffs' ancestor was in " possession for upwards of a year," and then he was turned out by the first mortgagees. Again, when Asaram and Sheololl, the first mortgagee, brought an action against the second mort-

gagee, Pertab Singh, the ancestor of the Plaintiffs, and Lulloo and others, the zemindars, the mortgagors were also made parties to that suit. And in that suit it appears that the decree of Pertab Singh against the zemindars was in evidence. The Sudder Court says, "The Plaintiffs sued Sulloo "and others, zemindars of the above-named vil- "lage, for possession on a mortgage bond dated "the 18th Kowur, 1859 Sumbut; but in con- "sequence of their having omitted to specify "the nature of the tenure, they were nonsuited. "Poohoop Singh also sued the zemindars on "a mortgage bond, and obtained a decree, which "was upheld in appeal." There was a finding then in that case that Poohoop Singh did sue the zemindars on the mortgage bond, and that he obtained a decree against them. Further, when the first mortgage had been paid off, and the Plaintiffs had been dispossessed by the mortgagors, they attempted to execute a second time the decree which their ancestor had obtained against the mortgagors, and they applied to the Court for an execution of that decree. The Moonsiff decided that they were entitled to have an execution. In that suit, Shimbhoo, who is the present Defendant, was one of the parties, and in that case the judgment was produced. The Moonsiff says, "The record of the case having been "brought forward, it appears that the objection "of the Defendants, judgment debtors," that is, Shimbhoo one of the present Defendants, "is that Poohoop Singh, the original decree "holder and deceased ancestor of the Plain- "tiffs, had been put in possession by the "Court after the passing of the decree." It appears, therefore, to their Lordships, that there is sufficient evidence in the cause to justify the first Court in coming to the conclusion that the Plaintiffs were mortgagees, and that they

obtained possession under a decree founded upon that mortgage.

The judgment of the High Court being erroneous, it becomes necessary to consider whether the decision of the first Court can be maintained to the full extent.

Now the claim made in the plaint is, "to "recover possession as mortgagees over the "entire 20 biswahs zemindaree right of Mouzah "Lallpoor, pergunnah Garee, within the juris- "diction of the Iglass Tehselee, valued at "Rs. 5,000,"—the valuation is not a matter of importance,—"the principal amount of the mort- "gage loan, and to recover Rs. 6,999. 15. 0. "interest thereon, during the period of the mort- "gagee's dispossession, as per detail given below, "aggregating Rs. 11,999." Now the Plaintiffs, although they were turned out of the land, might have sued for the interest. All that they are entitled to, as it appears to their Lordships, is to recover possession of the land; and when they have got possession of the land, if the mortgagors apply to redeem, the question will be, how much is due to the Plaintiffs as mortgagees under their mortgage, and how much they are entitled to receive before the mortgagors can redeem. The Judge of the first Court appears to have given them a decree not only for possession of the land, but also for 6,999 rupees interest, in addition to the possession of the land. His judgment is not very clear, but it is necessary to make the point perfectly clear as to what the judgment ought to be. He says: "Claim to "recover possession as mortgagees over the "entire 20 biswahs zemindaree right in Mouzah "Lallpoor, pergunnah Goree, valued at Rs. "5,000, principal of the mortgage loan, and "Rs. 6,999. 15. 0. interest on the mortgage "amount." Then he says:—"Ordered that "Plaintiffs' claim be decreed with costs against

" the Defendants, that the pleaders get their " fees." Then he says:—" Subject matter of " decree. Recovery of possession as mortgagees, " over the entire 20 biswahs right in Mouzah " Lallpoor, pergunnah Goree, valued at Rs. " 5,000, the principal amount of the mortgage " loan, and of Rs. 6,999. 15. 0. interest on the " mortgage amount for the period of the Plain- " tiff's dispossession; total Rs. 11,999. 15. 0." If by that decree the Lower Court intended to give the Plaintiff a decree not only for recovery of the possession of the land, but also to recover Rs. 6,999 in money as interest, it appears to their Lordships that that judgment, so far as giving a decree for the money as interest is concerned, was erroneous.

Their Lordships therefore think that the decision of the High Court ought to be reversed, and that the decision of the first Court should be modified by confining the recovery of the Plaintiffs merely to the possession of the land. In that case, the Plaintiffs having got possession of the land, the question, as before observed, will remain open until the Defendants seek to redeem the land. Then the question will arise, how much is due to the Plaintiffs as the second mortgagees, and for what amount they are entitled to hold possession of the land under their mortgage.

Their Lordships, therefore, upon the whole, will humbly recommend Her Majesty to reverse the decree of the High Court, and to affirm the decision of the Lower Court, so far only as it decrees possession to the Plaintiffs of the land sought to be recovered in the suit. Their Lordships are also of opinion that the Appellants are entitled to the costs of this Appeal.