

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Raja Pertab Bahadur Singh v. Gajadher Bakhsh Singh, from the Court of the Judicial Commissioner of Oudh, delivered the 22nd July 1902.*

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Present at the Hearing :

LORD DAVEY.

SIR ANDREW SCOBLE.

SIR ARTHUR WILSON.

[*Delivered by Sir Andrew Scoble.*]

The father of the Respondent, one Inderjit Singh, a Zemindar of Oudh, in the year 1851, mortgaged 12 villages in which he had proprietary rights to Raja Surnam Singh, the ancestor of the Appellant, to secure an advance of Rs. 5,600. The mortgage-deed is dated on the 15th June 1851, and the material clause is in these terms :—

“ I do hereby mortgage the following villages  
“ to the said Raja Surnam Singh at Rs. 2 per  
“ cent. interest, and promise and put down in  
“ writing that until delivery of possession of the  
“ aforesaid villages to the Raja Sahib mentioned  
“ above, I shall pay interest at the rate of Rs. 2  
“ per cent. on the above-mentioned mortgage  
“ money; that, until I pay up the sum of  
“ Rs. 5,600 on account of principal, with interest  
“ to the very last pie, Raja Surnam Singh shall  
“ continue in possession and occupation (of the  
“ aforesaid villages) and that I shall put forward  
“ no excuse or objection.”

It may here be noted that the learned Judicial Commissioner found that possession of the entire

mortgaged property was delivered to the mortgagee on the execution of the mortgage, and that this finding was not disputed before their Lordships.

By an instrument of even date with the mortgage deed, Raja Surnam Singh the mortgagee, leased to the mortgagor Inderjit Singh, six of the mortgaged villages at a consolidated rental of Rs. 2,801 per annum, less Rs. 800 per annum allowed to the lessee as *nankar*. The lease was to take effect from the 11th September 1851.

On the 18th September 1853, one Hanuman Persad obtained a *kabuliat* from the King of Oudh of the Talooka of Bhawan Shahpur in which the 12 mortgaged villages were included, and forcibly dispossessed Raja Surnam Singh, the mortgagee and previous *kabuliat* holder. The circumstances of this transaction are not very clear, but Charan Singh, one of the witnesses for the Plaintiff, gives a characteristic explanation. "In *Nawabi* might was the right, and *kabuliats* were executed by any one. There was none to hear to any grievances, and the *kabuliatdar* forcibly ejected the previous holder." Whatever his title may have been Hanuman Persad remained in possession until the annexation of Oudh by the British Government in 1856.

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The procedure adopted by that Government for the purpose of ascertaining rights of property in land in the territories annexed is matter of history, and has frequently formed the subject of consideration by this Committee. The first Summary Settlement was made with the persons actually in possession, and decided nothing as to ownership. At the second Summary Settlement, which was made in 1858, on the basis of proprietary right, the name of Inderjit Singh was entered in respect of the five villages now in suit, while of the remaining seven villages of the

twelve originally mortgaged, six were entered in the name of the Talookdar of Bhawan Shahpur, and one (Poorah Adhar) in the names of Hubdar Singh and Sukram Singh, who claimed under a mortgage of earlier date than that to Surnam Singh. On the 11th December 1858, Surnam Singh filed a petition in the Settlement Court, praying that the settlement of the whole twelve villages might be made with him, but his application appears to have been made too late, for it was ordered that "as the settlement of this village " is over, and the applicant did not appear at the " time the settlement was going on, and as it " appears from the application and the statement " of the applicant that this matter relates to " a mortgage, hence it is ordered that if the " applicant has any claim, he must sue in the " Civil Court."

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Surnam Singh took no proceedings in the Civil Court and no further action was taken until the regular settlement, which was made in 1864, when both mortgagor and mortgagee claimed to be proprietors of the twelve mortgaged villages. After enquiry the Assistant Settlement Officer, on the 3rd June 1864, decreed proprietary right of the five villages now in question in favour of Inderjit Singh, and directed that Raja Surnam Singh's name be entered as in possession under the mortgage bond of 15th June 1851, while Inderjit Singh was declared entitled to hold lease of the five villages according to the terms of the agreement of the same date "which must " be considered as binding on the parties." This decision was appealed against, but was eventually confirmed by the Superior Revenue Authorities with the result that the parties remained in the relation constituted by the mortgage-bond and lease, with the exception that the mortgagee was left with five villages

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only, instead of twelve, as security for his advance.

In 1866 and 1867 there was litigation between the mortgagor and mortgagee as to liability for certain charges upon the land, in which both parties relied on the mortgage-bond and lease as constituting the contract between them; and it is admitted that, after the determination of their respective rights by the Decrees of the Settlement Courts, the rent reserved by the lease and the charges allowed were paid by the Respondent and his predecessor in title to the Appellant and his predecessors in title.

Raja Surnam Singh died on the 18th May 1877, and Inderjit Singh died on the 2nd May 1884. The Appellant and Respondent are their heirs respectively.

On the 25th June 1894, the Respondent filed the present suit to redeem the mortgage, and the sole question now between the parties is as to the terms on which redemption should be decreed—the Respondent contending that he is entitled to redeem on payment of the amount originally advanced while the Appellant claims in addition interest at the rate of 2 per cent. per month upon that amount for the period during which the mortgagee was not in possession of the entire mortgaged estate up to the date of redemption.

The Sub-Judge of Sultanpur, before whom the suit came in the first instance, found in favour of the Appellant on this point, but his Decree was reversed on appeal by the Judicial Commissioners of Oudh who decreed the claim for the redemption of the mortgage of the villages in suit on payment of Rs. 5,600 only.

It appears to their Lordships that this decision is right. The only provision in the mortgage-bond as to interest is in these words “until delivery of possession of the aforesaid villages

“ to the Raja Sahib . . . I shall pay interest  
“ at the rate of 2 per cent. on the above-men-  
“ tioned mortgage-money ” and the subsequent  
words “ until I pay up the sum of Rs. 5,600 on  
“ account of principal, with interest to the very  
“ last pie,” must be read to refer to interest as  
previously stipulated, namely until possession  
was given of the mortgaged property. The  
mortgage was of the class known as usufructuary  
mortgages, which are not uncommon in India,  
and in which possession of the mortgaged pro-  
perty is delivered to the mortgagee who takes  
the rents and profits in lieu of interest or in  
payment of the mortgage-money, or partly in  
lieu of interest and partly in payment of the  
mortgage-money (Act IV. of 1882, Section 58  
(d).) In this case the arrangement between the  
parties was completed by the execution of a  
lease, under which the mortgagor became the  
tenant of the mortgagee, and paid rent in lieu of  
interest. Under such a mortgage the mortgagee  
takes his chance of the rents and profits being  
greater or less than the interest which might  
have been reserved by the bond and the mort-  
gagor is entitled to redeem on repayment of the  
mortgage money.

But it was contended that, although possession  
of the twelve villages originally mortgaged was  
given at the time of the execution of the mort-  
gage, the reduction of their number to six in  
1853 by the grant to Hanuman Persad, and to  
five by the Settlements of 1858 and 1864, con-  
stituted a failure on the part of the mortgagor  
to secure to the mortgagee possession of the  
mortgaged property, which entitled the mort-  
gagee to claim interest in lieu of the rents and  
profits of the property of which he was dis-  
possessed. In the opinion of their Lordships, it  
is a sufficient answer to this argument to say  
that the mortgagee appears to have acquiesced in

his dispossession by Hanuman Persad (as to which he probably had no alternative) and that the decisions of the Settlement Courts in 1858 and 1864 were final as to the ownership of the mortgaged property. As the learned Judicial Commissioner observes "the mortgagee was well aware in 1864 that he could not possibly recover possession of the villages . . . which were settled at the second Summary Settlement. He brought no suit then, or at any time subsequently, to recover his mortgage money, but appears to have remained satisfied for 31 years with the diminished security, and the possession of the remaining villages." It may be added that he made no attempt to enhance the rent of the villages which were left to him, and that they constitute an ample security for the whole amount of his claim.

In the Judgment of the Judicial Commissioner, it is inadvertently stated that the villages now in suit are six in number, but this is erroneous. As already pointed out, at the Settlements of 1858 and 1864, Inderjit Singh was confirmed in the proprietorship of five only, and the Decree must be varied accordingly. Their Lordships will therefore humbly advise His Majesty that the Decree of the Court of the Judicial Commissioner of Oudh, so far as it relates to the five villages of Hargaon, Ahed, Machheria, Bahadurpur, and Poorah Pershad-Badal, should be confirmed, and this Appeal dismissed. The Appellant must pay the Respondent's costs of this Appeal.

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