

*Judgment of the Lords of the Judicial Committee  
of the Privy Council on the Appeal of Rajah  
Furzund Ally Khan v. Abdool Razak and  
others, from the Court of the Financial Com-  
missioner of Oudh; delivered 21st November  
1872.*

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Present :

SIR JAMES W. COLVILLE.  
SIR BARNES PEACOCK.  
SIR MONTAGUE E. SMITH.  
SIR ROBERT P. COLLIER.

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SIR LAWRENCE PEEL.

THIS suit was brought to redeem Mouzah Ooderia by payment of Rs. 1,200, the amount of the mortgage debt. The Defendant, who is the Appellant, contended that the mortgagor was not entitled to redeem upon payment of Rs. 1,200 inasmuch as he, the Defendant, had been obliged, after he had advanced the Rs. 1,200 upon mortgage. to pay a further sum of Rs. 1,141 in discharge of a prior mortgage, and he claims also a sum of Rs. 6,515 as the interest due upon that sum. With regard to the Rs. 1,141 a receipt was produced given by Fuzal Kurreem, he being the prior mortgagee to whom that amount was due. The receipt admitted that the amount had been paid through Furzund Ali Khan the Defendant. The question arose whether that payment of Rs. 1,141 was an independent payment made by the Rajah in addition to the Rs. 1,200 advanced upon the mortgage, or whether it had been paid out of the mortgage money. The issue upon that point was found against the Rajah by the three Lower Courts. It was contended that the finding took place merely upon the production of the receipt without the pro-

duction of oral evidence, but there is nothing to show that the Defendant ever applied to the Court below to summon any witnesses, or that he ever produced any witnesses or asked to have witnesses examined to prove that the Rs. 1,141 was a payment made by him in addition to the Rs. 1,200 which were advanced upon the mortgage. Now, if the Rs. 1,141 had been a distinct sum advanced in addition to the Rs. 1,200 there could have been no difficulty in proving that advance. The Defendant might himself have come forward and proved it. It appears that he was once in the Court and that having produced a deed he retired. Now, if he was a gentleman who had no objection to go into a court of justice to produce a deed one would suppose that he would have no objection to give his testimony; but even if he objected to give his own evidence, there was no reason whatever why the payment, if it was made in addition to, and not out of, the advance, should not have been proved independently by other witnesses. The Plaintiff had a right *prima facie* to redeem upon payment of the Rs. 1,200. It was for the Defendant to prove that the Rs. 1,141 had been paid by him in discharge of the prior mortgage.

But there is also a fact in addition which tends to show that the Rs. 1,141 was not a distinct advance made by the Rajah upon the property, and that the Rajah did not hold it as a security for the Rs. 1,141 in addition to the amount due to him upon the mortgage for Rs. 1,200, viz., the subsequent mortgage in respect of the Rs. 341. That mortgage, which is dated the first of Rajub 1275, and is set out at page 2 of the supplemental record, after reciting that the Rs. 341 are due, says: "Peradventure if I should fail to  
" liquidate or make good the sum above noted at  
" the period herein stipulated upon, then the  
" village of Akberpur and Survun, with the  
" exception of Mouza Ooderia, which is held  
" under a mortgage transaction of prior date by  
" Raja Furzund Ali Khan Buhadur, I will mort-

“ gage the said property in lieu of the amount  
 “ aforesaid. Further, whenever I may be able  
 “ to pay up in one lump sum the amount of  
 “ mortgage money of Mouzah Ooderia, as well as  
 “ the amount set forth in this bond, I shall  
 “ redeem the property aforesaid from mortgage.”  
 Now the Rajah accepts that mortgage, and if  
 anything had been stated in it which was incon-  
 sistent with his interest he would naturally have  
 objected to it. If the Rajah held the property  
 not only for the Rs. 1,200, the amount of the  
 mortgage debt, but also for the Rs. 1,141, which  
 he alleges he paid, would he not have stated  
 that Mouzah Ooderia was held by him for the  
 Rs. 1,141, as well as under the mortgage to him  
 for the 1,200 Rs.

Further, the mortgage to Fuzul Kurreem,  
 upon which it is alleged that the Rs. 1,141 were  
 paid, was a mortgage of Mouzah Ooderia, Surwun,  
 and Roushunabad, whereas the subsequent mort-  
 gage was a mortgage of Mouzah Ooderia and the  
 villages of Akberpore and Surwun, Akberpore  
 being in the one mortgage and Roushunabad in  
 the other. If the Rajah had really paid off the  
 mortgage of Fuzul Kurreem out of his own  
 money and not out of the Rs. 1,200 which he was  
 to advance upon the new mortgage, he would  
 have been in possession of Roushunabad, but  
 there is no evidence whatever offered on his part  
 to show that he took possession of Roushunabad  
 in addition to Moczah Ooderia and the villages of  
 Akberpore and Surwun.

It appears, therefore, that the lower Courts  
 have come to a correct conclusion as to the  
 Rs. 1,141, and their Lordships even, independ-  
 ently of their rule not to disturb the concurrent  
 findings of two lower Courts upon a question of  
 fact, feel satisfied that the finding as to the  
 Rs. 1,141 was correct. Then, as the Rs. 1,141  
 fails, the Rs. 6,515, the interest claimed upon it,  
 must fail also.

There was another sum of Rs. 341 which the  
 Rajah says he was entitled to be paid before the

Plaintiff could redeem Mouzah Ooderia, and he says that his right to have that amount paid before the redemption of Ooderia depended on the subsequent mortgage of Rajub 1275. Now it appears to their Lordships that Mouzah Ooderia was not included in that mortgage. In fact the document was not a mortgage at all, it was merely an agreement to mortgage for Rs. 341 if that amount should not be paid at a subsequent date. It recites that the Rs. 341 were due. He then says: "I will pay up the amount mentioned above by the month of Bhadoon 1266, F.S." And then he says: "Peradventure, if I should fail to liquidate or make good the sum above noted at the period herein stipulated upon, then the village of Akberpur and Survun *with the exception of Mouzah Ooderia*, which is held under a mortgage transaction of prior date by Raja Furzund Ali Khan Buhadur, I will mortgage the said property in lieu of the amount aforesaid." Therefore there was an agreement that in case the Rs. 341 should not be paid in the month of Bhadoon 1,266 Fuslee, the other two villages would be mortgaged. Then he proceeds, "Further, whenever I may be able to pay up in one lump the amount of mortgage money of Mouzah Ooderia as well as the amount set forth in this bond I shall redeem the property aforesaid from mortgage." There is a stipulation that the villages of Akberpur and Survun are not to be redeemed until Ooderia is redeemed, but there is no stipulation for the converse that Mouzah Ooderia shall not be redeemed until the other villages are redeemed. Then he goes on, "The said Raja Sahib Buhadur shall enjoy possession of the villages mentioned above until the period of payment of the amount in question;" that is to say, that the Rajah shall hold the two villages until the payment of the Rs. 341,

Now Mouzah Ooderia had been described in the deed as a *mouzah*, and the other two were described as *villages*. Looking to the whole of



this document it would appear that the Rajah stipulated that he should hold possession of the villages of Akberpur and Survun until the payment of the amount in question, not that he should hold possession of Mouzah Ooderia and that Mouzah Ooderia should not be redeemed until the payment of the Rs. 341.

It appears, therefore, to their Lordships that the Defendant had no right to resist the redemption of Mouzah Ooderia upon the ground that the Rs. 341 had not been paid.

But there was an issue raised with respect to that Rs. 341. It was admitted that the Rajah had paid the Rs. 341, but the Plaintiff stated that the Rajah had been repaid, and he produced a receipt for the amount purporting to have been sealed by the Rajah's brother, for the purpose of proving that that payment had been made. The receipt appears to have been produced for the first time at the trial. On the part of the Rajah it was contended that it was a forgery, and the Plaintiff proceeded to prove the receipt by producing two documents with a seal purporting to be the seal of the Rajah's brother upon them. No evidence was given to show that the brother was acting as the Rajah's agent, or that the documents produced were genuine documents bearing the seal of the Rajah's brother. The Defendant's legal representatives stated that they could not say whether the seal on the documents was the seal of the Rajah's brother or not. The Judge compared the seal upon the receipt in question, and finding it was like those upon the other documents he found that the receipt in question was binding on the Rajah. It appears to their Lordships that that was a mis-trial; that the Judge was wrong in finding, upon such evidence, that the receipt was a genuine one. There was therefore the Plaintiff's admission that the sum had been paid, but there was no proof on his part that it had been repaid. In their Lordships view of the case the issue was an immaterial one and unnecessary for the determi-

nation of the cause. Their Lordships will therefore humbly recommend Her Majesty that the decree of the Lower Court be affirmed, subject to the variation of rejecting the finding upon the issue as to the Rs. 341. The parties therefore will not be prevented hereafter, by the finding of that issue, from contesting that the Rs. 341 have not been paid.

The existing decree of the Lower Court is simply one for redemption on payment of the Rs. 1,200. That decree is affirmed, but the finding of the issue relating to the Rs. 341 will not be binding upon the parties in any future proceeding.

The opposite party not having appeared there will be no costs.