

*Judgment of the Lords of the Judicial Committee  
of the Privy Council, on the Appeal of Kader  
Moideen v. Nepean and others, from the  
Court of the Judicial Commissioner for Lower  
Burma; delivered 12th July 1898.*

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Present:

LORD WATSON.

LORD HOBHOUSE.

LORD DAVEY.

SIR RICHARD COUCH.

[*Delivered by Lord Davey.*]

The action out of which this appeal arises was commenced some years ago by the present Appellant for the redemption of a large tract of land situate in the district of Shwegyn in Lower Burma which was originally waste land belonging to the Government. The Respondents deriving title from one John Nepean who died in 1883 denied the mortgage and claimed to hold free from any right of redemption. The Appellant's right to redeem was finally established in an appeal to this Board and by an Order in Council dated the 27th June 1894 the decree of the District Judge of Shwegyn which had been reversed by the Judicial Commissioner of Lower Burma was restored with a slight variation in the form of accounts thereby directed. The accounts as varied were as follows:

(1.) An account of what is due to Defendants for principal and interest on their mortgage in this case namely all debts due to them from Plaintiff and all money expended by them on behalf of Plaintiff in paying Government dues

on the land together with compound interest at 10 per cent. per annum upon these moneys.

(2.) An account of all sums of money laid out by Defendants on improvements and management of the land comprised in the said mortgage with simple interest at the rate of 10 per cent. per annum on the amounts expended by the Defendants from the respective dates of such expenditure to the date of taking the said accounts.

(3.) An account of all rents and profits received since 3rd June 1871 by Defendants or any of them or by deceased J. Nepean whose representatives they are or by any other persons acting by the order or for the benefit of Defendants or deceased J. Nepean.

In compliance with these directions the Respondents brought in three accounts which have been carefully and fully investigated by the District Judge of Shwegyn with the assistance of Mr. Villa who was named a Commissioner to take the accounts and there have been appeals to the Commissioner of the Tenasserim division and to the Judicial Commissioner of Lower Burma. The present appeal is from the decree of the Judicial Commissioner dated the 14th December 1896.

The difficulty of taking the accounts has been much increased by the fact that John Nepean in his lifetime and the Respondents since his death either believing themselves to be absolute owners or thinking that there was not any prospect of the Appellant redeeming the lands kept no proper mortgage accounts and such accounts as there were are said to have been eaten by white ants. Since the year 1874 the lands have been under the general management of the Respondent Charles W. Nepean who was a son of John Nepean. On his father's death Charles W. Nepean became entitled to a share of his estate including this mortgage. Charles W. Nepean

resided on the property while his father resided at Shwegyn where he carried on business as a money lender.

No question in this Appeal arises on account No. I (the amount due for principal lent and Government dues paid with compound interest) or upon account No. III. of rents and profits received. But the Appellants complain (and this is their first point) of the way in which the amounts found due on Account III. have been dealt with on appeal by the Commissioner of the Tenasserim Division whose judgment in this respect was confirmed by the Judicial Commissioner of Lower Burma. The learned Commissioner has in each year deducted the rents and profits received in that year as shown by Account No. III. from the balance of interest on expenditure then due as shown by Account No. II. It should be observed that the amount of the receipts was in each year less than the balance owing in that year for interest on expenditure.

The Burmese Courts are directed in the absence of any statutory law applicable to the case to follow the guidance of justice equity and good conscience. Mr. Haldane contended that there is no rule of abstract justice in taking the accounts of a mortgagee in possession and that the Indian rule which is now embodied in the 76th section of the Transfer of Property Act 1882 should though the Act has not been extended to Burma be followed there in preference to the English practice. The 76th section (*h*) provides that a mortgagee's receipts from the mortgaged property shall after deducting the expenses mentioned in clauses (*c*) and (*d*) and interest thereon be debited against him in reduction of the amount (if any) from time to time due to him on account of his interest on the mortgage money and so far as such receipts

exceed any interest due in reduction or discharge of the mortgage money. The expenses mentioned in clauses (c) and (d) are for Government revenue and other charges of a public nature arrears of rent and repairs. Their Lordships are not prepared to dissent from Mr. Haldane's contention on this point but it is really unnecessary for them to express any judicial opinion on it in the present case. The Commissioner of the Tenasserim division intended to follow the Indian rule as appears from his judgment and from the variation he made in the decree of the District Judge in directing a set off of the receipts in each year against the balance due for interest on expenditure in that year. But inasmuch as the receipts were in each year less than that balance and as (Account II. bearing only simple interest) the balance of interest did not carry interest it really makes no difference in the result whether the receipts are set off year by year, or the sum of the receipts at the end of the account is deducted from the sum of the amounts due on Account II. Mr. Haldane's real contention was that the receipts ought to have been deducted from the interest due year by year on Account I. which bears compound interest so as to stop *pro tanto* the interest running on that interest or (in other words) that the mortgagee was bound to give credit for his receipts against the debt which was most burdensome to the mortgagor. Their Lordships can find no warrant in principle or in authority for this contention. They agree with the judgment on this point delivered by the Judicial Commissioner, and they do not think that the mode in which the account is stated is inconsistent with the rule laid down in the Indian Transfer of Property Act.

The Appellant's next point was on items 12, 13, 14, and 15 of Account II. Item 12 is for

“ planting fruit trees digging well fencing garden  
“ &c.” in connection with the manager’s house.  
Item 13 is for “ a large brick house shingle roof  
“ at Thayet Kone ” and items 14 and 15 “ for  
“ out-houses and fencing compound and making  
“ masonry well.” Item 12 was objected to as  
an unreasonable and unnecessary improvement.  
The house referred to in item 13 was a sub-  
stantial house for which Rs. 14,500 is claimed  
in the mortgagees account with Rs. 17,400 for  
interest. It was built for the use of Charles  
W. Nepean when in management of the property  
in place of a former house of a less substantial  
character for which Rs. 1,500 is claimed in  
item 11. This latter house had fallen out of  
repair and according to the Respondent’s evidence  
it was necessary to replace it by a more sub-  
stantial erection. The Appellant contends that  
the expenditure was unreasonable and unnecessary  
and such as cannot be charged against a mort-  
gagor. The questions whether any improvement  
made by a mortgagee in possession is reasonable  
in its character and whether the expenditure  
on such improvement is reasonable in amount  
are questions of fact. The Commissioner of the  
Tenasserim division allowed item No. 12 at the  
reduced amount of Rs. 400, instead of Rs. 4,000  
as claimed and with regard to items 13, 14 and  
15, he thought that the amount claimed by the  
Respondents was altogether an exorbitant sum  
to spend on a house for the manager and that  
a much less pretentious house would have suited  
the purposes of the estate and he allowed  
Rs. 5,000 for those three items. The Judicial  
Commissioner confirmed these findings. There  
is therefore a concurrence of opinion on a  
question of fact between the two learned Com-  
missioners and their Lordships would not in  
accordance with their usual practice be disposed  
to disturb their finding even if they did not

altogether concur in it. But in this case they think that the Court below has dealt with the questions on the evidence before them in a manner which is quite satisfactory and they have no hesitation in agreeing with the result.

The next point is on item 39 for "four elephants employed for eight years (1871 to 1879) on the land for special purpose clearing jungle and other work at 100 each month." Rs. 38,400 was claimed by the Respondents for this item with Rs. 74,800 for interest. The Commissioner for the Tenasserim division has allowed Rs. 3,200 with corresponding interest and this allowance has been confirmed by the Judicial Commissioner. It was not disputed that it was reasonable to employ elephants for the purpose and there was evidence that four elephants belonging to Mr. Nepean were (at any rate) from time to time employed but it was contended that the employment was casual and occasional and that it was charged to and paid for by the cultivators. The evidence however on the latter point is vague and inconclusive. In this case again their Lordships are satisfied with the finding of the two Commissioners and will not disturb it.

The only remaining point is on item 54 for "management of land for  $23\frac{1}{2}$  years at 350 per month." The Respondents claimed Rs. 97,300 and interest Rs. 117,570. The Commissioner for the Tenasserim division allowed a salary to Charles W. Nepean at the rate of Rs. 100 per month and his decision was confirmed by the Judicial Commissioner. The Appellants object on the ground that the decree allows only "sums laid out" by the Defendants in management of the land and there is no evidence of any salary or allowance being paid to Charles W. Nepean as manager of the property. The evidence shows that Charles W. Nepean received an

education in surveying and practical engineering in this country and on his return to Burma in 1874 took charge from his father of the whole estate in dispute and resided on the land but he did not actually draw Rs. 350 a month and he stated that he drew money from his father whenever he wanted it. He subsequently states that his father advanced him money to carry on the estate and at the yearly meetings his father had memoranda of what he gave him and that his father required from him information as to how the money had been expended. The conclusion their Lordships come to upon the evidence is that during his father's lifetime the Respondent Charles W. Nepean was in the position of a son maintained by his father and living at his expense and at the same time assisting him in the management of his business but that there was no agreement between him and his father that he should receive any salary or remuneration for such assistance and that he never in fact received anything in the form of salary. The Courts below thought that an estate of this kind could not be managed without a resident manager and that if the Respondent Charles W. Nepean had not undertaken the management some other person must have been employed at a salary and it was therefore reasonable that an allowance should be made to the mortgagees for a salary to Charles W. Nepean as well during his father's lifetime as subsequently though none was in fact paid. Their Lordships do not dissent from the view thus expressed as to what might have been reasonable and if the Court had been asked in framing the decree to insert a special direction that such allowance should be made it would probably have been acceded to. But in taking an account of "moneys laid out" they think it would not be right to allow to the

mortgagee in possession as a disbursement or salary to a manager which was not in full paid either in form or in substance. Their Lordships however think that although a salary cannot be allowed as such yet during John Nepean's lifetime the cost of the separate maintenance of Charles W. Nepean while absent from his father's home and engaged in the management of the property may be allowed to John Nepean as a disbursement or "moneys laid out in management." And they think that Rs. 100 per month is not an unreasonable or excessive amount to be allowed for that purpose. After the father's death there is more difficulty. Charles W. Nepean was then himself only the mortgagee and was residing on the property and managing it for the benefit of himself and his co-mortgagees and their Lordships think it would be contrary to principle to allow either a salary or allowance for his maintenance in such circumstances.

Their Lordships will therefore humbly advise Her Majesty that the decree of the Judicial Commissioner of Lower Burma dated the 14th December 1896 be varied by disallowing so much of the sum of Rs. 25,200 for principal and Rs. 53,214 for interest charged against the Appellant being item No. 54 in the Account II. of the Respondents as represents the allowance of Rs. 100 per month after the death of John Nepean and the interest thereon with consequential variations and that in other respects the said decree be confirmed.

As the Appellant has succeeded partially only on one of his points and has failed on his other points their Lordships direct that the Appellant shall pay to the Respondents one half of their costs of this appeal and they make no other order as to costs.

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