

*Privy Council Appeal No. 20 of 1923.*

*Oudh Appeals Nos. 30 and 31 of 1919.*

Mirza Abid Husain Khan - - - - - *Appellant*

*v.*

Musammat Kaniz Fatima and others - - - - - *Respondents*

FROM

THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE  
PRIVY COUNCIL, DELIVERED THE 22ND JANUARY, 1924.

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*Present at the Hearing :*

LORD CARSON.

SIR JOHN EDGE.

MR. AMEER ALI.

[*Delivered by SIR JOHN EDGE.*]

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This is an appeal by the representative of the defendant from a decree, dated the 17th July, 1919, of the Court of the Judicial Commissioner of Oudh, which varied a decree, dated the 30th September, 1916, of the Subordinate Judge of Barabanki.

The suit in which this appeal has arisen is for the redemption of a mortgage with possession of the 15th May, 1869, of the village of Pindra, and of a mortgage of the same village by conditional sale of the 24th June, 1874. The original mortgagor and the original mortgagee died before suit. The suit was brought on the 21st August, 1915, by the representative of the mortgagor against the representative of the mortgagee. The plaintiff and the defendant are now dead and each is represented in this appeal, but, for the sake of convenience, they will be referred to respectively in this judgment as the plaintiff and the defendant as if living.

After the granting of the mortgages the mortgagee purchased a 4 annas share in the village, and it is admitted that the plaintiff

is entitled to redeem the mortgages on payment of twelve-sixteenths of the amount which would otherwise be due under the mortgages. The questions now in dispute, which have to be considered in this appeal, are whether the defendant is to be allowed in the account of the money due to obtain redemption payments of enhanced land revenue and payments of certain cesses which were made by the mortgagee after the 15th May, 1869.

It is not disputed that under the mortgage of 1869 the mortgagee in possession had to pay out of the usufruct, the Government land revenue payable under the Settlement in force in 1869, but it is contended by the defendant that he is entitled to charge in the accounts as against the mortgagor any enhancements of that land revenue which the mortgagee was obliged to pay.

In the mortgage of 1869 it was stated that the mortgagor had mortgaged the village to the mortgagee for a period of one year and had put the mortgagee in possession, and the mortgagor agreed, amongst other things, that if he failed to redeem within one year he should not be entitled to redeem for twenty-five years; that he would cause mutation of names to be effected in favour of the mortgagee in the Government records, "and when revenue is paid the dakhilas (receipts) shall be issued to the mortgagee"; that until redemption the profits of the village, with all zamindari dues, should be appropriated by the mortgagee; "that power to enhance rent, to appoint and dismiss Patwaris, Maqaddams and Chaukidars, and to resume Muafi land from the Muafidars who hold land as service grants, to populate Purwas and settle the tenants, to determine rights, etc., which had hitherto been exercised by the mortgagor, shall in the same manner be exercised by the mortgagee"; and that after redemption the mortgagor should not be entitled to claim any mesne profits.

The mortgagor borrowed further moneys from the mortgagee, and on the 24th June, 1878, gave to the mortgagee a mortgage in the form of a deed of conditional sale, the second clause of which as translated is as follows:—

"2. That just as the mortgaged property is liable for the money due under the mortgage deed, dated the 15th of May, 1869, similarly the same property is and shall be liable for the money due under this deed, that if I, the executant, pay in one lump sum within five years from to-day, in a fallow season in the month of Jeth, the money due under this deed and the mortgage money of the mortgage deed as well as other amounts due, the mortgaged property shall be redeemed, otherwise the consideration of this deed and the mortgage money of the deed of mortgage shall be deemed to be the consideration money and this deed shall be deemed to be the sale deed, and on the expiry of the stipulated period, I the declarant shall have left in me no right of redemption nor any other rights in respect of the mortgaged property and the said Mirza Sahib shall be entitled to have it foreclosed at any time he pleases after the expiry of the stipulated period and to that I shall have no objection or claim whatever."

It appears to their Lordships that the mortgage deed of the 15th May, 1869, and the mortgage deed of the 24th June, 1878, must be read together, and that the parties intended that the mortgagee should be treated as having held the mortgaged property

from the 15th May, 1869, as a mortgagee in possession under a mortgage in the form of a mortgage by conditional sale.

At the time when the mortgage of the 15th May, 1869, was made the land revenue payable to the Government in respect of the village was Rs. 1,300 per annum, but in the settlement of 1896 it was increased to Rs. 1,600 per annum, to be further increased in five years to Rs. 1,900. The increased revenue was paid by the mortgagee.

The cesses, the payments of which the defendant claims to charge against the plaintiff in the account, were sums paid by the mortgagee in discharge of a local rate imposed on the village under Act IV of 1878, The Oudh Local Rates Act, 1878. By Section 5 of that Act, "All sums due on account of an rate imposed under this Act, shall be recoverable as if they were arrears of land revenue due in respect of the land on account of which the rate is payable." Under that Act the "Landholder" was responsible for the payment of rates imposed upon the land, and by Section 3 of the Act "Landholder" included the person in receipt of the rent of any land, and responsible for the payment of the land revenue, if any, assessed on the estate. The mortgagee was the "Landholder" within the meaning of the Act.

This suit to redeem the two mortgages already mentioned was tried by the Subordinate Judge of Barabanki, who disallowed the defendant's claim in respect of the payments of enhanced revenue, but allowing his claim to include as against the plaintiff in the account the payments of the cesses, made a decree for redemption on payment of the amounts mentioned in the decree, and in default of such payment decreed that the 12 annas share in the village should be sold. From that decree the plaintiff and the defendant respectively appealed to the Court of the Judicial Commissioner.

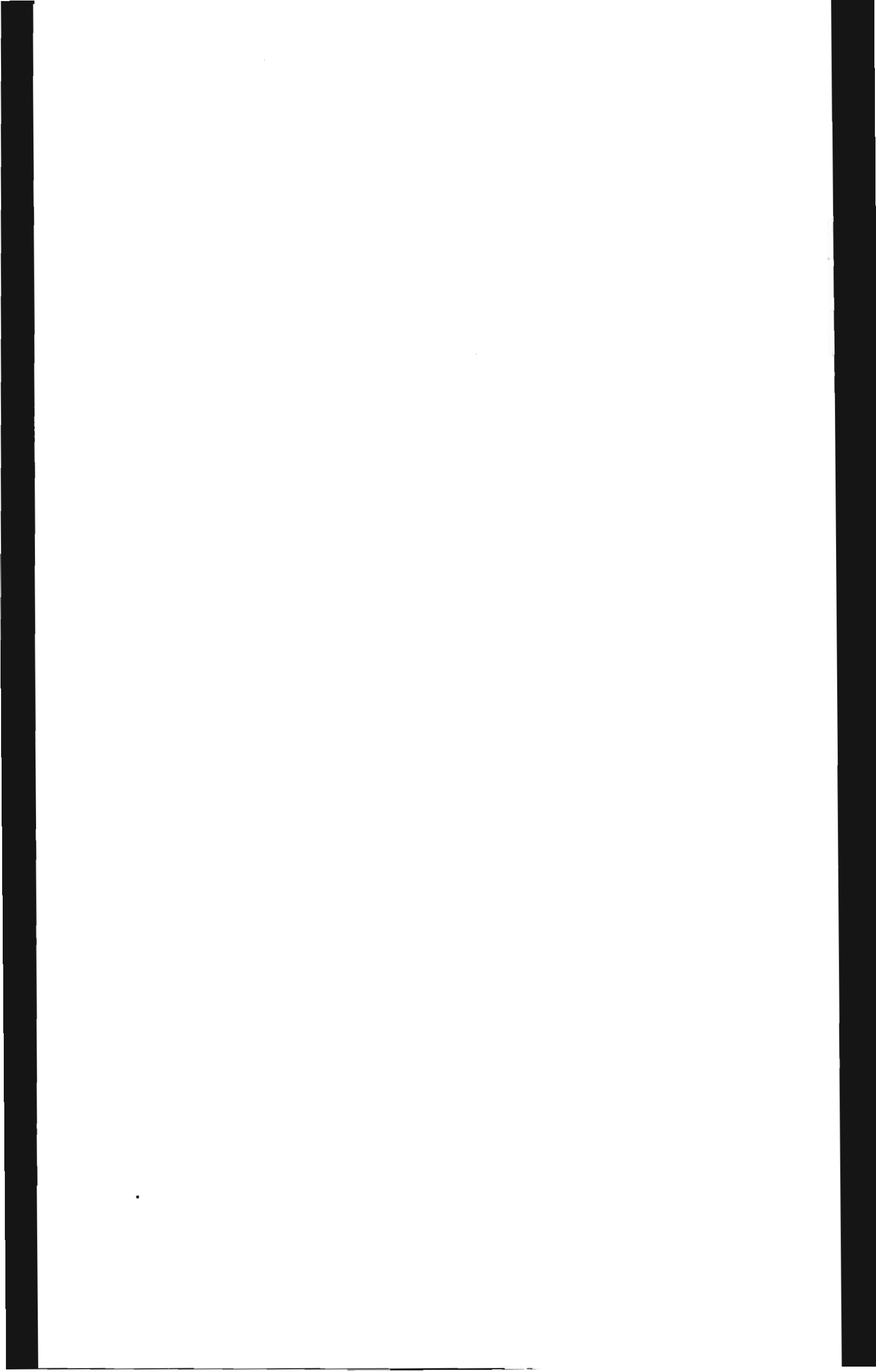
After the hearing of the appeal to the Court of the Judicial Commissioner had commenced the advocate for the defendant asked the Court to receive in evidence a document dated the 6th July, 1871, which had been executed by the mortgagor in favour of the mortgagee and had not been previously produced in the suit. It related to the mortgage of the 15th May, 1869. The learned Judges admitted the document in evidence, apparently on the ground that a provision in the document was incompatible with the mortgagee having a right to add the payments of the enhanced land revenue to the mortgage money. How that document could have assisted the defendant's case their Lordships do not see, nor did the learned Judges who admitted it in evidence. Independently of the document of the 6th July, 1871, the Judicial Commissioners held, to state their findings briefly, that the mortgagee as mortgagee in possession was bound to pay the enhanced revenue and the cesses out of the usufruct, and that the defendant was not entitled to charge such payments against the plaintiff in the account, and dismissed the defendant's appeal to their Court and substituted for the decree for sale of the Subordinate Judge a decree for foreclosure if the amount which they found to

be due was not paid on or before the 17th January, 1920. This appeal is from that decree.

The art of conveyancing was in 1869 and in 1878 little, if at all, understood in India, except possibly by some English solicitors practising in the Presidency towns, and the mortgages in question were made before the Transfer of Property of 1882 came into force and afforded some information as to how mortgages of immovable property should be framed. Their Lordships have no doubt that the mortgagor and mortgagee intended that the mortgage of 1869 and the mortgage of 1878 should be read together, and that until they should be redeemed the mortgagee should be in possession of the mortgaged property in the position of a mortgagee by a conditional sale in possession, and that if the mortgages should not be redeemed the right to redeem should be determined by a decree of foreclosure.

In British India a mortgagee in possession of immovable property under a mortgage made before the Transfer of Property Act of 1882 came into force was under the ordinary law then in force bound to manage it as a person with ordinary prudence would manage it if it were his own, and, unless there was an agreement to the contrary with the mortgagor, he was bound to pay out of the income of the property the Government land revenue which might during his possession be assessed upon it and such charges of a public nature as might accrue due in respect of the property and be payable by the person in possession of the rents and profits, and was not entitled to charge such payments against his mortgagor in the accounts.

Their Lordships will humbly advise His Majesty that the time for payment of the Rs. 32,268.2.0 redemption money into Court allowed by the Court of the Judicial Commissioner of Oudh should be extended to six calendar months after the receipt by that Court of His Majesty's Order in Council and that in other respects this appeal should be dismissed. The appellant must pay the costs of this appeal.



In the Privy Council.

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MIRZA ABID HUSAIN KHAN

v.

MUSAMMAT KANIZ FATIMA AND OTHERS.

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DELIVERED BY SIR JOHN EDGE.

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