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August 31.

Regular Appeal No. 55 *of* 1870.

KESHAVRA'V KRISHNA' JOSHI .....*Appellant.*

BHAVA'NJI bin BA'BA'JI .....*Respondent.*

Mortgage—Power of Sale—Right of Mortgagee to sell without intervention of Court—Costs—Discretion—Appeal.

As a general rule an appeal in respect of costs will only be entertained in cases in which no discretion has been fairly exercised upon the question, and the decision of the Court below has proceeded upon mistake or misapprehension.

Where *bonâ fide* care and discretion have been exercised, no appeal in respect of costs should be allowed, and the question whether such discretion has been well or ill exercised should not be entertained.

Semble (*per Melvill*, J.) that a private sale effected by a mortgagee in the Mofussil without the intervention of a Court, in pursuance of a power of sale given to him under his instrument of mortgage, is invalid.

THIS was an appeal from the decision of Krishnáráv Vithal Vinchurkar, Subordinate Judge, First Class, at Sátárá.

The appeal was heard by MELVILL and KEMBALL, JJ.

Shántárám Náráyan for the appellant.

Bahiravnáth Mangesh for the respondent.

The facts fully appear from the following judgments :—

MELVILL, J. :—The defendant borrowed from the plaintiff Rs. 644-11-3, bearing interest at six per cent., and executed a deed of mortgage by which he conveyed a house to the plaintiff, and covenanted that in default of payment of principal and interest within four months, the plaintiff might sell the house without notice to the defendant, and apply the proceeds to the liquidation of the debt, any balance which might remain due being recoverable from the defendant with compound interest. The plaintiff was also to account to the defendant for the rents and profits of the house.

The plaintiff has come into court asking for a decree for the principal and interest, and for an order for the sale of the house. This decree and order have been made, but the Subordinate Judge has laid all the costs of the suit on the plaintiff, on the ground that the mortgage-deed gave him a

power of sale, and it was, therefore, unnecessary for him to come into court until he had exercised that power, and found it insufficient for the purpose of recovering the full amount of the debt.

The plaintiff appeals against the order as to costs, and also against the refusal of the Subordinate Judge to award interest during the pendency of the suit. The defendant has filed an objection under Sec. 348 of the Code, on the ground that, under the terms of the mortgage-deed, he is not liable for interest after the expiration of four months from the date of the deed.

We are always unwilling to admit an appeal on the question of costs. I think that we should adhere to the principle laid down by the Privy Council in *Atterborough* v. *Kemp* (*a*), namely, that an appeal in respect of costs should only be entertained in cases in which no discretion has been fairly exercised upon the question, and the decision of the court below has proceeded upon mistake or misapprehension, and that where *bonâ fide* care and discretion have been exercised, no appeal in respect of costs should be allowed, and the question whether such discretion has been well or ill exercised should not be entertained. But, while accepting this as the general rule, I consider that we shall not be contravening it, if in the present case we allow the propriety of the Subordinate Judge's order as to costs to be called into question. To lay the whole of the costs of a suit on the winning party is an extreme measure, which is only justifiable in cases in which a suit may have been wholly unnecessary for the purpose of establishing and enforcing the plaintiff's right. If the plaintiff can show that such an order was made under a mistake or misapprehension of the law, and that the filing of a suit was a necessary proceeding, or, if not absolutely necessary, that it was a reasonable and discreet proceeding, then he is fairly entitled to ask an appellate court to set aside such order.

What I have to consider, then, is whether the Subordinate Judge acted under a mistake or misapprehension as to the

(*a*) 7 Jur., N. S, 665.

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law, when he held that the power of sale inserted in this mortgage-deed made it clearly unnecessary for the plaintiff to apply for a judicial order of sale.

With a single exception, to which I shall presently refer, I have not been able to find in the reported cases any decisions of the courts in India on the subject of a mortgagee's power to sell, without the intervention of a court, in cases not governed by English law. The English law is, of course, perfectly clear. Not only has the mortgagee the power to sell, without the concurrence of the mortgagor, in cases where such power is expressly given by the mortgage-deed, but by a recent statute such a power of sale is made incident to all mortgages, unless it be excluded or limited by the mortgage-deed.

The case above referred to is that of *Bhuwanee Churn Mitr* v. *Jykishen Mitr* (*b*). Although that case stands alone, it is a very valuable authority. It is stated in the judgment of the court to have been a novel and unprecedented case. "It may safely be affirmed," the Judges say, "that no such condition" (*i.e.*, a power of sale given to the mortgagee) "is to be found in any document produced in the Company's Courts, since the Code of 1793 came into operation, between parties contracting in the Mofussil. If, then, respect be had to the universal impression throughout the country, and to the uniform practice of our courts, the presumption must be against the validity of such a stipulation." As it was the first case of the kind, so it appears to have been the last; and Mr. Macpherson, in his work on mortgages (p. 46), accepts the decision in it as settling the present state of the law in Bengal and the N. W. Provinces. The case was very fully argued, Sir J. W. Colvile, then Advocate General, appearing in support of the sale made by the mortgagee under a power contained in the mortgage-deed; and the Judges unanimously held that such a power was repugnant to the spirit, if not to the letter, of the Regulations, and unsuited to the circumstances of this country.

(*b*) Calc. S. D. A. 1847, p. 354.

Our Bombay Regulations, like those of Bengal, contain no provision regarding the sale of a mortgaged estate under a power of sale; for cl. 3 of Sec. xv. of Reg. V. of 1827, referred to by the Subordinate Judge, has no real bearing on the question. If it has any such bearing, it seems to me to indicate rather that a civil suit is necessary, than that a mortgagee may sell the property without a suit. In the present case, as in the Bengal case, the point raised is a novel and unprecedented one. I do not remember ever to have seen a document executed between natives in the Mofussil in which such a condition was inserted, nor do I believe that such a power of sale has ever been exercised in the Mofussil, for if it had been exercised, the question would almost certainly have come before the courts.

I am strongly disposed to agree with the Calcutta Judges as to the impolicy of allowing sales by mortgagees in the Mofussil. The mass of mortgages consists of mortgages of ancestral fields, made by ignorant cultivators to greedy and unscrupulous money-lenders. The great object of the money-lender is to get the land into his own hands, and, when he has succeeded, he is the worst possible landlord, spending nothing on the improvement of his estate, and rackrenting the unfortunate ryot whose proprietary rights have passed from him, but who is willing to slave for the usurer rather than abandon the field of his fathers. When we stand between two classes such as these, it is the borrower, and not the lender, whom we should protect. Any measure which tends to the general transfer of proprietary rights in land from the cultivating to the money-lending classes should, in my opinion, be viewed with the greatest jealousy. We have introduced into our system, to the great benefit of the ryot, the English doctrine of the equity of redemption; and I am happy to say that this court has determined to adhere to that doctrine, notwithstanding the attempts which have been made to wrest a recent decision of the Privy Council into a weapon for attacking it. But this would be of little use, if we were to allow mortgagees to sell the property, whenever they pleased, without the intervention of a Court of Justice.

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As the Calcutta Judges say: "This court has only to declare such a condition legal, and in the course of a short time not a mortgage-bond would be without it. The mortgagee would then sell his debtor's property to suit his own time, and in such manner and with such publicity and formalities as he thought proper. Fraud, it is to be feared, would frequently accompany the transfers, and the property fall into the hands of the mortgagee or some of his connections at an inadequate price, leaving the lender at liberty still to pursue the borrower for the balance that may remain after the sale:" p. 364.

Of course it may be said that the system has been found to work well in England. That must be presumed to be so: for the courts, which were at first opposed to the introduction of such a system, have long since recognised its validity, and the Legislature has now gone so far as to annex a power of sale to contracts in which the contracting parties have not provided for it. But it does not follow that the system is suitable to other countries, or to this country in particular. The Code Napoleon (Articles 2078, 2090) absolutely excludes it, declaring any stipulation for a power of sale, to be exercised by a mortgagee otherwise than through the court, to be null and void. The nations of Continental Europe generally have, I believe, adopted the same rule (see Story on Bailments, Sec. 309), and a like rule is found in the Code of Louisiana. The notes of the Indian Law Commissioners on the first draft of the Penal Code sufficiently show in what high esteem the Louisiana Code is held by those who have been concerned in legislating for India.

The sale of a pledge by the creditor certainly does not appear to be opposed to the Hindú law. Mr. Colebrooke (Digest, Vol. I., p. 141,* Madras ed., 1864) gives a text of Bṛihaspati: "When the debt is doubled by the interest, and the debtor is either dead or has absconded, the creditor may attach his pledge, or the debtor's chattel, and sell it before witnesses; or, having appraised it in an assembly of good men, he may keep it ten days, after which, having received

* Bk. I., Ch. III., Sec. 2, Cl. cxxii.

the amount of his debt, he must relinquish the balance, if there be any. Having ascertained his own demand by the help of men skilled in arithmetic, and taken the attestation of witnesses, he commits no offence by thus recovering it." The very next text, however, points to the intervention of judicial authority in such matters: "When the pawner is missing, let the creditor produce his pledge before the King; it may then be sold with his permission: this is a settled rule. Receiving the principal with interest, he must deposit the surplus with the King." This last text prescribes a process very similar to a decree, and sale under a decree, of court; and, whatever texts may be found which may seem to authorise independent action of the creditor, it is certain that the usage of the country is opposed to it; and as a guide to our courts the usage of the country takes precedence of the Hindú law.

It is perhaps not necessary for the purposes of this suit to decide positively that a sale by a mortgagee, under a power contained in the mortgage-deed, would be void. That question is open to just so much doubt as to render legislation on the subject desirable; and I am glad to see that the Indian Law Commissioners in their sixth Report propose to legislate in the right direction, if I may venture so to say. The rules proposed by them oblige a mortgagee who desires a sale to obtain it through the agency of a Civil Court, and prevent him from buying the property himself at the court-sale without the leave of the court previously obtained. "We hope," say the Commissioners, "that the artful contrivances by which land is often acquired much under its value by means of the process of foreclosure may thus be checked, and that sales, being made openly under the supervision of the courts, will be fairly conducted." For the purposes of this suit it may be sufficient for me to say that, for the reasons which I have stated, it is extremely doubtful whether the plaintiff could have made a valid sale under the power contained in the mortgage-deed; that he would have been very ill-advised if he had attempted to exercise a power so novel and of such doubtful

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validity; and that even if it were not absolutely necessary for him to come into court, he showed a proper and wise discretion in so doing. It follows from this that he is entitled to his costs.

No doubt, if the defendant had shown that he had offered to join the plaintiff in making a conveyance of the property, and was ready to pay any balance which might be due, the plaintiff would fairly have been made to bear the costs. But the evidence on the record, even if reliable, does not prove this, or anything like this. It only shows that two persons who made an offer to buy the property were referred by the defendant to the plaintiff. The sum offered was less than the sum due to the plaintiff, and the plaintiff would certainly not have been bound to part with his security, even if the defendant had joined in the conveyance, unless he thereby obtained full satisfaction of his debt.

I think that the plaintiff is also entitled to interest until the date on which his debt was satisfied, though, on the other hand, he is bound to give an account of the rents and profits up to the same date. The Subordinate Judge has taken the account correctly up to the date of the institution of the suit, so that it only remains to do the same for the period intervening between the date of the suit and the date of payment.

I would, therefore, amend the Subordinate Judge's decree, by ordering that an account be taken of the rents and profits of the mortgaged premises received by the plaintiff between the date of institution of the suit and the date on which the decree of the Subordinate Judge was satisfied; that the amount found to be owing on such lastmentioned account be deducted from what shall be found to be due to the said plaintiff on account of simple interest at six per cent. accruing due between the same dates; that the balance, if any, be paid to the plaintiff; and that if, on the contrary, the amount found to be owing to the defendant on such account of rents and profits be in excess of the sum found to be due to the plaintiff on account of interest, the amount in excess be paid to the defendant. I would also direct

that the defendant bear all costs throughout. In other respects the decree of the Subordinate Judge should be confirmed.

KEMBALL, J.:—I quite concur in the order it is proposed to make on this appeal as to costs and interest; but as the ground on which my opinion is based differs from that taken by my brother Melvill, and as I am unable to agree with him in thinking it to be a matter of great doubt whether the mortgagee could have made a valid sale under the power given him in the deed, it becomes necessary for me to make a few observations.

I agree in thinking that the lower court laboured under a mistaken apprehension of the law in holding that "the institution of this suit simply to enable the plaintiff to sell the house was quite uncalled for," and for that reason saddling the plaintiff with all the costs of the suit; and that this, therefore, is one of those cases in which as regards costs we should entertain an appeal. It appears to me that the Subordinate Judge has misunderstood the rights and remedies of a mortgagee. It is a clear rule that a Court of Equity will not prevent a mortgagee from using all the remedies belonging to his character, and exercising all the powers that are given to him, as and when he pleases, even concurrently (2 Spence 634). A power of sale is only an additional remedy, and on that point—*vide* note *e*, 2 Spence 634—it was held that it does not interfere with the right of a mortgagee to foreclose. Consequently, it must be held that it was competent to the plaintiff in the present case to bring his action, and, that being so, following the usual rule in suits by mortgagees, he was entitled to his costs.

But assuming for the sake of argument that the only remedy left to the plaintiff under the terms of the mortgage was to sell the property on which his debt was secured, I must confess I see no objection, the ruling of the Bengal Ṣadr Court notwithstanding, to the exercise of such remedy. The introduction of a power of sale into mortgage-deeds in the Mofussil is, no doubt, to say the least, *unusual*, but I do not understand why on that account it should not be

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exercised; nor am I aware, whatever may be the law in Bengal, that the exercise of such a power is in any way repugnant to either the letter or spirit of our Regulations, it being borne in mind that prior to the ruling in *Rámji* v. *Chinto* it had been invariably held in this Presidency, where there was an agreement that the right of redemption should be confined to a particular time, that on default made the property in the thing mortgaged passed absolutely. Moreover, I do not understand why the courts should interfere with arrangements fairly entered into between individuals for the purpose of avoiding expense and delay, merely because some possible injustice is dreaded. My own experience teaches me that the professional money-lenders neither desire nor seek to possess themselves of land; and where cases of oppression and fraud do arise, the courts are open to those aggrieved.

Special Appeal No. 154 *of* 1871.

BHA'ICHAND bin KHEMCHAND *et al.* .....*Appellants.*
FULCHAND HARICHAND *et al.* .....*Respondents.*

Limitation—Reg. V. of 1827, *Secs.* 3 *and* 4—*Claim for Account by Representative of deceased Partner against the surviving Copartners.*

A right to an account claimed by the representatives of a deceased partner in a firm against his surviving partners falls under Sec. 4 of Reg. V. of 1827, and is not a debt within the meaning of Sec. 3 of that Regulation.

A question arose in this special appeal before WESTROPP, C. J., and WEST, J., whether a right to an account, claimed by the representatives of a deceased partner in a firm against his surviving partners, was barred by the old law of limitation in this Presidency, Reg. V. of 1827, Sec. 3, the suit not having been brought until more than six years had elapsed since the date of the death of the deceased partner. The other questions in the case were not of sufficient general importance to be reported.

Shántárám Náráyaṇ, for the appellants, contended that this claim was a debt within the meaning of Sec. 3 of the