

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Rajah Furzand Ally Khan v. Bhoop Singh, from the Court of the Financial Commissioner of Oudh; delivered 23rd January 1873.*

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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.

IN this case the Plaintiffs sued to redeem upon payment of the sum of Rs. 210, alleged to be due on a mortgage for that amount. The Defendant set up as an answer that the Plaintiffs were not entitled to redeem; that the Defendant was entitled to the estate absolutely; that he had got a sunnud from the Government; that he had come to a settlement for the revenue, and that he was the person entitled to that settlement. The Defendant produced a deed of mortgage for Rs. 700 to his brother Hyder Ali, and he also produced a deed of mortgage to Shadee Mirza. The Plaintiffs having claimed to redeem upon payment of Rs. 210, the settlement officer who tried the case raised an issue whether the mortgage was for Rs. 210 or for Rs. 700. He found upon the production of the mortgage deed by the Plaintiff for Rs. 700, that that was a genuine deed, and that the Plaintiff had really mortgaged the estate for Rs. 700. The Defendant had also set up that the mortgage to Hyder Ali was a mortgage to his brother, and that the Plaintiffs, when they executed it, were out of possession;

but the settlement officer found that when the Plaintiff executed the first mortgage he was in possession, and that that was within the period of limitation, and that the mortgage made to Hyder Ali, the brother of the Defendant—which was produced by the Defendant himself—was a mortgage for his benefit. Under these circumstances, the settlement officer found that the mortgage was for Rs. 700; that the Defendant did not hold by an absolute estate, but that he held under a mortgage for Rs. 700; and that the Plaintiff was entitled to redeem on payment of that amount. An appeal was preferred from the decision of the settlement officer to the Commissioner, who upheld that decision. Then there was a special appeal to the Financial Commissioner, who upheld the decision of the Commissioner. Again, an application for a review of judgment was made to the acting Financial Commissioner who had succeeded the Financial Commissioner who pronounced the decision. The case was heard before him, and he decided that there was no ground for a review. This appeal was then presented to Her Majesty in Council; and the question is, whether their Lordships ought to advise Her Majesty to reverse the decision of the Financial Commissioner.

It is contended that the Commissioner—and if the Commissioner did not do it, that the Financial Commissioner—ought to have reversed the decision of the settlement officer, upon the ground that the Plaintiff claimed to redeem a mortgage for Rs. 210, whereas it was found that the mortgage was for Rs. 700, and that he was not entitled to redeem except on payment of that amount. If this decision be reversed, it is said that the Plaintiff may bring a fresh suit to redeem upon payment of Rs. 700, but that then he will be out of Court, inasmuch as the period for redemption, namely, 1,276 Fusli, will have expired. It appears to their Lordships that if the Commissioner or the Financial Commissioner had reversed the decision of the settle-

ment officer upon the ground above mentioned, he would have been reversing a decision upon the ground of a defect which did not affect the merits of the case, whereas by section 350 of Act 8 of 1859, which was extended to the province of Oudh it is expressly enacted that “ no decree shall be reversed or modified, nor shall any case be remanded to the Lower Court, on account of any error, defect, or irregularity either in the decision or any interlocutory order passed in the suit not affecting the merits of the case or the jurisdiction of the Court.”

The costs of the suit in the Court below were in the discretion of the settlement officer; and when he found that the Defendant, instead of admitting that he held under a mortgage for Rs. 700, claimed to be the absolute owner of the estate, and stated that the mortgage had been made by the Plaintiff to his brother when the Defendant himself was in the possession of an absolute estate—that he was not bound by it, but was the owner of the estate absolutely, their Lordships think that the settlement officer, in coming to that decision, exercised a very sound discretion. At any rate their Lordships would not interfere with the discretion of the settlement officer with regard to the costs of the suit.

Under these circumstances, their Lordships will humbly recommend Her Majesty to affirm the decisions of the Financial Commissioner, and of the other Lower Courts, and to dismiss this appeal.

