Privy Council Appeal No. 67 *of* 1929.

Moulvi Zahir-ul-Said Alvi - - - - - *Appellant*

v.

R. S. Seth Lachhmi Narayan - - - - - *Respondent*

FROM

THE COURT OF THE JUDICIAL COMMISSIONER OF THE CENTRAL PROVINCES.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 5TH FEBRUARY, 1931.

Present at the Hearing:

LORD BLANESBURGH.
LORD MACMILLAN.
SIR GEORGE LOWNDES.

[*Delivered by* SIR GEORGE LOWNDES.]

This appeal was heard in November last and their Lordships took time to consider the form in which their humble advice should be tendered to His Majesty.

It appeared at the hearing that the final judgment delivered by the Judicial Commissioners, before whom the case came in appeal, was a judgment by consent of the parties, and their Lordships enquired of Counsel appearing for the appellants how, in face of this fact, he could ask the Board to interfere. Counsel did not then contest the consent, but contended that a point which had been the subject of decision at an earlier stage of the case was still open to him.

When the case was set down for judgment a fresh application was made to their Lordships in connection with this point, supported by an affidavit of the appellant which had been sent from India. In this it is alleged that there had in fact been no consent to the judgment above referred to, and that the statement to that effect by the Judicial Commissioners was a mistake.

The judgment was in the following terms :—

1. After considerable argument and some unavailing efforts to come to some settlement which would avoid future litigation, it is now agreed among the parties to this appeal that the foreclosure decree in favour of the plaintiff should cover the whole village of Urdhon, that defendant 1 should be allowed an opportunity to redeem in order to secure the payment of his charge on the income of the village, and that the amount of the charge cannot suitably be determined in this suit. Both parties agree that the decree of the Lower Court should be set aside and a decree on these lines substituted for it.

2. The only questions for the determination of this Court are the amounts which should be added to the Lower Court's decree on account of interest and costs. As regards interest the last ground in the memorandum of appeal has not been pressed, and the plaintiff-appellant and the first respondent have left the point to the discretion of the Court. The principal amount was Rs. 5,000-0-0 advanced in 1908 and bore compound interest at 1¼ per cent. per mensem. The Lower Court has allowed only simple interest at 6 per cent. per annum from the date of suit (15th September 1920), to the last date fixed for redemption (28th February 1925), and has given a decree for a sum of Rs. 16,475-2-0, exclusive of costs. This amount has not been challenged, and we consider it fair to allow this sum, with further simple interest at 1 per cent. per mensem on Rs. 16,475-2-0 from 28th February 1925 to 21st April 1927 the date we now fix for redemption.

3. As regards costs, the efforts of defendant 1, first to defeat this mortgage entirely and then to establish a charge which would defeat it very largely, have been unavailing, and the plaintiff is entitled to add to the amount due on his mortgage the total of his expenses throughout this litigation. The defendant No. 1 must bear his own costs throughout.

4. The decree of the Lower Court is set aside and a preliminary decree for foreclosure will be drawn up—

(1) against all five defendants ;
(2) covering the whole of *mauza* Urdhon ;
(3) for the amount permitted by paragraphs 2 and 3 above ;
(4) fixing 21st April 1927 as the last date for redemption ;
(5) declaring that the village is subject to a charge of an unascertained amount held by defendant 1 Maulvi Zahirul Saheed Alvi.

Under ordinary circumstances their Lordships would not hesitate to take the statements contained in this judgment as correct, and would refuse summarily such an application as is now made to them. But the circumstances in the present case are peculiar.

It appears from the proceedings that the appeal was partly heard by the Judicial Commissioners on the 5th October 1926 and then adjourned to the 13th " as there is a chance of a compromise." It came before the Court again on the last-mentioned date when, as appears from the fly-sheet, the attempted compromise broke down. Judgment was then reserved. The record discloses nothing except the judgment set out above of the 21st October.

A formal decree of the same date was drawn up in the ordinary course which recites only the hearing of the 5th October, makes no reference at all to the 13th or to any consent of parties, but proceeds to set aside the decree of the lower Court and in lieu thereof passes a decree in conformity with the effective terms of the judgment.

The matter did not end here. On the 7th January 1927 the present appellant applied to the Judicial Commissioner's Court for leave to appeal to His Majesty in Council against the decree of the 21st October 1926. This was opposed by the respondent, but whether on the ground that the decree of the 21st October was by consent or not their Lordships do not know. All that the learned Judicial Commissioners say in deciding that leave to appeal should be granted is " as the other party chose to oppose the application, on grounds so untenable that they do not require to be mentioned, he must pay the costs of the applicant."

Thereafter on the 16th June 1927 the respondent presented a memorandum of cross-objections to the same decree, and on the 15th August 1927 a certificate was issued in the usual form under Section 110 of the Civil Procedure Code.

The respondent did not proceed with his cross-objections, and in his printed case before the Board rested his defence to the present appeal solely on the ground that the decree appealed from being by consent, was not open to challenge. Their Lordships have not thought it necessary to give the respondent an opportunity of answering the affidavit of the appellant at this stage of the proceedings.

Under these circumstances which their Lordships have characterised, not without reason, as peculiar, it is impossible for them to accept without further question the affirmation by the judgment of the Judicial Commissioners that the decree they were about to pass was a decree by consent of parties. If it was so in fact, it clearly could not be challenged by way of appeal, and the certificate should have been refused.

If the recital of consent was in some way erroneous, as the appellant now alleges, it is equally clear that no judgment upon the merits has been pronounced by the Court of the Judicial Commissioner, and the appeal must be reconsidered by them and dealt with in the ordinary way.

Under these circumstances their Lordships feel constrained, lest some injustice may unwittingly be done by them, to remit this appeal to the Court of the Judicial Commissioner, with a copy of the affidavit of the appellant, for consideration of the matter now raised and a report thereon.

If the learned Judicial Commissioner is able to report that the statements in the judgment of the 21st October, 1926 are, as their Lordships would in all ordinary cases assume, entirely correct, the appeal will be returned to this Board and disposed of by their Lordships in due course.

If however by some mischance, a mistake has been made and no consent of parties was given, the appeal will be set down again in the Judicial Commissioner's Court and a proper judgment delivered and decree passed, and the Judicial Commissioner will so report to this Board. It will be open to either party to appeal

against any new decree so passed, subject to the usual conditions governing appeals to His Majesty's Council, without filing a new record.

Their Lordships would in any case call the attention of the Judicial Commissioner to the provisions of order 20 rule 6 of the first schedule to the Civil Procedure Code, which requires that "the decree shall agree with the judgment." Their Lordships feel no doubt that where a decree, or any part of a decree, is passed by consent of parties, it should always so appear on the face of the decree when drawn up.

If the objection now urged by the appellant to the judgment of the 21st October 1926 has any foundation in substance, it is clear that the proper steps should have been taken by him in India to rectify it. He must therefore pay, in any event, the costs of the present application. Any further costs incurred in India will be dealt with by this Board upon the report of the Judicial Commissioner. Their Lordships will humbly advise His Majesty that an order should be made in the terms of this judgment.

In the Privy Council.

MOULVI ZAHIR-UL-SAID ALVI

v.

R. S. SETH LACHHMI NARAYAN.

DELIVERED BY SIR GEORGE LOWNDES.

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