Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Chaudhri Ahmad Bakhsh v. *Seth Raghubar Dayal and another, from the Court of the Judicial Commissioner of Oudh; delivered the 2nd August* 1905.

Present at the Hearing:
LORD DAVEY.
SIR ANDREW SCOBLE.
SIR ARTHUR WILSON.

[*Delivered by Lord Davey.*]

This Appeal is the final stage in a litigation which, in one form or another, has been going on since the year 1856. Large costs have been incurred and, as regards one litigant, not now before the Court, injustice has perhaps been done to him in the course of the litigation, but the real question, when properly considered, appears to their Lordships to be comparatively a simple one.

The origin of the litigation was a usufructuary mortgage bearing a native date corresponding to the 16th August 1851 made by one Husain Bakhsh of a Taluka comprising seven villages situate in the then Kingdom of Oudh to one Raghuber Dyal, son of Seth Murli Manohar (who was the real lender), to secure Rs. 4,000 and interest at the rate of Rs. 3. 2 per cent. per mensem equivalent to 37½ per cent. per annum. The mortgage was made redeemable at the close of the Fasli year, and it was provided that on being redeemed the mortgagee should not account for the rents and profits of the villages possession of which it was stated had been given to him.

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The annexation of Oudh by the British Government took place on the 13th February 1856. Shortly afterwards Husain Bakhsh commenced a suit in the Court of the Deputy Commissioner of Sitapur against Murli Manohar for the redemption of the mortgage, and a decree was made therein by the Assistant Commissioner against which both parties appealed. On the appeal and cross-appeal Mr. Christian, the Commissioner, delivered a Judgment dated the 21st April 1857 in which he stated his opinion that the then Plaintiff Husain Bakhsh should pay the principal sum viz.: Rs. 4,000 only, and ordered that the file of the case be forwarded to the Deputy Commissioner with a request that Husain Bakhsh should be put in possession of the entire Taluka on the 1st Asarh 1264 Fasli, corresponding to the 8th June 1857, provided that he deposited Rs. 4,000 in the Government Treasury before that date. No record of any decree made pursuant to this Judgment is produced or is in existence, but it is admitted by all parties that Husain Bakhsh paid the Rs. 4,000 into the Government Treasury. He did not however obtain possession of the mortgaged villages, the reason no doubt being that Murli Manohar had given notice of an appeal from Mr. Christian's Judgment claiming interest as well as principal. On the 3rd June 1857 the mutiny extended to Sitapur, and the records of the Court are said to have been destroyed and the Treasury was looted. There is some rather shadowy evidence that Husain Bakhsh, during the disturbances, took forcible possession of the villages and was in his turn ousted by Murli Manohar. But however this may be, Murli Manohar was in undisturbed possession at the date of Lord Canning's Proclamation of March 1858. He did not, on the restoration of order, proceed with his Appeal from Mr. Christian's

Judgment, and of course never received payment of the Rs. 4,000. At the second summary settlement of Oudh Murli Manohar procured settlement of the villages in question to be made with him, and his Talukdari title thereto was confirmed by Sanad. Husain Bakhsh in the meantime presented three petitions to the Collector's Court asking that the settlement of the villages be made with him. The final answer to these applications was contained in a letter from the Secretary of the Chief Commissioner of Oudh to the Commissioner of Khairabad, dated the 8th January 1861, in the following terms:—

"(2.) It is certain that Husain Bakhsh deposited Rs. 4,000 "in the Treasury by order of Court to redeem the villages "mortgaged to Murli Manohar, and had not the rebellion "broken out he would have been restored to possession.

"(3.) But after the rebellion broke out the money was "plundered, and on re-occupation of the Province Murli "Manohar was settled with.

"(4.) Chaudhri Husain Bakhsh now seeks to redeem the "mortgage and recover possession on the ground of his having "paid the 4,000 rupees by order of the Court.

"(5.) Colonel Barrow rejected his claim on the ground that "he had plundered the Biswan Tehsil at the commencement "of the rebellion, but the Chief Commissioner must observe "that this would be no sufficient reason for denying him legal "redress, as his rebellion is pardoned by the amnesty, and no "act committed by him during the rebellion can be charged "against him in bar of justice.

"(6.) But Murli Manohar never received the 4.000 rupees "redemption money, consequently he cannot be made to "surrender the village. If Chaudhri Husain Bakhsh is pre-"pared to sue in ordinary course *de novo* for redemption of "mortgage and to pay the money due to the mortgagee, as "may be awarded by Court, supposing always his claim "admissible under statute of limitation, his suit can be heard "in the Court.

"(7.) Under the rule laid down by Government he might "ask for refund of his deposit, but this would be an indulgence, "and his conduct renders him undeserving of any."

The meaning of this order or direction is plain enough. The Government refused either to refund the Rs. 4,000 or to assume the responsibility of having received it on behalf of the mortgagee, and said to Husain Bakhsh in effect,

"We cannot dispossess Murli Manohar in your "favour, but you may bring a fresh action and "pay your mortgage money over again." Whether the Commissioner, acting in an administrative capacity, had any power to give such order or direction is another question which their Lordships are not now called upon to answer. The important point for the present purpose is the disclaimer by the Government of all responsibility for the deposit.

Acting on what he no doubt assumed to be the Commissioner's direction or permission, Husain Bakhsh, on the 24th February 1862, commenced a fresh suit for redemption in the Court of the Deputy Commissioner of Sitapur. His suit, however, was dismissed on the ground that the Talukdari settlement could not be reopened and the Sanad had given Murli Manohar a new and absolute title. And this decision was confirmed by the Commissioner and the Chief Commissioner on successive appeals.

During the pendency of this suit Husain Bakhsh died leaving two sons by one wife, viz., Muhammad Bakhsh and Ahmad Bakhsh, the present Appellant (then a minor), and a third son by another wife, who was otherwise provided for by his father's will, and had no interest in the equity of redemption of the mortgaged villages.

By Act No. XIII. of 1866 and Act No. I. of 1869 relief was given to mortgagors of lands which were in the possession of mortgagees at the time of the mutiny under certain conditions. By Section 6 of the latter Act, it was provided that nothing in Sections 3, 4, and 5, or in certain orders, or in any sanad, should be deemed to bar a suit for redemption. It was not, and is not, disputed that the heirs of Husain Bakhsh were entitled to the benefit of this enactment if his true position, but for the confiscation,

was that of a mortgagor with a right of redemption.

On the 27th March 1869 Muhammad Bakhsh commenced a suit in the Court of the Deputy Commissioner of Sitapur against the representatives of Murli Manohar (who was also dead) to be put in possession of the seven villages comprised in the mortgage which he alleged had been redeemed by the deposit of the Rs. 4,000 in the Treasury under Mr. Christian's Judgment of 21st April 1857. The second of the issues settled for determination by the Court raised the question whether the suit was a suit for redemption within the meaning of Section 6 of Act 1 of 1869, and is the only issue to which attention need be paid. By his Judgment dated the 28th October 1869, the Extra Assistant Commissioner decided all the issues in favour of the Plaintiff. On the second issue he held that the mere deposit of money before the rebellion, and the unlawful possession of Husain Bakhsh during that period, could not extinguish the mortgage, and that the possession of Murli Manohar being by virtue of the mortgage for the redemption of which the suit was preferred, the case was cognizable under Section 6 of Act 1 of 1869. This was affirmed by the Commissioner, but on special appeal to the Judicial Commissioner of Oudh it was reversed, and by a decree of that Court, dated the 21st September 1870, the suit of Muhammad Bakhsh was dismissed with costs. The ground stated by Mr. Capper, the Judicial Commissioner, for his Judgment was that by payment of the mortgage money into Court the mortgage lien then and there ceased and determined, and there was nothing then left to redeem. Consequently he considered himself forced, though with evident reluctance, to decree the Appeal. There was an appeal by Muhammad Bakhsh to the

Queen in Council, but it was not proceeded with and was dismissed for want of prosecution.

On the 7th July 1879 the present Appellant having attained his majority came to a partition of the general estate of Husain Bakhsh, including the claim to redeem the villages in question, with Muhammad Bakhsh under which the Appellant became entitled to a seven annas share. This partition was after some litigation confirmed by the Commissioner.

On the 3rd May 1895 the Appellant commenced the present suit against the Respondents, being the persons in possession of the seven villages and claiming title thereto under Murli Manohar, for redemption of the property on payment of Rs. 4,000 mortgage money together with any interest the Court might think proper to award. The issues settled by the Subordinate Judge of Sitapur (as amended) were so far as material for the present Appeal as follows:—

"1. Whether by the following judgments the Plaintiff's "claim is barred under Section 13, Code of Civil Procedure; "(*a*) 1st judgment (*in re* Husain Bakhsh) passed before the "Mutiny," *i.e.*, Mr. Christian's judgment; "(*b*) 2nd judg-"ment (*in re* Husain Bakhsh) dated 12th January 1862" meaning apparently the judgment of the 12th June 1862 at p. 36 of the Record; "(*c*) 3rd judgment, *in re* Muhammad "Bakhsh' (meaning Mr. Capper's judgment of 21st September 1870).

"2. Whether the Plaintiff's claim is barred by limitation?

"3. Whether the Plaintiff is entitled to get his own share "redeemed and also that of his brother Muhammad Bakhsh "whose claim has already been dismissed?

"4. Whether the Plaintiff is entitled to get his seven annas "share redeemed?

"7. What amount of interest the Defendants are entitled "to?"

The Subordinate Judge held, on the first issue that the suit was not barred by Section 13 of the Civil Procedure Code, on the second issue that it was not barred by limitation, on the third and fourth issues that the Appellant was entitled to redeem his seven annas share of the

mortgaged property, and on the seventh issue that the Respondents were entitled, in addition to the profits, to interest at one rupee per cent. from the 13th February 1856 to the date of the institution of the suit. And by his decree dated the 8th August 1896 it was ordered that upon Appellant paying to the Respondents or into Court on the last day day of April 1897 the sum of Rs. 13,078.11 the Respondents should transfer to the Appellant a seven annas share of the mortgaged property. This decree was reversed by the decree of the District Judge of Sitapur dated the 14th December 1897. The District Judge held that, without deciding whether Mr. Capper's Judgment of the 21st September 1870 was *res judicata* against the Appellant, the Court was bound by it as a precedent, and that in accordance therewith the relation of mortgagor and mortgagee was extinguished in 1856-1857.

The decree of the District Judge was affirmed on second Appeal by the Court of the Judicial Commissioner, and it is from the decree of that Court, dated the 9th August 1900, that the present Appeal is brought. The Judgment of the Court was delivered by Mr. Spankie, the Additional Judicial Commissioner. The learned Judge said that the real point was whether Husain Bakhsh having paid the money under Mr. Christian's decree of the 21st April 1857, and being in a position to obtain possession of the mortgaged property, could, instead of seeking to do so, have brought a second suit to redeem the mortgage, and he held that Husain Bakhsh had two courses open to him, namely, either to apply to have the Appeal (of Murli Manohar against Mr. Christian's decree) decided, or to apply for execution of his decree, and Husain Bakhsh having done neither one nor the other, the present suit was barred by Sections 13 and 244 of the Civil Procedure Code.

At their Lordships' Bar two points only were argued by the Counsel for the Respondent. It was contended, first, that the present Appellant was barred by the decree of the 21st September 1870 in the suit of Muhammad Bakhsh as *res judicata* between the parties to the present suit under Section 13 of the Civil Procedure Code; and secondly, that Husain Bakhsh's proper and only course was to apply for execution of his decree (treating the appeal from it as abandoned) as held by the Assistant Judicial Commissioner, or (which is the same point in another form) that this is not truly a suit for redemption within the meaning of Section 6 of Act I. of 1869 as held by Mr. Capper.

On the first point no opinion was expressed either in the Court of the District Judge or in the Court of the Judicial Commissioner. Their Lordships agree with the decision of the Subordinate Judge that the present suit is not barred by the decree in Muhammad Bakhsh's suit, and with the reasons upon which that decision was founded. The Appellant was then a minor, and Muhammad Bakhsh was not his guardian, either natural or appointed, nor did the suit purport to be instituted on behalf of the minor, who was not in any form a party on the record. Their Lordships were referred to evidence on behalf of the Respondents, which was shortly to the following effect: (1) That Husain Bakhsh in his lifetime applied for partition of the property between Muhammad Bakhsh and the Appellant in the proportion of 9 annas to 7 annas, and appointment of Muhammad Bakhsh as Lambardar and the Appellant as Pattidar; (2) that an agreement was come to by which the mother of both brothers and natural guardian of the Appellant directed that Muhammad Bakhsh should manage the estate and allow the Appellant 7 annas of

the profits, and that Muhammad Bakhsh did in fact manage the estate and was what was called the head of the family; (3) that the estate was under the nominal management of the Court of Wards, and the officer of that Court was privy to the institution of the suit. But this evidence at most proves nothing more than an intention that the suit should be for the minor's benefit, and their Lordships think that such an intention would not support the plea of *res judicata*. To maintain that plea it must appear from inspection of the record that the person whose interest it is sought to bind was in some way a party to the suit. This is not the case of a Hindoo joint family, to which other considerations would apply, and the mere fact that redemption was sought of the entire property proves nothing. A mortgagor of an undivided share may redeem the entirety, at any rate if the mortgagee does not object, and may be compelled to do so if required by the mortgagee.

On the second point also their Lordships agree with the Subordinate Judge. In the first place they observe that during the pendency of Murli Manohar's appeal by which he claimed interest in addition to the Rs. 4,000 an order could not properly have been made by the Court putting Husain Bakhsh in possession of the mortgaged property. He was not therefore entitled as of right to possession when the mutiny broke out. After the Rs. 4,000 had been lost by the looting of the Treasury, the Government definitely refused either to refund the amount to Husain Bakhsh, or to hold themselves responsible for payment of it to the mortgagee. The Court could not have executed the decree by ordering a retransfer of the mortgaged property to Husain Bakhsh by the mortgagee, without at the same time ordering payment to the latter of the sum

paid into the Treasury and placed under the control of the Court. But this by the *vis major* of the Mutiny, the Court was unable to do. And it would have been of no service to Husain Bakhsh to apply to have Murli Manohar's appeal decided, for whether it was decided for or against the Appellant, the same difficulty would have arisen that the Court could not dispossess the mortgagee without payment to him of his principal money and any interest which might be awarded to him. There was nothing therefore which the Court could execute. They could not order Husain Bakhsh to pay over again in a proceeding for execution of the existing decree, and they could not order the mortgagee to re-transfer the estate without receiving the amount due to him. The question whether payment into Court under Mr. Christian's decree would or would not (if that were all) have extinguished the lien seems under the circumstances somewhat academic, and their Lordships observe that they have not in fact got the exact terms of the decree before them but only those of the judgment on which the decree would be founded. The fallacy of the Respondents' contention is to apply rules made for the conduct of judicial business in ordinary course to exceptional circumstances such as those occasioned by the mutiny and rebellion in Oudh. As Mr. Asquith justly observed, the Respondents' contention when examined, is that their predecessor was a bare trustee of the estate granted to him by the sanad for the Appellant's ancestor, and indeed their Lordships understood Mr. De Gruyther to have argued that the Appellant might on coming of age have sued for and recovered his property without further payment. Their Lordships are of opinion that a new decree which could only

be regularly made in a fresh suit was in the circumstances required in order to give effect to the rights of the parties and do justice between them, and that Muhammad Bakhsh's suit ought to have succeeded, and the present Appellant is entitled to a decree in this suit. No objection was made, or perhaps could be made, either by the Appellant or by the Respondents to the terms of the decree made by the Subordinate Judge.

Their Lordships will therefore humbly advise His Majesty that the decrees of the District Judge, dated the 14th December 1897, and of the Court of the Judicial Commissioner, dated the 9th August 1900, should both be discharged, and the decree of the Subordinate Judge, dated the 8th August 1896, should be restored, with this variation that the last day of April 1906 be substituted for the last day of April 1897 (being the day therein fixed for redemption) and that the Respondents should pay to the Appellant the costs of the Appeals to the District Judge and the Court of the Judicial Commissioner. The Respondents will also pay the costs of this Appeal.