Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Mohun Loll Sookool v. *Goluck Chunder Dutt and others, from the Sudder Dewanny Adawlut at Calcutta ; delivered 1st December,* 1863.

Present:

LORD CHELMSFORD.
LORD JUSTICE KNIGHT BRUCE.
SIR JOHN TAYLOR COLERIDGE.

SIR LAWRENCE PEEL.
SIR JAMES W. COLVILE.

THIS Appeal arises on a litigation which commenced, at the latest, in the year 1852, but in a sense earlier, on the questions whether a mortgage continued subject to redemption; and if it did, what, if anything, was due upon it: a litigation that might, and ought to have been less complex, less prolix, and less tedious than it has unhappily been. That there was a mortgage is plain; it may be taken also as equally plain that if it is redeemable, the present Appellants (for it may be considered that there are two Appellants) are the persons entitled to redeem, and that the Respondents are the actual Mortgagees in possession, who, if the mortgage is redeemable, are liable to be redeemed.

By two Decrees, dated respectively December 31, 1855, and December 9, 1857, mentioned particularly in the Appellants' Case and the Appendix (the latter being made on the Appeal of the Mortgagees from the former), the Mortgagors (the Appellants) were not only declared entitled to redeem the mortgage, but were also declared entitled to do so without making any payment; and this on the ground that, as then decided, the

Mortgagees in possession had fully paid themselves by receipt of rents and profits.

These Zillah decisions, the Mortgagees having been dissatisfied with them, led to a Special Appeal on their part to the Sudder Dewanny Adawlut at Calcutta, which in 1859 reversed them, upon the ground (which was in fact the only question before the Court on the Special Appeal) that certain proceedings taken by the Mortgagees with a view to foreclosure had effectually barred the equity of redemption, and, consequently, that the Appellants' suits ought to be dismissed with costs.

That led to the present Appeal, in which the Appellants contend for the relief given to them by the Decrees of 1855 and 1857, or at least for something less disadvantageous to them than the Decree of 1859.

Upon the materials before their Lordships, their opinion is not in favour of the Decrees of 1855 and 1857, or either of them, nor is it in favour of the Decree of 1859. They conceive that the materials before the Court which pronounced the Decree of 1855, or before the Court which pronounced the Decree of 1857, were not, nor are sufficient, as to the matter of debt, to support either of those two Decrees, and that on the other hand, the Court which pronounced the Decree of 1859 was not, by the state of things then before it, enabled to make that Decree.

Their Lordships consider that it did not appear sufficiently before the Court in 1855, or before the Court in 1857, that on the assumption of the redeemable condition of the mortgage, there was not anything then due to the Mortgagees on their security.

The Zillah Courts in coming to this conclusion as to the state of the accounts, seem to have proceeded not upon proof of the actual collections which were or ought to have been made by the Mortgagees, but upon materials which were in a great measure speculative and conjectural. And this objection to the mode of taking the accounts has in fact been taken by the Appellants' Counsel at their Lordships' bar when contending against the application by the Sudder Court of the account so taken to the question of foreclosure.

The other objections taken to the Decree of 1859

are—first, that the Sudder Court ought not to have decided the cause on the question of foreclosure, because that question, though raised upon the pleadings, had not been made one of the issues settled in the Court of First Instance, where alone evidence could be taken; and secondly, that the Court came to an erroneous conclusion in treating the proceedings of which there was any evidence as an effectual bar to the Appellants' right of redemption. Their Lordships consider both these objections to be well founded. It is clear that there has been no such trial of the question of foreclosure as the regulation which prescribes the statement of formal issues, and indeed substantial justice, require. And in dealing with this question the Sudder Court seems to have directed its attention to the erroneous reasons assigned by the Zillah Judge for holding that no right of foreclosure existed rather than to the effect of the proceedings proved.

In September 1850, when they filed their notice of foreclosure, the Mortgagees not only had notice that the interest of the original Mortgagor had been taken in execution, but were actively disputing in a summary suit the right of the Decree-holder to put up that interest for sale. There had been a decision against their objection, and their appeal against that decision was pending. The appeal was decided against them on the 8th of January, and the equity of redemption was sold to the Appellants on the 7th of April, 1851. It is quite clear upon the authorities that, if the sale had taken place before the notice of foreclosure was filed, that notice, to be effectual, must have been served on the purchaser; and in the circumstances above stated their Lordships conceive that it ought to have been served upon the Decree-holder. Yet there is no evidence of any attempt to serve it upon any one except the widow and heiress of the original Mortgagor.

Their Lordships therefore think that the question of foreclosure ought to be further and fully tried upon an issue to be regularly settled; and that the mortgage account, whether as incidental to the question of foreclosure or to the question of redemption, ought to be properly taken. They desire, however, to leave undisturbed the findings of the Zillah Courts upon the title of the Appellants to

sue as the representatives of the Mortgagor, and upon the extent and nature of the lands which are the subject of litigation.

Their Lordships are of opinion that each of the three Decrees of 1855, 1857, and 1859 should be discharged, and that the cause should be remitted to India, and that the High Court at Calcutta or, under its direction, the proper Zillah Court, should inquire whether the Appellants' right or equity of redemption as concerning the mortgaged estates in question, or any and what part of them, has become foreclosed or barred; and if it has not become so as to the whole of the estates, then to take an account of what, if anything, is due to the Respondents, or any of them, on the security, and for that purpose to take the usual accounts as to rents and profits and disbursements, with just allowances, and upon the result of that account to deal with the matters in dispute accordingly: The parties respectively to be at liberty to adduce evidence, in addition to that now before us, upon these issues, upon the determination of which the final decision of the cause must depend: The costs of the trial, including those of this Appeal, to abide the event.