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they may be argued as against the decree of the Court below itself, although from that decree no appeal has been preferred. These rights were not intended to be used in such a fashion as to be available to the respondent who apparently accepted the terms of the decree of the Court of first instance, and who never wanted to appeal therefrom, and it was only after the opposite party had appealed that he raised objections. We have already held that the original appeal of the plaintiffs in the suit could not be heard on the merits, as it was barred by limitation, and were we to allow these objections to be dealt with now separately and irrespective of that appeal, we should be practically holding that an appellant who prefers an appeal long after the prescribed period of limitation, may confer upon the respondent the right of having an appeal of his own heard in the shape of objections under s. 561, Civil Procedure Code, although, if the original appeal was barred by limitation, *a fortiori* such objections ought to be barred also.

I am of opinion that the *ratio decidendi* of the cases which I have cited applies as much to cases where an appeal is rejected or dismissed, as this appeal was dismissed by us yesterday, upon the ground that it could not be entertained because it was barred by limitation.

It is therefore not necessary for us to enter into those objections, and they are rejected with costs.

STRAIGHT, J.—I am of the same opinion.

*Appeal and objections dismissed.*

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 May 25.

*Before Mr. Justice Mahmood.*

BHAGWAT DAS (PLAINTIFF) v. PARSHAD SINGH (DEFENDANT).\*

*Mortgage—Redemption before expiration of term—Mortgagor entitled to redeem before expiration of term unless mortgagee can show that the term binds mortgagor—Usufructuary mortgage.*

No such general rule of law exists in India as would preclude a mortgagor from redeeming a mortgage before the expiry of the term for which the mortgage was intended to be made, unless the mortgagee succeeds in showing that by reason of the terms of the mortgage itself, the mortgagor is precluded from paying off the

\* Second Appeal No. 2283 of 1886 from a decree of Maulvi Abdul Basit Khan, Subordinate Judge of Mainpuri, dated the 18th September, 1886, confirming a decree of Munshi Mata Prasad, Munsif of Etawah, dated the 8th July, 1886.

debt due by him to the mortgagee. Where parties agree that possession of any property shall be transferred to a mortgagee by way of security and repayment of the loan for a certain term, it may be inferred that they intended that redemption should be postponed until the end of the term, though the creation of a term is by no means conclusive on the point.

The term fixed for payment of a debt should be presumed to be a protection only for the debtor till a contrary intention is shown.

THIS was a suit for redemption of a usufructuary mortgage made on the 15th December, 1876, by two persons, Udit Singh and Musammat Maharaji, in favour of one Mohar Singh. On the 19th of August, 1878, the mortgagors conveyed their equity of redemption to Bhagwat Das, the plaintiff in the suit. Both the lower Courts dismissed the suit, and on appeal to the High Court, the point for contention was whether or not the plaintiff was entitled to redeem the mortgage before the expiry of the stipulated period for redemption mentioned in the instrument of mortgage.

The material clause in the instrument of mortgage, and the facts as well as the arguments of counsel are fully set forth in the judgment of the Court.

Mr. G. T. *Spankie*, for the appellant.

Mr. S. *Howell*, for the respondent.

MAHMOOD, J.—In order to explain the question of law which arises in this case it is necessary to state the following facts:—

On the 15th December, 1876, two persons, Udit Singh and Musammat Maharaji, borrowed a sum of Rs. 100 from one Mohar Singh, deceased, (represented in this litigation by the defendants-respondents) and executed a mortgage-deed in his favour. The nature of the mortgage was usufructuary, and under its terms the mortgagee was to be placed in possession and to appropriate the profits of the mortgaged property in lieu of interest, the rate whereof is not specified in the mortgage-deed. The principal part of the deed, so far as the question in appeal is concerned, runs as follows:—

“ We have now delivered the possession of the mortgaged zemindari share to the mortgagee. Neither shall we claim profits and mesne profits from the date of the mortgagee’s possession, nor shall the mortgagee claim interest on the debt. We shall pay the principal mortgage money in 15 years (*asl zar-i-rahn arsa pandrah*

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*baras men add karengen*). If upon the stipulated promise we are unable to pay the mortgage-debt above mentioned, then whenever we repay the principal mortgage-money at the end of Jaith in any year, the mortgaged property shall be redeemed."

The mortgagee was accordingly placed in possession, and on the 19th August, 1878, the aforesaid mortgagors, Udit Singh and Musamat Maharaji, executed a sale-deed whereby they conveyed their rights and interests in the mortgaged property to the present plaintiff, Bhagwat Das.

Upon the title so derived, the plaintiff instituted the present suit on the 15th June, 1886, with the object of obtaining possession of the mortgaged property by redemption on payment of the sum of Rs. 100 mortgage-debt above-mentioned.

The only ground upon which the suit was resisted is that it was premature, inasmuch as it was instituted before the expiry of the term of 15 years specified in the mortgage-deed of the 15th December, 1876.

Both the Courts below in interpreting that document have rived at the conclusion that the term of 15 years was binding as much upon the mortgagor as upon the mortgagee, and upon this ground they held that the right to redeem could not accrue before the expiry of the stipulated term of 15 years, and that the action was therefore premature and should be dismissed.

From the decree of the lower appellate Court this second appeal has been preferred, and Mr. *Spankie* in arguing the case for the appellant has addressed a learned argument to me upon the contention, that, in the first place, the Courts below have misconstrued the mortgage-deed, and in the next place, even if their construction be accepted to be correct, the plaintiff as representing the equity of redemption is entitled to redeem the mortgage even before the expiry of the term of the mortgage; because, as the learned counsel contends, such terms must be understood to be stipulations for the protection of the mortgagor, and so long as the mortgagee receives all that is due upon the mortgage he cannot resist such a suit.

This contention is opposed by Mr. *Howell* on behalf of the defendants-mortgagees, and the contention of the parties therefore

raises two points for determination ; one relating to the interpretation of the mortgage-deed, and the second as to the rule of law applicable to such suits.

Upon the first of these points, having consulted the terms of the mortgage-deed in the original Hindustani, I am of opinion that the parties intended that the mortgage should continue at least for a period of 15 years, after which it would become redeemable. The Hindustani words "*arsa pandrah baras men*" may no doubt be interpreted to mean "within a period of 15 years," but followed as those words are by the phrase *wadah par*, "at the promised time," they cannot have any meaning other than that 15 years was the term fixed for the mortgage. Mr. *Spankie's* contention would involve the conclusion that the term of 15 years need never have been mentioned at all, as the mortgage was redeemable at any time according to his contention. I cannot give the parties credit for any such surplusage, there being nothing in the document to justify such a construction. On the contrary, as I have already said, the phrase *wadah par*, "at the promised period," must refer to the expiry of 15 years, for otherwise the sentence which immediately follows, which provides that in subsequent years the mortgage would be redeemable at the end of any Jaith, would also become superfluous.

Then as to the latter part of Mr. *Spankie's* argument—I am not aware of any such general rule of law as would go the length of laying down that in all cases and in all circumstances the term for which a mortgage is executed is binding only upon the mortgagee and that the mortgagor can enforce redemption even before the expiry of the stipulated period. A mortgage is only a kind of contract whereby certain rights and obligations are created as between the mortgagor and the mortgagee. Such rights and obligations may be subjected to any terms and conditions not prohibited by law, and the fixation of any particular period as the term of the mortgage or as the time when redemption is to take place is not such a stipulation as the law prohibits. Indeed, Mr. *Spankie* himself conceded that the term of 15 years mentioned in the mortgage-deed was binding upon the mortgagee, so as to preclude him from foreclosure or any other remedy which he may have for recovery of the mortgage-

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debt before the lapse of that time. But the learned counsel argues that in the absence of any express covenant in the mortgage-deed to the effect that the same shall not be redeemable before the expiry of 15 years, the presumption of law is that the term was intended only for the protection of the debtor, *i. e.*, the mortgagor.

I think there might have been considerable force in this contention, if the nature of the mortgage and the terms of the deed did not preclude it. The relation between the mortgagor and the mortgagee is that of debtor and creditor, and redemption is the process by which the debt due on the mortgage is paid off. When in such a contract of mortgage a term of payment is fixed, the ordinary rule would be the same as in regard to a term of payment fixed in any other kind of obligations of debt. Upon this point Pothier in his treatise on *Obligations* (Vol. I, p. 132) has the following :—

“It remains to observe, concerning the effect of a term, that being presumed to be inserted in favour of the debtor, the debtor may very well defend himself from payment before the expiration of the term, but the creditor cannot refuse receiving if the debtor is willing to pay, at least unless it appears from the circumstances that the term was appointed in favour of the creditor, who is the holder, as well as of the debtor.”

This, then, being the general principle, I have to consider how it is applicable to mortgages. In *Vadju v. Vadju* (1) Westropp, C. J., following the authority of *Brown v. Cole* (2) and some Indian cases, held that the right of redemption and the right of foreclosure are coextensive, in the absence of any stipulation, express or implied, to the contrary; and that in such cases when a day is fixed for payment, the mortgagor is not at liberty to insist on redemption before the expiration of the period named. In that case the mortgage-deed stipulated that the mortgagor would pay the mortgage-debt *within ten years* and redeem the mortgaged property, and the suit having been brought before the expiry of that term, the learned Chief Justice held that the suit was unsustainable because prematurely instituted, and that the mere use of the word “*within*” was not a sufficient indication of the intention of the parties that the mortgagor might redeem in a less period than the ten years mentioned in the mortgage-deed. The same ques-

(1) I. L. R., 5 Bom., 22.

(2) 14 Sim., 427.

tion was considered by Turner, C. J., in *Sri Raja Setrucherla Ramabhadra Raju Bahadur v. Sri Raja Vairicherla Surianarayanaraju Bahadur* (1) upon somewhat broader principles than the rule of the English law as to the right of redemption and the right of foreclosure being presumed to be coextensive, with reference to the period mentioned in the mortgage-deed for payment of the mortgage-debt, and the *ratio decidendi* adopted in that case seems to me to be scarcely in full accord, upon minor points, with the views upon which the judgment of Westropp, C. J., in *Vadju v. Vadju* (2) proceeded. To put the matter briefly, the general effect of the Bombay case is to lay down that the mere fixation of a term for paying off the mortgage-debt is to be presumed to be binding as much upon the mortgagor as upon the mortgagee unless the contrary is clearly shown, whilst the effect of the Madras case is that where the mere fixation of the term occurs in a mortgage-deed, the presumption is that the date is fixed for the convenience of the debtor, and that he may repay the debt at an earlier period, unless the mortgagee could show that any such stipulations existed between him and the mortgagor as would debar the latter from redeeming the mortgage before the expiry of the term mentioned in the mortgage. In other words, whilst Westropp, C. J., would have the presumption as to the binding effect of the term of mortgage in favour of the mortgagee, Turner, C. J., would presume in favour of the mortgagor that the mortgage was redeemable at any time; unless the mortgagee could show from the nature of the mortgage or other circumstances that redemption should not be allowed before the expiry of the time mentioned in the mortgage-deed. The two cases are, however, undistinguishable so far as the result is concerned, because in both cases the mortgage appears to have been of a usufructuary nature, in which the term of the enjoyment of the possession of the mortgaged property seems to have formed a substantial part of the terms of the mortgage itself, as was also the case in *Soorjun Chowdhry v. Imambundee Begum* (3). The same principle, however, appears to have been extended by a Division Bench of this Court in *Raghubar Dayal v. Budhu Lal* (4) to simple mortgages or hypothecation bonds in which a term of years is stated as the period of payment of the mortgage-debt, and in doing

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(1) I. L. R., 2 Mad., 314.

(3) 12 W. R., 527.

(2) I. L. R., 5 Bom. 22.

(4) I. L. R., 8 All., 95.

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so the learned Judges seem to have adopted in its integrity the rule laid down by Westropp, C. J., in *Vadju v. Vadju* (1), where, as I have already said, the nature of the mortgage being usufructuary, the period of enjoyment of possession by the mortgagee would form a substantial part of the contract, lending force to the contention that such possession and enjoyment could not be put an end to at the will of the mortgagor before the expiry of the term for which the mortgage was made.

Having so far referred to the principal rulings bearing upon the subject I have no hesitation in adopting the *ratio decidendi* upon which the judgment of Turner, C. J., in *Sri Raja Setrucherla Ramabhadra Raju Bahadur v. Sri Raja Vairicherla Surianarayana-rajū Bahadur* (2) proceeded, for, as I understand, that judgment enunciates no such rigid principle as that adopted by Westropp, C. J., in *Vadju v. Vadju* (1) that redemption and foreclosure are coextensive in the absence of any stipulation to the contrary.

I have already said that the relation between a mortgagor and mortgagee is that of a debtor and creditor respectively, the main distinction between a simple debt and a mortgage-debt being that, whilst in the former case the obligation to pay the money is a simple personal obligation, in the latter a security of property is given as the means whereby such obligation is to be discharged. The difference rests, not in the essence of the contract but in the *modus operandi* agreed upon by the parties in respect of discharge of the obligation of the debt. In the case of a simple debt, the law provides a suit resulting in a simple money-decree to be executed or enforced in such manner as the rules of procedure for the time being prescribed. In the case of a mortgage-debt, the remedies of the mortgagee-creditor for realising his debt may lie either in foreclosure, or in obtaining possession of the mortgaged property, or in bringing such property to sale, according as the terms of the mortgage contract itself may be. But whether the debt is a simple money-debt or a debt secured by mortgage, one element is common to them all, namely, that before the obligation can be extinguished it must be discharged by payment or by such other methods as are appropriate to the nature of the obligation.

(1) I. L. R., 5 Bom., 22.

(2) I. L. R., 2 Mad., 314.

This being the common element of the obligation to pay a debt, the fixation of any particular period for discharge of the obligation must necessarily be governed by the same principles. Parties to a contract of debt, as indeed parties to any other class of contracts, are at liberty to enter into any stipulations as to the time, place, and mode of discharging such obligations, so long as such stipulations are consistent with the law of the land where they are made. The fixation of a period for discharge of a debt is nothing more or less than one kind of such stipulations, and I am not aware of any rule of law which would prohibit a debtor from stipulating that the debt should not be demandable from him before the expiry of a particular period, nor of any rule which would prohibit a creditor from stipulating that the debt due to him will not be received by him till after the expiry of any particular period. Where such stipulations are already expressed, no such difficulties arise as those in this case, for, if here the mortgage-deed of 15th December, 1876, expressly stated that the mortgagor could not redeem the mortgage before the expiry of the 15 years term mentioned therein, this litigation would probably never have been commenced. But the mortgage-deed contains no such stipulation in express language, and the Courts have to decide whether any such stipulation was implied in the contract of mortgage.

In the present case I am of opinion that because the terms of the mortgage itself do not expressly state that the mortgage shall not be redeemable (that is, the mortgage-debt shall not be paid off) before the expiry of the 15 years mentioned therein, it rested upon the mortgagee to show that he is entitled to decline to receive payment of the mortgage-debt before the expiry of that period. With all respect due to the ruling of Westropp, C. J., in *Vadju v. Vadju* (1) which was followed by a Division Bench of this Court in *Raghubar Dayal v. Budhu Lal* (2), I am of opinion that no such general rule of law exists in India as would preclude a mortgagor from redeeming a mortgage before the expiry of the term for which the mortgage was intended to be made, unless indeed the mortgagee succeeds in showing that by reason of the terms of the mortgage itself the mortgagor is precluded from paying off the debt due by him to the mortgagee, and, to use the

(1) I. L. R., 5 Bom., 22.

(2) I. L. R., 8 All., 95

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language of Turner, C. J., in *Marana Ammanna v. Pendyala Perubotulu* (1), "it requires a clear expression of intention to deprive a mortgagor of his right to redeem at any time on payment of the debt." I respectfully think that the rule that the right of redemption and the right of foreclosure are coextensive and coincident, as to the time when these rights may be respectively exercised by the mortgagor and the mortgagee, is not a rule recognised by the law of mortgage, at least in this part of the country. As I take the law, both these rights rest upon the terms of the mortgage itself, and considering that the juristic reasoning as stated by Pothier requires that a term fixed for payment of a debt should be presumed to be a protection only for the debtor till the contrary is shown, I hold that in this case it rested upon the mortgagee to show why he is justified in declining to accept all that is due to him upon the mortgage, though the offer of such payment is made before the period of 15 years at the end of which the mortgagor, at the time of the mortgage, as interpreted by me, expected to be able to pay off the mortgage-debt.

But whilst holding these views upon the principles of law applicable to such payment of debts, I am of opinion that in the present case the mortgagee has succeeded in showing that, by reason of the very nature of the mortgage and the circumstances of the contract, he is entitled to resist redemption on the ground that the period of 15 years mentioned therein must be taken to form a material part of the contract itself, and to have been named not only for the protection of the mortgagor-debtor but also for that of the mortgagee-creditor. The mortgage was of a usufructuary character, in which no rate of interest on the mortgage-debt was specified, and the mortgagee, whilst entitled to possession and the appropriation of profits in lieu of interest, had to run the risk of appropriating only such profits as he could recover during the period of his possession of the mortgaged property, so that, to use the words of Turner, C. J., in the case already cited, "the continuance of the enjoyment of the mortgaged property for a prescribed period forms a material part of the contract," and "it would be inequitable to deprive the mortgagee of this right on the mere ground that the contract was one of mortgage;" and I agree with

(1) I. L. R., 3 Mad., 280.

what was said by him in the same case that "where parties agree that possession of the property shall be transferred to a mortgagee for a certain term it may be inferred that they intended that redemption should be postponed until the end of the term," though "the creation of a term, is by no means conclusive on this point."

In this view of the case I am of opinion that the lower Courts were right in interpreting the terms of the mortgage-deed of the 15th December, 1876, and that they were right in holding that this suit for redemption, which was brought before the expiry of the term of 15 years stipulated as the promised date of redeeming that mortgage, was premature and, as such, not sustainable.

I dismiss this appeal with costs.

*Appeal dismissed.*

*Before Mr. Justice Straight and Mr. Justice Mahmood.*

GIRDHAR LAL AND OTHERS (PLAINTIFFS) v. BHOLA NATH AND OTHERS  
(DEFENDANTS)\*

1888  
June 14.

*Mortgage—Usufructuary mortgage—Covenant by the mortgagor to pay the mortgage arrears of rent due at the time of redemption—Payment by mortgagee of arrears of revenue—Right of mortgagee to re-imbusement before redemption—Act IV of 1882 (Transfer of Property Act), s. 72 (b).*

On the 27th August, 1883, M and B jointly executed two usufructuary mortgages for the sums of Rs. 3,000 and 5,000 respectively in favour of the defendants. On the 24th March, 1886, the mortgagors executed another usufructuary mortgage in favour of the plaintiffs for Rs. 15,000, entitling them to possession of the property mortgaged. The second mortgagees instituted a suit to redeem the prior mortgages by depositing in Court the principal sum of Rs. 8,000. The defendants urged that a sum of Rs. 4,000 was due to them besides the principal amount, without payment of which the property in suit could not be redeemed. The Court found that a sum of Rs. 498-15-9 only composed of certain arrears of rent, and an item of arrears of Government revenue paid by the defendants, was due to them, and decreed redemption of the property on condition of payment of the aforesaid sum. Both the parties appealed.

*Held* that the items of arrears of rent were recoverable under the covenant contained in that behalf in the mortgage deeds; as to the item for arrears of Government revenue, it was clear that unless this revenue was duly paid the whole estate might have been sold to realise it, thereby putting an end to all the rights of the mortgagors and mortgagees; and therefore upon the general principles of law upon which the doctrine of salvage and subrogation proceeds, persons in the position of mortgagees in possession are entitled to claim that sum before the property which they saved from sale for arrears of revenue could be redeemed.

\* First appeal No. 101 of 1887, from a decree of Maulvi Saiyid Fauid-ud-din Alunad Khan, Subordinate Judge of Agra, dated the 28th March, 1887.