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February 10.

APPELLATE CIVIL.

Before Sir Arthur Strachey, Knight, Chief Justice, and Mr. Justice Banerji.

BIMAL JATI (PLAINTIFF) *v* BIRANJA KUAR AND OTHERS (DEFENDANTS).*

Mortgage—Covenant for pre-emption of mortgaged property in favour of mortgagee—Collateral advantage—Covenant fettering redemption—Act No. IV of 1882 *(Transfer of Property Act)*, s. 60.

A provision in a mortgage which has the effect of preventing redemption of the mortgaged property on payment of principal, interest and costs, in accordance with the terms of the mortgage, is a void provision which cannot be enforced; but a covenant conferring on the mortgagee a collateral advantage is enforceable, provided that it is not objectionable on the ground of unfairness or unreasonableness.

Held, that a covenant giving the mortgagee a right of pre-emption in respect of the mortgaged property at a price fixed by reference to another share in the same village, was, *primâ facie*, a good covenant and enforceable by the mortgagee. *Biggs* v. *Hoddinott* (1), *Santley* v. *Wilde* (2) and *Orby* v. *Trigg* (3) referred to.

THE facts of this case are as follows. Madho Saran Singh and Bishan Saran Singh mortgaged to the plaintiff, Goshain Bimal Jati, a 9 anna 3 pie share of mauza Rampur. In the mortgage deed it was recited that the mortgagors had previously sold to the mortgagee a 4 anna share in the same village at a certain specified price; and the mortgagors, after setting forth the terms of the mortgage, proceeded to covenant that "if we, the executants, stand in need of making an absolute transfer of the mortgaged share, we shall transfer it absolutely to the said Goshain at the same rate of sale consideration at which we have sold the 4 anna share, and if we transfer it to any other person such transfer made by us shall be deemed invalid and wrong as against the conditions set forth in this instrument." Notwithstanding the above covenant, the mortgagors sold the share in question by a deed of sale dated the 17th July 1897 to Ram Nandan Pande and others. The mortgagee accordingly sued upon the said covenant, alleging that it gave him a right of pre-emption over the mortgaged property.

* First Appeal No. 105 of 1898 from a decree of Babu Jai Lal, Subordinate Judge of Azamgarh, dated the 9th February 1898.

(1) 1898, 2 Ch., 307. (2) 1899, 2 Ch., 474.
(3) (1722) 9 Mod., 2.

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The Court (Subordinate Judge of Azamgarh) found (1) that the covenant relied on did not give to the mortgagee any right of pre-emption, (2) that the covenant was void for uncertainty within the meaning of section 29 of the Indian Contract Act, 1872, and (3) that the covenant was also void for want of consideration under section 25 of the same Act. The Court accordingly dismissed the suit. The plaintiff thereupon appealed to the High Court.

Munshi *Gobind Prasad*, for the appellant.

Mr. *A. H. C. Hamilton*, Pandit *Sundar Lal*, and Munshi *Haribans Sahai*, for the respondents.

STRACHEY, C. J.—This is a suit by the mortgagee under a mortgage for fifteen years, executed on the 12th November 1889, to enforce against the mortgagor and his vendee of the mortgaged property, a covenant for pre-emption, alleged to be contained in the mortgage-deed. Certain lessees from the mortgagor were also made defendants. The Court below has dismissed the suit upon two grounds—first, that the covenant in question does not give any right of pre-emption to the mortgagee and is unenforceable at law, because, in the opinion of the Court, it is void for uncertainty; secondly, that the covenant was without consideration. Against this decision the plaintiff has appealed to this Court.

Now the deed of mortgage recites that the mortgagors have already sold to the mortgagee a 4-anna share in the village of Rampur. The mortgage is a mortgage of another 9 annas 3 pie share in the same village. The covenant in question is as follows:—"If we the executants stand in need of making an absolute transfer of the mortgaged share, we shall transfer it absolutely to the said Goshain at the same rate of sale-consideration at which we have sold the 4 annas share; and if we transfer it to any other person, such transfer made by us shall be deemed invalid and wrong, as against the conditions set forth in this instrument." Although the word "pre-emption" is not used, and although it is not expressly stated that before transferring to any other person the property must be offered to the mortgagee at the price specified, I think there cannot be any doubt that that is the substantial meaning of the covenant. It cannot possibly

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mean that if the property were offered to the plaintiff at that price and were refused by him, the mortgagor could not transfer it to any other person. If that view is correct, then the covenant means that the plaintiff is to have an option of purchase at the price specified, and that any transfer to a third person, without first offering it to the plaintiff, is to be deemed invalid as against him. That is pre-emption and nothing else, and the Court was wrong in holding that the covenant was not one for pre-emption. I think also that the Court is wrong in holding that the agreement was void for uncertainty. It has, I think, a perfectly definite meaning, and that is the meaning which I have just stated. I think also that the Court was wrong in holding that the agreement was without consideration. There is one single and entire consideration for the mortgage-deed. The consideration for the mortgage, and for all the mortgagor's covenants, is the loan,—the advance made by the mortgagee. It follows that both the preliminary grounds upon which the Court below dismissed the suit, are wrong.

The defendant, however, seeks to uphold the decision upon two other grounds. The first is, that the stipulation of the covenant was for a collateral advantage to the mortgagee, and was therefore void according to the English authorities relating to the principle that a mortgagee is not entitled to the benefit of any stipulation contained in the instrument of mortgage for any collateral advantage, or to anything more than the security for payment of his principal, interest and costs. The answer to that contention is first, that no such doctrine is to be found in the Transfer of Property Act, 1882, which in this country governs the relations of mortgagor and mortgagee; and, secondly, that the latest English authorities show that the rule about collateral advantage is no longer recognized in England in the sense and to the extent supposed in some of the earlier cases, and that provided two conditions are secured, a mortgagee may at the time of the advance and as a term of it stipulate for a collateral advantage. The two conditions are, first, that the bargain is not an unconscionable bargain, and not the result of improper pressure, unfair dealing, or undue influence; secondly, that the right of redemption is not taken away or fettered. That is in substance

the effect of the two latest cases on the subject decided by the Court of Appeal, *Biggs* v. *Hoddinott* (1) and *Santley* v. *Wilde* (2).

Now as to the first of these two conditions, the Court below has not considered whether the bargain here was unconscionable or oppressive. It has simply dismissed the suit upon the two other grounds which I have mentioned. Whether a bargain is open to objection in reference to the first condition cannot be decided upon any general rule, but depends upon the evidence as to the particular circumstances of the bargain itself. But it is said that the stipulation here is void with reference to the second condition, that is to say, as a fetter or clog on the right of redemption. Now the condition about fettering the right of redemption only means that no bargain made at the time of a mortgage is valid, which prevents a mortgagor from redeeming upon payment of principal, interest and costs. As pointed out by Mr. Justice Shephard, that is the effect of section 60 of the Transfer of Property Act, which provides for the right of redemption, but which is not prefaced with any such words as "in the absence of a contract to the contrary." But so long as the bargain places no obstacle in the way of the mortgagor getting back his property upon payment of the mortgage money, it is not open to objection as a fetter on the right of redemption. Then is this covenant for pre-emption open to objection on this ground? It does not, it appears to me, in the least stand in the way of the mortgagor getting back the property, if and when he pays the mortgage-money. There is no provision whatever requiring the mortgagor to transfer the property to the mortgagee if he does not wish to do so. There is nothing which, assuming the mortgage-money to be paid, gives the mortgagee any further right or interest in the property. In Fisher on Mortgages, 4th edition, section 1150, it is expressly stated that "the Court will not object to a covenant in a mortgage for a right of pre-emption in the mortgagee in case the estate be sold; though he is liable to be deprived of its benefit by oppressive or fraudulent conduct"—*Orby* v. *Trigg* (3). The only special feature here is, that the covenant for pre-emption

(1) 1899, 2 Ch., 307. (2) 1899, 2 Ch., 474.
(3) (1722) 9 Mod., 2.

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includes a stipulation for the price which the mortgagee is to pay in the event of the sale being made to him. The price is to be calculated with reference to the price for which the 4 annas share was previously sold. Does that particular feature in the covenant bring it within the condition invalidating bargains as fettering a right of redemption? I do not think it does. If that particular provision could be shown to be fraudulent or oppressive in the sense already stated, the matter would be different; but so far that has not been shown. I think therefore that as the suit has been wrongly dismissed upon a preliminary point, the appeal must be allowed, the decree of the Court below set aside, and the case remanded to that Court under section 562 of the Code of Civil Procedure for disposal on the merits, with reference to the other issues in the case. The appellant will get his costs of this appeal. Other costs will abide the result.

BANERJI, J.—I agree that the grounds upon which the Court below has dismissed the suit cannot be sustained. The covenant upon which the plaintiff relies is not a covenant which imposes an absolute bar upon the mortgagor's right to transfer the mortgaged property to any person other than the mortgagee, but simply gives the mortgagee a preferential right to purchase the property at the price specified in the covenant, in the event of the mortgagor electing to sell the property. This, as pointed out by the learned Chief Justice, is nothing more than a covenant conferring on the mortgagee a right of pre-emption. It is not a covenant which is void for vagueness or uncertainty, nor is it a covenant without consideration. The amount advanced under the mortgage-deed is the consideration for all the covenants contained in that deed. The learned advocate for the respondent seeks to support the decree of the Court below on the ground that the covenant in question is not legally enforceable, inasmuch as it fetters the right of redemption of the mortgagor. I am unable to accept this contention. The recent authorities in England, to which the learned Chief Justice has referred, lay down this, that a provision in a mortgage which has the effect of preventing redemption of the mortgaged property on payment of principal, interest and costs, in accordance with the terms of the mortgage, is a void provision which cannot be enforced, but that a covenant

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conferring on the mortgagee a collateral advantage is enforceable, provided that it is not objectionable on the ground of unfairness or unreasonableness. The covenant in the mortgage-deed which is in question in this case does not affect the right of the mortgagor to redeem the mortgaged property upon payment of the amount due upon the mortgage. It no doubt confers a collateral advantage upon the mortgagee, but the mortgagee cannot be deprived of that advantage unless, as has been stated above, the covenant can be repudiated on the ground of its being oppressive or unfair. The question whether the covenant in this case is objectionable on the ground last mentioned, was not considered in the Court below, and it is a question which that Court may have to consider when the case goes back to it, but I agree in holding that the said covenant does not fetter the mortgagor's right of redemption, and is not open to objection on that ground. I agree in the order proposed by the learned Chief Justice.

Appeal decreed and cause remanded.

Before Sir Arthur Strachey, Knight, Chief Justice, and Mr Justice Banerji.

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February 12.

SHEO NARAIN (PLAINTIFF) *v.* CHUNNI LAL AND OTHERS (DEFENDANTS).*

Civil Procedure Code, section 244—*Execution of decree—Representative of party to the suit—Second mortgagee taking a mortgage during the pendency of a suit on the first mortgage.*

Held, that a second mortgagee who takes his mortgage during the pendency of a suit on the first mortgage is a representative of the mortgagor within the meaning of section 244 of the Code of Civil Procedure. *Madho Das* v. *Ramji Patak* (1) referred to.

THE suit out of which this appeal arose was a suit for sale on a mortgage of the 5th June, 1885. The mortgage sued upon was executed pending a suit by the respondents on an earlier mortgage over the same property taken by the respondents in 1882. The respondents in that suit obtained a decree for sale on the 30th September, 1885. In his plaint in the present suit the plaintiff stated that the respondents "are impleaded as defendants on account of their decree of the 30th September, 1885,

* First Appeal No. 160 of 1898, from a decree of Maulvi Syed Siraj-ud-din, Subordinate Judge of Agra, dated the 29th March 1898.

(1) (1894) I. L. R., 16 All., 286.