

## APPELLATE CIVIL.

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April 19.*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt.*SHEO SHANKAR (PLAINTIFF) v. PARMA MAHTON AND OTHERS  
(DEFENDANTS).\**Act No. IV of 1882 (Transfer of Property Act), section 60—Redemption of mortgage—Clog on equity of redemption—Bond subsequent to mortgage, providing that the bond should be paid off before the mortgage was redeemed.*

After the execution of a usufructuary mortgage the mortgagor executed a bond, which, in addition to the usual stipulation for repayment of the money secured thereby, contained a covenant to the effect that the mortgaged property should not be redeemed until the principal money and interest due under the bond had been paid.

*Held* that such provision was a clog or fetter on redemption placing in the way of the mortgagor a bar to the exercise of the right of redemption which the law gave him, and therefore a provision not to be enforced. *Brown v. Ryan* (1) and *Noakes & Co., Ltd., v. Rice* (2) referred to. *Abu Khan v. Roshan Khan* (3) not followed.

THIS was a suit for redemption of a mortgage. The plaintiff's predecessor in title executed a usufructuary mortgage on Bhadon Badi 11th, Sambat 1917, in favour of Ram Saran, the father of the defendants 1—3, and placed him in possession as mortgagee. On offering to redeem this mortgage the plaintiff was met by a demand for payment of not merely the mortgage debt, but also of a sum of Rs. 382, which was secured by a bond executed in favour of the mortgagee by the mortgagor after the date of mortgage, namely, on Asarh Sudi 7th, Sambat 1922. This bond contained the following stipulation:—"We agree to pay off the money with interest on Jeth Sudi 15th, and if we fail to pay off the money with interest on the date fixed, we shall first pay off the amount and interest due under this bond and then pay the money with respect to the field (*i.e.*, the land comprised in the usufructuary mortgage). The field shall not be redeemed until we have paid the money and interest due under this bond."

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\* Second Appeal No. 505 of 1902, from a decree of E. O. E. Leggatt, Esq., District Judge of Mirzapur, dated the 16th of May 1902, confirming a decree of Rai Shankar Lal, Subordinate Judge of Mirzapur, dated the 28th of September 1901.

(1) (1901) 2 I. R., 653. (2) L. R., 1902, A. C., 24.  
(3) (1881) I. L. R., 4 All., 65.

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The Court of first instance (Subordinate Judge of Mirzapur) held that the plaintiff in order to redeem must pay off the amount due under this bond, as also the amount due under the usufructuary mortgage, and gave a decree accordingly; and this decree was upheld on appeal by the District Judge. The plaintiff thereupon appealed to the High Court.

Babu *Durga Charan Banerji*, for the appellant.

Mr. *B. E. O'Connor* and Pandit *Baldeo Ram* for the respondents.

STANLEY, C.J, and BURKITT, J.—This appeal arises out of a suit for redemption, and the question raised in it involves the consideration of the subject of fettering, or, as it is commonly called, “clogging” the equity of redemption of mortgaged property. The plaintiff’s predecessor in title gave a usufructuary mortgage, on Bhadon Badi 11th, Sambat 1917, of some property to Ram Saran, the father of the defendants Nos. 1—3, and placed him in possession as mortgagee. On offering to redeem this mortgage the plaintiff was met by a demand for payment of not merely the mortgage debt but also of a sum of Rs. 382 which was secured by a bond executed in favour of the mortgagees by the mortgagor after the date of the mortgage, namely, on Asarh Sudi 7th, Sambat 1922. This bond contains the following stipulation, *viz.*:—“We agree to pay off the money with interest on Jeth Sudi 15th, and if we fail to pay off the money with interest on the date fixed (*miti*) we shall first pay off the amount and interest due under this bond and then pay the money with respect to the field (that is, the land which is comprised in the usufructuary mortgage), *the field shall not be redeemed until we have paid the money and interest due under this bond.*”

The Court of first instance held that the plaintiff in order to redeem must pay off the amount due under this bond, as also the amount due under the usufructuary mortgage, and gave a decree accordingly. His decision was upheld on appeal by the learned District Judge. In coming to it reliance was placed on the decision in the case of *Allu Khan v. Roshan Khan* (1). From this decision the present appeal has been preferred. We

are unable to distinguish the facts of the present case from those in the case to which we have referred ; but the case of *Allu Khan v. Roshan Khan* was decided before the passing of the Transfer of Property Act, No. IV of 1882, and therefore does not carry the weight which would otherwise be attached to it. Section 60 of the Transfer of Property Act enables a mortgagor at any time after the principal money has become payable, on payment or tender of the mortgage money, to require the mortgagee to deliver the mortgage deed, if any, to him, and where a mortgagee is in possession of the mortgaged property, to deliver possession thereof to him, and at his cost either to re-transfer the mortgaged property to him or as he may direct, or to execute and have registered an acknowledgment in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished ; and section 83 enables a mortgagor at any time after the principal money has become payable, and before a suit for redemption has become barred, to deposit in Court the money due on the mortgage and stop the payment of further interest. In view of this enactment it is difficult to see how the decision of the lower Courts can be supported. Before, however, the passing of this Act the rule prevailed which precludes the enforcement of any agreement between a mortgagor and a mortgagee, the effect of which is to impose what is commonly called "a clog" upon the equity of redemption. We do not find any reference to this rule in the judgments of the learned Judges who decided the case of *Allu Khan v. Roshan Khan*, and we are disposed to think that it was not before their minds. In that case the mortgagor gave to the mortgagee four successive bonds for the payment of money, in each of which it was stipulated that if the amount were not paid on the due date it should take priority of the amount due under the mortgage, and redemption of the mortgage should not be claimed until it has been satisfied. The Court held that although the bonds did not create charges on the property, yet inasmuch as it appeared from their terms that it was the intention of the parties that the equity of redemption should be postponed until the amount of the bonds had been paid, the representative of the mortgagor was not entitled to possession of the mortgaged

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property on payment merely of the mortgage money. Duthoit, J., in the course of his judgment observes as follows:—"It is not denied that the mortgages referred to in the supplemental bonds are those which the respondent is now seeking to redeem; and although the bonds are not scientifically drafted, so as to charge the estate in so many words, their terms are such as to leave no doubt in my mind of its having been the intention of the contracting parties that the equity of redemption should be postponed till the money advanced under them had been repaid." Now, as it seems to us, the postponement of the exercise of the right of redemption is one of the clogs or fetters on redemption which are aimed at by the principle of equity to which we have referred. Yet no mention of the rule is made in the judgment. As we understand it, the rule forbids the enforcement of any stipulation which places a hindrance or stay in the way of the mortgagor in the exercise of his right to redeem. In a recent case in the courts in Ireland—*Browne v. Ryan* (1), the subject was well considered. Andrews, J., in delivering a dissentient judgment in the Queen's Bench Division, which was upheld on appeal in a new trial motion, observes:—"It is the right of a mortgagor on redemption, by reason of the very nature of the mortgage, to get back the subject of the mortgage (in the present case the mortgaged lands), to hold and enjoy as he was entitled to hold and enjoy it before the mortgage. If he is prevented from doing so, that which he is entitled to on redemption is prevented, and to constitute such prevention it is not necessary that the subject of the mortgage should be directly charged with whatever causes the prevention. If he be so prevented in fact the equity of redemption is affected by what, whether very aptly or not, has been always termed a 'clog.'" On appeal, Walker, L. J., thus states (at page 673) the principle governing the subject:—"As I understand the principle, it is that when a transaction appears or has been declared to be a mortgage, the Courts of equity regard the instrument only as a security for the repayment of the principal, interest and costs named and secured, and the mortgagor is entitled to get back his property as free as when he gave it on

payment of principal, interest and costs, and provisions inconsistent with that right cannot be enforced. The equitable rule 'once a mortgage always a mortgage' and that the mortgagee cannot impose any 'clog or fetter on the equity of redemption' are merely concise statements of the same rule." In the later case of *Noakes & Co., Ltd., v. Rice* (1), the subject was also dealt with, and the case of *Browne v. Ryan* was referred to. Lord Davey, in the course of his judgment, says:—"There are three doctrines of the Courts of Equity in this country, which have been referred to in the course of the argument in this case. The first doctrine to which I would refer is expressed in the maxim 'once a mortgage always a mortgage.' The second is that the mortgagee shall not reserve to himself any collateral advantage outside the mortgage contract, and the third is that a provision or stipulation which will have the effect of clogging or fettering the equity of redemption is void." Dealing later on with the third of these doctrines, he observes:—"The third doctrine to which I have referred is really a corollary from the first, and might be expressed in this form 'once a mortgage always a mortgage and nothing but a mortgage.' The meaning of that is that the mortgagee shall not make any stipulation which will prevent a mortgagor, who has paid principal, interest and costs, from getting back his mortgaged property in the condition in which he parted with it." In the case before us the mortgage security contained a provision that the *field* (i.e., the mortgaged property) shall be redeemed on payment of the principal amount in a lump sum in any *Jeth*. So far as regards the security itself, no fetter on redemption is imposed. The later bond, however, contains a stipulation that the mortgaged property shall not be redeemed until the principal money and interest due under that bond had been paid. It appears to us clear that such a stipulation is a fetter or clog on redemption. It places in the way of the mortgagor a bar to the exercise of the right of redemption which the law gives him, and therefore offends against the rule which we have stated. Mr. O'Connor, on behalf of the respondents, contended that the later bond created a charge upon the mortgaged property in

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respect of the money secured by it, and that, therefore, the plaintiff could not complain if he was obliged to pay the amount of that charge along with the mortgage debt. We are unable to agree with him, being clearly of opinion that the later bond does not create any charge whatever upon the property, but is simply a money bond. Therefore, it is unnecessary to consider what the effect would have been if a charge had been imposed on the property in respect of the later debt. Having regard to the provisions of the Transfer of Property Act, and especially the section empowering mortgagors to redeem, to which we have referred, it appears to us that the ruling in *Allu Khan v. Roshan Khan* cannot now properly be followed.

For the foregoing reasons, therefore, we allow this appeal, and modify the decree of the lower Courts by the exclusion from the amount payable for redemption of the money secured by the bond of Asarh Sudi 7th, Sambat 1922, as also the costs of the appeal to the lower appellate Court. The respondents must pay to the appellant the costs of this appeal and also the costs of the appeal to the lower appellate Court. We extend the time for payment to the 20th of next July.

*Appeal decreed.*

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April 21.

## REVISIONAL CRIMINAL.

*Before Mr. Justice Know and Mr. Justice Aikman.*

FATTU AND OTHERS v. FATTU.\*

*Criminal Procedure Code, sections 206 et seq.—Discharge—Practice—Powers and duties of Magistrate inquiring into case triable by the Court of Session discussed.*

Under Chapter XVIII of the Code of Criminal Procedure a Magistrate inquiring into a case triable by the Court of Session has a wide discretion in the matter of weighing the evidence produced on one side or the other, the remedy for an erroneous exercise of such discretion being provided in the powers conferred on Sessions Judges and District Magistrates by section 436 of the Code. But in the exercise of such discretion, if the question of discharge, or commitment, is one merely of probabilities, the inquiring Magistrate ought rather to leave the decision thereof to the Court of Session than to make an order of discharge because in his opinion the accused ought to

\* Criminal Revision No. 145 of 1904.