

from having conceived and given birth to her son. For the foregoing reasons we are of opinion that the conclusion arrived at by the learned Subordinate Judge is correct and that the appeal must fail. We dismiss it with costs.

Appeal dismissed.

1904

BEHARI
LAL
v.
SHEB LAL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt.

BHAWANI (PLAINTIFF) vs. SHEODIHAL (DEFENDANT).*

1904
March 6.

Mortgage—Suit for redemption—conditions postponing redemption whilst allowing the mortgagee under certain circumstances to realize the mortgage money before due date.

The right of redemption and the right of foreclosure or sale are not always and under all circumstances co-extensive.

Hence where in a mortgage with possession for a term of 15 years there was a covenant on the part of the mortgagor to the effect that if the property "be found to have been mortgaged or hypothecated or transferred to anyone, or if there should arise any cause which might be considered likely to affect the total or partial loss of the principal mortgage money and interest, the mortgagee shall have power to realize the entire mortgage money, with interest thereon at the rate of Rs. 3-2-0 per cent. per mensem," it was held that this covenant, properly construed, was not an unreasonable stipulation and did not give the mortgagor any right to claim redemption before the expiry of the term of the mortgage. *Sayad Abdul Hak v. Gulam Jilani* (1) and *Sari v. Motiram* (2) referred to.

This was a suit for redemption of a mortgage brought under the following circumstances. One Mahugu, halwai, on the 13th of March 1901, mortgaged with possession to Sheodihal, teli, two houses situated in the city of Jaunpur for a term of fifteen years. The mortgagee was empowered to remain in possession of the mortgaged property, either personally or through his tenants, and the profits were to be taken in lieu of interest on the mortgage debt. The mortgagor agreed to pay on the expiry of the term, whereupon the mortgage should be redeemed. The mortgage deed further provided that "if the property be found to have been mortgaged or hypothecated or transferred to anyone, or if there should arise any cause which might be considered likely to affect the total or partial loss of

* Second Appeal No. 154 of 1902, from a decree of Saiyid Muhammad Ali, District Judge of Jaunpur, dated the 6th December 1901, reversing a decree of Maulvi Saiyid Zainul Abdin, Subordinate Judge of Jaunpur, dated the 23rd September 1901.

(1) (1895) I. L. R., 20 Bom., 377. (2) (1896) I. L. R., 22 Bom., 375.

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the principal mortgage money and interest, the mortgagee shall have power to realize the entire mortgage money, with interest thereon at the rate of Rs. 3-2-0 per cent. per mensem," from the mortgagor and his property without waiting for the expiration of the term. Immediately after the execution of this mortgage Mahngu sold the mortgaged property to one Musammat Bhawani, who, on the 16th of July 1901, instituted the present suit for redemption, pleading that the condition above referred to had the effect of making the mortgage redeemable at any time. The Court of first instance (Subordinate Judge of Jaunpur) decreed the plaintiff's claim; but on appeal the District Judge reversed that decree and dismissed the suit, holding that the right of redemption was not necessarily co-extensive with the right of foreclosure or sale. The plaintiff thereupon appealed to the High Court.

Pandit *Sundar Lal* and Mr. *M. L. Agarwala*, for the appellant.

Maulvi *Ghulam Mujtaba*, for the respondent.

STANLEY, C. J., and BURKITT, J.—The only question in this second appeal is whether or not the suit instituted by the plaintiff for redemption of mortgaged property is premature. The Court of first instance decreed the claim; but upon appeal the lower appellate Court reversed the decree and dismissed the suit on the ground that the plaintiff was not entitled to redeem the mortgage before the expiration of the term of 15 years for which the mortgage was granted. By the mortgage, which is dated the 13th of March 1901, one Mahngu, halwai, the predecessor in title of the plaintiff, mortgaged with possession for a term of 15 years two houses and shops situate in the city of Jaunpur. By it the mortgagee was empowered to remain in possession of the mortgaged property from the date of the execution of the mortgage, he occupying the same himself or placing others in possession and taking the profits in lieu of interest on the mortgage debt. The mortgagor agreed to pay the debt on the expiry of the term, whereupon the mortgage should be redeemed. The deed contained the following provision that if the property "be found to have been mortgaged or hypothecated or transferred to anyone, or if there should arise

any cause which might be considered likely to affect the total or partial loss of the principal mortgage money and interest the mortgagee shall have power to realize the entire mortgage money, with interest thereon at the rate of Rs. 3-2-0 per cent. per mensem" from the mortgagor and from his property without waiting for the expiration of the term. Immediately after the execution of the mortgage Mahngu, halwai, sold and transferred the property to the plaintiff, who, on the 16th of July 1901 instituted the suit out of which this second appeal has arisen.

The learned counsel on behalf of the appellant contends that the right of redemption and the right of foreclosure are always co-extensive and that where there is an express provision in a mortgage giving the mortgagee the power to realize his debt at any time a stipulation postponing the mortgagor's right to redeem is void. As authority for this proposition he has cited the cases of *Sayud Abdul Hak v. Gulam Jilani* (1) and *Sari v. Motiram* (2). The right of redemption may undoubtedly be postponed by a covenant that during a certain period the estate shall remain irredeemable—arrangements of this nature are of common occurrence. It is advantageous to both parties, the mortgagee obtaining the advantage of a continuing security for his money; while the mortgagor is free from the expense and trouble of finding new lenders. Where a restraint upon redemption extends for a long period, of say, 30 years or upwards, the contract may no doubt be regarded by a Court of equity as unconscionable or oppressive; and it might also be considered unreasonable if the mortgage-deed enabled the mortgagee at any time during the term arbitrarily to call in his debt whilst the mortgagor was restrained from redeeming. This, however, is not the case before us. The term of the mortgage is 15 years and the provision in the deed whereby the mortgagee is empowered to recover his mortgage debt during the term does not appear to us to be unreasonable or oppressive. Under that provision he has not, we think, power to require payment arbitrarily, but only in the event of the discovery of a prior mortgage or of anything arising which might, in the view of reasonably minded men, be considered likely to cause total

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 BHAWANI
 v.
 SREODHIAL.

(1) (1895) I. L. R., 20 Bom., 677. (2) (1896) I. L. R., 22 Bom., 375.

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BHAWANI
v.
SHEODIHAL.

or partial loss of the debt. The words "if there should arise any cause which might be considered likely to affect the total or partial loss" of the debt must, we think, be interpreted, not as giving the mortgagee a right from mere caprice or unreasonable apprehension of loss to call in his debt, but only as giving him this right, if anything should arise which in the view of reasonably minded men might cause any such loss. The provision does not appear to us to be unreasonable or to give the mortgagee any undue advantage. The right of redemption and the right of foreclosure or sale do not appear to us to be always and under all circumstances co-extensive. The right of redemption may be postponed during a certain period just as the right of the mortgagee to call in his debt may be limited, and in the latter case the limitation may be greater than that upon the right to redeem. As we understand the law, both these rights rest upon the terms of the document itself, and in this case the mortgagee has satisfied us from the nature of the mortgage and the language of the deed that the restriction on redemption is not unfair or unduly onerous, and that the claim for redemption is premature. The continued enjoyment by him of the mortgaged property for the prescribed period formed a material part of the contract of the benefit of which it would be inequitable to deprive the mortgagee.

For the foregoing reasons we think that the view adopted by the lower appellate court was correct, and we dismiss the appeal with costs.

Appeal dismissed.

1904
March 10.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burditt.

MUNICIPAL BOARD OF MUSSOORIE (DEFENDANT) v. H. B.

GOODALL (PLAINTIFF).*

Act No. XV of 1877 (Indian Limitation Act), schedule II, articles 2 and 28—Suit for compensation for an illegal distress—Limitation—Principal and agent—Liability in tort of principal for acts of agent.

Where the Secretary of a Municipal Board acting under orders from the Chairman of the Board procured the issue of a warrant of distraint for a sum exceeding what was due from the person against whom the warrant was obtained and proceeded to seize and sell the goods of such person, it was held

* First Appeal No. 71 of 1902, from a decree of Maulvi Muhammad Sirajuddin, District Judge of Saharanpur, dated the 13th of November 1901.