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Lordships in the case to which we have referred seems to us to be applicable to this case.

For these reasons we allow the appeal, set aside the decrees of both the lower Courts and dismiss the plaintiff's claim with costs in all Courts.

Appeal decreed.

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June 6.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir George Knox.

CHATTAR MAL (DEFENDANT) *v.* BAIJ NATH (PLAINTIFF).*

Mortgage—Clog on the equity of redemption—Profits—Interest.

Held that the following terms contained in a usufructuary mortgage did not constitute a clog on the mortgagors' right of redemption :—

"The interest of the mortgage money and the profits of the lands mortgaged, have been declared to be equal. We shall obtain redemption of the mortgaged property from the possession of the mortgagee on payment of the whole of the mortgage money in a lump sum in the month of Jeth, when the land is unoccupied by crops. The mortgagee is at liberty to cultivate the land mortgaged himself or have it cultivated by any other person. We shall have no objection. Should the whole or part of the land mortgaged be cultivated by us in any year, we shall pay the arrears due by us at the time of harvest and before the Government instalment has fallen due. If we raise any objection, the mortgagee shall be at liberty to recover the same from us and our mortgaged and other movable and immovable properties by means of distress or a suit. Should any part thereof remain unpaid we shall pay it together with interest at one rupee per cent. per mensem and the mortgage money, in a lump sum at the time of the mortgage. We shall not be entitled to redemption without its payment." *Sheo Shankar* v. *Parma Mahton* (1), distinguished.

THE plaintiff sued to redeem a usufructuary mortgage, dated the 16th April, 1884. The mortgage contained the following clause :—"The interest of the mortgage money and the profits of the lands mortgaged have been declared to be equal. We shall obtain redemption of the mortgaged property from the possession of the mortgagee on payment of the whole of the mortgage money in a lump sum in the month of Jeth, when the land is unoccupied by crops. The mortgagee is at liberty to cultivate the land mortgaged himself or have it cultivated by any other person. We shall have no objection. Should

* Second Appeal No. 163 of 1905, from a decree of A. B. Bruce, Esq., District Judge of Agra, dated the 5th of December, 1904, confirming the decree of Munshi Raj Nath Prasad, Subordinate Judge of Agra, dated the 31st of March, 1904.

(1) (1904) I. L. R., 26 All., 559.

the whole or part of the land mortgaged be cultivated by us in any year, we shall pay the arrears due by us at the time of harvest and before the Government instalment has fallen due. If we raise any objection, the mortgagee shall be at liberty to recover the same from us and our mortgaged and other movable and immovable properties by means of distress or a suit. Should any part thereof remain unpaid, we shall pay it together with interest at Re. 1 per cent. per mensem and the mortgage money, in a lump sum at the time of redemption of the mortgage. We shall not be entitled to redemption without its payment."

Relying on the case of *Sheo Shankar* v. *Parma Mahton* (1), the learned District Judge held that the proviso regarding redemption constituted a reservation to the mortgagee of a collateral advantage outside the mortgage contract and was therefore void.

The Hon'ble Pandit *Sundar Lal* and Babu *Durga Charan Banerji*, for the appellant.

Babu *Jogindro Nath Chaudhri* and the Hon'ble Pandit *Madan Mohan Malaviya*, for the respondent.

STANLEY, C.J. and KNOX, J.—Mr. Chaudhri has advanced a very plausible argument in support of the decree of the lower appellate Court, but we are unable to accede to it. We think that the lower appellate Court was wrong in thinking that the agreement contained in the mortgage which we have to consider is a clog upon the equity of redemption. The parties contemplated two states of circumstances when the contract of mortgage was entered into. The first, the possibility that the mortgagees would obtain possession and enjoy the profits of the entire mortgaged property, in which event it was provided that the profits should be regarded as equal to the interest on the mortgage debt and should be accepted as such. The other possibility which they contemplated was that the mortgagors should be allowed to retain possession of part of the mortgaged property, and provision was made for that event by the agreement that if the mortgagors were allowed to cultivate any portion of the mortgaged property, the rent payable by them in respect of that portion should be

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regarded as the profits which the mortgagees under ordinary circumstances would have enjoyed or in other words should be regarded as part of the interest. Now it appears to us perfectly clear that such an arrangement, if contained in the mortgage-deed itself, does not form a clog upon the equity of redemption. The facts of the case upon which the lower appellate Court has relied were quite different from those of the present case. In that case after the execution of a usufructuary mortgage, the mortgagor executed a separate bond which contained, in addition to the usual stipulation for the payment of the money secured thereby, 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. That was a case in which what formed the clog upon the equity of redemption was a contract or agreement outside the mortgage contract itself. In the present case the covenant for the payment of the arrears of rent and the provision that such arrears should be secured by the deed formed part of the contract of the parties and in fact amounted merely to a security for the payment of interest and therefore are not obnoxious to the well-known rule of law that no agreement will be valid which forms a clog or hindrance to the right of the mortgagor to redeem. This being our view the appeal must be allowed, but we cannot now finally determine the appeal, inasmuch as one important issue of fact which was determined by the Court of first instance has not been decided by the lower appellate Court. The Court of first instance held that no arrears of rent were due to the mortgagees. The lower appellate Court has not come to any finding upon this issue. We therefore under the provisions of section 566 of the Code of Civil Procedure refer the following issue to the lower appellate Court, namely :—

"Are any arrears of rent, and if so what arrears, due by the mortgagors to the mortgagee on account of *sir* and *khudkasht* lands held by them ?"

On return of the finding the parties will have the usual ten days for filing objections. The costs of this appeal will abide the event.

Issue remitted.