

below dismissed the suit. The plaintiff appealed to the High Court.

Dr. *Tej Bahadur Sapru*, for the appellant.

The respondents were not represented.

RICHARDS, C. J., and BANERJI, J.—We think that the court was quite justified in finding that the deceased occupancy tenant, Siya Ram, was a Sudra, and could adopt a daughter's son. This being so, the only question which remains is whether or not an adopted son is a lineal descendant within section 22 of the Tenancy Act, and in our opinion he clearly is. An adopted son is in the eye of the Hindu law just the same as a natural born son. The appeal fails and is dismissed, but without costs, as no one appears on behalf of the respondents.

Appeal dismissed.

1912

LALA
v.
NAHAR
SINGH.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Banerji.

OHHOTKU RAI AND ANOTHER (PLAINTIFFS) v. BALDEO SHUKUL AND OTHERS (DEFENDANTS).*

1912
June, 21.

Mortgage—Non-payment of greater part of mortgage money—Mortgages allowed to redeem before expiry of term of mortgage.

Certain property was mortgaged by way of conditional sale for Rs. 599-15-0 for ten years. Of the mortgage money Rs. 50-15-0 only were paid, and the balance was left with the mortgagees for payment to prior incumbrancers. The mortgagees did not pay off the prior incumbrancers, and the mortgagor having meanwhile sold the mortgaged property, his assignees sued for redemption of the mortgage before the expiry of ten years. *Held* that on equitable grounds, the defendants not having performed what was a most essential part of the contract, the plaintiffs ought to be allowed to redeem before the expiration of the period of ten years.

The facts of this case were as follows :—

One Baldeo executed a mortgage by conditional sale in favour of the defendants, second party, on the 21st of August, 1905, for a term of ten years. The mortgage money was Rs. 599-15-0, out of which only Rs. 50-15-0 were paid to the mortgagor and the balance was left with the mortgagees for payment of debts due to prior creditors. This amount not having been paid, Baldeo transferred the same share to the plaintiffs on the 5th of January, 1906. The plaintiffs brought the present suit against the defendants, second party, the mortgagees, under the deed of the 21st of August, 1905, seeking to redeem the mortgage on payment of Rs. 50-15-0, on

* Appeal No. 128 of 1911 under section 10 of the Letters Patent.

1912

CHHOTKU
RAI
v.
BALDEO
SHUKUL.

the allegation that they had paid the sum of Rs. 549-15-0 to the prior creditors of Baldeo and were entitled to redeem. The defence of the defendants, second party, was that they had paid the sum of Rs. 549-15-0, and in any case that the suit for redemption was premature, the period of ten years not having elapsed. The courts below, without a finding whether the defendants, second party, had actually discharged the prior debts which they had undertaken to pay, dismissed the suit on the ground that it was premature, the period of ten years not having elapsed. On second appeal, a single Judge of the High Court confirmed the decision of the court below by the following judgement:—

“The point really in issue in this appeal admits of being stated without going into all the somewhat complicated, but not strictly relevant, details. The proprietor of a one anna share in certain zamindari property executed a mortgage by conditional sale, the terms of which were as follows:—

“The mortgagees paid Rs. 50-15-0 in cash to the mortgagor, and covenanted to pay Rs. 549 to certain other creditors of the latter. The mortgagor covenanted to give the mortgagees possession for ten years and to redeem at the end of that time; there was the usual stipulation that, failing redemption at the time specified, the instrument should operate as a deed of sale. The plaintiffs have acquired the equity of redemption in this one anna share. They say the holders of the mortgage above referred to have not paid off the creditors in accordance with the stipulations in the deed; they accordingly deposit in court Rs. 50-15-0 for payment to the mortgagee and sue for possession. The courts below have held that the suit is premature, the period of ten years stipulated in the mortgage deed not having expired. The plaintiffs do not contest the general principle that on a deed like the one in question the mortgagee is entitled to claim the benefit of the stipulation ensuring him ten years' possession; they plead that it is inequitable that the mortgagees should enforce this stipulation when they have not performed their part of the bargain. The principles governing the question in issue are to be found in sections 39, 55 and 73 of the Indian Contract Act (Act IX of 1872); a consideration of these sections shows that the courts below were right, the mortgagor (or the plaintiffs as representatives of the mortgagor) cannot claim relief against the contract allowing ten years' possession to the mortgagee, and that the mortgagor's remedy for the loss he is alleged to have suffered is by way of a suit for damages. The contract embodied in the instrument of mortgage cannot be set aside unless the plaintiffs can bring the case within the scope of section 39 or of section 55 of Act IX of 1872. The latter section cannot apply because no time was fixed within which the mortgagees were to pay off the creditors named in the deed. Nor can it be said that they have either 'refused to perform or disabled themselves from performing their promise in its entirety' within the meaning of section 39. The plaintiffs' case is at most that they have neglected to perform it. So far from refusing to do so, their plea on the facts (a plea which the decision of the courts below on the issue of law has prevented them from investigating) was

1912

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that they had performed it. It cannot be said that the mortgagees have disabled themselves from performing their part of the contract, or that it has become impossible of performance within the meaning of section 56 of Act IX of 1872. The case is simply one for a suit for damages. This appeal therefore fails and is hereby dismissed with costs."

The plaintiffs appealed under section 10 of the Letters Patent. On the appeal coming up for hearing before RICHARDS, C. J. and BANERJI, J., a finding on the issue as to whether the defendants, second party, had or had not paid the amount which they had undertaken to pay, was called for. The finding on this issue was in the negative. The appeal was then re-argued.

Babu *Piari Lal Banerji*, for the appellants, contended that the mortgagees, defendants, second party, were not entitled to resist the claim for redemption on the ground that the claim was premature. The reason for enforcing a contract for a fixed term was based on the principle that when a mortgagee had parted with his money on the understanding that he would be allowed to enjoy the usufruct of the property for a fixed term, he should not be deprived of the fruits of his bargain by being made to give up the property before the expiration of the period. But this equitable rule could not be enforced by a mortgagee who had never parted with his money. If a mortgagor in order to save himself and his property makes a mortgage for a long term on the understanding that the mortgagee would pay off his creditors, it would be most unfair to allow the mortgagee to retain possession of the property without paying off the prior debts and thus expose the mortgagor to all the risks which he had intended to avoid by making the mortgage. If, under such circumstances, the mortgagee was allowed to resist the claim for redemption, it would be a most deplorable consequence to flow from an equitable rule.

Babu *Jogendra Nath Mukerji*, for the respondent, urged that the mortgagor was bound by the term fixed, just as much as the mortgagee was bound. A mortgage when made was not a mere contract, but a conveyance, and the mortgagor could not avoid the mortgage simply because a portion of the mortgage money had not been paid. He cited *Rashik Lal v. Ram Nurain* (1) and *Baj-rangi Sahai v. Udit Narain Singh* (2).

Babu *Piari Lal Banerji* was not called upon.

(1) (1912) I. L. R., 34 All., 273.

(2) (1906) 11 C. W. N., 932

1912

OHHOTKU
RAI
v.
BALDEO
SHUKUL.

RICHARDS, C. J. and BANERJI, J.—The vendors of the plaintiffs in this appeal made a usufructuary mortgage in favour of the defendants of the second party. The consideration for the mortgage was Rs. 599-15-0. All save Rs. 50-15-0 were left with the mortgagees for payment of creditors of the mortgagors. It has been found as the result of certain issues which we referred to the court below that the creditors were prior incumbrancers of the mortgaged property, and that the mortgagee never discharged the incumbrances. The usufructuary mortgage was by way of conditional sale and provided that the property should not be redeemed for ten years. The present suit is in form a suit to redeem the property upon payment of Rs. 50-15-0, which was the full amount of the consideration given by the mortgagees. The defendants, second party, contend that the plaintiffs cannot redeem the property or get possession of it until the expiration of the term of ten years, and this notwithstanding that the prior incumbrances to meet which the greater part of the consideration was left with them have never been discharged by them. Both the lower courts dismissed the plaintiff's suit. On second appeal to this Court the decision of the courts below was affirmed.

The plaintiffs came here in appeal under the Letters Patent and contend that inasmuch as the defendants, second party, never kept their part of the bargain by discharging the incumbrances which they agreed to discharge, they ought not to be delayed in redeeming or getting back possession of the property until the end of ten years. It seems to us that if under the circumstances of the present case the defendants, second party, are allowed to remain in possession of the property over the full period of ten years, taking the profits and allowing the interest on the prior incumbrances to accumulate, the plaintiffs will be without any proper or effectual remedy. It is doubtful whether a suit for damages could possibly be brought at the present time, and at the expiration of the period of ten years it will only be an effectual remedy if the defendants, second party, or their representatives are sufficiently good marks for damages. We think that on equitable grounds the defendants not having performed what we deem to be a most essential part of the contract so far as they are concerned, the plaintiffs ought to be allowed to redeem the property before the expiration of the period of ten years.

We accordingly allow the appeal ; set aside the decree of this Court and also the decrees of the courts below, and decree the plaintiff's claim for redemption on payment of Rs. 50-15-0. The appellants will have their costs in all courts. We allow one month for payment of the Rs. 50-15-0 mentioned above. The decree will be drawn up in the usual form.

Appeal decreed.

Before Mr Justice Banerji and Mr. Justice Piggott.

BUDDHA SINGH AND OTHERS (PLAINTIFFS) v. LALTU SINGH AND ANOTHER (DEFENDANTS).*

1912
CHHOTKU
RAI
v.
BALDEO
SHUKUL.

1912.
July, 6.

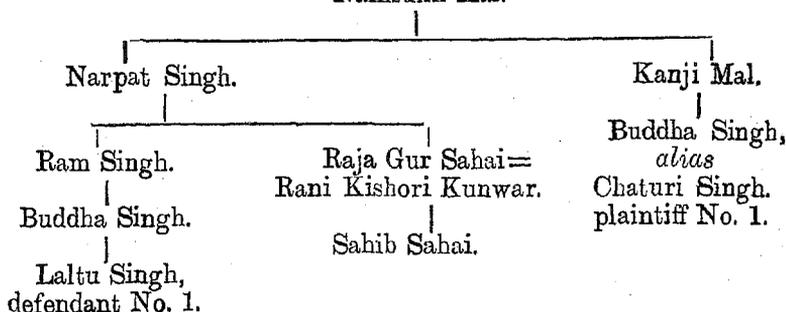
Hindu law—Mitakshara—Succession—Great-grandson of the grandfather—Grandson of the great-grandfather.

According to the Mitakshara law the three immediate descendants of the grandfather succeed in preference to the great-grandfather and his descendants, and the great-grandson of the grandfather is a preferential heir as against the grandson of the great-grandfather.

The following cases were referred to in the judgements delivered:—*Kalian Rai v. Ram Chandar* (1), *Rutcheputty Dutt Iha v. Rajunder Narain Rae* (2), *Kashibai Ganesh v. Sitabai Raghunath Shivram* (3), *Rachava v. Kalingapa* (4), *Kureem Chand Gurain v. Oodung Gurain* (5), *Chinnasami Pillai v. Kunju Pillai* (6), *Bhyah Ram Singh v. Bhyah Ugur Singh* (7) and *Suraya Bhukta v. Lakshminarasamma* (8).

This was a suit for possession by right of inheritance of considerable property, both movable and immovable, which had belonged in his life-time to one, Sahib Sahai. The relationship of the parties to the propositus is shown in the subjoined table:—

Nainsukh Mal.



* First Appeal No. 249 of 1910 from a decree of Gauri Shankar, Subordinate Judge of Moradabad, dated the 23rd of June, 1910.

(1) (1901) I. L. R., 24 All., 128.

(5) (1866) 6 W. R., 158

(2) (1889) 2 Moo. I. A., 133.

(6) (1911) I. L. R., 35 Mad., 152.

(3) (1911) 13 Bom. L. R., 552.

(7) (1870) 13 Moo. I. A., 373.

(4) (1892) I. L. R., 16 Bom., 716.

(8) (1881) I. L. R., 5 Mad., 291.