P. C.*
1912.
June 21, 25
July 18.

PRIVY COUNCIL.

SHANKAR DIN AND OTHERS (PLAINTIFFS) *v.* GOKAL PRASAD AND OTHERS (DEFENDANTS) *

[On appeal from the Court of the Judicial Commissioner of Oudh, at Lucknow.]

Mortgage—Redemption—Subsequent agreement qualifying right to redeem—Loss of deed—Onus of proof of terms of mortgage—Act No. I of 1869 *(Oudh Estates Act), section* 6 *—Limitation—Compromise barring right to redemption.*

There is nothing in law to prevent the parties to a mortgage from coming to a subsequent arrangement qualifying the right to redeem.

In this case the mortgage which it was sought to redeem was dated in 1846, and in 1870, the mortgagors had, in consideration of certain additional benefit reserved to them under a compromise, agreed to subject their right of redemption to certain conditions. The deed having been lost, the onus was on the plaintiffs to prove the terms of the mortgage, so as to show that the suit was not barred by section 6 of the Oudh Estates Act (I of 1869) [see *Raja Kishen Dutt Ram Panday* v. *Narendar Bahadoor Singh* (1)] which onus he was found unable to discharge.

Held (affirming the decision of the Judicial Commissioner of Oudh) that the plaintiffs were not in any case entitled to redeem as long as there was no breach by the defendants of the covenants contained in the compromise.

Appeal from a judgement and decree (28th July, 1908) of the Court of the Judicial Commissioner of Oudh, which reversed a decree (15th May, 1907) made on appeal by the Court of the Subordinate Judge of Biswan, the latter decree having affirmed a decree (12th December, 1906), by the court of the Munsif of Biswan.

The main question for decision on the present appeal was whether the appellants were entitled to redeem a mortgage executed on the 12th of July, 1846, by one Ahlad Singh, in favour of one Daryao Singh.

The mortgaged properties were the villages of Gathia and Pipri; and the mortgage money was Rs. 388-15-0. The plaint alleged that the mortgagor was to retain possession of 250 bighas of land and receive the sum of Rs. 87-8-0 annually from the mortgagee, who was to have possession of the rest of the villages and appropriate the profits in lieu of interest. Redemption was to take place in any year during the fallow season.

The first ten appellants were the representatives of Ahlad Singh, the mortgagor; the eleventh appellant was a purchaser

* *Present.*—Lord SHAW, SIR JOHN EDGE and MR. AMEER ALI.

(1) (1876) L. R. 3 I. A., 85.

from them. On a partition between the descendants of Daryao Singh, the mortgagee (whose name was entered in lists 1 and 3 under section 8 of Act I of 1869) the village of Gathia fell to the share of Shankar Bakhsh Singh, whose estate was under the management of the Court of Wards. The village of Pipri was allotted to Hardeo Bakhsh Singh, and descended to his widow Musammat Ram Kali, by whom it was transferred as a waqf to the President of the Kyastha Scholarship Trust, Allahabad (the respondent No. 1). The suit was originally brought to redeem both villages, but so far as it related to Gathia it was dismissed in default of sufficient notice to the Court of Wards, and the present appeal was confined to the right to redeem the village of Pipri.

For the defendant No. 6 (respondent No. 1) it was admitted that Ahlad Singh had made a possessory mortgage in 1846, but its terms as stated in the plaint were denied. The defendants did not, however, produce the mortgage deed. They alleged that it was lost and "not found in spite of search;" but they produced no evidence to prove either the loss of the deed, or that any search had ever been made for it. It was also pleaded that the suit could not be maintained in consequence of a compromise made on the 7th of January, 1870, between the predecessors of the parties at the time of the regular settlement of Oudh. The terms of the compromise and the order of the Settlement Commissioner thereon, dated the 17th of January, 1870, are sufficiently set out in the judgement of their Lordships of the Judicial Committee. The 17th paragraph of the written statement of Gokal Prasad (respondent No. 1) was—"Plaintiff's claim is barred by limitation and the defendants hold proprietary possession."

The Oudh Estates Act (I of 1869) became law on the 12th of January, 1869, and under section 6 of that Act the following mortgages only could be redeemed from a taluqdar:—"(*a*) When the instrument of mortgage was executed on or after the 13th of February, 1844, and fixed no term within which the property comprised therein might be redeemed; or (*b*) When the instrument of mortgage fixed a term within which the property comprised therein might be redeemed, and such term did not expire before the 13th of February, 1856."

On the pleadings 9 issues were settled by the Munsif, of which only two were material on this appeal namely:—(3) "Did Ahlad

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Singh, son of Kirpa Ram, mortgage the villages in suit with possession to Daryao Singh, for Rs. 388-15-0 on the 12th of July, 1846, with the conditions given in the plaint," and (5) "How do the compromise, dated the 7th of January, 1870, and the decision of the Settlement Court, dated the 17th of January, 1870, affect the plaintiffs' claim ?"

On these issues the Munsif held on the oral evidence that the execution of the mortgage was proved and that its terms were as stated in the plaint. He was of opinion that the proceedings taken at the settlement did not bar redemption, and he made a decree for redemption of the one village of Pipri.

The Subordinate Judge on appeal decided that the oral evidence produced by the plaintiffs and accepted by the Munsif was valueless to prove the mortgage or its terms, but that from the documentary evidence he was satisfied that the mortgage referred to in the compromise was that which the plaintiffs now sought to redeem; and that under the circumstances, and on the inferences to be drawn from the non-production of the mortgage deed by the defendants, the presumption was in favour of the plaintiffs' right to redeem. He therefore agreed with the Munsif that the settlement proceedings were no obstacle to the maintenance of the suit. As to these holdings, he said:—

"It is urged before me that as the plaintiffs have failed to prove that the mortgage-deed fixed no term within which the property comprised therein might be redeemed or that, if it fixed such a term, it did not expire before the 13th of February, 1853, no decree could be passed in plaintiffs' favour. The learned counsel, Mr Lincoln, who argued the case on behalf of the plaintiffs before me did not protest against the contention being raised. That contention seems to have been raised before the court below at the time of argument. The learned Munsif allowed it to be raised and disposed of it. But that contention does not appear to have been raised in the pleadings. The only pleas that might be said to embody the above contention are the plea of limitation and another plea that the plaintiffs have no *locus standi*. I do not think that the said pleas cover the contention above referred to. The plaintiffs never stated in their plaint that the mortgage-deed in suit fixed any term. What they said was that, according to the conditions of the mortgage-deed, the mortgage was redeemable in any fallow season. It does not amount to the fixation of a term within the meaning of section 6 of the Oudh Estates Act. The mere denial by the defendant No. 6 of the conditions of the mortgage-deed does not amount to the raising of a plea that by the mortgage-deed in suit a term for redemption was fixed and that it expired before the 13th of February, 1856.

After referring to the case of *Raja Kishen Dutt Ram Panday* v. *Narendar Bahadoor Singh* (1) and distinguishing it from the present, the Subordinate Judge continued :—

"I do not think the authority noted above is applicable to this case. If the defendant No. 6 wanted to raise a plea under section 6 of the Oudh Estates Act he should have pleaded expressly that the term fixed for redemption in the mortgage-deed expired before the 13th of February, 1856. This plea does not arise by the mere denial of the averment that no term for redemption was fixed in the deed. However, if the pleadings in the case be so construed as to raise the aforesaid plea, the authority of their Lordships of the Privy Council in the case noted above will be fatal to the plaintiffs' case. But, as I have distinguished the case noted above from the one before me, I think the plaintiffs are entitled to redeem. Every mortgage is in its nature redeemable and its redemption is barred either by act of the parties or by force of law. It is not for a plaintiff, mortgagor, to prove in absence of any plea that no conceivable acts of the parties have rendered the mortgage incapable of redemption, or that there is no law which stands in the way of redemption."

The appeal was accordingly dismissed with costs. The respondent No. 1 appealed to the Court of the Judicial Commissioner, (Mr. L. G. EVANS, Additional Judicial Commissioner, and Mr. T. C. PIGGOTT, officiating Second Additional Judicial Commissioner), who reversed the decisions of the lower courts.

The material part of their judgement was as follows :—

"In this appeal the following points have to be decided :—

"First, whether the plaintiffs have proved the terms of the mortgage-deed as set forth by them in their plaint ; and secondly, if the terms are not proved, whether there is anything in the compromises alluded to above, which would enable the plaintiffs to redeem the mortgage, having regard to the provisions of section 6 of Act I of 1869.

"With reference to the first point, the learned Subordinate Judge discussed the evidence produced on behalf of the plaintiffs and found that the oral evidence as to the contents of the mortgage-deed was wholly insufficient and worthless. As to the documentary evidence, he discussed the terms of the compromises noted above. He was satisfied that they did refer to the mortgage-deed which the plaintiffs seek to redeem, but he remarked that he was unable to ascertain its terms and that the plaintiffs had failed to prove what they were."

"Upon this point, the case of *Raja Kishen Dutt Ram Panday* v. *Narendar Bahadoor Singh* (1) is the only authority. In that case, it was held that the burden of proof lay upon the plaintiff to substantiate his case by evidence. 'But..... regard must be had to the opportunities which each party may naturally be supposed to have of giving evidence ; and although the burden of proof *primâ facie* in this case in their Lordships' view is upon the plaintiffs, still they think that the consideration should not be omitted that the defendant would naturally have the mortgage, and that it would be, *primâ facie* at all

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events, more in his power to give accurate evidence of its contents than in that of the plaintiff.' In this particular case, it is necessary to consider what trustworthy evidence has been produced by the plaintiffs. I concur entirely with the learned Subordinate Judge in his opinion as to the oral evidence produced by them. He regarded it as worthless and has given good reasons for his decision. I have perused the evidence and have come to the same conclusion.

"The other evidence as to the terms of the mortgage-deed consists of the compromises of 1870, which are admitted by the parties. It is true that these compromises give details of the land held by the ancestors of the plaintiffs and the annual sum payable to them by the defendants' predecessors, and in the plaint these details are given as one of the conditions under which the property is mortgaged. Under section 61 of the Evidence Act the contents of a document can only be proved by *primary* or *secondary* evidence. The plaintiffs are unable to produce *secondary* evidence of the contents of the mortgage-deed within the meaning of section 63 of the Evidence Act, and I am compelled to find that the plaintiffs have failed to produce any legal evidence, which is admissible, as to the terms of the mortgage they seek to redeem. Therefore, as the plaintiffs are unable to give any *primâ facie* proof that the mortgage is redeemable, it must be held that they cannot succeed, unless they can show that there is anything in the terms of the compromises of 1870 which would entitle them to a decree for redemption. It might be urged that the predecessors of the defendants admitted in the compromises that the mortgage was redeemable and that that admission was made one year after Act I of 1869 was passed, when all the taluqdars knew perfectly well that mortgages executed after the 13th of February, 1844, could only be redeemed if they came within the meaning of section 6 of the Act. But I am unable to find that any admission made by a mortgagee would operate as to make a mortgage redeemable, which, *by law*, was irredeemable at the time when the admission was made. The plaintiffs have failed to discharge the burden laid on them of proving that the mortgage can now be redeemed, and I hold that the subsequent agreement of 1870 cannot operate so as to extend a period of limitation which had already expired according to the special law provided for cases of this kind in Act I of 1869. All that I find established from the compromises of 1870 is that the parties agreed that no action should be taken by the mortgagors so long as they are retained in possession of certain lands assigned to them in under-proprietary tenure. If their possession was disturbed, they were entitled to take action under their mortgage-deed of 1846. It is not pretended that the defendant (No. 6) or his predecessors have broken the terms of the compromises, and therefore the plaintiffs, according to the strict terms of the compromises, have no right to enforce the mortgage of 1846. If they now insist upon their legal right as mortgagors to institute a suit for redemption independently of the terms of the compromises, they have to show by evidence which is legally admissible that the mortgage is redeemable. This they have failed to show, and I hold that the claim for redemption should have been dismissed."

The appeal was consequently allowed and the suit dismissed with costs.

On this appeal by the plaintiffs

De Gruyther, K. C., and *Ross* for the appellants contended that having regard to the special circumstances of the case the terms of the mortgage were sufficiently proved to enable the appellants to redeem.

The respondent, it was submitted, in whose possession the mortgage had all along been, should, if it were lost as he alleged, have produced some evidence of the loss, and that a search had been made for it, but no such evidence was given. The case of *Kishen Dutt Ram* v. *Narendar Bahadur Singh* (1) was distinguishable from the present case. It was held by the Judicial Commissioner that the mortgage was not redeemable in consequence of the provisions of section 6 of the Oudh Estates Act (I of 1869). No plea, however, raising that defence was taken in the pleadings: the only plea that could possibly include it was paragraph 17 of the respondents' written statement, as to limitation, which did not cover the point, and it therefore ought not to have been allowed to be raised on appeal. No term was fixed in the mortgage for redemption. As to the compromises of 1870, it was contended that they did not operate as an agreement under which the right of redemption could not be exercised and did not bar the right of redemption. The onus was on the respondent and he had not discharged it. Reference was made to the Oudh Estates Act (I of 1869), sections 3, 4, 5 and 6: Sykes' Taluqdari Law, page 168; and the Commentaries on the Transfer of Property Act (IV of 1882) by Shephard and Brown (7th edititon), section 6, note 1.

Sir Erle Richards, K. C., and *B. Dube* for the respondent contended that the appellants had failed to prove the terms of the mortgage, or to show that the mortgage was still subsisting and was redeemable. For 42 years no claim had been put forward by the appellants to the property. At the time of the compromises in 1870 there was no right of redemption which could have been enforced. The right of redemption could only be exercised on the conditions in the compromises and on no other. The onus had been rightly placed on the appellants.

De Gruyther, K. C., replied.

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1912, July 18th.—The judgement of their Lordships was delivered by Mr. AMEER ALI.—

The sole question for determination in this appeal is whether the plaintiffs are entitled in this action to a decree for redemption in respect of certain property mortgaged so long ago as 1846 by their ancestor, Ahlad Singh, to one Daryao Singh, whom the defendants represent.

The suit was brought in the Court of the Munsif of Biswan in the Province of Oudh in respect of two villages, Pipri and Gathia. This officer dismissed the claim in respect of Gathia for failure on the part of the plaintiffs to serve sufficient notice on the Court of Wards, who held the village for one of the defendants; but he made a decree for redemption in respect of Pipri, and his decision was affirmed on the appeal of the defendants by the Subordinate Judge. On second appeal to the Court of the Judicial Commissioner of Oudh, this decree has been reversed and the suit dismissed with costs. The present proceedings refer only to Pipri.

The plaintiffs have appealed to His Majesty in Council, and their main contention before this Board is that, having regard to the admitted position of the parties as mortgagors and mortgagees, the learned Judges have taken a wrong view of their relative rights.

In the view their Lordships take of the case they do not deem it necessary to set out at any length the facts on which the parties proceeded to trial. It is not disputed that in 1846, Ahlad Singh mortgaged the two villages in question to Daryao Singh and that since then the mortgagee and his representatives have been in possession. As the transaction took place ten years before the annexation of Oudh, it came within the purview of the Oudh Estates Act of 1869, section 6 of which imposed certain restrictions on the right of redemption in respect of properties held by the taluqdars on mortgage.

The plaintiffs were naturally unable to produce the deed of mortgage, and the defendants would not produce it on the ground that it was lost. The onus was thus cast on the plaintiffs to show that they had, in view of section 6 of the Oudh Estates Act, the right to redeem. To discharge this burden and to prove the contract as stated by them in their plaint they relied in part on

certain oral evidence and in part on proceedings *inter partes* which took place in 1870 in the course of settlement disputes regarding the lands of which they were in possession under the terms of the mortgage in question. In the course of those proceedings certain *razinamahs* or deeds of compromise were entered into between the parties and filed in the court of the Extra Assistant Commissioner, who, on the 17th of January, 1870, made the following order:—"With the consent of the parties the Court decrees the claim subject to the conditions set forth in the *razinamahs*." These documents clearly show that, although the right of redemption was admitted as subsisting, it was subjected to certain conditions. The plaintiffs' right to the possession of the lands and to the enjoyment of the annuity reserved to them under the deed of 1846, together with various other rights, were admitted; some further lands were conceded, and then followed an important covenant, which in the document executed by the plaintiffs' ancestors is in these terms:

"Should Anant Singh or any of his descendants resume the under-proprietary tenure, then we the executants may at first obtain a decree in respect of the said proprietary tenure.

"Should they even after the decree fail to deliver possession, then we the executants and our heirs shall be at liberty to take back the villages Pipri and Gathia according to the terms of the deed executed by Ahlad Singh and others in favour of Thakur Daryao Singh after compliance with the said terms."

The same covenant in almost identical language is to be found in the deed of compromise executed by the persons who then represented the mortgagee. They say as follows:—

"Whenever they convert the same into an agricultural land they should pay rent therefor. Wherefore we with our own volition do record that neither we nor our heirs shall, generation after generation, resume the under-proprietary land. And in case we or our heirs resume the same, the said Madho Singh and others may by suing in Court obtain a decree.

"If we fail to deliver the land after such a decree then Madho Singh and others and their heirs shall be competent to take back, recover the villages of Pipri and Gathia after complying with the provision of the deed executed by Ahlad Singh and others in favour of Thakur Daryao Singh, our deceased father."

In their Lordships' judgement the arrangement arrived at in 1870 is conclusive as regards the present action. Whatever may have been the mortgagor's right under the deed of 1846, the parties deliberately came to a settlement in 1870 by which his representatives for certain additional benefit reserved to them under the *razinamahs*, agreed to subject their right of redemption

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to certain conditions. There is nothing in law to prevent the parties to a mortgage from coming to any arrangement afterwards qualifying the right to redeem. In the present case it is not alleged that the action is brought upon a breach of the covenant contained in the deed of compromise. Their Lordships are therefore of opinion that the suit was rightly dismissed by the Judicial Commissioners, and they will humbly advise His Majesty to dismiss this appeal with costs.

Appeal dismissed.

Solicitors for the appellants:—*T. L. Wilson & Co.*

Solicitors for the respondent No. 1.—*Barrow, Rogers, & Nevill.*

APPELLATE CIVIL.

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July 17.

Before Mr. Justice Muhammad Rafiq and Mr. Justice Piggott.

SRI CHAND (DECREE-HOLDER) *v.* MURARI LAL (JUDGEMENT-DEBTOR).*

Act No. III of 1907 *(Provincial Insolvency Act), sections* 16 *and* 34—*Execution of decree against the insolvent during pendency of insolvency proceedings—Right of decree-holder in respect of proceeds of property attached and sold and money attached before order of adjudication.*

Whilst proceedings in insolvency under the Provincial Insolvency Act, 1907, were pending, certain immovable property of the insolvent was attached and sold in execution of a decree against him, and the proceeds deposited in court for the benefit of the decree-holder. The decree-holder also attached certain moneys which had been paid into court to the credit of the insolvent, but up to the date of the order of adjudication had taken no further steps to possess himself thereof. *Held* that the decree-holder was entitled as against the receiver to the benefit of the proceeds of execution of his own decree, but not to the money of the insolvent which he had attached. *Peacock* v. *Madan Gopal* (1) followed.

The facts of this case were as follows:—

Ram Saran Das and two others were, on an application by one of their creditors, dated the 21st of February, 1911, adjudged insolvents on the 1st of February, 1912. The appellant, Sri Chand, was one of the creditors and was made a party to the insolvency proceedings. In execution of a decree which Sri Chand had obtained against the persons adjudged insolvents, he attached, in November, 1911, a sum of Rs. 1,139-12-3, which was in deposit in the court of the Subordinate Judge to the credit of those persons; and, further,

*First Appeal No. 79 of 1912 from an order of Sushil Chandra Banerji, Officiating Second Additional Judge of Meerut, dated the 29th of March, 1912.

(1) (1902) I. L. R., 29 Calc., 428.