

Before Mr. Justice Chamier and Mr. Justice Muhammad Rafiq.

SARBDAWAN SINGH AND OTHERS (DEFENDANTS) v. BIJAI SINGH
AND ANOTHER (PLAINTIFFS) AND BABUNANDAN AND OTHERS (DEFENDANTS).*

1914
June, 5.

*Mortgage—Redemption—Condition intended to defeat the right of
redemption—Condition held to be unenforceable.*

A court of equity will not permit any device or contrivance designed or calculated to prevent or impede redemption, although it may be impossible to lay down any general rule as to what should not be regarded as an improper restraint or fetter on the right of redemption.

Where a mortgage was made for forty years and a provision was inserted in the deed fixing a particular day on which it was to be redeemed, failing which the mortgage was to be renewed for another term of forty years, and it was further provided that the mortgage should not be redeemed with borrowed money, it was held that these provisions were designed to make redemption very difficult if not impossible, and should not be enforced. *Bansi v. Girdhar Lal* (1) and *Rambaran Singh v. Ramker Singh* (2) referred to.

THE facts of this case were as follows :—

A usufructuary mortgage was made on the 4th of February, 1871, by the father of the respondent Bijai Singh in favour of Ram Din Singh, father of the four appellants. The mortgage was for a term of forty years and was to be redeemed on the day following the completion of that term, but, if the mortgagor failed to redeem on that day, the mortgage was to hold good for a second term of forty years. It was also provided that the mortgagor should not be entitled to redeem the mortgage with borrowed money. The mortgage money was paid into court under section 83 of the Transfer of Property Act on the 10th of June, 1911, but the appellants refused to accept it. The present suit was filed on the 9th of September, 1911. The defence was that the representative of the mortgagor was not entitled to claim redemption of the mortgage except on the day following the expiry of the term of forty years. The Subordinate Judge accepted this plea and dismissed the suit. On appeal the District Judge held that the mortgage deed did not show with certainty the day on which redemption might be effected and that the provision that the mortgagee might retain possession for another forty years in case the mortgagor failed to redeem at the end of the first term was penal and should not be enforced. Accordingly he decreed the claim.

* First Appeal No. 9 of 1914, from an order of B. J. Dalal, District Judge of Benares, dated the 24th of September, 1913.

(1) Weekly Notes, 1894, p. 143. (2) (1910) 10 Indian Cases, 243.

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The defendants mortgagees appealed to the High Court.

Dr. *Surendro Nath Sen*, for the appellants.

Dr. *S. L. Sulaiman*, for the respondents.

CHAMIER and MUHAMMAD RAFIQ, JJ.—This is an appeal in a suit brought for redemption of a usufructuary mortgage made on the 4th of February, 1871, by the father of the respondent Bijai Singh in favour of Ram Din Singh, father of the four appellants. The mortgage was for a term of forty years and was to be redeemed on the day following the completion of that term, but if the mortgagor failed to redeem on that day the mortgage was to hold good for a second term of forty years. It was also provided that the mortgagor should not be entitled to redeem the mortgage with borrowed money. The mortgage money was paid into court, under section 83 of the Transfer of Property Act, on the 10th of June, 1911, but the appellants refused to accept it. The present suit was filed on 9th of the September, 1911. The defence was that the representative of the mortgagor was not entitled to claim redemption of the mortgage except on the day following the expiry of the term of forty years. The Subordinate Judge accepted this plea and dismissed the suit. On appeal the District Judge held that the mortgage deed did not show with certainty the day on which redemption might be effected and that the provision that the mortgagee might retain possession for another forty years in case the mortgagor failed to redeem at the end of the first term was penal and should not be enforced. Accordingly he decreed the claim.

In this appeal it is contended that the decision of the District Judge is erroneous.

The date given at the foot of the mortgage is Magh Sudi 14, Sambat 1967, the Fasli year being stated to be 1278. The corresponding date according to the British calendar was the 4th of February, 1871, but is not given in the deed. According to the Fasli or Sambat year the term of forty years expired on the 13th of February 1911, and redemption should have been effected on the 14th of February. According to the British calendar forty years expired on the 3rd of February and redemption should have been effected according to the deed on the 4th of February. The calendar now commonly employed in transactions of this kind is the British calendar, but it is not certain that two rustics, as the

mortgagor and mortgagee in the present case were, intended that the term of the mortgage should be calculated according to the British calendar. The deed is written in the Nagri character and seems to have been the production of some village writer of documents. We are unable to say that the deed indicates with certainty the date on which redemption might be effected. But assuming that some date is definitely fixed by the deed for redemption, we are of opinion that the provision in question was designed to prevent redemption, or at all events to hamper the mortgagor in such a way as to make redemption almost impossible. It is unnecessary to cite authority for the proposition that a Court of Equity will not permit any device or contrivance designed or calculated to prevent or impede redemption. The appellants rely upon cases in which it has been held that the postponement of the right to redeem till the end of a very long term of years, in one case ninety years, is not a ground for holding that the provision should not be enforced—*Muhammed Ibrahim v. Muhammed Abiz Kroshi* (1), *Ram Prasad v. Jagrup* (2), *Puran Singh v. Kesar Singh* (3); upon a large class of cases, of which that of *Bansi v. Girdhar Lal* (4) is an example, and upon the decision of GRIFFIN, J. in *Rambaran Singh v. Ramker Singh* (5) affirmed in L. P. A. No. 73 of 1911.

The English Courts have shown a strong disinclination to uphold provisions restraining redemption for long periods, and we doubt whether they would approve some of the Indian decisions on this question. We doubt also the soundness of the reason that has been given for upholding such provisions in this country, namely, that the Indian Limitation Act allows a very long period for suits for redemption. But cases in which the parties have merely agreed to fix a very long term for a mortgage are not to be compared with a case in which a very long term has been fixed and a provision has been inserted in the deed which makes redemption very difficult, if not impossible, at the end of that term.

The present case is also clearly distinguishable from such cases as that of *Bansi v. Girdhar Lal* (4). It is an old, and, we

(1) (1910) 8 Indian Cases, 1068. (3) (1907) Punj. Rec., O.J., No. 39.

(2) (1912) 10 A. L. J., 157. (4) Weekly Notes, 1894, p. 143.

(5) (1910) 10 Indian Cases, 243.

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think, a reasonable practice to provide that redemption shall take place only in the *khali fasl*, in the month of Jeth, when the crops are off the ground. The mortgagor is allowed a month in which to redeem the mortgage, and if he fails to redeem within the month he must wait till the following year. We have also seen mortgages in which it was provided that if the mortgagor did not redeem during the *khali fasl* immediately following the expiry of the term fixed he should not be entitled to redeem till after the expiry of several more years, and such provisions have often been enforced. But to give a man one day only in eighty years on which he may redeem is to make difficulties for him far greater than are to be found in cases like *Bansi v. Giridhar Lal* (1) or the other cases to which we have referred.

There remains to be considered the case of *Bambaran Singh v. Ramker Singh* (2) decided by this Court. In that case the mortgage was made on the 3rd of June, 1895, and provided that the mortgagor might redeem on Jeth Sudi Puraamashi 1315 Fasli, *i. e.* a little over thirteen years after the date of the mortgage, and that if the mortgagor failed to redeem on that date, the mortgagee would be entitled to retain possession for another term of thirteen years. This Court held that the provision should be enforced. Section 83 of the Transfer of Property Act had been passed before that mortgage was made, a provision which has made the redemption of mortgages much easier than before, but there was no such provision in force when the mortgage now in suit was made. The consequences of failure to redeem that mortgage on the day fixed were much less serious than in the case before us and in that case the mortgagor was to have an unfettered right to redeem at the end of twenty-six years, a period much shorter than the first term fixed by the mortgage now in suit. On these grounds that case may, if necessary, be distinguished from the present one.

But it is impossible to lay down a hard and fast rule as to what should and what should not be regarded as an improper restraint or fetter on the right of redemption. The decision in each case must depend upon its own circumstances. We are satisfied that the provision for redemption in the present instance

(1) Weekly Notes, 1894, p. 143.

(2) (1910) 410 Indian Cases, 243.

was designed to make redemption very difficult, if not impossible. The stipulation that the mortgage should not be redeemed with borrowed money, which is admittedly invalid, shows that the mortgagee intended to place every obstacle in the way of redemption.

The provision that redemption may take place on one day only in the course of eighty years is most oppressive. Many circumstances might easily prevent redemption on that day, for example the illness of the mortgagor, the absence of the mortgagee, or the impossibility of discovering, on account of the recent death of either mortgagor or mortgagee, what persons were entitled to redeem or to receive the mortgage money. The shorter the time during which the money is to be paid the more difficult does redemption become. It was conceded in argument that a provision making redemption possible only during two or three hours on a particular day during a long term of years should not be enforced. In our opinion the lower appellate court was right in refusing to enforce the provision for redemption in this case. We dismiss the appeal with costs.

Appeal dismissed.

Before Mr. Justice Chamier and Mr. Justice Muhammad Rafiq.

THE MUNICIPAL BOARD OF GHAZIPUR (DEFENDANT) v.
DEOKINANDAN PRASAD (PLAINTIFF)*

Act No. IX of 1908 (Indian Limitation Act), schedule I, articles 2, 62 and 120—Limitation—Suit for refund of octroi duty not alleged to have been in the first instance wrongfully exacted.

The plaintiff sued a municipal board for a refund of octroi duty. He did not allege that the duty had in the first instance been taken from him illegally, but that he had after payment thereof become entitled to a refund. *Held* that the suit was governed by article 120 and not by article 2 or article 62 of the Indian Limitation Act, 1908. *Rajputana-Malwa Railway Co-operative Stores v. Ajmera Municipal Board* (1), *Guru Das v. Ram Narain* (2) and *Hanuman v. Hanuman* (3) referred to.

IN this case the plaintiff came into court asking for a refund of octroi duty which he had paid to the Ghazipur municipality on certain logs. His allegation was that when the duty was demanded he had represented to the Board that the logs were being

* First Appeal No. 3 of 1914, from an order of Sri Lal, District Judge of Ghazipur, dated the 26th of June, 1913.

(1) (1910) I.L.R., 32 All., 491. (2) (1884) I.L.R., 10 Calc., 860.

(3) (1893) I.L.R., 19 Calc., 123.

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