

APPELLATE CIVIL.

1915

December, 13.

Before Mr. Justice Tudball and Mr. Justice Walsh.

MUHAMMAD ALI AND ANOTHER (DEFENDANTS) v. BALDEO PANDE
(PLAINTIFF).*

Mortgage—Suit for redemption—Tender of mortgage money a condition precedent to the institution of a suit for redemption.

A usufructuary mortgage of agricultural land provided that the right to redeem should be exercised only in the month of *Jeth* of any year.

Held, that before the mortgagor could sue for redemption it was necessary for him to prove that he had tendered to the mortgagee the mortgage-debt or such amount as he considered due on the mortgage in the month of *Jeth* of some year after the mortgage money had become payable. *Bansi v. Giridhar Lal* (1) followed.

THIS was a suit for redemption of a usufructuary mortgage of agricultural land. The court of first instance decreed the claim in part, and the lower appellate court confirmed the decree. The defendants appealed to the High Court, their main ground of appeal being that the mortgagor had failed to prove, as was incumbent on him, that, before the suit was filed, he had, according to the provisions of the mortgage-deed, tendered the mortgage money to the mortgagees during the month of *Jeth* in some year. It was found as a fact that no such tender had been made.

The Hon'ble Mr. *Abdul Raoof* and *Maulvi Iqbal Ahmad*, for the appellants.

Dr. Surendra Nath Sen, for the respondent.

TUDBALL and WALSH, JJ. :—This is the defendants' appeal arising out of a suit for redemption. The mortgage-deed is dated *Miti Asadh Badi* 7th, *Sambat* 1918, corresponding with the 29th of June, 1861. It was for a term of five years certain and it was an agriculturist's mortgage, in which the parties laid down a condition that the right to redeem should be exercised only in the month of *Jeth* of any year. The courts below have decreed the suit. The defendants raised a plea that the plaintiff had made no payment or offer of payment before bringing his suit. The plaintiff in paragraph 5 of the plaint

* Second Appeal No. 1472 of 1914, from a decree of H. L. Lane, Subordinate Judge of Mirzapur, dated the 11th of July, 1914, confirming a decree of *Shibendra Nath Banerji*, Munsif of Mirzapur, dated the 13th of February, 1914.

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

stated that on the 18th of June, 1913, he had expressed his readiness to redeem the property and offered to pay the mortgage money to the defendants, but the latter declined to allow redemption. In paragraph 6 of the plaint he stated that the cause of action had accrued to him on the 18th of June, 1913, the date of the mortgagee's refusal. The courts below have found as a fact that the plaintiff had not made any tender of the mortgage money at any time to the mortgagees, but in spite of that they proceeded to give the plaintiff a decree allowing redemption of the mortgaged property in the month of *Jeth* following the date of the decree. The defendants have appealed, and the plea raised on their behalf is that in view of the fact that the plaintiff had at no time offered to pay the mortgage debt prior to the institution of the suit he had no cause of action and the suit ought to have been dismissed. Reliance is placed on the ruling in *Bansi v. Girdhari Lal* (1). The two cases are parallel. In that case, as in the present, there was an agricultural mortgage and the parties had laid it down in clear terms that the mortgage was redeemable only in the month of *Jeth*. It is unnecessary to give the reasons why such a term is entered in this class of mortgage. Section 60 of the Transfer of Property Act lays down what a right of redemption is. It clearly shows that the right to recover possession does not arise until the mortgagor has at the proper time and place paid or tendered the mortgage money. It is contended that this section was not in force at the date of the mortgage, and that the principles of justice, equity and good conscience should be employed for the decision of this case. This would seem to be an argument that section 60 of the Transfer of Property Act is not based on principles of justice, equity and good conscience. It clearly is based on such principles, and it seems even as a matter of business or common sense that a mortgagor has no right to institute a suit for redemption, unless and until he has tendered to the mortgagee the debt due to the latter, or at least the amount which he considers to be due to the latter. The point before us is clearly covered by the decision in *Bansi v. Girdhar Lal* (1), which was subsequently followed by this Court in *Hafiz Muhammad Abdul Rahim v. Lala Tulshi Prasad* (2). The facts of both these cases

1915

 MUHAMMAD
 ALI
 v.
 BALDEO
 PANDE.

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

(2) S. A. No. 1721 of 1903, decided on the 22nd of June, 1905.

1915

MUHAMMAD
ALI
v.
BALDRO
PANDE.

are like those of the present case. It is clear, therefore, that the plaintiff's suit was brought without any cause of action and ought to have been dismissed. We, therefore, allow this appeal, set aside the decrees of both the courts below and dismiss the plaintiff's suit with costs in all courts.

Appeal allowed.

FULL BENCH.

1915
December, 22.

*Before Sir Henry Richards, Knight, Chief Justice, Mr. Justice Tudtall and
Mr. Justice Muhammad Rafiq.*

NURI MIAH (DEPENDANT) v. THE GANGES SUGAR WORKS, LIMITED,
CAWNPORE (PLAINTIFF).*

*Civil Procedure Code (1908), section 109, clause (a); order XLI, rule 23—
Appeal to His Majesty in Council—"Final order"—Order of remand which
decided finally only one issue out of several.*

*Held, that an order of remand made by the High Court which decided
finally only one issue out of several which were raised by the proceedings before
the court of first instance, which were proceedings under rule 17 of the
second schedule to the Code of Civil Procedure, was not a "final order" within
the meaning of section 109, clause (a) of the Code.*

THE facts of this case were as follows:—

The Ganges Sugar Works Company made an application, under schedule II, article 17, of the Code of Civil Procedure, to file an alleged contract to submit to arbitration. The court of first instance dismissed the application on the sole ground that the agreement, not being under the seal of the company, was invalid. No evidence was recorded. There were several other objections to the agreement, *e g.*, fraud, vagueness, misrepresentation, etc. The High Court reversed the decree of the court below and remanded the case for trial of the other issues under order XLI, rule 23, of the Code of Civil Procedure. After the remand the court below tried the case and decided against the objector. An appeal from that decree is pending in the High Court. The objector filed an application for leave to appeal to His Majesty in Council from the order of remand.

Dr. S. M. Sulaiman, for the applicants, submitted that the order of this Court was a "final order" within the meaning of clause (a) of section 109 of the Code of Civil Procedure. He

* Privy Council Appeal No. 12 of 1915.