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FAZAL ILAHI  
v.  
EAST INDIAN  
RAILWAY  
COMPANY.

BY THE COURT.—The appeal is decreed in part, the appellant being allowed Rs. 400 for the cost of his goods, Rs. 100 damages, Rs. 3-8-0 railway freight, Rs. 1-12-6 expenses of despatching telegram and As. 3-6, the costs of registering notice, making a total of Rs. 505-8. We also award him full costs in all courts as we do not consider that the Railway Company have met him in a fair way over this matter. He will thus get Rs. 505-8-0 and his full costs of the trial court, together with interest at 6 per cent. per annum on both sums from the date of the institution of the suit to the date of realization; full costs of the lower appellate court with interest at 6 per cent. per annum from the date of the institution of the appeal in the lower appellate court to the date of realization, and full costs of this Court with interest at 6 per cent. per annum from the date of the institution of this appeal to the date of realization.

*Appeal decreed.*

## FULL BENCH.

*Before Justice Sir Pramada Charan Banerji, Mr. Justice Tudball  
and Mr. Justice Stuart.*

RAGHUNANDAN RAI (PLAINTIFF) v. RAGHUNANDAN PANDE  
AND OTHERS (DEFENDANTS)\*

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May, 6.

*Act No. IV of 1882 (Transfer of Property Act), section 60—Mortgage—Suit for redemption—Tender of mortgage money not a condition precedent—Usufructuary mortgagee planting trees—"Improvement".*

It is not necessary that a mortgagor who wishes to redeem should make a tender or payment of the money due on the mortgage before instituting a suit for redemption.

All that section 60 of the Transfer of Property Act, 1882, provides is what constitutes the right of redemption, and there is nothing in the section which requires that a tender of the mortgage money should be made as a condition precedent to the institution of a suit for redemption.

The planting of trees on the mortgaged property by a mortgagee in possession is not such an improvement as entitles him to claim compensation from the mortgagor, but he is entitled to cut down and remove those trees.

**THE facts of the case are fully set out in the judgment.**

\* Second Appeal No. 198 of 1919 from a decree of Jogindra Nath Chaudhri, Additional Subordinate Judge of Ghazipur, dated the 14th of December, 1918, reversing a decree of Ramugrah Lal, Munsif of Pallia, dated the 22nd of January, 1918.

The point of law involved in this appeal was whether a tender before the institution of the suit was an essential condition precedent for a suit for redemption.

Dr. *M. L. Agarwala*, for the appellant, contended that section 60 of the Transfer of Property Act drew a distinction between a suit for redemption and actual redemption. No actual redemption could take place unless payment of the mortgage-debt had been made, but there was nothing to prevent a person from bringing a suit for redemption simply because he had not made any tender. This principle applied with still greater force to the present case. Here the appellant came with the allegation that nothing was due from him, but the lower court found that a certain sum of money was due. Under such circumstances it was impossible for the appellant to make any tender before bringing the present suit.

The following cases were reviewed by the appellant:—*Narsingh Singh v. Achhaibar Singh* (1), *Muhammad Ali v. Baldeo Pande* (2), *Mewa Ram Singh v. Ganga Ram* (3) and *Muhammad Mushtaq Ali Khan v. Banke Lal* (4).

He relied on I. L. R., 43 All., 95, where all these cases have been reviewed. He further contended that here complicated questions of accounts were involved, and this being so, it was not possible for the appellant to know what amount he was to tender. Hence his suit for redemption could not be thrown out on the sole ground of his not making any tender.

Munshi *Haribans Sahai*, for the respondents, in support of the contention that section 60 of the Transfer of Property Act imposed an essential condition precedent which must be fulfilled before a property could be redeemed, relied on *Bansi v. Girdhari Lal* (5), *Muhammad Ali v. Baldeo Pande* (6) and *Muhammad Mushtaq Ali Khan v. Banke Lal* (4).

Gour: Law of Transfer, Vol II (4th Edn., § 1352, p. 900) was also referred to.

BANERJI, TUDBALL and STUART, JJ. :—This appeal arises out of a suit for the redemption of a mortgage made on the 20th of

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(1) (1913) I. L. R., 36 All., 36; (4) (1920) I. L. R., 42 All., 420.

(2) (1916) I. L. R., 38 All., 148. (5) Weekly Notes, 1894, p. 143.

(3) (1919) 17 A. L. J., 910. (6) (1916) I. L. R., 38 All., 148 (149).

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December, 1865. It was a usufructuary mortgage and it provided that the usufruct should be appropriated in lieu of interest, and that the principal amount secured, viz., Rs. 375, would be paid on the last day of Jeth, 1280 Fasli (1873).

The plaintiff instituted the present suit on the allegation that the defendant had cut down trees existing on the mortgaged property, that the value of the trees cut down by him exceeded the amount of the mortgage, that the mortgage had thus been discharged and that a further sum was payable to him by the defendant. He accordingly claimed possession of the mortgaged property and the further sum which he alleged to be due to him. In the alternative he prayed that should the court find any sum to be due by him a decree for redemption should be made conditional upon his paying that sum to the defendant.

The suit was resisted on various grounds. It was denied that any trees existing on the land which belonged to the mortgagor had been cut down, but it was asserted that the trees cut down were the trees of a grove planted by the mortgagee after the mortgage. It was also alleged that there was a subsequent mortgage effected in 1886 by the mother and guardian of the plaintiff, and that under that mortgage a large sum was due to the mortgagee and the payment of this sum was a condition upon the performance of which redemption could take place. A further plea was raised to the effect that under a contract between the plaintiff and the defendant the defendant had planted trees and that when redemption took place compensation should be made for the value of the trees.

The court of first instance found the plaintiff's allegation as to the cutting down of trees existing on the mortgaged property at the time of the mortgage was untrue. It found that the trees cut down had been planted by the mortgagee and that he was competent to cut them down. On the other questions raised that court decided mainly against the defendant and it made a decree for redemption conditional upon the payment of Rs. 375, the principal amount of the mortgage.

Upon appeal by the defendant the lower appellate court came to the same conclusion as the court of first instance in regard to the cutting down of the trees; but it held that as some mortgage

money was still due to the defendant and that the aforesaid sum had not been tendered or paid before the suit was instituted, the suit could not be maintained, and it dismissed it without trying the other questions which arose in the case.

From this decision of the lower appellate court the plaintiff has preferred this appeal.

The question which we have to decide is whether tender or payment of the mortgage money is a condition precedent to the institution of a suit for redemption of a mortgage. On this point the rulings of this Court are not in harmony. Of the numerous cases decided on the point the following have been cited to us:—

*Narsingh Singh v. Achhaibar Singh* (1), *Muhammad Ali v. Baldeo Pande* (2), *Muhammad Mushtaq Ali Khan v. Banke Lal* (3), *Het Singh v. Behari Lal* (4) and *Bansi v. Girdhari Lal* (5). Whilst in some of these cases it has been held that previous tender or payment is essential, the opposite view has been taken in others.

We do not deem it necessary to consider these rulings in detail. We think that for the purpose of determining the question which we have to decide in this case we must look to the provisions of section 60 of the Transfer of Property Act. That section declares that the right to redeem is the right to require the mortgagee to give up the mortgaged property and the mortgage deed upon tender or payment of the mortgage money when the time for payment of the mortgage money has arrived; and a suit to enforce this right is declared to be a suit for redemption. The section only defines "a right to redeem" and provides that it is a right to require the defendant to surrender the mortgage deed and, where the mortgagee is in possession, to give up possession of the mortgaged property, and this right can be enforced if after the time for redemption has arrived the mortgage money has been tendered or paid. The section does not lay down the conditions upon which a suit for redemption can be instituted. In some of the rulings to which we have referred above, the provisions of the section do not

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(1) (1913) I. L. R., 36 All., 36. (3) (1920) I. L. R., 42 All., 420.

(2) (1915) I. L. R., 33 All., 143. (4) (1920) I. L. R., 43 All., 95.

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

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appear to have been considered from this point of view, and the distinction between a right to redeem and a right to bring a suit for redemption does not appear to have been observed. All that section 60 provides, therefore, is what constitutes the right of redemption and there is nothing in the section which requires that a tender of the mortgage money should be made as a condition precedent to the institution of a suit for redemption. This would in many cases be impossible, for instance if a plaintiff says that the mortgage was discharged from the usufruct and the defendant, the mortgagee, asserts that a large sum is still due to him, it is impossible for the plaintiff to tender to the defendant any particular sum, unless an account of the mortgage has already been taken. This single instance shows that the tender of the mortgage money cannot be a condition precedent to the institution of a suit for redemption. In the suits in which the plaintiff alleges, as he does in the present case, that the mortgage has been discharged, the question will be whether the plaintiff's allegation is true or whether any particular sum is still due to the mortgagee. If the court finds that some money is due to the mortgagee the court will, under the provisions of order XXXIV of the Code of Civil Procedure, make a decree for redemption subject to the payment of the money so found due on or before a particular date. The mortgagor will then be bound to pay the mortgage money on or before that date, or to tender it into court; and if he does so he becomes entitled to redeem the mortgage and take possession of the mortgaged property if he is not already in possession. What section 60 requires is that without payment or tender of the amount due upon the mortgage, the mortgagor will not be entitled to redeem, and for this purpose it is not necessary that a tender of the mortgage money should have been made before the institution of the suit. In our opinion a suit may be brought for redemption of a mortgage without tendering the mortgage money to the mortgagee, but redemption will not be allowed unless the amount declared by the decree to be due to the mortgagee be paid or tendered on or before the date fixed by the court in its decree.

In this view, the court below was wrong in dismissing the suit on the ground that a tender of the mortgage money, or such

portion of it as was due, had not been made, and its decision on the point must be set aside.

Instead of remanding the case to the court below we have thought it proper to consider the other points which arose in the case. The first is the amount of the mortgage of 1886 alleged to have been made by the plaintiff's mother during his minority in favour of the mortgagee. That mortgage was for a sum of Rs. 1,999 of which Rs. 95 was alleged to have been received in cash. The court of first instance stated in its judgment that no evidence had been produced to prove that there was any necessity for borrowing this Rs. 95 and the learned vakil for the respondent has not been able to draw our attention to any credible evidence upon the point.

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Therefore the court of first instance was justified in refusing to give effect to that mortgage.

The only other point is the planting of a grove by the mortgagee. It has been found, and it is not disputed, that trees have been planted. In the written statement reliance was placed upon an alleged contract between the parties. That was found against the defendant. In the appeal which the defendant preferred to the lower court he did not rely on the contract, but his contention was two-fold; he urged that the planting of the trees was an improvement to the mortgaged property and that for that improvement the defendant was entitled to be compensated. His other contention was that he should be allowed to cut down the trees and remove them and that the plaintiff should not have the benefit of the trees. We do not think that the planting of these trees could be deemed to be an improvement of such a nature as to entitle the defendant to claim compensation from the plaintiff, but he has certainly the right to take away the trees and the plaintiff cannot benefit by the trees which have been planted by the defendant. The defendant will be entitled to remove the trees as prayed for by him in his memorandum of appeal to the lower appellate court.

The result is that the appeal is allowed, the decree of the court below is set aside and a decree is granted in favour of the plaintiff for redemption of the property claimed, on payment of

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Rs. 375 within three months from this date, subject to the condition that the detendant will be entitled to remove the trees planted by him within three months from the date of the payment of the mortgage money. The plaintiff will get his costs in all courts.

*Appeal allowed.*

## REVISIONAL CRIMINAL.

*Before Mr. Justice Walsh.*

EMPEROR v. KASHMIRI LAL.\*

1921  
May, 12.

*Act (Local) No II of 1916 (United Provinces Municipalities Act), sections 267 (b), 318, 321.—Notice to construct a cesspool—Appeal—Prosecution for failure to comply—Power of trying court to question reasonableness of Board's order on the merits—Procedure in case of continuing breach indicated.*

No appeal will lie from a notice legally issued under section 267 (b) of the United Provinces Municipalities Act, 1916, requiring the owner of premises to construct a cesspool.

The effect of section 321, read with section 318 of the United Provinces Municipalities Act, 1916, is that certain orders, directions or requirements of a Municipal Board or of the Committee of a notified area only can be called in question as regards their reasonableness or practicability, but the legality of any such orders, directions or requirements can be questioned in any court in which penal proceedings are brought in respect of any alleged breach for non-compliance therewith.

*Emperor v. Ram Dayal (1), Municipal Board of Etawah v. Debi Prasad (2), Ram Pratab Marwari v. Emperor (3) and Emperor v. Mannu (4) referred to.*

An order imposing a daily fine in respect of future breaches is *ultra vires*. If the offender persists in continuing the the breach after the first conviction, the fact has to be proved in a second and substantive proceeding brought against him in respect of the subsequent breaches.

In such cases of continued breach of an order passed by the Municipality in respect of an urgent matter affecting public health or sanitation it is desirable for the Municipality to exercise its power of having the necessary work done at the expense of the person who was ordered to do it.

THIS was reference made by the District Magistrate of Meerut in a prosecution arising out of notice issued under section 267 (b) of the United Provinces Municipalities Act, 1916. The facts of the case are fully stated in the judgment of the Court.

\* Criminal Reference No 262 of 1921.

(1) (1910) I. L. R., 33 All., 147. (3) (1920) 18 A. L. J., 229.  
(2) (1920) I. L. R., 42 All., 435. (4) (1920) I. L. R., 42 All., 295.