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by the court or counsel on either side, specially when the question is on a point which is relevant to the case. It would be too much to ask of an ordinary layman that he should know all the terms of section 132 of the Indian Evidence Act and that he should be prepared to protest against every question put to him in order to protect himself under that section. I think, if a common sense meaning be given to the word "compelled" in section 132, it is clear that in the present case these five persons were compelled to answer. They were under the direct compulsion of the law and of the court and in my opinion they were protected by that section.

As regards the second point, the learned Sessions Judge remarks that "it follows that these defamatory statements being similar to one another must have been made in concert and as the result of conspiracy. That being so the joint trial appears to me to be proper." Excepting the similarity of the statements and the fact that the court of first instance has, on a somewhat flimsy ground, held them to be untrue, there is nothing else to indicate conspiracy. If it had been necessary I should have been compelled to send the case back for retrial of the accused separately. However, no order on this point is necessary as in my opinion they are protected by the law as laid down under section 132 of the Indian Evidence Act and they cannot be convicted of defamation. I, therefore, allow this application, set aside the convictions and sentences and direct that the fines, if paid, be refunded.

Conviction set aside.

APPELLATE CIVIL.

Before Mr. Justice Sulaiman and Mr. Justice Kanhaiya Lal.
 HET SINGH (PLAINTIFF) v. BIHARI LAL AND OTHERS (DEPENDANTS).
Act No. IV of 1882 (Transfer of Property Act), section 60—Mortgage—Redemption—Tender of mortgage-money as a condition precedent to suit for redemption.

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 June, 29.

Section 60 of the Transfer of Property Act, 1882, does not necessarily mean that before a suit for redemption can be instituted the amount due on

* Second Appeal No. 1393 of 1917, from a decree of D. R. Lyle, District Judge of Agra, dated the 6th of August, 1917, reversing a decree of Kalka Singh, Subordinate Judge of Agra, dated the 21st of February, 1917.

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the mortgage must be paid or tendered, and this would obviously be impossible when, the mortgage being usufructuary, the plaintiff's case is that the debt has been liquidated by the profits of the property mortgaged.

Bansi v. Girdhar Lal (1), *Narsingh Singh v. Achhastar Singh* (2), *Muhammad Ali v. Baldeo Pandé* (3), *Mewa Ram Singh v. Ganga Ram* (4) and *Muhammad Mushtaq Ali Khan v. Banké Lal* (5) referred to.

THE facts of this case are fully stated in the judgment of the Court.

Mr. M. L. Agarwala and Munshi Baleshwari Prasad, for the appellant.

Mr. T. A. Bradley, Dr. Surendra Nath Sen and the Hon'ble Munshi Narain Prasad Ashthana, for the respondents.

SULAIMAN and KANHAIYA LAL, JJ.:—This is a plaintiff's appeal arising out of a suit for redemption. It appears that on the 17th of November, 1360, one Pirthi Singh made a mortgage of the property in dispute in this case in favour of one Nand Kishore and Gulab Singh. The mortgage deed provided that the mortgagee was to remain in possession and was to pay Rs. 40 a year to the mortgagor and appropriate the balance of the profits in lieu of interest. The mortgage was not to be redeemed within 25 years. Subsequent to this Pirthi Singh died and two of his sons and his widow, acting as guardian of his third minor son, executed a fresh mortgage deed of the whole property in favour of defendants 1 to 7, under which the previous mortgage deed was redeemed and it was provided that instead of Rs. 40 a year only Rs. 25 should be paid to the mortgagor and the balance of the profits was to be appropriated by the mortgagee. On the 29th of March, 1886, Ishri, the minor son, having attained majority, transferred to the present plaintiff his one-third share in the property previously mortgaged. The plaintiff sued for redemption, alleging that the mortgage deed of 1880 was not binding on him, that the whole of the mortgage money had been satisfied out of the usufruct of the mortgaged property; that he was entitled to recover possession of the property without payment of any amount, and that in fact he was entitled to Rs. 475 as mesne profits. In the

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

(3) (1915) 14 J. L. J., 56.

(2) (1913) I. L. R., 55 All., 33.

(4) (1919) 17 A. L. J., 910.

(5) (1920) I. L. R., 42 All., 420.

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alternative the plaintiff said that, if the court held the mortgage of the 23rd of November, 1880, to be binding on the plaintiff, he should be given a decree for redemption of the mortgaged property on payment of the amount due from him. In paragraph 8 of the plaint the plaintiff based his cause of action on the date of the denial made by the defendants mortgagees. Various pleas were taken in the written statement, one of which was to the effect that there having been no tender of the amount due on the mortgage before the suit, the suit was premature and not maintainable. The learned Subordinate Judge who tried the case ultimately decreed the suit directing that the amount of Rs. 1,689.14, found to be due from the plaintiff to the defendants should be deposited in court by the end of *Baisakh* following and that the plaintiff would be entitled to take possession in the next *Jeth*. The defendants appealed to the District Judge. The District Judge has allowed the appeal and dismissed the suit on the sole ground that, there having been no previous tender of the mortgage money due by the plaintiff before the institution of the suit, the suit was premature. He has not disposed of any other points raised in the appeal. The plaintiff comes up in second appeal to this Court and on his behalf it is contended that the view of the learned District Judge is not correct.

The right of the mortgagor to redeem is recognized by section 60 of the Transfer of Property Act. It says:—"At any time after the principal money has become payable the mortgagor has a right on payment or tender at a proper time and place of the mortgage money to require the mortgagee to deliver the mortgage deed, etc." As we read the section, all that it means is that there is an inherent right in the mortgagor to require the mortgagee to deliver the mortgage deed, etc., when the mortgagor pays the amount due at a proper time and place. It does not necessarily mean that before a suit for redemption can be instituted the amount must be paid or tendered. In other words, his right to claim redemption on payment of the mortgage money exists, although he has not yet made any tender, provided the mortgage money has

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become payable. Where the mortgage money is stated to have been satisfied out of the usufruct, a tender would obviously be out of question. In the case of *Bansi v. Girdhar Lal* (1), which is the earliest case on the point, it was held that in the case of a mortgage deed of an agricultural land in which there was a condition that there would be no redemption without a payment in the month of *Jeth*, the plaintiff having failed to prove any offer or tender in the month of *Jeth* had failed to show that he had a cause of action to bring his suit for redemption. In a subsequent case, that of *Narsingh Singh v. Achhaibar Singh* (2), a Division Bench of this Court held that in spite of a provision in the mortgage deed that the mortgage was redeemable in *Jeth* the conditional decree passed by the District Judge to the effect that on payment of the mortgage debt possession was to be given to the plaintiff in *Jeth* following was a proper decree in the case. The Bench distinguished the case of *Bansi v. Girdhar Lal* (1) by saying that in that case the plaintiff had failed to prove that he had made any offer or tender at any time before the suit, whereas in the case under consideration "the plaintiffs did make a tender of the amount they believed to be due under the mortgage of which they had purchased the equity of redemption." In the subsequent case of *Muhammad Ali v. Baldeo Pande* (3), on which great reliance is placed by the learned advocate for the respondents, a Division Bench of this Court, following the case of *Bansi v. Girdhar Lal* (1), on second appeal dismissed the plaintiff's suit for redemption on the ground that a tender of the mortgage money had not been made previous to the suit. It was there laid down that section 60 of the Transfer of Property Act clearly shows "that the right to recover possession does not arise until the mortgagor has at proper time and place paid or tendered the mortgage money." The learned Judge went on to say that this rule is based on principles of justice, equity and good conscience and "It seems even as a matter of business or common sense that a

(1) Weekly Notes, 1894, p. 143. (2) (1913) I. L. R., 36 All., 86.

(3) (1915) 14 A. L. J., 55.

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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 case of *Mewa Ram Singh v. Ganga Ram* (1) is very similar to the present case. In that case the mortgage deed provided that there should be redemption only in the month of *Jeth*. No tender, however, had been made by the mortgagor before the institution of the suit, but the plaintiff came into court on the allegation that the mortgage had been satisfied by the usufruct of the property long before the suit. It was, however, found that the amount of the mortgage deed had not been satisfied and that some amount was actually due from the plaintiff. A Division Bench of this Court held that the suit could not be dismissed on the mere ground that there had been no previous tender, because the plaintiff's case had been that the mortgage deed had been satisfied out of the usufruct of the property before the suit. The latest case is that of *Muhammad Mushtaq Ali Khan v. Banke Lal* (2). In that case the mortgagors admitted that a sum of Rs. 17,000 was still due from them. They had sent a notice to the mortgagees before the suit offering to pay that amount and asking for redemption; but the mortgagees sent no reply. There had, however, been no actual tender of the amount which the mortgagors themselves admitted to be due. The learned Subordinate Judge held that inasmuch as the mortgagors themselves admitted that a sum of Rs. 17,000 was due from them it was necessary for them to make the tender before bringing a suit for redemption. The High Court on appeal confirmed the decree of the learned Subordinate Judge.

In the present case, however, the plaintiff's case was that the second mortgage deed of 1880 was not binding on him; that the amount due under the mortgage deed of 1860 had been paid out of the usufruct of the property, and that, therefore, he was entitled to a decree for possession of the property without payment of any amount at all. That being his case, it is difficult to see how he could have made a tender of any

(1) (1919) 17 A. L. J., 910.

(2) (1920) I. L. R., 42 All., 420.

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amount at all. The plaintiff considered that no amount was due from him, and, therefore, even if the rule of law were that he must tender to the mortgagee the debt due to the latter, "or at least the amount which he considers to be due to the latter," it is clear that the suit cannot fail on this technical ground. In a case where complicated questions of settlement of account arise, it is very difficult to see how a mortgagor can beforehand fix upon an exact sum which would be payable by him. If he tenders an amount in excess of the amount actually due he suffers loss, and he cannot tender the exact amount unless that amount has been ascertained. There may be disputes between the mortgagor and the mortgagee as to the actual amount due, and, if the law were to require a previous tender, in many cases mortgagors may find it impossible to redeem their mortgages. Again, if it be conceded that a mortgagor is bound to tender only the amount which he considers to be due to the mortgagee, then it would enable the mortgagor to tender a grossly insufficient amount alleging that he considered that to be the amount due. This would facilitate an easy evasion of the rule. In the absence of any authority to the contrary, we would have been disposed to hold that there are three remedies open to the mortgagor.

(1) He may either deposit money under section 83 and claim redemption in that way, or

(2) He may tender the amount privately to the mortgagee and recover the mortgaged property from him, and

(3) He may institute a suit for redemption and ask the court to pass a decree in his favour for possession of the property on condition of his depositing in court the amount found to be due at a time fixed by the court.

He can avail himself of any of these three remedies, and it is difficult to see why the mortgagor should be compelled to resort to any particular one of these. Of course, where there has been a previous legal tender of the mortgage money interest ceases to run from the date of the tender and the mortgagor is also entitled to the profits. Whereas, in the absence of any tender, a mortgagee can claim interest or profits as well as costs.

However, in the present case, as we have already remarked, the plaintiff's case was that no amount was due from him at

all. He could not, therefore, have made any tender. He, however, did, in the alternative, offer to pay the amount which the court might find to be due. In our opinion, therefore, the view taken by the learned District Judge under the circumstances of this case was not correct. The suit cannot be dismissed on the mere ground that it was premature. There is in fact nothing to prevent the court from passing a decree that on payment of the amount due by the plaintiff he should get possession of the mortgaged property in the next *Jeth*. We may also note that the plaintiff's case was that he actually demanded accounts and surplus mesne profits. If he had made such a demand in *Jeth* and the demand had been refused that may also give him a cause of action for his suit for accounts. We, accordingly, allow the appeal, set aside the decree of the court below and remand the case for disposal of the remaining issues according to law. The appellant will get costs of this appeal.

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Appeal decreed.

REVISIONAL CIVIL.

Before Mr. Justice Sulaiman and Mr. Justice Kanhaiya Lal.

BASDEO MAL, GOBIND PRASAD (DEPENDANTS) v. KANHAIYA LAL,
LACHMI NARAIN (PLAINTIFFS).*

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June, 30.

Private arbitrator not making his award within time—Notice issued to show cause why he should not be proceeded against for contempt of court.

Semble that a court has no authority to compel a private arbitrator to arbitrate against his own will, as by issuing a notice to him to submit his award by a certain date or to explain or show cause why he should not be charged with contempt of court. *Shib Charan v. Rati Ram* (1) referred to.

THE facts of the case are fully set forth in the judgment.

Dr. *Surendra Nath Sen*, for the opposite party, raised a preliminary objection that no question of jurisdiction being involved in the case, no revision lay under section 115 of the Code of Civil Procedure. He relied on *Balkrishna Udayar v. Vasudeva Ayyar* (2), *Ghulam Khan v. Mohammad Hasan* (3) and *Fazl Rab v. Manzur Ahmad* (4).

* Civil Revision No. 118 of 1919.

(1) (1884) I. L. R., 7 All., 20. (3) (1901) I. L. R., 29 Calc., 167.

(2) (1917) I. L. R., 40 Mad., 793. (4) (1918) L. L. R., 40 All., 425.