

PRIVY COUNCIL.

MUHAMMAD SHER KHAN (APPELLANT) v. RAJA SETH SWAMI
DAYAL (RESPONDENT).

*P. O.
1921
December, 9.

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

Mortgage—Right to redeem—Deed excluding right—Anomalous mortgage—Statutory right—Transfer of Property Act (IV of 1882), sections 60, 68.

Immovable property was mortgaged by deed for five years to secure a debt. The deed provided that the mortgagor was to redeem at the end of the five years, and that if he did not do so the mortgagee was to have the option of taking possession for a period of twelve years. If the mortgagee took possession, it was provided that during the period of twelve years the mortgagor was not to be entitled to redeem, but that at its conclusion he was to do so. The mortgage debt not being repaid at the end of five years, the mortgagee took possession: in the same year the mortgagor sued to redeem.

Held that the mortgagor had by section 60 of the Transfer of Property Act, 1882, a statutory right to redeem, whether or not the mortgage was one in which by section 98 the rights and liabilities of the parties were to be determined by their contract.

Judgment of the Court of the Judicial Commissioner reversed.

CONSOLIDATED Appeals (No. 6 of 1921) by special leave from two judgments and decrees (February 9, 1915, and June 19, 1918) of the Court of the Judicial Commissioner affirming two decrees of the Subordinate Judge of Kheri.

The question for determination in the appeals was whether the appellant, the mortgagor under a deed, dated the 9th day of June, 1908, had a right to redeem having regard to the terms of the deed, which excluded the right at the time when it was sought to be exercised.

The terms of the mortgage and the material facts appear from the judgment of the Judicial Committee.

The Subordinate Judge, and on appeal the Court of the Judicial Commissioner, had held that, having regard to the terms of the mortgage deed, the mortgagor had not a right to redeem during the period of twelve years if the mortgagee had elected to go into possession for that period.

1921, November 10th. — *Upjohn, K. C.*, and *Dube* for the appellant.—The mortgage was a simple mortgage and was not an anomalous mortgage to which section 98 of the Transfer of

* Present :—Lord BUCKMASTER, Sir JOHN EDGE, Mr. AMEER ALI, and Sir LAWRENCE JENKINS.

1921

MUHAMMAD
SHEER KHAN
v.
RAJA SETH
SWAMI
DAYAL.

Property Act, 1882, applied. But whether it was so or not, the mortgagor had a right to redeem under section 60 of that Act. Any provision to the contrary in the deed was a clog on the equity of redemption; it could not take away the statutory right given by section 60. Reference was made to *Lingam Krishna Bhupati v. Maharaja of Vizianagram*, (1).

De Gruyther, K. C., and *Parikh* for the respondent.—This was an anomalous mortgage to which section 98 of the Transfer of Property Act applied. The rights of the parties are governed by the express terms of the contract as appearing in the deed; these terms clearly excluded the right to redeem in the circumstances in which the suit was brought.

Upjohn, K. C. replied.

December 9th.—The judgment of their Lordships was delivered by Sir LAWRENCE JENKINS.

These are consolidated appeals preferred by special leave of His Majesty in Council from two decrees, dated the 9th day of February, 1915, and the 19th day of June, 1918, of the Court of the Judicial Commissioner of Oudh, which affirmed two decrees passed by the Subordinate Judge of Kheri on the 7th day of September, 1914, and the 17th day of April, 1916, in suits No. 234 of 1913 and No. 93 of 1915.

The question for determination is whether Muhammad Sher Khan, the mortgagor and appellant in both appeals has a present right on payment of the mortgage money to redeem the mortgaged property. This has been decided adversely to him in both the lower courts.

The mortgage is dated the 9th day of June, 1908, and is Exhibit A 36 on the record. The sum of Rs. 82,000 is recited to be due, and the mortgagor declares—“Therefore I . . . do hereby mortgage for five years” the immovable property there described. Then follow the terms.

Clause 1 provides for the payment of interest half-yearly at the rate of $9\frac{1}{2}$ annas per cent. per month, for compound interest, in the event of default, and that—

“This system of payment of interest and of compound interest by six-monthly instalments will continue during the stipulated period as well as after that till redemption and payment of the entire amount.”

Clause 2 is in these terms :—

“ After five years at the end of Jeth 1320 Fasli in the fallow season I shall pay at a time and in a lump sum the entire principal, interest and compound interest and redeem the mortgaged property.”

Clause 3 provides :—

“ That if interest for four six-months be not paid in full, or if at the stipulated period, i.e., after five years, I do not get the mortgaged property redeemed on payment of the entire amount of principal, interest and compound interest, then in both cases the mortgagee will have the option either to take possession of the mortgaged property in lieu of the principal for a period of twelve years commencing from the date of entering into possession or to let his interest and compound interest run as usual, in which case I shall not raise the objection to the effect that the mortgagee did not take possession in order to let his interest accumulate—the mortgagee having the option to choose one of the two alternatives.”

Clause 4 deals with mutation of names.

Clause 5 is in these terms :—

“ The mortgagee will remain in possession for twelve years from the date on which he takes possession of the mortgaged property and the mortgagor will not have the right of redemption during the period of twelve years.”

Clause 6 stipulates for the appropriation of produce and profits in lieu of interest, and that during the period of possession neither the mortgagee will have any claim to interest nor the mortgagor to profits, and there will be no accounting as to shortage or surplusage of profits at the time of redemption.

Clause 9 provides :—

“ That on the expiry of twelve years at the end of Jeth, i.e., on Puran-mashi in the fallow season I shall redeem the mortgaged property on payment of principal, interest and compound interest,” and other specified payments.

“ Pending the payment of the entire demands due hereunder the mortgagee will as usual remain in possession and occupation of the mortgaged property in accordance with the above-mentioned conditions.”

Interest fell into arrear, and at the stipulated time the mortgage-money was not paid. Thereupon suit No. 234 of 1913 was instituted by Raja Seth Swami Dayal, the mortgagee, for possession of the mortgaged property under the terms of the mortgage. He was resisted by the mortgagor, who pleaded that he intended to redeem the property.

On the 7th day of September, 1914, the Subordinate Judge decided in favour of the mortgagee, who obtained possession on the 14th day of February, 1915. An appeal was preferred by the mortgagor to the Court of the Judicial Commissioner of Oudh,

1921

MUHAMMAD
SHEER KHAN
v.
RAJA SETH
SWAMI
DAYAL.

1921

MUHAMMAD
HER KHAN
v.
LATA SETH
SWAMI
DAYAL.

but it was dismissed on the 19th day of February, 1915, the Court at the same time declaring that the decree would not affect any right of redemption exercised in the manner provided by law before the delivery of possession. On the 25th day of February, 1915, the mortgagor applied for leave to appeal to His Majesty in Council, but his application was dismissed on the 26th day of April, 1915. On the 18th day of June, 1915, the mortgagor instituted suit No. 93 of 1915 for redemption. It was dismissed in the first Court on the 17th day of April, 1916, and this was affirmed on the 19th day of June, 1918, by the Appeal Court on the ground that the suit was premature. On the 23rd day of August, 1918, the mortgagor applied to the Court of the Judicial Commissioner for leave to appeal to His Majesty in Council, but without success.

Finally, the mortgagor, on an application here, obtained special leave to appeal from the appellate decrees in both suits on the 30th day of May, 1919.

Many questions were raised in the Courts below which have now disappeared, and all that now remains to be determined is whether the present claim to redeem is premature. Mortgages of immovable property are governed by the provisions contained in Chapter IV of the Transfer of Property Act, 1882. In section 58 four kinds of mortgage are described—a simple mortgage, a mortgage by conditional sale, a usufructuary mortgage, and an English mortgage. Section 98, headed "Anomalous Mortgages," contemplates a mortgage that does not fall under any of the four descriptions contained in section 58, and is not a combination of a simple and a usufructuary mortgage or of a mortgage by conditional sale and a usufructuary mortgage. In the case of such a mortgage the rights and liabilities of the parties are to be determined by their contract as evidenced in the mortgage-deed and, so far as such contract does not extend, by local usage.

By section 60 of the Act it is provided that at any time after the principal money has become payable the mortgagor has a right to redeem, and a suit to enforce it is called a suit for redemption.

The contest between the parties to this litigation turns upon whether the mortgagor's right to redeem is suspended by the

provision in the mortgage which purports to entitle the mortgagee to remain in possession for twelve years from the date on which he took possession.

In the argument there has been considerable discussion as to the category to which this mortgage belongs, and more especially as to whether or not it is an anomalous mortgage. But their Lordships do not think it necessary to pursue this inquiry, for, in the view they take, the rights and liabilities of the litigants must depend on the terms of the instrument as controlled by the Transfer of Property Act, for, even if it were an anomalous mortgage, its provisions offend against the statutory right of redemption conferred by section 60, and the provisions of the one section cannot be used to defeat those of another unless it is impossible to effect reconciliation between them. An anomalous mortgage enabling a mortgagee after a lapse of time and in the absence of redemption to enter and take the rents in satisfaction of the interest would be perfectly valid if it did not also hinder an existing right to redeem. But it is this that the present mortgage undoubtedly purports to effect. It is expressly stated to be for five years, and after that period the principal money became payable. This, under section 60 of the Transfer of Property Act, is the event on which the mortgagor had a right on payment of the mortgage-money to redeem.

The section is unqualified in its terms, and contains no saving provision, as other sections do, in favour of contracts to the contrary. Their Lordships, therefore, see no sufficient reason for withholding from the words of the section their full force and effect. In this view the mortgagor's right to redeem must be affirmed, and as both suits are now before the Board there will be no difficulty in passing one decree in both so framed as to give due effect to this right.

Though the appellant has succeeded in these appeals, by his procedure and dilatoriness he must be held responsible for this protracted litigation, and the consequent wasted expense; and to mark their disapproval of his conduct their Lordships will not interfere with the orders as to costs made by the lower courts, nor will they allow him any costs of these appeals.

The decrees of the lower Courts should, therefore, be discharged except so far as they order payment of costs by the mortgagor.

1921

MUHAMMAD
SHER KHAN
v.
RAJA SETH
SWAMI
DAYAL

1921

MUHAMMAD
SHEER KHAN
v.
RAJA SETH
SWAMI
DAYAL.

There should then (in their Lordships' opinion) be one preliminary decree for redemption in both suits in accordance with order XXXIV, rule 7, of the Code of Civil Procedure, 1908. But in taking the accounts the period during which the mortgagee may have been in possession under the decree in suit No. 234 of 1913 should be excluded, for, though the provisions of the mortgage entitling the mortgagee to possession cannot operate to defeat section 60 of the Transfer of Property Act, effect should be given to them so far as they provide that the mortgagee is to appropriate in lieu of interest all the produce Mal and Sewai and profits of the mortgaged villages after payment of the Government revenue. And so, during this period, as in effect provided by the mortgage, neither will the mortgagee be accountable for profits nor the mortgagor for interest.

The decree should further provide that if payment is not made on the fixed day the mortgaged property should be sold.

Their Lordships will humbly advise His Majesty that the case ought to be remitted to the Court of the Judicial Commissioner of Oudh with directions to pass a decree in accordance with the opinion expressed. There will be no order as to the costs of these appeals.

Appeal allowed and cause remanded.

Solicitors for the appellant :—*Barrow, Rogers and Nevill.*

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

APPELLATE CIVIL.

Before Mr. Justice Muhammad Rafiq and Mr. Justice Lindsay.

BHUP KUNWAR AND ANOTHER (PLAINTIFFS) v. BALBIR

SAHAI AND OTHERS (DEFENDANTS). *

Hindu law—Joint Hindu family—Mortgage by father—After-born son's right to question validity—Suit by a son to set aside mortgage—Right of second son born pending suit to question the validity of the mortgage after death of plaintiff—Antecedent debt—Legal necessity.

The father in a joint Hindu family consisting of himself and one son (a minor) executed a mortgage of some of the joint family property. Shortly after the execution of this mortgage, the son, under the guardianship of his uncle, filed a suit for a declaration that this mortgage was not binding on the joint family property, as it had been made without legal necessity.

* First Appeal No. 349 of 1913, from a decree of Muhammad Ali Ausat, Subordinate Judge of Aligarh, dated the 26th of July, 1913.

1921
November, 17.