1932

EMPEROR v. LAKSHMI NARAIN.

duties. If a Magistrate before issuing a notice under section 112 thinks it fit to consult the police in order to form an opinion as to whether or not he should issue such a notice, there is nothing in the Code to prevent him from doing so. It follows, therefore, that, apart from the provisions of section 202 of the Code, a Magistrate proceeding under chapter VIII has the right to call for a report from the police before issuing a notice under section 112. The view that I take is in consonance with the view taken in the case of *Sanjivi Reddy* v. *Koneri Reddi* (1).

The moment a notice is issued under section 112 the Crown has the right to conduct the case against the person called upon to show cause and section 495 of the Code of Criminal Procedure gives discretion to the Magistrate to permit the prosecution to be conducted by any person mentioned in that section. That person may or may not be a police officer. In the present case, therefore, the Magistrate was fully competent to direct the police to adduce evidence in the case.

For the reasons given above I dismiss this application.

APPELLATE CIVIL.

Before Justice Sir Lal Gopal Mukerji and Mr. Justice Bennet.

SHUBRATAN AND ANOTHER (DEFENDANTS) *v.* DHANPAT GADARIYA (PLAINTIFF).*

1932
June, 21.

Transfer of Property Act (IV of 1882), sections 60, 62—Redemption of usufructuary mortgage—Long period fixed—Onerous terms—Contract Act (IX of 1872), section 14—"Clog on the equity of redemption"—Rules of equity contained in English cases are inapplicable where statutory law applies.

A possessory mortgage of a house was made for a period of 60 years for Rs.75. The rent of the premises was taken

*Second Appeal No. 204 of 1931, from a decree of Sarup Narain, Second Additional Subordinate Judge of Gorakhpur, dated the 25th of November, 1930, modifying a decree of S. Z. Rahman, Munsif of Gorakhpur, dated the 23rd of March, 1929.

(1) (1925) I.L.R., 49 Mad., 815.

1932

SHUBRATAN v. DHANPAT GADARIYA.

to be annas 8 per month, and the interest was Re.1-8-0 per month; so that, after deducting the rent, the interest was Re.1 per month, payable after 60 years, at the time of redemption. It was further agreed that the mortgagee was also to be paid, at the time of redemption, any money which he might spend in building or rebuilding the house, with interest thereon at 2 per cent. per mensem. In a suit for redemption, brought within the period of 60 years, the trial court decreed redemption on payment of Rs.2,300, but on appeal the lower appellate court reduced the amount to Rs.711 only, holding that the amount spent by the mortgagee in building was Rs.300 and that as the house could fetch a rent of between Rs.5 and Rs.6 per month the interest on this amount should be set off against the usufruct. *Held*, in second appeal,—

In India there is a codified law of mortgage and it would be improper for the courts in India to ignore that law and to look to English cases as their guide in determining what amounts to a clog on the equity of redemption. Where the statutory law will not help them, it may then be open to them to look to English cases for rules of justice, equity and good conscience.

The mere fact that the term of redemption fixed is a long one is no ground for holding that the agreement is bad and should be relieved against. The courts below were wrong in allowing redemption before the term fixed, but the mortgagee had not appealed on that point.

On the question whether the terms of the mortgage were onerous and unconscionable and the mortgagor should be relieved against them, the law was clearly defined in section 14 and subsequent sections of the Contract Act. There being no allegation or proof that the mortgagor did not enter into the contract with free consent, the contract had to be upheld in its entirety; unless there was any other law applicable to the case, like section 74 of the Contract Act or the Usurious Loans Act, under which relief could be granted. Mere vague grounds of equity would not justify a court in interfering with the terms of a contract. The courts below were not justified in reducing the interest, or in setting off the usufruct against the interest, there being no stipulation to that effect.

Dr. *M. H. Faruqi*, for the appellants.

Mr. *Haribans Sahai*, for the respondent.

1932

SHUBRATAN v. DHANPAT GADARIYA.

MUKERJI and BENNET, JJ. :—This appeal arises out of a suit for redemption instituted by the respondent, Dhanpat gadariya. The mortgage was made by the respondent's father on the 30th of October, 1905, for a term of sixty years in consideration of Rs.75. The mortgagee was one Abdullah weaver, the predecessor in title of the defendants, and the terms were as follows.

The mortgagee was to be in possession of the premises. The rent of the premises was taken to be annas 8 per month. The interest carried by the mortgage money was 2 per cent. per mensem. Thus, after deducting 8 annas per mensem as the rent of the house the mortgagor had to pay Re.1 per mensem at the end of sixty years at the time of the redemption. It was further agreed that the mortgagee would be free to build or rebuild the house and in that case, in the case of redemption, the mortgagor would pay the amount of the money spent over the building or rebuilding, with interest at 2 per cent. per mensem.

The plaintiff alleged in the plaint that the mortgage had been made by his father without legal necessity; that the house was ancestral and that, therefore, he was entitled to redeem the property by removal of the onerous terms. The allegation that the house was ancestral was challenged in the written statement but no issue was framed by the courts below. The first court decreed the suit on condition of payment of Rs.2.300. The plaintiff appealed, but in his memorandum of appeal he did not ask the question of the character of the property to be tried. The lower appellate court came to the conclusion that the redemption should be allowed on payment of Rs.711 only. It held that the cost of the building was Rs.300, but, as the house was capable of fetching a rent of between Rs.5 and Rs.6 per month, the interest would be set off against the usufruct and thus only the principal amount of Rs.300 was to be paid on this head.

The learned counsel for the appellants, that is-to say, the mortgagees, has argued that the courts below were

1932

SHUBRATAN v. DHANPAT GADARIYA.

not entitled to interfere with the terms of the contract, and we think he is right.

This case leads us to consider the law of mortgage with special reference to what is known as the clog on redemption. In England the law of mortgage is essentially different from our law. Cases of mortgage used to come in England under the jurisdiction of the equity courts, and the rules of equity apply to cases of mortgage. Here in India we have got a codified law of mortgage and it would be improper for us in India to ignore the law obtaining in India and to look for the English cases as our guide. Where our statutory law will not help us, it may be open to us to look to the English cases for rules of equity, justice and good conscience, as laid down by their Lordships of the Privy Council in the cases of *Waghela Rajsanji* v. *Shekh Masludin* (1) and *Mehrban Khan* v. *Makhna* (2) and *Muhammad Raza* v. *Abbas Bandi Bibi* (3). In the last mentioned case section 10 of the Transfer of Property Act was applied as embodying a rule of justice and equity and good conscience.

It has been held by their Lordships of the Privy Council that the mere fact that the term of redemption is large is no ground for holding that the agreement is bad and should be relieved against; see *Bakhtawar Begam* v. *Husaini Khanum* (4). The courts below, therefore, were wrong in holding that because the term of redemption was 60 years it was a bad stipulation and the plaintiff was entitled to redeem within the term. The defendants, however, did not appeal and redemption having been decreed, we have only to see on what terms the redemption should be decreed.

The plaintiff stated in the plaint that the stipulations contained in the mortgage deed were unconscionable, and, therefore, not enforceable in a court of law. On this point the law is clearly defined in section 14 and subsequent sections of the Indian Contract Act. Where a

(1) (1887) I.L.R., 11 Bom., 551. (2) (1930) I.L.R., 11 Lah., 251.
(3) (1932) I.L.R., 7 Luck., 257. (4) (1914) I.L.R., 36 All., 195.

contract is not tainted by coercion, undue influence, fraud, misrepresentation or mistake, the contract has to be upheld in its entirety, unless there is any other law under which a relief can be granted to either party. For example, where the contract amounts to a penalty section 74 of the Contract Act provides for relief at the discretion of the court. Again, where the Usurious Loans Act applies, it is open to the court to modify the terms of the contract. But apart from special rules of law, there is nothing to authorise the courts to interfere with the sanctity of contracts. This has been laid down by their Lordships of the Privy Council in numerous cases.

The plaintiff did not allege that his father entered into the mortgage under any mistake of law or was influenced by fraud or there existed any other circumstance which would vitiate the contract. It was open to the plaintiff's father to sell the house outright. If he sold the house outright for Rs.75, the plaintiff could never have asked for redemption. It is, therefore, wrong to say that the terms entered into by the father were onerous and unconscionable and the plaintiff should be relieved against them. If the plaintiff's father knew that he was entering into terms which would make it impossible for him to redeem the property later on or for his descendants to redeem the property at the end of sixty years, it was certainly open to him not to enter into the contract and go to a creditor who could have given him better terms. Thus, under the law of the land, a contract has to be respected and cannot be interfered with except on well known lines. Mere vague grounds of equity will not justify a court in interfering with the terms of a contract. In certain cases the courts in India have followed the English rule which sets aside what it calls "clogs on the equity of redemption". Those rules have to be applied within well defined limits, and what contract may be set aside in England as a mere clog on redemption need not necessarily be set aside having regard to the conditions of the Indian law. Broadly speaking, a stipulation which

1932

SHUBRATAN v. DHANPAT GADARIYA.

gives the mortgagee an advantage which does not arise legitimately out of the mortgage contract is treated as a stipulation to clog the redemption. Thus, where the mortgagee and the mortgagor agree that after redemption the mortgagee would remain in possession of the lands mortgaged as a tenant of the mortgagor with occupancy rights, the stipulation would be set aside as a clog on redemption. The reason is clear. After the mortgage is redeemed, there remains no consideration for the subsidiary contract by which the mortgagee wants to remain in possession. The contract, therefore, fails. The contract is no part of the original contract of mortgage. Similar cases may be cited.

In the case of *Muhammad Sher Khan* v. *Raja Seth Swami Dayal* (1) the stipulation was that there would be a redemption at the end of five years, but, if no redemption was asked for, then it could not be asked for within another twelve years. Their Lordships of the Privy Council said that under section 60 of the Transfer of Property Act a party had an absolute right of redemption after the mortgage money fell due and any stipulation that sought to interfere with that right of the mortgagor was bad in law. The case came under section 23 of the Indian Contract Act and was, therefore, covered by Indian law.

Two cases have been cited before us as showing that rules of equity have been applied by this Court and the stipulations between the parties have been interfered with. One case is that of *Rajai Singh* v. *Randhir Singh* (2). This was a case of mortgage of occupancy holdings. The mortgage itself was bad and, according to the view held in this Court, the redemption is allowed because the mortgagor was entitled to get back his occupancy holdings. But by rules of equity he must pay back what he has received, from the mortgagee. Their Lordships who decided the case pointed out that there were two kinds of

(1) (1921) I.L.R., 44 All., 185. (2) (1925) 87 Indian Cases, 30.

cases; one kept the parties strictly within the terms of the mortgage and the other applied the English rules of equity. Their Lordships say: "That is evident from the way in which matters of this kind are treated in England as exemplified by the case of *Morgan* v. *Jeffreys* (1)." The other case that has been cited before us, and was also cited before their Lordships, was the case of *Sarbdawan Singh* v. *Bijai Singh* (2). Their Lordships pointed out that it bore the influence of English authorities. These two cases may be distinguished, the first on the ground that it was a case of occupancy tenancy and the second on the ground that it was covered by the ruling of their Lordships of the Privy Council in the subsequent case of *Muhammad Sher Khan* v. *Raja Seth Swami Dayal* (3). The case in I. L. R., 36 Allahabad need not have been decided on the grounds of equity. It could have been decided on the terms of section 60 of the Transfer of Property Act on which the Privy Council relied.

There being, therefore, no abstract rules of equity applicable to the present case, the present case being governed by established rules of law made by the legislature, we have to see whether we can cut down the interest or whether we can direct that the usufruct of the house would be set off against the interest payable under the terms of the mortgage.

In our view neither the court of first instance was right in reducing the interest, nor was the lower appellate court right in setting off the usufruct against the interest, there being no stipulation to that effect. The stipulation was that the mortgagee would be entitled to interest on the money laid out by him in building or rebuilding the house.

The lower appellate court has held that Rs.300 were spent in building the house. The appellants, therefore, are entitled to interest on this sum at 2 per cent. per

(1) [1910] 1 Ch., 620. (2) (1914) I.L.R., 36 All., 551.
(3) (1921) I.L.R., 44 All., 185.

1932

SHUBRAIAN v. DHANPAT GADABIYA.

mensem from 1908, when the building was erected, to the date of the decree which we take to be the present date. The interest will be calculated in complete years, as the exact dates are not forthcoming, i.e., for 24 years. The interest will be simple. A decree under order XXXIV, rule 7, of the Code of Civil Procedure will be framed. We allow six months to pay. The decree will stand in other respects. The appellants as mortgagees will have their costs of the litigation throughout. The cross-objections fail and they are dismissed with costs.

REVISIONAL CIVIL.

Before Sir Shah Muhammad Sulaiman, Chief Justice.

1932
June, 21.

BIBI KASTURI AND ANOTHER (PLAINTIFFS) *v.* BALMUKAND (DEFENDANT).*

Provincial Small Cause Courts Act (IX of 1887), sections 23, 25—Order returning a plaint—Revision—"Case decided"—Civil Procedure Code, order VII, rule 10—Provincial Small Cause Courts Act (IX of 1887), sections 17(1), 27—Plaint returned by Small Cause Court—Appeal.

Where a plaint was returned by the Judge of the Small Cause Court, as he considered that the case depended upon the proof or disproof of a title to immovable property, the order returning the plaint was one passed under section 23 of the Provincial Small Cause Courts Act and not under order VII, rule 10, of the Civil Procedure Code. By section 27 of the Act no appeal lay from the order; and the provisions of the Civil Procedure Code could not be invoked for the purpose of an appeal, as by section 17(1) of the Act the Civil Procedure Code was applicable only so far as it was not inconsistent with the provisions of the Act.

If a court of small causes has, in ordering a plaint to be returned, acted grossly wrongly or with material irregularity, for instance where the case does not come under section 23 of the Act and the court arbitrarily returns the plaint, the order can be interfered with in revision under section 25, as the return of the plaint terminates the proceedings in the court of

*Civil Revision No. 102 of 1932.