

in the Court books had been privately made to the applicant, and declared his willingness to satisfy arrears, and prayed that the request for entry on the property might be disallowed. The Court of first instance ruled that no allegation of out-of-Court payments could be listened to; and holding that the judgment-debtor was a confirmed defaulter, directed delivery of possession to the applicant of her share in the estate. In appeal to the Judge limitation was relied on, and it was pleaded that, as the last application for execution was presented more than eleven years ago, the present application was beyond time. The Judge, however, held that such part-payments on account of the allowance created a fresh limitation period, and that the present application was within time, and affirmed the Munsif's order.

It is contended in second appeal that the Judge is mistaken, and that the claim is really barred by limitation. Our sympathies are necessarily with the respondent, but we are of opinion that the appeal must prevail. The provisions of column 3, art. 75, sch. ii, Act XV of 1877, are not applicable to the circumstances of this case; for the claim is not on a promissory note or a bond, and it is an application, not a suit. Art. 179 contains the law which must govern it. And it appears from the registers of the Court of the Munsif of Bansi that the date upon which complete default first occurred (*i.e.*, as regards three over-due instalments) was the 18th January, 1874. That, therefore, was the date upon which the decree became capable of execution for possession. The original application for execution made prior to the one now in question bears date the 9th January, 1868. Clearly, therefore, the respondent's application of the 23rd January, 1880, was statutorily barred, and should have been rejected. The appeal is decreed with costs.

*Appeal allowed.*

*Before Mr. Justice Straight and Mr. Justice Duthoit.*

ALLU KHAN (DEFENDANT) v. ROSHAN KHAN (PLAINTIFF).\*

*Mortgage—Redemption—Tacking.*

The mortgagor of an estate gave the mortgagee four successive bonds for the payment of money in each of which it was stipulated that, if the amount were

\* Second Appeal, No. 1331 of 1881, from a decree of G. F. Knox, Esq., Judge of Banda, dated the 1st October, 1880, modifying a decree of Kazi Wajeh-ulla Khan, Subordinate Judge of Banda, dated the 14th August, 1880.

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not paid on the due date, it should take priority of the amount due under the mortgage, and redemption of the mortgage should not be claimed until it had been satisfied. The representative in title of the mortgagor subsequently sued the mortgagee for possession of such estate on payment merely of the mortgage-money. Held that, although such bonds did not in so many words create charges on such estate, yet inasmuch as it appeared from their terms that it was the intention of the parties that the equity of redemption of such estate should be postponed until the amount of such bonds had been paid, the representative in title of the mortgagor was not entitled to possession of such estate on payment merely of the mortgage-money.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of Duthoit, J.

Babu *Oprokash Chandar Mukarji* and *Munshi Ram Prasad*,  
 for the appellant.

\*The *Senior Government Pleader* (*Lala Juala Prasad*) and *Lala Lalta Prasad*, for the respondent.

The Court (STRAIGHT, J., and DUTHOIT, J.,) delivered the following judgments:—

DUTHOIT, J.—This is an appeal from a decree of the Judge of Banda, modifying a decree of the Subordinate Judge of that district. Omitting matter which is now irrelevant, the facts connected with it may be thus stated:—Bakar Khan had four sons, Pahar Khan, Dilawar Khan, Pahlu Khan, and Maharban Khan. On the 23rd December, 1878, Roshan Khan acquired by private purchase the rights and interests of Pahar Khan, Dilawar Khan, and Pahlu Khan in certain landed estate which had belonged to Bakar Khan. This estate had on various dates been usufructuarily mortgaged by Bakar Khan, by Bakar Khan and his brothers, and by Bakar Khan's sons (vendors to Roshan Khan) to Allu Khan, member of the same family, for sums which amounted in all to Rs. 517; Roshan Khan admitted that a further sum of Rs. 45, borrowed (on a simple bond) by his vendors from the mortgagee, was due from him, which made the total amount due Rs. 562; and, by plaint dated the 31st May, 1880, sued for redemption of the entire estate, on the allegation that although he had, on the 23rd May, 1879, tendered Rs. 562 to the mortgagee, redemption had been refused to him. Allu Khan defended the suit on the ground that no

tender of Rs. 562 had been made to him as stated by the plaintiff, and that, besides the amount of the original mortgage loan, other sums were due to him on bonds as per subjoined detail :—

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Serial letter.	Obligor.	Date of bond.	Consideration	Rate of interest in bond.	Due date.	Amount of bond with interest at time of suit.
			expressed in it.			Rs. a. p.
A.	Bakar Khan himself.	15th September, 1865.	Rs. 49	24 per cent. per annum.	Baisakh, Sambat 1926, or about April, 1866.	241 14 0
B.	Maharban Khan a son of Bakar Khan.	7th October, 1868.	15	Ditto ...	Baisakh, Sambat 1926, or about April, 1869.	56 4 0
C.	Pahar Khan, Dilawar Khan, Pahlu Khan, sons of Bakar Khan, (the vendors to Roshan Khan.)	26th June, 1869.	45	Ditto ..	Aghan Badi 15th, Sambat 1926, or the 3rd December, 1869.	110 8 4
D.	Pahar Khan, Pahlu Khan and Dilawar Khan.	16th July, 1876.	24	Ditto ...	Aghan, Sambat 1933, or about November, 1876.	46 4 4

Each of these bonds was conditioned to the effect that, if the amount of the loan with interest should not be repaid on due date, it should take priority of the mortgage loan, and redemption of the mortgage on the property should not be claimed until it had been satisfied. The Court of first instance found that none of the supplemental bonds constituted a charge upon the estate, and that, this being so, all which the mortgagee was entitled to receive before the redemption was Rs. 562; but it held that as this amount had not been paid into Court, redemption could not be decreed, and on this ground it dismissed the plaintiff's suit. With this decision both parties were dissatisfied. The plaintiff asserted in appeal to the Judge that he had proved tender, on the 23rd May, 1879, of Rs. 562 to the mortgagee, and prayed a decree for redemption. Allu Khan objected to that part of the Subordinate Judge's decision which declared the plaintiff entitled to redemption on payment of Rs. 562 only. The Judge held that tender of the

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Rs. 562 had been sufficiently established; but (mistaking in this respect the tenor of the lower Court's decision) held that the Subordinate Judge had erred in finding that "moneys due under four other bonds must be paid off before appellant could redeem the land," and decided the suit in the following terms:—"The bonds in question are for moneys which according to the bonds fell due (two of them) on the 13th April, 1869, one in 1865, and the fourth in December, 1876: the moneys due under them were all barred by limitation long before the suit was filed—31st May, 1880. The respondents urge, and the lower Court apparently inclines to the view, that the bonds are one and all saved by a clause which exists in each bond: 'And when any one shall redeem the field he must first pay the money due under the bond.' But all the bonds contain a fixed date upon which the money due under them was to fall due, and be paid. With this particular date given, I consider that the words already quoted allude to an earlier alternative date, if they refer to any date for payment at all. But they are not given as an alternative date. They would seem to have been intended as burdens upon the land without payment of the stamp-duty for a formal mortgage-deed. Finding, as the Court does, that the moneys due were all barred by limitation except those due under the bond for Rs. 24, long before any attempt was made to redeem the fields, the Court also finds that respondents had a right to refuse redemption or insist first upon payment of the moneys under the bond for Rs. 24, before giving credit for the moneys due under the mortgage-deed. Seeing, however, that by the time the suit was brought the respondents had by their laches allowed these moneys also to become barred, the Court finds the plea in favour of appellant and decides that his claim should not have been dismissed. This Court therefore decrees the appeal, and directs that the judgment and decree of the lower Court be amended into a decree for his claim but without costs in the lower Court. The costs of the appeal will be borne by respondent."

Allu Khan has appealed to this Court on the ground that the supplemental bonds do create a further charge upon the estate; that if the date of the cause of action be, as alleged by the plaintiff (respondent) and found by the lower appellate Court, the 23rd

May, 1879, none of the bonds is beyond time; and that their conditions are binding on the respondent (plaintiff), who ought not to be allowed to redeem the land without satisfying them. For the respondent it has been argued that the bonds created no charge on the land, but personal obligations only; and that although Allu Khan might, with reference to them, have refused redemption to Bakar Khan, or to Bakar Khan's heirs, he cannot do so to the plaintiff, who is not affected by any obligation of the mortgagors which is not a charge on the land. To me it seems that no question of limitation which deserves serious consideration arises on these pleadings; for the bonds have not been put in suit. They are pleaded merely as a bar to the equity of redemption; and I am clearly of opinion that their terms must now be treated as concurrent with the pledge, and that until they are discharged the equity of redemption is postponed.

Their effect in this respect is, as it seems to me, the true point for consideration. The question is not one of those referred to in the former clause of s. 24, Act VI of 1871; nor is it one which is as yet covered by statute. It is one, therefore, regarding which we have to act "according to justice, equity and good conscience." The case is not one of priority of incumbrance as between a first and subsequent incumbrancer; but it is one between a representative of the mortgagor and a mortgagee, who claims to hold the pledge until certain debts subsequent to that of the original mortgage loan be satisfied.

The Roman Law by a rescript of the Emperor Gordian ("etiam ob chirograph: pecun: pignus teneri posse") allowed a mortgagee to retain the pledge, as against the mortgagor, till all debts due to him were satisfied:—"Si in possessione fueris constitutus, nisi ea quoque pecunia tibi a debitore reddatur vel offeratur quae sine pignore debetur, eam restituere propter exceptionem doli mali non cogeris (1)." And the French law (cl. 2, art. 2082 of the Code Civil) is to the same effect:—"S'il existait de la part du même débiteur, envers le même créancier, une autre dette contractée postérieurement à la mise en gage, et devenue exigible avant le paiement

(1) "Should you have been placed in possession of the property, a plea of fraud will prevent your being compelled to restore it, until that money also which, though not covered by the mortgage, is due to you from the mortgagor, be paid or tendered."

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*de la première dette, le créancier ne pourra être tenu de se dessaisir du gage avant d'être entièrement payé de l'une et de l'autre dette, lors même qu'il n'y aurait eu aucune stipulation pour affecter le gage au paiement de la seconde*" (1). The English law is less favourable to the mortgagee; but even under it (Fisher on the Law of Mortgage, 2nd ed. para. 1215, p. 664) "debts which form a lien on the estate, as debts by mortgage, further charge, judgment, or statute, may be tacked against the mortgagor, his sureties, and all others claiming under him, including mesne incumbrancers; and the reason given is, that the person who took the security, trusted to the hold which he already had on the land." The usage in force in these Provinces was thus formulated by the Court of Sudder Dewanny in 1853, in *Khyratee Ram v. Chenoo* (2):—"It will be found on reference to the printed decisions of the Court, of which a few are cited in the margin, that the practice of tacking bonds of subsequent date to the original mortgage, which is thereby rendered liable for the discharge of the aggregate amount, is far from uncommon, and that it has been fully recognized by the Courts (3)." And in 1860—*Hanuman Fershad v. Sheo Narayan Sookul* (4)—the Court remarked:—"The terms of the bond, which is not disputed, are distinct. The borrower engaged to pay off that sum before liquidating the mortgage loan, or in other words tacked it to the mortgage, which the lower Courts have considered to be discharged by the mere payment of the mortgage loan. The property, therefore, still remains saddled with this liability, and the mortgage has not been redeemed."

The mortgagors and the mortgagee in this case are all of the same family. It is not denied that the mortgages referred to in the supplemental bonds are those which the respondent is now seeking to redeem; and although the bonds are not scientifically drafted, so as to charge the estate in so many words, their terms are such as to leave no doubt in my mind of its having been the intention of the contracting parties that the equity of redemption should be

(1) "If by the same debtor there be due to the same creditor another debt which, although contracted subsequently to the mortgage, has fallen due before the former debt is satisfied, the creditor cannot be compelled to divest himself of the mortgage, until both debts have

been satisfied, even though there may have been no condition charging the property for payment of the latter debt."

(2) 8 S. D. A. N.-W. P. (1853) 726.

(3) at p. 728.

(4) S. D. A. N.-W. P. 1860, p. 122.

postponed till the money advanced under them had been repaid. The lower appellate Court finds this; for the Judge writes:—  
 “They (the bonds) would seem to have been intended as burdens upon the land, without payment of the stamp-duty for a formal mortgage-deed.” The justice of charging the land for payment of the principal sum due under the Rs. 45 bond (bond C) is admitted in the plaint; the lower appellate Court has included that amount in its decree; and the bond for Rs. 24 (bond D) seems to stand on precisely the same footing.

That the respondent, who seeks to redeem the entire mortgage, trusting, of course, to being able to compel the other mortgagors, or their representatives, to contribute in the future, is in no better position as regards the equity of redemption than the mortgagors themselves, seems to be so plain as not to need arguing. “He who seeks equity must do equity;” and it would seem to me unjust and inequitable to set aside in this case the obligation contained in the bonds, and to declare a representative of some of the mortgagors entitled to re-entry on mere payment of the original mortgage-loans. I would decree the appeal with costs.

STRAIGHT, J.—I concur in the order proposed by my honorable colleague.

*Appeal allowed.*

## CIVIL JURISDICTION.

*Before Mr. Justice Straight and Mr. Justice Duthoit.*

HARSARAN SINGH (PLAINTIFF) v. MUHAMMAD RAZA AND OTHERS  
 (DEFENDANTS).\*

*Rejection of application to appeal as a pauper—High Court, powers of revision of—Act X. of 1877 (Civil Procedure Code), ss. 592, 622.*

An application for permission to appeal as a pauper was presented, not by the applicant personally, but by his pleader, and was on that ground rejected. Held, on an application to the High Court for revision, that s. 622 of Act X. of 1877 did not apply to a proceeding of so purely an interlocutory a character as mentioned in s. 592, and such application therefore could not be entertained.

This was an application to the High Court by one Harsaran Singh for the exercise of its powers of revision under s. 622 of Act

\* Application, No 47 of 1881, for revision under s. 622 of Act X of 1877 of an order of M. S. Howell, Esq., Judge of Jaunpur, dated the 28th February, 1881.

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