APPELLATE CIVIL.

Before Mr. Justice Wazir Hasan.

1927
April, 13.

FATEH MUHAMMAD KHAN (DEFENDANT-APPELLANT) *v.* RAM DAYAL SINGH AND OTHERS (PLAINTIFFS-RESPONDENTS).*

Mortgage—Redemption—Clog on the equity of redemption—Long term alone, when operates as clog on the equity of redemption.

There may be cases in which a long term by itself may amount to a clog on the equity of redemption and on the other hand there may be cases where such a term may not amount to a clog on the equity of redemption unless there are other circumstances tending to establish the clog.

Where, in a mortgage, it was prescribed that the right to redemption shall not be exercised for 200 years, *held*, that the period of 200 years was wholly unreasonable and would practically kill the right of redemption, it was, therefore, a clog on the right of redemption and so the doctrine of equity would take effect in spite of the terms of the contract and redemption could be allowed before the prescribed period. *James Bradley* v. *Carritt* (1), *Noakes & Co.* v. *Rice* (2), and *Balbhaddar Prasad* v. *Dhanpat Dayal* (3), followed.

Mr. *Niamatullah* and Mr. *Naimullah*, for the appellants.

Messrs. *Bisheshwar Nath Srivastava* and *Bhagwati Nath Srivastava*, for the respondents.

HASAN, J. :—This is the defendant's appeal from the decree of the Subordinate Judge of Sultanpur, dated the 4th of June, 1926, reversing the decree of the Munsif of Amethi, dated the 12th of February, 1926.

* Second Civil Appeal No. 332 of 1926 against the decree of Humayun Mirza, Subordinate Judge of Sultanpur, dated the 4th of June, 1926, reversing the decree of Krishnanand Pandey, Munsif of Amethi at Sultanpur, dated the 12th of February, 1926, dismissing the plaintiffs' claim.

(1) (1903) L.R., A.C., 253 (261). (2) (1902) L.R., A.C., 24 (28).
(3) (1924) 27 O.C., 4.

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The plaintiffs-respondents brought the suit out of which this appeal arises to enforce a claim for redemption in respect of a mortgage, dated the 1st of March, 1886. The title to redeem was disputed by the defendants and the further plea in defence was that under the terms of the mortgage in suit the right to redeem did not, and could not, accrue before the expiry of 200 years from the date of the mortgage.

On the question of title the court of first instance gave a finding against the plaintiffs. On the other plea in defence the finding was against the defendants. The result was that the suit was dismissed.

On appeal by the plaintiffs the lower appellate court held that the plaintiffs' title to redeem was established and it further held that the claim to redeem was not barred by the stipulation in the mortgage as to the term of 200 years. The suit was accordingly decreed.

The only point urged at the hearing of this appeal by the learned Advocate for the appellants is as to whether the period of 200 years fixed in the mortgage was a bar against the claim for redemption. In agreement with the courts below on this part of the case I have come to the conclusion that there is no such bar.

The mortgage of the 1st of March, 1886, is a mortgage of the nature of a conditional sale and is mentioned as a *bye-bil wufa* in the deed of mortgage. The mortgagee advanced a sum of Rs. 400 and in consideration of the money so lent the mortgage in question was effected and the mortgagee was put in possession of the mortgaged property. The covenant in respect of the right to redeem is that it shall not be exercised within 200 years from the date of the mortgage and that it shall be exercised only in the 201st year in the month of *Jeth* on payment of the

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principal sum of Rs. 400. In the event of default the deed of mortgage was to execute itself into a deed of sale.

In the arguments of the learned Advocate who addressed the court on behalf of the appellants it was repeatedly insisted that a long term by itself could not be construed as a fetter or a clog on the equity of redemption and that in this particular case there was nothing else except a long term. It is true that in certain cases decided in the late Court of the Judicial Commissioner of Oudh it was stated that a long term by itself does not constitute a clog on the equity of redemption. This statement is not, however, in my opinion a statement of any proposition of law. It must be read in relation to the facts of the case in which it was used. There may be cases in which a long term by itself may amount to a clog on the equity of redemption. On the other hand there may be cases where such a term may not amount to a clog on the equity of redemption unless there are other circumstances tending to establish the clog. The present case, in my opinion, is a case in which the fact that the right to redeem has been taken away from the mortgagor for so long a period as 200 years does constitute a clog on the equity of redemption. That the period of 200 years is wholly unreasonable can admit of no doubt and it is agreed that the true nature of the transaction evidenced by the deed of the 1st of March, 1886, is that of a mortgage and nothing but a mortgage. That being so it must remain a mortgage and as such must carry with it the essential element of the right to redeem. In the present case this right having been postponed for a period of 200 years is practically killed. As observed by Lord MACNAGHTEN in the case of *James Bradley* v. *Carritt* (1) "equity

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(1) (1903) L.R., A.C., 253 (261).

will not permit any devise or contrivance designed or calculated to prevent or impede redemption."

This principle is as old as the hills. The principle has also been stated in the following words by Lord HALSBURY in *Nookes & Co.* v. *Rice* (1).

> "A mortgage is a conveyance of land . . . as a security for the payment of a debt. This is the idea of a mortgage; and the security is redeemable on the payment of such debt, any provision to the contrary notwithstanding. That, in my opinion, is the law. Any provision inserted to prevent redemption on payment of the debt for which the security was given is what is meant by a clog or fetter on the equity of redemption, and is, therefore, void."

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It follows that the doctrine of equity takes effect in spite of the terms of the contract. It is true that to the general rule of equity there are some limitations which are upheld by the courts of equity but the limitation in the present case is of a nature which it is not possible for any court to uphold.

I had occasion to consider the same question in an earlier decision of mine in the case of *Balbhaddar Prasad* v. *Dhanpat Dayal* (2) and it seems to me that the principle of that decision applies to the present case.

The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

(1) (1902) L.R., A.C., 24 (28)

(2) (1924) 27 O.C., 4.