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facts that these partition proceedings were fictitious and collusive and intended solely to deprive Manni Ram of his security. That is a finding of fact which cannot be challenged in second appeal. In these circumstances the plaintiffs' suit, which was for a declaration that the five-sixths share of the property in suit was not liable to be attached and sold in execution of the decree, has been rightly dismissed. We dismiss this appeal with costs.

Appeal dismissed.

APPELLATE CIVIL.

Before Sir Louis Stuart, Knight, Chief Judge, and Mr. Justice Muhammad Raza.

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 March, 22.

KUDAI LAL (DEFENDANT-APPELLANT) v. MUSAMMAT AISHA JEHAN BEGAM (PLAINTIFF-RESPONDENT).*

Mortgage—Usufructuary mortgage—Redemption before the prescribed period, whether parties can stipulate about—Clog on equity of redemption—Condition restraining alienation during the mortgage, whether amounts to a clog—Transfer of Property Act (IV of 1882) section 76(g)—Mortgagee with possession is bound to keep full and accurate accounts—Accounts to be kept by mortgagee with possession, nature of—Mortgagee is liable to mortgagor for sums actually realized though unauthorized.

Held, that ordinarily, and in the absence of a special condition entitling the mortgagor to redeem during the term for which the mortgage is created, the right of redemption can only arise on the expiration of the specified period. But there is nothing in law to prevent the parties from making a provision that the mortgagor may discharge the debt within the specified period and take back the property.

Where a mortgage provides that the mortgagor can redeem within the prescribed period, too, by paying the

* First Civil Appeal No. 36 of 1926, against the decree of Muhammad Abdul Haq, Subordinate Judge of Lucknow, dated the 22nd of December, 1925.

money out of his own pocket and not by money raised by the transfer of the property, the condition restraining alienation during the mortgage is a clog on the equity of redemption and cannot be enforced. [*Bakhtawar Begam v. Husaini Khanum* (1), followed.]

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A mortgagee in possession is under a statutory liability to keep clear, full and accurate accounts. Accounts to be full must be detailed and supported by vouchers as required by section 76(g) of the Transfer of Property Act. The accounts to be kept by the mortgagee are independent of those which may be kept by anyone else as, for example, the patwari, and cannot be dispensed with on the ground that the latter was keeping them.

If the mortgagee in possession, who is liable to keep and give accounts, does not render accounts or has not kept them, the courts will make every presumption against him: It is fair to draw inferences against him because he being the party, who alone can know the actual facts, has failed to keep the accounts in a manner in which the court can safely accept them. [*Ram Kishen Singh v. Shah Kundan Lal* (2), and *Lal Bahadur v. Murlidhar* (3), relied upon.]

The mortgagee is liable to the mortgagor for any sum realized by him out of the mortgaged property. The fact that his realizations were unauthorized or wrongful does not qualify his liability in this matter.

Messrs. *Bisheshwar Nath Srivastava, Hakim Uddin and Nazir Uddin*, for the appellant.

Messrs. *M. Wasim, Hydar Husain and Banke Behari Lal*, for the respondent.

STUART, C. J., and RAZA, J.:—This appeal arises out of a suit brought by the plaintiff for redemption of a 2 annas, 8 pies zamindari share in four villages, namely, (1) Oodarya, (2) Roshanabad, (3) Sarwan and (4) Chhulgawan, in the district of Bara Banki and a nine-hundredth share in two houses and some shops in Lucknow, on payment of Rs. 17,523-5-0.

(1) (1914) I.L.R., 36 All., 195.

(2) (1864) W.R., (C.R.), 177.

(3) (1924) 27 O.C., 250.

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The facts of the case, so far as it is necessary to state them for the purpose of disposing of this appeal, are as follows :—

The plaintiff's mother, Musammat Mahmud-un-nissa executed a possessory mortgage in respect of the property in suit in favour of Girdhari Lal and Damodar Dass for Rs. 18,000 bearing interest at annas 14 per cent. per mensem, on the 30th of May, 1919.

The mortgagees were authorized to retain possession of the mortgaged property for ten years and to receive the rents and profits accruing from the property and to appropriate them in lieu of interest, after deducting the Government revenue and the collection charges at 10 per cent. of the income. In case of deficiency, if any, the mortgagor covenanted to pay the same six monthly and authorized the mortgagees to add the same to the principal in case of default. It was also provided by the mortgage that the mortgagees would be entitled to call in the mortgage-money at any time by giving six months' notice to the mortgagor and the mortgagor would be entitled to redeem within the aforesaid period of ten years by paying the money out of her own pocket and not by money raised by the transfer of the property.

The mortgagees assigned their mortgage rights to the defendant on the 28th of January, 1920. The mortgagor, Musammat Mahmud-un-nissa, made a gift of the entire equity of redemption in favour of her daughter, the plaintiff, on the 22nd of September, 1922.

The plaintiff brought the present suit for redemption on the 2nd of October, 1924.

The claim was resisted by the defendant on various grounds. He alleged that the suit was premature, that the Court of the Subordinate Judge, Lucknow, had no jurisdiction to entertain the suit and that

the plaintiff had no right to redeem the property in suit. He alleged further that he was entitled to Rs. 32,510 on redemption.

The learned Subordinate Judge framed four issues and found as follows :—

- (1) The suit is not premature.
- (2) The court has jurisdiction to entertain the suit.
- (3) The plaintiff is entitled to redeem the property in suit.
- (4) She is entitled to redeem the property on payment of the principal sum (Rs. 18,000).

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The defendant has appealed, challenging the findings of the learned Subordinate Judge on the first and fourth issues only. He contends that the suit is premature, that he is entitled to Rs. 11,865-0-6 over and above the sum of Rs. 18,000 awarded by the lower court and that he is also entitled to the costs of the suit.

In our opinion there is no substance in this appeal.

We are not prepared to accept the contention that the suit is premature. It is true that the term of the mortgage was ten years at the outset, but it was also provided by the deed that the mortgagor could redeem within that period by paying the money out of her own pocket and not by money raised by the transfer of the property. The condition restraining alienation during the mortgage is a clog on the equity of redemption and cannot be enforced. It should be noted that the present case is not a case in which the mortgagor has raised money by alienating the property.

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The mortgagor in this case has made a gift of the equity of redemption in favour of her daughter, the plaintiff, and the latter has brought the suit to redeem the property. It is contended that the option to redeem the property within the period of ten years was merely a personal concession granted to the original mortgagor only. This contention is not well founded. There is nothing to show that it was a personal concession granted to the original mortgagor only for any particular reason. In this case both the mortgagor and the mortgagees have transferred their rights and the plaintiff is a transferee from the mortgagor and the defendant, from the mortgagees.

Those who have stepped into the shoes of the parties to the original mortgage contract, are entitled to enforce the terms of the contract, and are also bound by its terms, exactly in the same manner as the original parties were. If the defendant can enforce the terms of the mortgage as a transferee from the mortgagees, there is no reason why the plaintiff should not enforce the terms, as a transferee from the mortgagor. The mortgagor must be held entitled to redeem at any time within the stipulated period in the same manner as the mortgagee is authorized to call in his money within that period. As observed by their Lordships of the Privy Council in the case of *Bakhtawar Begam v. Husaini Khanum* (1): "Ordinarily, and in the absence of a special condition entitling the mortgagor to redeem during the term for which the mortgage is created, the right of redemption can only arise on the expiration of the specified period. But there is nothing in law to prevent the parties from making a provision that the mortgagor may discharge the debt within the specified period, and take back the property." In the

(1) (1914) I.L.R., 36 All., 195.

present case the parties had made such a provision and the plaintiff's suit is, therefore, not premature as alleged by the defendant.

The next point is whether the lower court was justified in awarding the principal money only to the defendant under the circumstances of the case. The defendant being a mortgagee in possession was under a statutory liability to keep clear, full and accurate accounts. Accounts to be full must be detailed and supported by vouchers [see section 76(g) of the Transfer of Property Act]. Having regard to the terms of the mortgage-deed in suit, we think the defendant ought to have been very careful in discharging his duty in this matter. The defendant has produced some accounts (exhibits A57 to A67) and wishes it to be believed that they are the full and accurate accounts which he was bound to keep under the law. He and his *karinda* Sheo Shankar Lal have given evidence about the accounts in question. The defendant's story is that he used to note on slips of paper the collections which he made from the tenants. He says that he used to dictate to Sheo Shankar Lal whatever he realized and the latter used to enter the same in the accounts. The slips in question are not forthcoming. It is said that they were destroyed when the accounts in question were prepared by Sheo Shankar Lal. It is not shown that any receipts were given to the tenants. No receipts are forthcoming. The defendant's evidence shows that he is a big zamindar and has money-lending business also, but it is noticeable that he has not produced any *account books*. He says that he keeps no account books and wishes it to be believed that the accounts produced by him in this case were the only accounts kept by him. He says that the accounts in question were kept simply because

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he was bound to keep them under the law. The statement which his witness Sheo Shankar Lal has made about the accounts in question is on some points inconsistent with his own statement. Sheo Shankar Lal has admitted some mistakes in the accounts in question. The learned Subordinate Judge, who saw and heard these witnesses, was not satisfied with their evidence. We have gone through their evidence carefully. We are not also satisfied with their evidence. We are not prepared to hold on their evidence that the accounts in question are full, accurate and genuine accounts as alleged. The defendant's learned Counsel has attempted to explain away some mistakes in the accounts, pointed out by the learned Subordinate Judge, but the fact remains that the very appearance of the accounts in question shows that they are not genuine accounts and that they have been prepared for the purposes of this case. In our opinion the learned Subordinate Judge was perfectly right in rejecting the accounts in question. The defendant and his *karinda* Sheo Shankar Lal are not honest witnesses and their evidence was properly rejected by the learned Subordinate Judge. We are afraid, the genuine accounts have been dishonestly withheld by the defendant. The defendant has now to thank himself for the consequences. If the mortgagee in possession, who is liable to keep and give accounts, does not render accounts or has not kept them, the courts will make every presumption against him. It is fair to draw inferences against him because he being the party, who alone can know the actual facts, has failed to keep the accounts in a manner in which the court can safely accept them. In this case the plaintiff has examined the patwaris of the villages in suit. She has also examined Siraju and Surajdin who had been in the defendant's service

and had helped him in making collections for some time after he had got possession of the property in suit as a mortgagee. The evidence produced by the plaintiff shows that there was considerable *sewai* income from 1919 to 1924, but the *sewai* items were never recorded in the village papers. The defendant realized the *sewai* items, but they were not entered in the revenue papers. It is also in evidence that some lands are really held by the defendant under his own cultivation, but they are entered in the village papers in the names of his relations and dependants. The defendant is surely guilty of concealing the gross income of the property in suit.

The defendant's learned Counsel contends that if the accounts filed by the defendant are not accepted as correct, calculations may be made on the entries in the revenue papers. It is said that there was deficiency in the profits every year since 1327 Fasli (1919 A. D.). The annual interest amounted to Rs. 1,890, but the net income is said to be Rs. 1,007-15-2 in 1327 Fasli, Rs. 911-15-4 in 1328 Fasli, Rs. 933-11-1 in 1329 Fasli, Rs. 986-7-3 in 1330 Fasli and Rs. 1,031-6-3 in 1331 Fasli. The plaintiff's learned Counsel has attempted to show that the gross income exceeded the annual interest during the said period of five years. The net income including the *sewai* items is said to be Rs. 3,234-12-10 (including the arrears of the past years rents collected by the defendant) in the year 1327 Fasli, Rs. 1,751-14-4 in 1328 Fasli, Rs. 1,648-12-9 in 1329 Fasli, Rs. 2,160-3-8 in 1330 Fasli and Rs. 1,954-10-1 in 1331 Fasli. The learned Subordinate Judge has rejected the evidence given by the plaintiff's witnesses about the *sewai* items on the ground that the income has been exaggerated. We have gone through the oral evidence produced by the plaintiff on the point under consideration. We are

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not prepared to disagree with the finding of the learned Subordinate Judge. It appears of course that there was considerable *sewai* income, but the income appears to have been exaggerated and the amount cannot be fixed definitely on the evidence given by the plaintiff's witnesses. There is also no reliable evidence to show that the rents of the past years amounting to Rs. 1,853-9-7 were realized by the mortgagee as alleged by the plaintiff. The evidence produced by the plaintiff was properly rejected under these circumstances, but there is no doubt that there was considerable *sewai* income which has been denied by the defendant dishonestly. As the *sewai* income has not been recorded in the revenue papers and as the plaintiff's realizations exceed the rents entered in the papers in respect of several holdings, it is quite unsafe to make calculations on the entries in the revenue papers. The contention of the appellant's learned Counsel cannot, therefore, be accepted. It should be borne in mind that the accounts to be kept by the mortgagee are independent of those which may be kept by any one else as, for example, the patwari, and cannot be dispensed with on the ground that the latter was keeping them. [See *Ram Kishen Singh v. Shah Kundan Lal* (1); see also *Lal Bahadur v. Murlidhar* (2).] The mortgagee is liable to the mortgagor for any sum realized by him out of the mortgaged property. The fact that his realizations were unauthorized or wrongful does not qualify his liability in this matter.

We think the learned Subordinate Judge was not wrong in passing the decree on the basis of the plaintiff's admission under the peculiar circumstances of the case. The plaintiff agreed to pay the entire principal money and redemption was, therefore, allowed on payment of Rs. 18,000.

(1) (1864) W.R., (C.R.), 177.

(2) (1924) 27 O.C., 250.

As to the costs of the suit, we do not think it proper to interfere with the order passed by the learned Subordinate Judge, when the defendant has been found guilty of misconduct. He was under a statutory obligation to keep clear, full and accurate accounts of all the sums received and spent by him as mortgagee. He has failed to fulfil the obligation imposed on him by law and has attempted to manufacture evidence to support his claim for the amount to which he is not entitled.

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We do not think that a case has been made out to disturb the judgment of the learned Subordinate Judge. The result is that the appeal fails and must be dismissed. We dismiss the appeal with costs. The decree of the lower court is confirmed in all respects.

Appeal dismissed.

REVISIONAL CRIMINAL.

Before Mr. Justice A. G. P. Pullan.

KING-EMPEROR v. DAYA RAM.*

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June, 28.

Criminal Procedure Code (Act V of 1898) sections 203 and 436—Indian Penal Code (Act XLV of 1860), section 182—Applicability of proviso to section 436 of the Code of Criminal Procedure to orders under section 203 of that Code—Complaint under section 182 of the Indian Penal Code—Magistrate's order refusing to start case, whether an order of discharge or acquittal.

Held, that an order of a Magistrate rejecting a complaint by the police under section 182 of the Indian Penal Code on the ground that it was not proper to start the case is not an order of acquittal or discharge but is merely an order

* Criminal Revision No. 43 of 1927, against the order of S. H. Thompson, District Magistrate of Gonda, dated the 4th of October, 1926.