

suit against Jadu Nath, the present plaintiff, in the civil court claiming a refund of the profits paid by him in the first suit. The question was again fully contested, and the decision went against Ram Sahai in the highest court of appeal. The judgments of the Judicial Commissioner's Court have not been produced in evidence, but I think it is unnecessary for me to consider the merits of the dispute. It appears that it has been decided finally between the parties, or their predecessors-in-interest, that the miscellaneous plots have to be taken into account in calculating the profits due on the plaintiff's two annas share. I think I am bound by these decisions, and accordingly I dismiss the respondent's cross-objection with costs.

The plaintiff's appeal is allowed on the point of lambardari dues only, and dismissed on all other points. The plaintiff-appellant will get his costs throughout in proportion to his success.

*Appeal partly allowed.*

## APPELLATE CIVIL.

*Before Mr. Justice Wazir Hasan and Mr. Justice Gokaran Nath Misra.*

SANWALEY PRASAD (PLAINTIFF-APPELLANT) v. SHEO SARUP, MINOR, UNDER THE GUARDIANSHIP OF FATEH BAHADUR (DEFENDANT-RESPONDENT).\*

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*Mortgage—Redemption before the term fixed in the mortgage-deed—Mortgagee having failed to perform his part of the contract, mortgagor's right to rescind his promise as well and to claim redemption before the stipulated period—Contract Act (IX of 1872), sections 39 and 54—Specific Relief Act (I of 1877), section 24, clause (2).*

Where a mortgage was effected for a fixed period of 15 years and its sole object was to satisfy a decree in favour of a

\* Second Civil Appeal No. 180 of 1925, against the decree of Jitendra Nath Roy, 1st Additional Subordinate Judge of Lucknow, dated the 31st of December, 1924, confirming the decree of Avadh Behari Lal, Munsif Haveli, Lucknow, dated the 20th of February, 1924.

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third person by punctual payment of the instalments due thereunder by the mortgagee and one of the covenants in the deed was that in the event of the decree-holder proceeding to bring the property to sale and selling it the mortgagee would be entitled to recall the whole of the mortgage money due and the mortgagee after paying some instalments made default and the decree-holder gave notice to the mortgagor threatening to put the property to sale and the mortgagor then to avert the sale paid the instalments due to the decree-holder and brought a suit for redemption, *held*, that the covenant referred to was intended for the mutual benefit of the mortgagor and the mortgagee, and the contingency having happened the mortgage money became due and the right to redeem accrued simultaneously.

The obligation imposed on the mortgagee to make payments punctually to the decree-holder was an essential part of the contract of mortgage and the mortgagee having failed to perform his part of the contract it follows that the mortgagor is entitled to rescind his promise as well and to recover possession of the property without waiting for the expiry of 15 years under the provisions of sections 39 and 54 of the Indian Contract Act, 1872, and of section 24, clause (2) of the Specific Relief Act, 1877. *The Mersey Steel and Iron Co. v. Naylor, Benzons and Co.* (1), *Pordage v. Cole* (2), *Syed Mohammad Baqar v. Kedar Nath* (3); *Husaini v. Ram Charan* (4), *Avantika Prasad v. Gur Bakhsh* (5), and *Chhutku v. Baldeo* (6), relied upon.

The facts and circumstances of this case are set out in detail by GOKARAN NATH MISRA, J., who originally heard the appeal as a single Judge and referred it to a Bench. His referring order is as follows:—

This is a plaintiff's appeal in a suit for redemption. The facts of the case are that on the 2nd of August, 1917 one Nand Lal obtained a compromise decree against one Piarey Lal for a sum of Rs. 432-14. This sum was to be paid by annual instalments of

(1) L.R., 9 A.C., 434.

(3) (1908) 11 O.C., 89.

(5) (1924) 27 O.C., 60.

(2) 1 Wms. Summ., 548 (1871).

(4) (1915) 18 O.C., 280.

(6) (1912) I.L.R., 34 All., 659.

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Rs. 50 a year, the first instalment to fall due on the 30th of June, 1918, and subsequent instalments to fall due on the same date each succeeding year. Piarey Lal mortgaged his property to the defendant-respondent on the 4th of September, 1918 for a sum of Rs. 500 out of which Rs. 5 were paid for the purchase of stamp for the deed and the balance was to cover the payment of annual instalments that had already fallen due or were to fall due in future. Nothing was, however, paid in cash. It appears that the mortgage was a mortgage empowering mortgagee to remain in possession for a period of 15 years. The mortgagee paid instalment which had already fallen due in the month of June, 1918, and also paid regularly instalments that fell due during the years 1919, 1920 and 1921. The defendant-respondent, however, failed to pay the instalments during the year 1922 and 1923, whereupon the original decree-holder Nand Lal served the plaintiff-appellant with a notice to pay the entire balance of the decretal amount and in case of default to put up his property to sale. The plaintiff-appellant thereupon paid the entire balance of the decretal amount remaining due and brought the present suit for redemption of the property on payment of the amount which had been paid by him after allowing a deduction for a small sum which it is alleged had been realised by the defendant. It is admitted that the present plaintiff is the representative in interest of Piarey Lal, the original mortgagor.

The defendant-mortgagee contended that the period fixed in the mortgage-deed had not yet expired and the suit for redemption was premature.

Both the courts below have allowed the plea to prevail and dismissed the plaintiff's suit on the

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ground that no suit for redemption can be brought before the expiration of the period of 15 years.

It is contended before me in second appeal that the view taken by the courts below is erroneous and it is urged that because the defendant-mortgagee has not performed his part of the contract by paying the mortgage money as stipulated under the deed, it was open to the plaintiff-appellant to ignore the condition as to the period of 15 years stipulated in the mortgage-deed and to seek redemption before the expiration of the period fixed.

The matter is important and cases are constantly brought on a plea like that urged in this case. Two cases decided by the late Court of the Judicial Commissioner of Oudh were cited before me on behalf of the appellant, namely 18 O. C., 280, decided by KANHAIYA LAL, A. J. C., and 27 O. C., 60, decided by WAZIR HASAN, J. C. Both these cases did not decide the actual point which is in dispute in the present appeal. As it would be proper to get the matter decided by a Bench of the two Judges of this Court, I direct that under section 14, clause (2) of the Oudh Courts Act, IV of 1925, the case should be laid before a Bench consisting of myself and the Hon'ble Mr. Justice HASAN on the 6th of May, 1926.

Mr. *Hyder Husain*, for the appellant.

Mr. *Anant Prasad*, for the respondent.

HASAN and MISRA, JJ. :—This is the plaintiff's appeal from the decree of the First Additional Subordinate Judge of Lucknow, dated the 31st of December, 1924, affirming the decree of the Munsif Haveli, Lucknow, dated the 20th of February, 1924.

On the 4th of September, 1918, Piarey Lal, brother of the plaintiff-appellant, Sanwaley Prasad, executed

a deed of mortgage in favour of Sheo Sarup, defendant-respondent, in respect of a 1½ pies zamindari share situate in village Gomi Khera, pargana Mohanlalganj in the district of Lucknow, in consideration of a sum of Rs. 500. The courts below have found that the property mortgaged was the joint ancestral property of the family of the plaintiff and his deceased brother, Piarey Lal. The validity of the transaction of the mortgage just now mentioned is accepted on behalf of the plaintiff and the suit, out of which this appeal arises, was laid for the purpose of redeeming the same mortgage.

It appears that on the 3rd of September, 1919 Piarey Lal borrowed a further sum of Rs. 50 from the mortgagee and gave a deed of charge in respect of the loan effecting the property which was mortgaged previously. The plaintiff's case in respect of this deed of charge is that the money borrowed by Piarey Lal thereunder was not borrowed for the purpose of the joint family and the charge was therefore not binding on the joint family property. This case has been accepted by the courts below and the plaintiff-appellant has been absolved from the liability of repaying the loan of Rs. 50. The defendant-respondent in the course of arguments before us challenged the propriety of the decision of the courts below on that part of the case. We, however, have heard nothing to justify any interference.

The courts below have dismissed the suit for redemption on the ground that the deed of mortgage of the 4th of September, 1918 provides against redemption for the period of 15 years. That there is such a covenant is not disputed, and if the performance of that part of the contract on the part of the mortgagor is enforced the claim for redemption must be held to be premature; but it is argued on behalf of

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the plaintiff-appellant that in view of the circumstances to be stated presently the defendant-respondent has disabled himself from insisting on the performance of that contract by the plaintiff-appellant. Now those circumstances are as follows:—

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It appears that one Nand Lal held a decree against Piarey Lal for a sum of Rs. 432-14 and the amount of the decree was declared to be a charge on the family property. The decree-holder had the option in the event of certain contingencies to bring the family property to sale in execution of his decree. For the satisfaction of the decree provision was made that the judgement-debtor, Piarey Lal, would pay Rs. 50 at the end of June every year till the entire amount due under the decree was paid off. The first instalment was to fall due at the end of June, 1918. The mortgage of the 4th of September, 1918 was expressly effected with the sole object of satisfying Nand Lal's decree in the manner contemplated by that decree, that is to say, by punctual payment of the instalments due thereunder by the mortgagee. The mortgagee paid some of the instalments, but he made default in paying the rest. The decree-holder, Nand Lal, thereupon served the plaintiff-appellant with a notice to pay the entire balance of the decree and in case of default threatened to put the property which bore the charge for the decree to sale. To avert the threatened sale the plaintiff-appellant discharged the instalments due to the decree-holder. Having done that he brought the suit for redemption, out of which this appeal has arisen.

The argument advanced on behalf of the plaintiff-appellant is that the defendant-respondent having failed to perform his part of the contract the plaintiff was entitled to rescind the promise to maintain

the mortgagee's possession for a term of 15 years certain.

It appears to us that the argument is sound and must be upheld. The decision can be founded on two distinct grounds. The first ground arises out of the covenants contained in the mortgage itself.

One of such covenants is that in the event of the decree-holder proceeding to bring the property to sale and selling it, the mortgagee would be entitled to recall the whole of the mortgage money due to him. The default in the payment of the instalments having occurred and the decree-holder having expressed his intention to enforce the right to bring the property to sale we must hold that the contingency contemplated by the covenant mentioned above did happen. That being so, the mortgage money became due in terms of that covenant. It follows that the right to redeem accrued simultaneously. The present suit seeks no more than to exercise that right. The covenant, to which we have referred, appears to be intended for the mutual benefit of the mortgagor and the mortgagee. The reason for this view is very simple. It would obviously be for the benefit of the mortgagee to be able to recover whatever he paid on the transaction of the mortgage, and it will be also beneficial to the mortgagor to avert the possible sale of the mortgaged property and to recover possession thereof from the hands of the mortgagee on payment of his dues. We therefore hold on the construction of the covenant in question that the parties to the contract intended to put an end to the mortgage in the event of the contemplated contingency coming to happen.

The second ground on which we think that the appeal should prevail is that the obligation imposed on the mortgagee to make payments punctually to

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Nand Lal, decree-holder, was an essential part of the contract of mortgage. Indeed, the whole purpose of the mortgage is centred on that particular obligation. Admittedly the mortgagee has failed to perform that obligation which he had undertaken to perform in its entirety. The consideration for this obligation on the part of the mortgagee consisted, amongst other promises, of the promise on the part of the mortgagor to maintain the mortgagee's possession for 15 years certain. The mortgagee having failed to perform his part of the contract it seems to us to follow that the mortgagor is entitled to rescind his promise as well and to recover possession of the mortgaged property without waiting for the expiry of 15 years on payment of the sum of money which may be due to the mortgagee. In a case of this nature it was not necessary for the mortgagor to withhold rescission of the contract until every disability to perform his part of the contract by the mortgagee had been exhausted. The mortgagee admittedly made default and therefore breach of the contract which he had promised to perform did take place as soon as the default was made, and if that part of the contract in respect of which the breach occurred on the part of the mortgagee was an essential part of the entire contract of mortgage the plaintiff-appellant, who was the promisee of the reciprocal promise to maintain possession for 15 years certain, was entitled to rescind the latter forthwith. Our reasoning in support of the second ground of decision is, we presume, well founded on the provisions of sections 39 and 54 of the Indian Contract Act, 1872, and of section 24, clause (2) of the Specific Relief Act, 1877. The provisions of section 39 of the Indian Contract Act are in harmony with the general law of contract as it prevails in England. In the case

of *The Mersey Steel and Iron Co. v. Naylor, Benzon and Co.* (1), Lord BLACKBURN made the following observation :—

“ The rule of law, as I always understood it, is that where there is a contract in which there are two parties, each side having to do something (it is so laid down in the notes to *Pordage v. Cole* (2)), if you see that the failure to perform one part of it goes to the root of the contract, goes to the foundation of the whole, it is a good defence to say ‘ I am not going on to perform my part of it when that which is the root of the whole and the substantial consideration for my performance is defeated by your misconduct.’ ”

On the construction of the deed of mortgage before us we have already held that the obligation to meet the instalments of the decree as they fell due was an essential obligation undertaken to be performed by the mortgagee.

The courts below have refused to apply the principle of law which we are applying to the present case on the ground that the mortgagor having delivered possession once to the mortgagee had nothing to perform any further act under the contract. This is an erroneous view of the construction of the contract of mortgage under consideration. The promise made by the mortgagor in consideration of the reciprocal promise made by the mortgagee was not only to deliver possession under the contract of mortgage but also to maintain that possession for a term of 15 years certain.

We rejoice to find that the view which we have taken in this case is fortified by several decisions of the late Court of the Judicial Commissioner of Oudh and also by a decision of a Bench of the High Court

(1) L.R., 9 A.C., 434.

(2) 1 Wms. Saund, 548 (1871).

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at Allahabad. Those cases are *Saiyed Muhammad Bakar v. Kedar Nath* (1), *Husaini v. Ram Charan* (2), *Avantika Prasad v. Gur Bakhsh* (3), and *Chhotku v. Baldeo* (4).

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We allow this appeal, set aside the decrees of the courts below and grant a decree to the plaintiff-appellant for redemption of the property described in the plaint on payment of Rs. 254 within six months of this date. A decree in terms of order 34, rule 7 of the Code of Civil Procedure, will be prepared. The plaintiff-appellant will be entitled to his costs in all the three courts and he will be at liberty to deduct the same from the mortgage money and to pay the balance.

*Appeal allowed.*

### APPELLATE CIVIL.

*Before Mr. Justice Gokaran Nath Misra and Mr. Justice Muhammad Raza.*

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PIRTHIPAL SINGH AND ANOTHER (PLAINTIFFS-APPELLANTS)  
v. RAMESHWAR AND ANOTHER (DEFENDANTS-RESPONDENTS).\*

*Hindu Law—Joint Hindu family property—Mortgage by manager of joint family property—Foreclosure suit against manager only without impleading other members—Decree, whether binding upon the other members—Suit not specifically mentioning as being against manager, effect of.*

Where the manager of a joint Hindu family executed a mortgage of the family property and the mortgagee brought a suit on the basis of his mortgage and obtained a decree for foreclosure against the mortgagor only without impleading the other brothers, *held*, that the other members were effectively represented in the suit by the manager and the provisions of order 34, rule 1 of the Code of Civil Procedure, were substantially complied with and the decree passed in that suit was binding upon them.

\* Second Civil Appeal No. 510 of 1925, against the decree of Sitta Sahai, Additional Subordinate Judge of Unao, dated the 21st of July, 1925, upholding the decree of S. Qadir Hasan, Munsif of Salsipur at Unao, dated the 28th of November, 1924.

(1) (1908) 11 O.C., 89.

(2) (1915) 18 O.C., 280.

(3) (1924) 27 O.C., 60.

(4) (1912) I.L.R., 34 All., 659.