

that because the appellants were in jail, special concession should be made in their favour. We do not understand why special concessions should be made in favour of criminals which would not be granted to non-criminals who were prevented from personal appearance. We dismiss these appeals with costs.

Appeal dismissed.

APPELLATE CIVIL.

*Before Sir Louis Stuart, Knight, Chief Judge, and
Mr. Justice Wazir Hasan.*

BALDEO AND OTHERS (DEFENDANTS-APPELLANTS) v.
LOSAL AND ANOTHER (PLAINTIFFS-RESPONDENTS).*

1928
November,
1.

Redemption—Clog on the equity of redemption—Mortgage postponing redemption for 99 years and other terms not unconscionable—Long term whether by itself constitutes clog.

Ordinarily, and in the absence of a special condition entitling the mortgagor to redeem during the term for which a mortgage is created, the right of redemption can only arise on the expiration of the specified period, but where it is shown on the merit that the effect of the condition postponing redemption for a specified term of years is to make the mortgage practically irredeemable, the court is justified in setting it aside.

Where, therefore, a usufructuary mortgage contains a provision by which redemption is postponed for 99 years, and the terms of the mortgage are not unconscionable, there being nothing else except the long term in the deed of mortgage, to which objection can be taken, the long term by itself does not constitute a clog on the equity of redemption

*Second Civil Appeal No. 182 of 1928, against the decree of S. Asghar Hasan, Additional District Judge of Gonda, dated the 6th of February, 1928, confirming the decree of M. Zia-ud-din Ahmad, Officiating Subordinate Judge of Gonda, dated the 31st of May, 1927, decreeing the plaintiff's suit.

1928

BALDEO
v.
LOSAL.

and the mortgagee has a right to enforce the condition postponing redemption. *Dargahi Lal v. Rafiqunnisa* (1), *Balbhaddar Prasad v. Dhanpat Dayal* (2), and *Bakhtawar Begam v. Husaini Khanam* (3), relied upon.

Messrs. *M. Wasim* and *Bisheshwar Nath Srivastava*, for the appellants.

Mr. *A. P. Sen*, for the respondents.

STUART, C. J. :—The question for decision in this second appeal is whether a provision in a deed of usufructuary mortgage by which redemption is postponed for 99 years is a condition which can be avoided by the mortgagor. This question has frequently been before the Judicial Commissioner's court and the Chief Court. I do not wish to refer to the long series of decisions that there have been on the point as, as far as I am concerned, I arrived at a conclusion upon this point in April, 1927, which I see no reason to alter. A Bench, of which I was a member, then decided in *Dargahi Lal v. Rafiqunnisa* (1) that we agreed with the view taken by my learned brother Mr. Justice HASAN when he was Additional Judicial Commissioner in *Balbhaddar Prasad v. Dhanpat Dayal* (2). We then stated the view. The view taken was that where the restriction had the effect of making the mortgage practically irredeemable by imposing upon the mortgagor such a burden at the date when redemption became open to him as was impossible in practice for him to bear, it was open to the court to permit redemption before the period came to an end. While the ordinary rule is as laid down by their Lordships of the Judicial Committee in *Bakhtawar Begam v. Husaini Khanam* (3): "Ordinarily, and in the absence of a special condition entitling the mortgagor to redeem during the term for which a mortgage is created, the right of redemption can only arise on the expiration

(1) (1927) 1 Luck. Cas. 1 (4).

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

(3) (1914) L.R., 41 I.A., 84.

of the specified period", where it is shown on the merits that the effect of the condition postponing redemption for a specified term of years is to make the mortgage practically irredeemable, a court is justified in setting it aside.

1928

 BALDEO
v.
LOBAL.

Stuart, C.J.

Here I am asked the same question in respect of a different deed. On the merits, is the effect of the condition in this particular deed to make the mortgage practically irredeemable? It certainly has not that effect and further the terms of the mortgage were not unconscionable. It appears to me that at the time the mortgage was executed in the year 1897 the mortgagee's return as interest upon the amount, which he advanced, was by no means excessive. It appears to me from the examination of the record that it could not have been much more than 12 per cent. The profits are now in the neighbourhood of 20 per cent. But even if they were higher, the fact that they have increased since the execution of the mortgage is immaterial. In these circumstances, therefore, I should give the mortgagee the right to enforce the condition postponing redemption. The result of this will be that the appeal will succeed and the suit will stand dismissed. The plaintiffs will then pay their own costs and those of the defendants in all courts.

HASAN, J. :—My view on this subject was stated at considerable length in the case of *Balbhaddar Prasad v. Dhanpat Dayal* (1). I have invariably followed the view taken in that case. On several occasions other learned Judges, either sitting singly or in a Bench, have also accepted the view laid down in the afore-mentioned decision. In the present case I am of opinion that there is nothing else, except the long term in the deed of mortgage in question, to which objection can be taken and the long term by itself in the present instance does not,

(1) (1924) 27 O.C., 4.

1928

BALDEO
v.
LOSAL.

in my opinion, constitute a clog on the equity of redemption. The contract, therefore, into which the parties entered with their eyes open must be upheld. I, therefore, agree that the appeal should be allowed.

BY THE COURT :—The appeal is allowed, and the suit is dismissed with costs in all courts.

Appeal allowed.

APPELLATE CIVIL.

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

1928
November,
1.

RAM SEWAK AND OTHERS (DEFENDANTS-APPELLANTS) v.
LALTA PERSHAD AND ANOTHER (PLAINTIFFS-
RESPONDENTS).*

Co-sharers not allowing the donee of another co-sharer to obtain possession—Donee, remedy of—Donee, whether entitled to obtain joint possession from civil courts—Suit for partition or profits in revenue courts, necessity of.

Where one of the co-sharers who was in exclusive possession of certain plots and in joint possession of certain other plots gifted his share to another but the donee was not allowed by the other co-sharers to obtain possession of either the exclusive or joint plots, *held*, that the other co-sharers were in the position of persons who had taken wrongful possession and the donee could obtain a decree for joint possession of the gifted plots and of mesne profits or damages from the civil courts and it was not necessary that they should bring a suit for partition or profit or both in the revenue courts. *Babu Ram Bahadur Singh v. Raja Sukhmangal Singh* (1), followed. *Jalaluddin Khan v. Rampal and others* (2), and *Jagarnath Ojha v. Ram Phal* (3), referred to.

*Second Civil Appeal No. 275 of 1928, against the decree of Jagdamba Saran, Additional Subordinate Judge of Hardoi, dated the 30th of April, 1928, modifying the decree of Syed Abid Raza, Munsif of Bilgram, dated the 27th of September, 1927, decreeing the plaintiffs' suit.

(1) (1921) 8 O.L.J., 637.

(2) (1927) 2 Luck., 740.

(3) (1912) I.L.R., 34 All., 150.