

in this plea. As observed by the learned Subordinate Judge the mortgage-deeds which have been proved and which the defendant-appellant has paid off were the mortgages executed by Musammât Purna herself. No proof was given that these mortgages were executed for legal necessity. Under those circumstances we do not see how we can ask the plaintiffs to pay the money in respect of those mortgages.

We are, therefore, of opinion that the decision of the learned Subordinate Judge is correct on all the points and that this appeal has no force. We, therefore, dismiss this appeal with costs.

Appeal dismissed.

APPELLATE CIVIL.

Before Mr. Justice Muhammad Raza and Mr. Justice Bisheshwar Nath Srivastava.

SARFARAZ SINGH (PLAINTIFF-APPELLANT) v. UDWAT SINGH, PLAINTIFF AND OTHERS (DEFENDANTS-RESPONDENTS).*

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Mortgage—Redemption—Clog on the equity of redemption, what constitutes—Long term, whether by itself a clog—Profits of mortgaged property sufficient only to pay interest on a portion of mortgage-debt—High rate of interest.

A stipulation for a long period before which redemption is not to be allowed does not by itself amount to a fetter on the right of redemption.

* Second Civil Appeal No. 130 of 1928, against the decree of Saiyed Shaukat Hnsain, Additional Subordinate Judge of Gonda, dated the 4th of February, 1928, reversing the decree of Pandit Girja Shankar, Munsif of Tarabganj, dated the 30th of November, 1927.

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If the effect of a condition postponing redemption for a specified term of years is to make the mortgage practically irredeemable, a court is justified in setting it aside, but ordinarily, and in the absence of a special condition entitling the mortgagee 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. A postponement of the right of redemption for a long period, when coupled with such other provisions in the mortgage deed as are wholly advantageous to the mortgagee and do not confer any corresponding advantages in favour of the mortgagor, operates as a clog on the equity of redemption and the mortgagor is entitled to be relieved of it.

In the absence of undue influence or unfair dealing no case of clog can be put forward merely upon the ground that a high rate of interest had been stipulated for in the mortgage-deed.

Bakhtawar Begam v. Husaini Khanum (1), *Sohan Lal v. Kunwar* (2), *Raza Mohammad Khan v. Ram Lal* (3), *Dargahi Lal v. Rafiqunnissa* (4), *Saheb Bakhsh Singh v. The Hon'ble Sir Raja Mohammad Ali Mohammad Khan* (5), and *Gokul Prasad Pathak v. Goitri Prasad Singh* (6), relied upon.

Mr. Naimullah, for Mr. Haider Husain and Mr. A. C. Mukerji, for the appellants.

Messrs. A. P. Sen and Mahabir Prasad, for the respondents.

RAZA and SRIVASTAVA, JJ. :—These two appeals, Nos. 129 and 130 of 1928, arise out of suits Nos. 235 and 252 of 1927, decided by the learned Munsif of Taraganj on the 30th of November, 1927.

The dispute in these suits relates to a 1 anna 4 pies share in village Inderpur in the district of Gonda. The circumstances out of which these suits have arisen so far as they are material to this judgment, may be shortly stated :—

Drigbijai Lal and Girwar Lal, sons of one Raj Bahadur, were owners of the property in suit. They

(1) (1914) I. L. R., 36 All., 195 (2) (1921) 8 O. L. J., 138.
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(3) (1925) 12 O. L. J., 222.

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

(5) (1920) 7 O. L. J., 389.

(6) (1927) 4 O. W. N., 147.

mortgaged the property to Gur Partab Singh for Rs. 950 for a period of fifteen years, on the 5th of September, 1911. It was a possessory mortgage.

On the 14th of October, 1925, Drigbijai Lal and his son Gur Charan and Girwar Lal's widow, Musammat Parshadi, mortgaged the property in suit to Sarfaraz Singh for Rs. 1,600 out of which Rs. 950 were left with the mortgagee for redemption of the prior mortgage of the 5th of September, 1911. The term of the mortgage in favour of Sarfaraz Singh was thirty-five years and six months. The mortgagee was to appropriate the profits in lieu of interest on Rs. 1,000 and interest was to be paid by the mortgagors on the remaining Rs. 600 at Rs. 18-12-0 per cent. per annum, compoundable yearly.

On the 29th of July, 1926, the mortgagors (Drigbijai Lal and others) sold the property in suit to Udwat Singh, brother of Gur Pratab Singh, prior mortgagee. Udwat Singh and Gur Pratab Singh are admittedly members of a joint Hindu family.

Sarfaraz Singh deposited Rs. 950 in court under section 83 of Act IV of 1882 on the 2nd of April, 1927, to pay off the prior mortgage of 1911. However, Gur Pratab Singh refused to accept the money and the result was that the application was dismissed on the 28th of May, 1927. Suit No. 235 was thereupon brought by Sarfaraz Singh on the 11th of August, 1927, for redemption of the prior mortgage of 1911, against Gur Pratab Singh and Udwat Singh. The defence was that the mortgage was extinguished as Udwat Singh had already redeemed the property from his brother Gur Pratab and thus nothing was left to be redeemed.

Suit No. 252 was then brought by Udwat Singh and the original mortgagors, against Sarfaraz Singh, on the 6th of September, 1927, for redemption of the mortgage

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of 1925 on the allegation that the terms of the mortgage constituted a clog on redemption and that they were, therefore, entitled to redeem the mortgage at once without waiting for the term entered in the deed.

The claim was resisted by Sarfaraz Singh. He denied that the terms constituted a clog on redemption and contended also that Udwat Singh, being a transferee from the mortgagors, could not raise the plea of clog on redemption.

Both the suits were tried together by the learned Munsif of Tarabganj. He found in Sarfaraz Singh's suit that the latter was entitled to redeem the mortgage as the alleged redemption by Udwat Singh from Gur Pratab Singh was a bogus one. The suit of Sarfaraz Singh was therefore decreed by the learned Munsif. He found in Udwat Singh's suit that the terms of the deed do not constitute a clog on redemption and the claim for redemption was, therefore, premature. He, therefore, dismissed that suit.

Udwat Singh and his transferors then appealed. Both the appeals were allowed by the learned Additional Subordinate Judge. The result was that the claim of Udwat Singh was decreed and Sarfaraz Singh's suit was dismissed with costs.

Sarfaraz Singh has now come to this Court in second appeal. He challenges the findings of the learned Additional Subordinate Judge on the points decided against him.

The plea that Udwat Singh could not raise the plea of clog on redemption has now been given up by the appellant's learned Counsel. He contends, however, that the terms of the mortgage of 1925 do not constitute a clog on redemption and the claim for redemption should, therefore, be rejected. The only point for determination in appeal No. 130 of 1928 is whether the terms of the

deed in suit (i.e. mortgage-deed, dated the 14th of October, 1925) operate as a clog on the equity of redemption. We have heard the learned Counsels on both sides at some length. We have also examined the deed in suit carefully. We think the terms of the deed in suit do not operate as a clog on the equity of redemption.

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It has now, definitely, been settled by the case of *Bakhtawar Begam v. Husaini Khanum* (1) that ordinarily there cannot be any redemption before the term of the mortgage expires. As pointed out in the case of *Sohan Lal v. Kunwar* (2) a stipulation for a long period before which redemption is not to be allowed does not by itself amount to a fetter on the right of redemption, but it may when, coupled with other collateral covenants in the mortgage, go to show an intention on the part of the mortgagee to render redemption extremely difficult, if not altogether impossible, so as to constitute a clog on the equity of redemption. It was of course held by the late Court of the Judicial Commissioner of Oudh in the case of *Raza Mohammad Khan v. Ram Lal Kalwar* (3) that a postponement of the right of redemption for a long period, when coupled with such other provisions in the mortgage-deed as are wholly advantageous to the mortgagee and do not confer any corresponding advantages in favour of the mortgagor, operates as a clog on the equity of redemption and the mortgagor is entitled to be relieved of it. As pointed out in the case of *Dargahi Lal v. Rafiq-un-nissa* (4), decided by a Bench of this Court on the 20th of April, 1927, if the effect of a condition postponing redemption for a specified term of years is to make the mortgage practically irredeemable, a court is justified in setting it aside, but ordinarily, and in the absence of a special condition entitling the mortgagor to redeem during the term for which a mortgage is created, the

(1) (1914) I. L. R., 36 All., 195. (2) (1921) 8 O. L. J., 136.

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(3) (1925) 12 O. L. J., 222.

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

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right of redemption can only arise on the expiration of the specified period. Where a mortgage contains a condition that it should not be redeemable for 75 years and the condition is not unreasonable and its effect is not at the end of that period to raise the amount payable for redemption to an unconscionable figure, the condition which prevents redemption until the period of 75 years has passed is enforceable. Each case has to be decided on its own facts and circumstances. There is nothing more dangerous and misleading than to apply the inferences to be drawn from one set of facts to the facts and circumstances proved elsewhere. We have examined the deed in suit carefully. The term of the mortgage is of course thirty-five years and six months, but we find no other provisions in the mortgage-deed as are wholly advantageous to the mortgagee and do not confer any corresponding advantages in favour of the mortgagors. The mortgagors or their ancestors had already mortgaged the property in suit to Gur Pratab Singh for Rs. 950 by the deed, dated the 5th of September, 1911. It was a mortgage with possession and the mortgagee was to appropriate the profits in lieu of interest. It appears that the profits accruing from the property were sufficient only to pay the interest due on the mortgage. The mortgage in suit was executed for Rs. 1,600 out of which Rs. 950 were left with the mortgagee for redemption of the prior mortgage. The mortgagee was to appropriate the usufruct in lieu of interest on Rs. 1,000 and interest was to be paid by the mortgagors on the remaining Rs. 600 at Rs. 18-12-0 per cent. per annum with yearly rests. The profits of the mortgaged property were not sufficient to cover the interest accruing on the said sum of Rs. 600 and hence the mortgagors had covenanted to pay interest at the rate mentioned above. In the first place, the rate of interest is not a high rate. In the second place, in the absence of undue influence or unfair

dealing, no case of clog can be put forward *merely* upon the ground that a high rate of interest has been stipulated for in the mortgage-deed (See *Saheb Bakhsh Singh v. The Hon'ble Sir Raja Mohammad Ali Mohammad Khan* (1). As pointed out in the case of *Gokul Prasad Pathak v. Goitri Prasad Singh* (2), where the profits of the mortgaged property are not enough to cover interest accruing on a portion of the mortgage money and that portion is left to carry interest at the rate provided for in the document, there is no reason why the enforcement of a covenant of that nature would constitute any clog on the equity of redemption. It is true that interest, if it remains unpaid, may accumulate, but who is to blame for that. It cannot accumulate if it is paid by the mortgagors at the proper time. The mortgagors can easily stop the running of interest by making payments at the proper time. If they fail to do so they have themselves to thank for the consequences. We do not find that the conditions entered in the deed are unreasonable. The covenants in the mortgage in suit do not show that there was any intention on the part of the mortgagee to render redemption impossible or extremely difficult. Under these circumstances, we are not prepared to agree with the finding of the learned Additional Subordinate Judge on the point under consideration. We hold, agreeing with the learned Munsif, that the terms of the deed in suit do not constitute clog on the equity of redemption. Udwat Singh's suit is, therefore, premature and the claim for redemption must, therefore, be rejected.

The result is that we allow appeal No. 130 of 1928 and setting aside the decree of the lower appellate court, restore that of the first court. The appellant will get his costs from Udwat Singh respondent in all the three courts.

(1) (1920) 7 O. L. J., 389.

(2) (1927) 4 O. W. N., 147.

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We cannot dispose of Appeal No. 129 of 1928 which arises out of suit No. 235 of 1927. The appeal which arises out of that suit was not disposed of by the learned Additional Subordinate Judge on the merits. Having disposed of the other appeal, he did not think it necessary to dispose of Appeal No. 3 of 1928, before him on the merits and made the following observations in his judgment:—

“In view of the decision in the first case the second suit should be dismissed. Therefore the decree of the court below in the other suit No. 235 of 1927, decreeing the suit for possession, is set aside and the appeal No. 3 of 1928 is also allowed with costs and the suit No. 235 of 1927 is dismissed with costs.”

We allow the appeal and setting aside the decree of the lower appellate court remand the case to that court with directions to re-admit the appeal under its original number in the register of appeals and proceed to determine it according to law. Costs will abide the result.

Case remanded.