

law that the ownership of a superstructure may exist in one person and the ownership of the soil in another. In the judgment of their Lordships of the Judicial Committee just now referred to the following passage from the judgment of Sir BARNES PEACOCK in the case of *Thakoor Chunder Poramanic v. Ram Dhoree Bhatta-charjee* (1) is quoted with approval:

“We have not been able to find in the laws or customs of this country any traces of the existence of an absolute rule or law that whatever is affixed or built on the soil becomes a part of it, and is subjected to the same rights of property as the soil itself.”

This pronouncement was made by Sir BARNES PEACOCK in the year 1866 and since then nothing has happened, in my opinion, in the state of laws or customs of these provinces which would have the effect of reducing in any manner the force of the observations then made by Sir BARNES PEACOCK.

The appeal therefore fails and is dismissed with costs.

Appeal dismissed.

APPELLATE CIVIL

*Before Sir Syed Wazir Hasan, Knight, Chief Judge
and Mr. Justice H. G. Smith*

HAR DAYAL SINGH AND OTHERS (DEFENDANTS-APPELLANTS) v.
RAJA RAM SINGH AND OTHERS (PLAINTIFFS-RESPONDENTS)*

1923
August, 29

Mortgage—Usufructuary mortgage—Redemption—Clog on the equity of redemption—Deed full of covenants advantageous to mortgagee with no benefit to mortgagor—Rate of interest not mentioned—Covenant that redemption shall not take place within 55 years, whether constitutes clog—Mortgagee not exercising his powers under the deed, effect of.

Where a usufructuary mortgage deed does not indicate any rate of interest, but is full of covenants all advantageous to

*Second Civil Appeal No. 64 of 1922, against the decree of M. Ziauddin Ahmad, Subordinate Judge of Sultanpur, dated the 21st of December, 1921, confirming the decree of Babu Maheshwar Prasad Asthana, Munsif of Amethi at Sultanpur, dated the 8th of September, 1921.

(1) (1866) 6 Suth. W.R., 228.

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the mortgagee with no corresponding benefit in favour of the mortgagor, a covenant to the effect that no redemption shall take place within 55 years of the date of the mortgage, when considered with the other covenants in the deed of mortgage, constitutes a clog on the equity of redemption, and therefore the mortgagors are entitled to redeem even before the expiry of the period of 55 years, it does not matter whether the mortgagee exercises all his powers with which he is clothed by the deed of mortgage, the true test being that if he exercised all those powers, it would clearly impede the exercise of, if not wholly extinguish, the equity of redemption. *Balbhaddar Prasad v. Dhanpat Dayal* (1), *Dargahi Lal v. Rafiqun-nisa* (2), *Thakur Bahksh Singh v. Jagdat* (3), *Baldeo v. Losai* (4), *Faujdar Khan v. Abdulsamad Khan* (5), and *Bradley v. Carrit* (6), relied on.

Messrs. *A. P. Sen* and *S. C. Das*, for the appellants.

Messrs. *Bhagwati Nath Srivastava* and *Ganpat Sahai*, for the respondents.

HASAN, C.J. and SMITH, J.:—This is the defendants' appeal from the decree of the Subordinate Judge of Sultanpur, dated the 21st of December, 1931, affirming the decree of the Munsif of Amethi, dated the 8th of September, 1931.

The appeal arises out of a suit brought by the plaintiffs-respondents for redemption of a mortgage dated the 10th of March, 1893. Amongst other covenants contained in the deed of mortgage there is a covenant to the effect that no redemption shall take place within 55 years of the date of the mortgage. The courts below have held that the disability imposed on the mortgagor to redeem the mortgage for such a long period of time, when considered with the other covenants in the deed of mortgage constitutes a clog on the equity of redemption, and therefore the plaintiffs were entitled to redeem even before the expiry of the period of 55 years. The mortgage is a usufructuary one in lieu of a loan of Rs.1,000. The deed does not indicate any rate of interest, but is full of

(1) (1923) 27 O.C., 4.

(3) (1928) 5 O.W.N., 525.

(5) (1924) A.I.R., Lah., 129.

(2) (1927) 1 Luck. Cas., 1.

(4) (1928) I.L.R., 4 Luck., 203.

(6) (1903) L.R., A.C., 253.

covenants all advantageous to the mortgagee with no corresponding benefit in favour of the mortgagor. The important covenants are these:

The mortgagee is entitled to appropriate the income after paying the Government demand; he has the power to make improvements and appropriate the profits accruing therefrom; at the time of redemption the mortgagor would be liable to pay to the mortgagee the amount of money spent on the improvements with interest at 6 per cent. per annum; the mortgagor is further to be liable at the time of redemption to pay to the mortgagee all the arrears of rent and taqavi and also interest thereon at the rate of 6 per cent. per annum: the mortgagee would be entitled to take dry wood and to appropriate the *saer* income without any liability to account for the profits arising therefrom; the mortgagee will also have the right to plant groves and trees, settle tenants, sink wells and construct embankments, and the mortgagor is laid under an obligation to pay the costs thereof at the time of redemption; the mortgagor is also laid under the liability to pay all costs of litigation.

We are of opinion, in agreement with the lower courts, that the cumulative effect of these covenants will be to extinguish the equity of redemption at the end of 55 years. The principle of law applicable to this class of cases is well understood. One of us had an occasion to consider this question in the case of *Balbhaddar Prasad v. Dhanpat Dayal* (1). The view taken in that case has consistently been accepted as correct in several decisions of the Chief Court:

See Dargahi Lal v. Rafiun-nisa (2). *Thakur Bakhsh Singh v. Jagdat* (3) and *Baldeo and others v. Losai and others* (4).

The learned Counsel for the appellants argues that the mortgagees have not done so far any of the acts

(1) (1923) 27 O.C., 4.

(3) (1928) 5 O.W.N., 525.

(2) (1927) 1 Luck. Cas., 1.

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contemplated in the several clauses of the mortgage deed, and therefore it is impossible to say that those clauses impose fetters on the mortgagor's right to redeem. In our opinion the argument is not sound. The true test is not to look to the events as they have or have not happened, but to see whether such events might have happened in the past, or may happen in the future. The same view was taken by the Lahore High Court in *Faujdar Khan v. Abdulsamad Khan* (1) There can be little doubt that if the mortgagee exercises all his powers with which he is clothed by the deed of mortgage, the sum of money which the mortgagor will be unable to pay at the end of 55 years to secure the equity of redemption, will be far in excess of the value of the property mortgaged. Such an eventuality would clearly impede the exercise of, if not wholly extinguish, the equity of redemption. As observed by Lord MACNAGHTEN in the case of *Bradley v. Carrit* (2) "You cannot impose on the equity of redemption a fetter operating indirectly when you cannot impose a fetter which operates directly."

We accordingly dismiss this appeal with costs.

Appeal dismissed.

APPELLATE CIVIL

*Before Sir Syed Wazir Hasan, Knight, Chief Judge
and Mr. Justice J. J. W. Allsop*

1933
September, 20

RAJA AVDHESH SINGH (PLAINTIFF-APPELLANT) v. LACHHMAN SINGH AND OTHERS (DEFENDANTS-RESPONDENTS)*

Land Revenue Act (III of 1901), sections 32(a), (b), 41 and 233(i)—Khewat—Defendants entered in khewat as perpetual lessees of proprietary rights—Suit in Civil Court for declaration that defendants were not lessees with heritable non-transferable rights—Jurisdiction of Civil Courts to maintain the suit.

Where the defendants' names were entered in the khewat as perpetual lessees of proprietary rights and the plaintiffs

*First Civil Appeal No. 30 of 1932, against the decree of Babu Bhagwati Prasad, Subordinate Judge of Partabgarh, dated the 8th of March, 1932.

(1) (1921) A.J.R., Lah., 129.

(2) (1903) L.R., A.C., 253.