declining in the circumstances to apply the maxim in *Illustration* (*b*) to section 114 and, in the absence of any proof of the 'fact' set out in the maxim, in convicting the said appellants on the testimony of the approver. At the same time I desire to add that in a long experience of criminal cases in India I have found only a few other instances in which I inclined to convict or to maintain a conviction depending on such uncorroborated testimony

1928.

RATTAN DHANUK *v.* KING-EMPEROR.

MACPHERSON, J.

Appeal dismissed.

APPELLATE CIVIL.

Before Adami and Fazl Ali, JJ.

MATURA SUBBA RAO

v.

SURENDRANATH SAHU.*

1928.

July, 24.

Mortgage—covenant not to redeem or mortgage or sell mortgaged property for certain years—right of pre-emption, creation of, in favour of mortgagee, whether clog on redemption—pre-emption, right of, to exist during the life-time of the parties, whether offends rule against perpetuities.

A condition whereby the mortgagor binds himself not to redeem the mortgaged property or to mortgage or sell it for certain years is not necessarily a clog on the equity of redemption.

Muhammad Ibrahim v. *Muhammad Abiz Kroshi* (1) and *Ram Baran Singh* v. *Ram Ker Singh* (2), followed.

A covenant in a mortgage deed creating a right of pre-emption in favour of the mortgagee, the operation of which

*Circuit Court, Cuttack. Appeal from Appellate Decree no. 52 of 1927, from a decision of Babu Brajendrakumar Ghosh, Subordinate Judge of Cuttack, dated the 9th June, 1927, confirming a decision of Babu Rangalal Chatterjee, Munsif, 2nd Court of Cuttack, dated the 17th July, 1925.

(1) (1910) 8 Ind. Cas. 1068. (2) (1911) 10 Ind. Cas. 243.

1928.

MATURA SUBBA RAO v. SURENDRANATH SAHU.

is not meant to extend beyond the life-time of the parties, is neither a clog on the equity of redemption nor obnoxious to the rule against perpetuities.

Bimal Jati v. *Birenja Kuer* (1), *Haria Paik* v. *Jaharuddi Gazi* (2), *Rajaram* v. *Krishna Sami* (3), and *Kalimaddin Bhuya* v. *Reazuddin Amad* (4), followed.

Maharaja Rajaramji v. *Ramnath Upasni* (5), *Nabin Chandra Sarma* v. *Rajani Chandra Chakrabarty* (6), *Nabin Chandra Soor* v. *Nawab Ali Sarkar* (7) and *Tripura Soonderi* v. *Jaggernath* (8), distinguished.

Appeal by the defendant.

The facts of the case material to this report are stated in the judgment of Fazl Ali, J.

B. N. Dutta, for the appellant.

S. C. Chatterji, for the respondent.

FAZL ALI, J.—The circumstances which have given rise to this appeal are briefly these:

On the 15th April, 1919, the defendant no. 1 took a loan of Rs. 1,200 from the plaintiff and executed an usufructuary mortgage deed in his favour in respect of a certain building in the town of Cuttack and the land on which it was situated. One of the clauses in the deed ran as follows:

" Until the expiry of the term of nine years from to-day neither I nor my heirs or representatives shall be competent to pay you the principal or any part threof on account of the usufructuary mortgage bond nor shall we dispossess you from the building in any way within nine years. Nor until your usufructuary mortgage is redeemed shall I be able to transfer the building by sale, mortgage simple or usufructuary or otherwise or in any way encumber it nor shall I sell or surrender my right in the site of the building. If I do so, it will be inoperative. If I ever wish to sell or transfer by usufructuary mortgage or patta or otherwise the building and its site, I shall not be able to

(1) (1900) I. L. R. 22 All. 238.
(2) (1897-98) 2 Cal. W. N. 575.
(3) (1893) I. L. R. 16 Mad. 301.
(4) (1909) 10 Cal. L. J. 626.
(5) (1928) 9 Pat. L. T. 17.
(6) (1920-21) 25 Cal. W. N. 901.
(7) (1900-01) 5 Cal. W. N. 343.
(8) (1875) 24 W. R. 321.

1928.

MATURA SUBBA RAO v. SURENDRA-NATH SAHU.

FAZL ALI, J.

transfer it to any one except you and I shall serve due notice on you about it beforehand by registered post. If you express unwillingness I shall transfer it elsewhere but if you desire to take it I shall not be able to transfer to anybody else."

I have reproduced this clause in full because the whole case turns on a proper construction of the latter portion of it and on the view that may be taken as to its legal effect. Now, ignoring for the present the controversial matters which have been raised in connection with this clause, there can be no doubt that by inserting it in the deed the parties meant to provide that (*i*) the defendant no. 1 was not to sell or mortgage the property within nine years from the date of the execution of the mortgage and (*ii*) that if he chose to sell the house he was required to give to the plaintiff the right of first refusal to buy the house. It appears, however, that in spite of these provisions the defendant no. 1 mortgaged the house in question to one Radhakrishna Bharathi and then to the defendant no. 2 and ultimately sold the house to the defendant no. 2 for a sum of Rs. 3,000 on the 22nd January, 1924. The plaintiff thereupon brought the present suit in which he relied on the clause quoted above and contended that in view of the contract between him and the defendant no. 1 he had acquired a right of pre-emption in respect of the house in dispute and was entitled to enforce it against the defendant no. 2 who had purchased it with full notice of the contract between him and the defendant no. 1.

The two Courts below have come to the conclusion that the plaintiff had a right of pre-emption under the mortgage deed as claimed by him and the defendant no. 2 purchased the house with notice of this right. They have accordingly decreed the suit and ordered the house in dispute to be reconveyed to the plaintiff on certain terms.

The defendant no. 2 has now appealed to this Court and it is contended on his behalf that the contract in the mortgage deed is not enforceable because

1928.

MATURA SUBBA RAO v. SURENDRANATH SAHU.

FAZL ALI, J.

(1) it is void for uncertainty; (2) it is a clog on redemption; and (3) it is obnoxious to the rule against perpetuities.

Now, before proceeding to examine these contentions, I should like to make a few observations with regard to certain matters which have been incidentally raised in the course of the argument. I may say at once that merely because there is a condition in the mortgage deed whereby the mortgagor binds himself not to redeem the mortgaged property or to mortgage or sell it during the period of nine years such a condition is not necessarily to be regarded as a clog on redemption. It has been held in numerous cases that the mere fact that certain covenants in a mortgage deed are onerous they could not on that ground alone be regarded as fettering the right of redemption and that it is open to the mortgagee to stipulate for his peaceful possession for a fixed number of years. See in this connection *Ram Baran Singh* v. *Ramker Singh* (1), *Ram Pershad* v. *Jagrup*(2) and *Mahammad Ibrahim* v. *Muhammad Abitz Kroshi* (3). I may also observe that the Courts below have rightly held that the passage relied on by the plaintiff was intended to confer on him a right of preemption in respect of the property in dispute. The learned Vakil for the respondents has cited before us a number of cases in which on the construction of similar passages to that which occurs in the mortgage deed before us, it has been held that a right of pre-emption had been conferred; but even apart from these cases I have no hesitation in holding that although the word 'pre-emption' has not been used in the deed, the contracting parties meant nothing else than this that if the house was to be sold at all the plaintiff was to have an option of purchase and that any transfer to a third person without offering

(1) (1911) 10 Ind. Cas. 243. (2) (1912) 10 All. L. J. 157.

(3) (1910) 8 Ind. Cas. 1068.

it to the plaintiff was to be deemed invalid as against him. This is, in my opinion, nothing else than the giving of the right of pre-emption to the plaintiff.

Now once it is found that the contract relied on by the plaintiff is really a contract giving him the right of pre-emption, I do not see how it can be attacked on the ground that it is void for uncertainty. It is said on behalf of the appellant that the contract is vague because it does not fix any price at which the house was to be sold and reliance is placed on certain cases in which contracts of sale were held to be incomplete and unenforceable because no price had been agreed upon between the parties. The argument, however, completely overlooks the distinction between a contract which is out and out a contract for sale and one which merely creates a right of pre-emption. If it is the former, then it is certainly incomplete if no price is fixed. If it is the latter, then it is not at all necessary that any price should be fixed beforehand because in such cases the price to be paid would be the price at which the property was actually sold to a third party. In fact it has been pointed out in a number of cases that if the mortgagor is tied down to a particular price in a covenant for pre-emption it may make the covenant hard and unconscionable and even a clog on redemption. In my opinion the appellant cannot make a grievance of the fact that no price was fixed in this case and the covenant cannot be avoided on that ground.

Then arises the question as to whether the covenant is a clog on redemption. In order to decide this question it would be necessary to properly construe the clause in the mortgage deed which gives to the plaintiff the right of pre-emption. It is contended on behalf of the appellant that the use of the word 'ever' in the clause indicates that it is to hold good for all times and that it will apply even after the property has been redeemed. In my opinion this is by no means a reasonable construction of the covenant the

1928.

MATURA SUBBA RAO v. SURENDRA-NATH SAHU.

FAZL ALI, J.

plain meaning of which is that the right of pre-emption will remain in the plaintiff as long as the mortgage subsists. This being so, the mere fact that there is a covenant in the deed creating a right of pre-emption in favour of the plaintiff such a covenant cannot by itself be considered to be a clog on redemption. If any authority is needed for this proposition, it is to be found in the case of *Bimal Jati* v. *Biranja Kuar* (1). In that case a similar objection was taken to a covenant for pre-emption in a mortgage deed, and Strachey, C.J., overruling the objection, observed as follows: "Now the condition about fettering the right of redemption only means that no bargain made at the time of a mortgage is valid, which prevents a mortgagor from redeeming upon payment of principal, interest and costs......................... But so long as the bargain places no obstacle in the way of the mortgagor getting back his property upon payment of the mortgage money, it is not open to objection as a fetter on the right of redemption. Then is this covenant for pre-emption open to objection on this ground? It does not, it appears to me, in the least stand in the way of the mortgagor getting back the property, if and when he pays the mortgage money. There is no provision whatever requiring the mortgagor to transfer the property to the mortgagee if he does not wish to do so. There is nothing which, assuming the mortgage money to be paid, gives the mortgagee any further right or interest in the property. In Fisher on Mortgages, 4th edition, section 1150, it is expressly stated,

> The Court will not object to a covenant in a mortgage for a right of pre-emption in the mortgagee in case the estate be sold; though he is liable to be deprived of its benefit by oppressive or fraudulent conduct [*Orby* v. *Trigg*(2)].

The passage quoted by me disposes of the main argument advanced in this case on behalf of the appellant that a covenant for pre-emption is from its

(1) (1900) I. L. R. 22 All. 238. (2) (172) 9 Mod. 2.

1928.

MATURA SUBBA RAO v. SURENDRA-NATH SAHU.

FAZL ALI, J.

nature a clog on redemption. I may also in this connection refer to the case of *Haris Paik* v. *Jaharuddi Gazi* (1) in which it was held that an agreement by the mortgagor to give the mortgagee a preference of pre-emption in the case of sale was not contrary to public policy and might be enforced against the purchaser with notice of the covenant. See also *Rajaram* v. *Krishna Sami* (2); and *Kalimaddin Bhuya* v. *Reazuddin Ahmed* (3).

It is next contended that the covenant for preemption being unlimited in point of time is void on the ground that it violates the rule against perpetuities and reliance is placed on the case of *Maharaja Rajaramji* v. *Ramnath Upasni* (4). That was a case where in a lease the lessee covenanted to make the first offer of sale of the leasehold property to the lessor for purchase, but the former sold it to a stranger and thereupon the lessor brought a suit to eject the lessee for breach of the said covenant, and Das, J. relying on the authority of *Nabin Chandra Sarma* v. *Rajani Chandra Chakrabarty* (5) held that the clause was void as it was obnoxious to the rule against perpetuities. The facts of the case are not fully stated in the report; but the lease referred to in that case must have been a permanent lease and the covenant of pre-emption must have been made in such a way as to bind not only the lessee but also his heirs When we refer to the case of *Nabin Chandra Sarma* v. *Rajani Chandra Chakrabarty* (5) on which the decision of Das, J. is based we find that the learned Judges who decided that case never meant to lay down the proposition that a covenant of pre-emption the operation of which is not meant to extend beyond a lifetime would necessarily violate the rule against perpetuities. What happened in that case was that a Hindu transferred certain immoveable property to his son-in-law reserving a condition that if the *transferee or his*

(1) (1897-98) 2 Cal. W. N. 575.
(2) (1893) I. L. R. 16 Mad. 301.
(3) (1900) 10 Cal. L. J. 626.
(4) (1928) 9 Pat. L. T. 17.
(5) (1920-21) 25 Cal. W. N. 901.

1928.

MATURA SUBBA RAO v. SURENDRA-NATH SAHU.

FAZL ALI, J.

successor found it necessary to sell the property he or his successor must sell to *the vendor or to his nephew or his heirs* at a specified price. This being so, it was obviously a case in which the covenant was intended to apply not only to the parties during their lifetime but also to their heirs and successors and it was rightly held that the case came within the rule against perpetuities. Again Mookerjee, C.J., who delivered the judgment in the case of *Nabin Chandra Sarma* (1) referred to two other cases of the Calcutta High Court *Nobin Chandra Soor* v. *Nawab Ali Sarkar* (2) and *Tripura Soonderi* v. *Juggernath* (3). In both these cases the covenant extended beyond the lifetime of the parties and was intended to operate as between their heirs and successors and it was accordingly held that it contravened the rule against perpetuities. Now, in the present case the covenant is expressed in the following words:

> "If I ever wish to sell or transfer........................ I shall not be able to transfer it to any one except you and I shall serve due notice on you about it beforehand by registered post. If you express unwillingness I shall transfer it elsewhere but if you desire to take it I shall not be able to transfer it to anybody else."

We must remember that here the covenant is between a mortgagee and a mortgagor who has a right to redeem the property at any time after nine years. Besides the language used clearly indicates that the covenant was between the defendant no. 1 and the plaintiff only and there is nothing in it to suggest that the heirs of the parties were meant to be bound by the covenant. The view I take is supported by the fact that in other passages in the deed reference is made to the heirs and representaives and also to the sons and grandsons of the parties and there seems to be no reason why they would not have been referred to in connection with the covenant for pre-emption also if it was intended that it should apply to them. I, therefore, hold that the covenant for pre-emption relied on by the plaintiff is a covenant which he is entitled to enforce and in my opinion this suit has been rightly decreed.

(1) (1920-21) 25 Cal. W. N. 901. (2) (1900-01) 5 Cal. W. N. 848. (3) (1875) 24 W. R. 321.

1928.

MATURA SUBBA RAO v. SURENDRA-NATH SAHU.

FAZL ALI, J.

The question whether the defendant no. 2 was a purchaser with notice of such a covenant is a question of fact which has been decided by both the Courts below against the defendant no. 2 and I am bound by the finding.

The result is that the appeal will have to be dismissed. The plaintiff, however, will not be entitled to any costs in this Court, because it appears that the property was mortgaged twice in contravention of one of the conditions in the deed and yet the plaintiff did not raise any objection.

ADAMI, J.—I agree.

S. A. K. *Appeal dismissed.*

APPELLATE CIVIL.

Before Das and Wort, JJ.

MUSSAMMAT BIBI SALEHA

v.

HAJI AMIRUDDIN.*

1928.

July, 24.

Muhammadan Law—Pre-emption—Mukarraridar whether can pre-empt.

A mukarraridar holding under a co-sharer has no right to pre-empt as against another co-sharer.

Sheikh Mohammad Jamil v. *Khub Lal Raut*,(1) followed.

Katyayani Debi v. *Udoy Kumar Das*(2) and *Ram Bali Singh* v. *Jaglal Singh*(3), distinguished.

Kally Dass Ahiri v. *Monmohini Dassee*(4) and *Surama Musalmani* v. *Munsi Danesh Mohamed*(5), referred to.

*Appeal from Appellate Decree no. 1158 of 1926, from a decision of H. Ll. L. Allanson, Esq., I.C.S., District Judge of Gaya, dated the 24th April, 1926, reversing a decision of M. Shaikh Ahmad Hussain Khan, Munsif of Gaya, dated the 7th December, 1925.

(1) (1920) 5 Pat. L. J. 740.
(2) (1925) I. L. R. 52 Cal. 417, P. C.
(3) (1925) 89 Ind. Cas. 421.
(4) (1897) I. L. R. 24 Cal. 440.
(5) (1907-08) 12 Cal. W. N. ccxliv (Notes)