in the Pensions Act, although the property was held, as the parties have considered, in *saranjám—Rávji Náráyan Mandlik* v. *Dádáji Bápuji Desái*[1]. Again, if the lands were not, as the Agent thinks was possibly the case, the subject of the *saranjám*, the question of the Pensions Act cannot arise, although the Government may possibly have a right to the lands as against both the parties. We must, therefore, reverse the decree and send back the case for a decision on the merits. Costs to abide the result.

1892.

KESHAVRÁO v. GANPATRÁO NILKANTH NAGARKAR.

Decree reversed.

(1) I. L. R., 1 Bom., 523.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Telang.

TRIMBA'K JIVA'JI DESHAMUKHA, (ORIGINAL DEFENDANT NO. 1) APPELLANT, *v.* SAKHA'RA'M GOPA'L, (ORIGINAL PLAINTIFF), RESPONDENT.*

1891. *November* 23.

Mortgage—Undertaking not to alienate the equity of redemption—Void undertaking—Assignment of the equity of redemption—Redemption suit by assignee—Co-heir having no interest in the mortgaged property at the time of the suit not necessary party—Currency in which the debt was contracted—Repayment.

Where a mortgagor undertook that he would not alienate the equity of redemption, and that the mortgagee should not be obliged to receive the money from any one but the original mortgagor,

Held, that as the undertaking absolutely forbade alienation, and thus deprived the mortgagor of a right which was an essential incident of the estate he had in the property by virtue of his equity of redemption, it could not be given effect to.

A co-heir of the plaintiff, having an interest in the mortgage at the time of the redemption suit, is a necessary party to the suit, but not otherwise.

When a mortgage-debt is contracted in a particular currency, it should be repaid in that currency.

THIS was a second appeal from the decision of W. H. Crowe, District Judge of Poona.

Suit to redeem.

* Second Appeal, No. 692 of 1890.

1891.

TRIMBAK JIVÁJI DESHAMUKHA v. SAKHÁRÁM GOPA'L.

The plaintiff, Sakhárám Gopál, deceased, represented by his sons and heirs, Shiváji and others, stated in the plaint that the house in dispute belonged to one Lakshman Rámchandra Deshamukha, who had mortgaged it to the deceased defendants Trimbak and Bramhanáth Jiváji for Rs. 450 of the Poona currency, and subsequently sold his equity of redemption to the deceased plaintiff. The plaintiffs, therefore, sought to redeem the house from the defendants on payment of Rs. 430-2-11, equivalent to Rs. 450 of the Poona currency.

Defendant No. 1, Vishnu Trimbak, son of Trimbak Jiváji, at first denied the mortgage, and set up his own title; but subsequently admitted the mortgage, and claimed Rs. 450 under the mortgage and Rs. 1,600 on account of improvements and repairs done to the mortgaged property. He further contended that one Anant Sakhárám, another heir of the deceased plaintiff, was a necessary party.

The Subordinate Judge (Ráo Sáheb Mahádeo Shridhar) passed a decree directing the plaintiffs to redeem the house on payment to defendant No. 1 of Rs. 450 on account of the mortgage, and Rs. 80 on account of the repairs and improvements, within six months.

Defendant No. 1 appealed to the District Court, and the plaintiffs presented cross-objections under section 561 of the Civil Procedure Code (Act XIV of 1882).

The District Court confirmed the decree.

Against the decree of the District Court defendant No. 1 appealed to the High Court, and the plaintiffs presented cross objections.

Ganesh Rámchandra Kirloskar for the appellant:—There is an express provision in our mortgage-deed that no one, except the mortgagor, should redeem the property from us, and that we should not accept payment from any other person. Therefore, according to the condition of the contract, the right of redemption was personal to the mortgagor. The respondents, who stand in the shoes of the mortgagor, being the heirs of his assignee, cannot now turn round and say that they are entitled to redeem.

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The suit, moreover, is defective for want of parties. Anant Sakhárám, one of the heirs of the deceased plaintiff, Sakhárám Gopál, is not a party. In a redemption suit all persons having any interest in the mortgaged property must be joined; otherwise the suit is not properly constituted.

The lower Courts have given us nothing for the new building which we have erected, and only a very small amount for repairs.

Ganesh Krishna Deshmukha for the respondents:—A mortgagor's equity of redemption cannot be restricted or destroyed. The clause in the mortgage-deed is oppressive, and must be treated as of no effect. No Court of law or equity will give effect to such a condition.

It was not necessary to join Anant Sakhárám, because he was divided, and had no interest in the mortgaged property.

In one of our cross-objections in this Court we complain that the lower Court has directed us to pay the amount of the mortgage in the British currency. The loan was, as is expressly stated in the mortgage-deed, given in the Poona currency; Rs. 540 of the Poona currency would amount to Rs. 435-2-0 of the British currency. Redemption should, therefore, be allowed on payment of the latter amount.

The appellant had, in his original written statement, denied the mortgage and our right to redeem it; at a subsequent stage of the suit he presented another application admitting the mortgage, and prayed for the amendment of the issues. The Subordinate Judge granted the application, and saddled the appellant with the costs thereof, irrespective of the result of the suit. But this circumstance was not made clear in the decree, which directs us to pay costs. We brought this circumstance to the notice of the Appellate Court, but it declined to interfere.

SARGENT, C. J.:—Two objections have been taken by the appellant to the plaintiff's suit for redemption. It was, in the first place, contended that Sakhárám's title to the equity of redemption by assignment from the original mortgagor was rendered invalid by the mortgagor undertaking that he would not alienate the equity of redemption, and that the mortgagee

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should not be obliged to receive the money from any one but the original mortgagor; and, secondly, that Anant, who was one of the co-heirs with plaintiff of Sakhárám, ought to have been made a party.

As to the first of these objections, it has long been settled that a Court of Equity will not give effect to any collateral restriction on the equity of redemption—Spence's, Equity, Vol. II p. 628. In an old case in the Equity Cases Abridged, a proviso that the mortgagee should have a right of pre-emption was held to be one which the mortgagee was entitled to insist on; but here the proviso in question absolutely forbids alienation, and thus deprives the mortgagor of a right which is an essential incident of the estate which he has in the land by virtue of his equity of redemption. The lower appeal Court was, therefore, in our opinion, right in refusing to give effect to the proviso.

As to the second objection, it is clear that, if Anant had an interest in the mortgage when this suit was brought, he would be a necessary party to the suit—see Coote on Mortgages, 5th Ed., p. 1162, and *Henley* v. *Stone*[1]; but the plaintiff alleged in his plaint that he and Anant had divided the paternal property, and that the equity of redemption had fallen to his share, and as no issue was framed, on either of the two occasions on which issues were raised, for the purpose of determining whether plaintiff's statement was true, and it was not alleged by the defendant before the lower Court of Appeal that Anant still had an interest in the equity of redemption, we must assume that the District Judge was right in disregarding the objection, on the assumption that the plaintiff was the sole owner of it.

The plaintiff-respondent has filed cross-objections, of which we think it only necessary to mention the two last, *viz.*, that the mortgage-debt ought have been calculated in Poona currency, and that he ought not to have been ordered to pay all the costs.

As to the former of these objections, we think the Appeal Court was wrong in not allowing for the difference in value between Poona currency rupees and those of the East India Company. The mortgage states that the loan was of Rs. 450 in the Poona

(1) 3 Beav., 356.

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currency, and the money actually paid to the mortgagor must, therefore, in the absence of evidence to the contrary, be presumed to have been in that currency. The decree must, therefore, be varied by inserting Rs. 435-2-0 for Rs. 450 as the principal mortgage-debt.

As to costs, in order to avoid any doubt, the decree should, we think, be varied by adding the words "except the costs caused by the defendant's denial of the mortgage and the plaintiff's title," as such costs had been already, and we think rightly, thrown on the defendant. In other respects the decree is confirmed with costs.

Decree varied.

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Parsons.

GANPAT AND OTHERS, (ORIGINAL PLAINTIFFS), APPLICANTS, *v.* JIVAN AND OTHERS, (ORIGINAL DEFENDANTS), OPPONENTS.*

1891. *December* 11.

Review—Civil Procedure Code (Act XIV of 1882), Secs. 624, 626(c)—Act VII of 1888, Sec. 59—Grant of the application for review—Notice—Hearing by successor.

An application for review of judgment upon grounds other than those mentioned in section 624 of the Code of Civil Procedure (as amended by Act VII of 1888), if presented to the Judge who delivered it, and who has thereupon directed notice to be given to the opposite party, may be heard and disposed of by his successor.

THIS was an application under section 622 of the Code of Civil Procedure (Act XIV of 1882).

The applicant sued to recover Rs. 602 with interest as money lent and advanced to the defendant. The defendant denied the loan.

The Court of first instance awarded the plaintiff's claim. On appeal, Mr. T. B. Alcock, District Judge, reversed the decree and rejected the claim.

Plaintiff applied for a review of the Appellate Court's judgment, and Mr. Alcock issued notice to the defendant to show cause why the review sought should not be granted.

* Application, No. 180 of 1891.