

1902.

NANDURAT

G. GAU.

As to the second question, the reference is made to us not only under the Stamp Act but also under the Court Fees Act. There is no provision of law empowering the Subordinate Judge to make a reference to this Court or giving us jurisdiction to answer it under the Court Fees Act. I would, therefore, decline to answer the second question so far as it relates to that Act. So far as it is a reference under the Stamp Act, the decision in *Kastur v. Fakiria* (1) is clear. It was held there that "copies furnished under section 141-A do not come within article 24 of schedule I of the Stamp Act, 1899."

BATTY, J. :—I entirely concur.

ASTON, J. :—I concur.

(1) (1902) 26 Bom. 522.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Batty.

RAJMAL MOTIRAM AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS,
v. SHIVAJI ANANDRAV (ORIGINAL PLAINTIFF), RESPONDENT.*

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December 2.

Mortgage—Subsequent money bonds—Provision as to the payment of the bonds before redemption—Clogging the equity of redemption—Once a mortgage always a mortgage, and nothing but a mortgage.

In the year 1869 the plaintiff's deceased father mortgaged his lands with possession to the defendants' deceased father under two mortgage-deeds, and in the year 1882 the plaintiff passed two money bonds to the defendants' deceased father, which contained a clause providing that the amount due on the mortgages should not be paid in redemption of the property unless that which was due on the money bonds was also paid.

The plaintiff having filed a suit to redeem the lands, the defendants objected to the redemption under the above clause.

PER CURIAM.—Following *Noakes & Company, Limited, v. Rice*, (1)—a clause which has the effect of clogging the equity of redemption is void. *Hari Mahadaji v. Balambhat* (2) doubted.

SECOND appeal from the decision of Ráo Bahádur A. G. Bhave, First Class Subordinate Judge of Sholápur, with Appellate

* Second Appeal No. 188 of 1902.

(1) L. R. (1902) A. C. 24.

(2) (1884) 9 Bom. 233.

Powers, confirming the decree passed by Ráo Sáheb D. W. Bhat, Subordinate Judge of Karmála.

Suit for redemption.

The property in suit was mortgaged with possession to the defendants' father in the year 1869 by two mortgage-deeds dated, respectively, 1st May, 1869, and 6th July, 1869. The first mortgage was for Rs. 400 and the second for Rs. 300.

The defendants denied the plaintiff's right to redeem. They alleged that on the 17th July, 1882, the plaintiff had executed to their father (the original mortgagee) two money bonds which provided that the debts secured by them should be satisfied before the mortgages were redeemed.

These debts had not been paid and the defendants, therefore, contended that the plaintiff was not entitled to redeem the mortgages.

The Subordinate Judge passed a decree for the plaintiff. He held that the mortgage-debt had been satisfied and also the debts secured by the two money bonds.

On appeal the decree was confirmed with some slight variations which are not material to this report.

The defendants preferred a second appeal. They contended that the debts due under the mortgages and under the later money bonds had not been satisfied, and that the plaintiff was bound by his agreement not to redeem contained in the money bonds. On this point *Hari Mahadaji v. Balambhat*⁽¹⁾ and *Yashvant v. Vithobate*, were cited for the appellants. The respondent cited Ghose's Law of Mortgage in India (3rd Ed.), pages 271, 273.

Ratanji R. Desai for the appellants (defendants).

N. V. Gokhale for the respondent (plaintiff).

JENKINS, C.J. (after referring to other points which are not material to this report, continued):—Then it is argued that as the two later bonds passed in favour of the mortgagees provided that the amount due on the mortgages could not be paid off in redemption of the property, without also paying

(1) (1884) 9 Bom. 233.

(2) (1887) 12 Bom. 231.

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that which was due on those bonds, the lower Appellate Court should have awarded redemption only on those terms. The subsequent bonds are not registered, and it is conceded that they do not create any charge on the land; but it is said that notwithstanding this, warrant for the appellants' contention is to be found in *Hari Mahadaji v. Balambhat*.⁽¹⁾ The lower Appellate Court, however, is not satisfied that there is anything due on the bonds, and so we are not under the necessity of considering whether the cited decision involves a violation of the principle that an equity of redemption cannot be clogged. The meaning of that rule has been recently expounded in *Noakes & Company, Limited v. Rice*⁽²⁾ by Lord Davey, who, dealing with the doctrine that a provision or stipulation which will have the effect of clogging or fettering the equity of redemption is void, says it might be expressed in this form: "Once a mortgage always a mortgage and nothing but a mortgage," and then continues: "The meaning of that is, that the mortgagee shall not make any stipulation which will prevent a mortgagor, who has paid principal, interest and costs, from getting back his mortgaged property in the condition in which he parted with it." We have merely referred to this aspect of the case in order that it may not be supposed that we accept the view which is said to have found favour in *Hari Mahadaji's case*.⁽¹⁾

The last point urged is that the lower Appellate Court improperly cast upon the mortgagees the burden of proving as to the amount of the sum advanced on the occasion of the mortgage. We think it acted quite within its right when regard is had to section 12 of the Dekkhan Agriculturists' Relief Act.

Decree confirmed with costs.

Decree confirmed.

(1) (1884) 9 Bom. 233.

(2) (1902) A. C. 24.