APPELLATE CIVIL.

Before Sir John Heaton, Kt., Ag. Chief Justice, and Mr. Justice Crump.

GENU TUKARAM TAPKIR AND OTHERS (ORIGINAL PLAINTIFF), APPELLANTS *v.* NARAYAN AND ANOTHER ; SONS AND HEIRS OF THE DECEASED BALA *alias* RAGHU GOVIND TAMHANE, MINORS, BY THEIR GUARDIAN, MOTHER, MUKTABAI (HEIRS OF ORIGINAL DEFENDANT NO. 2), RESPONDENTS*.

1920. *February* 27.

Transfer of Property Act (IV of 1882), section 60—Mortgage—Redemption—Mortgagee to remain in possession so long fruit-bearing trees remain on land—Whether the term operated as a clog on equity of redemption—Dekkhan Agriculturists' Relief Act (XVII of 1879), Section 13.

A mortgage deed of 1867 provided that on payment of the principal sum on the expiry of twenty-one years, the mortgagor shall be entitled to recover the land and trees free of all charges and that if the money was not so paid, the mortgagee will be allowed to develop the land by growing fruit-bearing trees on it and will not be required to give up possession until the trees had ceased bearing fruit. The mortgagor did not redeem at the expiry of the stipulated period of twenty-one years. The mortgagee who remained in possession planted a number of fruit-bearing trees on the land. In 1913, the mortgagor sued for redemption of the mortgage of 1867, under the Dekkhan Agriculturists' Relief Act contending that the stipulation in the deed postponing the mortgagor's taking possession so long as there were fruit-bearing trees on the land was a clog on the equity of redemption,

Held, that the provision in the deed postponing the mortgagor's taking possession so long as there were fruit-bearing trees did not operate as a clog on the equity of redemption.

Held further, that the proper relief which the mortgagor was entitled to was that under section 13 of the Dekkhan Agriculturists' Relief Act, 1879, namely, the taking an account from the beginning of the mortgage up to the date of the suit.

The words "at any time after the principal money has become payable" in section 60 of the Transfer of Property Act, mean become payable according to the terms of the contract.

HEATON, Ag. C. J. :—Section 60 of the Transfer of Property Act merely enacts that redemption is to be according to the terms of the mortgage contract and there is nothing in the Transfer of Property Act which says anything about clogs on the equity of redemption.

* Second Appeal No. 461 of 1918.

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SECOND appeal against the decision of C. N. Mehta, Joint Judge of Poona, varying the decree passed by J. R. Dhurandhar, Joint Subordinate Judge at Haveli, Poona.

Suit for redemption.

The land in suit originally belonged to one Vinayak Pandurang. Vinayak mortgaged the land with possession to the ancestor of the defendants in 1867. The terms of the mortgage deed were as follows :—

"The land thus described along with the well and the trees is mortgaged to you. You are to make vahiwat of the land and trees and to take profits realised in lieu of interest and assessment. The money is to be paid twenty-one years from the year of this deed at the end of the month of Vaisha and the lands and trees to be redeemed. If the money be paid after the expiry of the said period and if there be any Udim (cultivation) in the land at that time, I shall charge reasonable rent, and allow you to use the land till the Udim is taken out. Even a Panmala may be grown into the land............You may grow any produce you like into the land and receive the profits realised in lieu of interest and assessment."

The heirs of the original mortgagor sold the equity of redemption to the plaintiff's father in 1913. In 1913 the plaintiffs sued for accounts of the mortgage of 1867 and for redemption under the provisions of the Dekkhan Agriculturists' Relief Act.

The defendants contended that they had planted about 700 orange trees, five or six years before suit, and which would yield a net annual income of Rs. 2,000 ; that they had spent in planting and maturing those trees nearly Rs. 4,000 ; that unless the defendants were compensated for the said outlay and future damages the plaintiff would not be entitled to redeem and that if redemption were to be allowed the defendants would be entitled to retain possession of the land as tenant of the plaintiffs as long as the trees lasted under the terms of the mortgage deed.

The Subordinate Judge, J. R. Dhurandhar, found that the mortgagee had planted 600 orange trees at a cost of Rs. 4,000 but he held that the stipulation about the mortgagee continuing in possession, if there were fruit trees on the land, was a clog on the equity of redemption and could not, therefore, bind the mortgagor. His reasons for holding thus were :

"The principle to be applied in such a case is in the words of Lord Davy this : That a mortgage must not be converted into something else ; and when once you come to the conclusion that a stipulation for the benefit of the mortgagee is part of the mortgage transaction, it is but part of his security and necessarily comes to an end on the payment off of the loan. To the same effect are the decisions in Bradley *v.* Carrit (L. R. 1903 A.C. 253) and Fairclough *v.* Swan Brewary Co., Ltd., (L. R. 1902 A. C. 565) where it was laid down that the Court will not allow the right of redemption in any way to be hampered or crippled in that which the parties intended to be a security by any contemporaneous instrument with the deed in question or by anything which the Court would regard as a simultaneous arrangement or part of the same transaction."

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"Such stipulations are also looked upon with disfavour by Indian Courts and have not been given effect to. In Mahmed Muse *v.* Jijibhoy (I. L. R. 9 Bom. 524) it was held that a condition in a mortgage, that if the mortgagor redeems the property the mortgage right shall be extinguished, but the property shall forever remain in the possession of the mortgagee on his paying a fixed rent, is a stipulation which cannot be enforced ; for though such a condition does not absolutely exclude the right of redemption, it has undoubtedly the effect of fettering it with an onerous obligation. Although in this case the lease is not permanent, yet it is for an indefinite period, for, the mortgagee is allowed to raise any produce even a Panmala which according to the evidence in this case may last for 10 or 15 years. In Dada *v.* Dhondo (P. J. 1887, page 12) a lease between a mortgagor and a mortgagee which was to last for 25 years was not upheld, in the absence of proof of its entire fairness, being considered as an advantage taken of the mortgagor and against policy. In Mahomed *v.* Ezekiel (7 Bom. L. R. 772) Tyabji J. upheld a lease between a mortgagor and a mortgagee relying on the decisions in Santley *v.* Wilde (1899) 2 Ch. 474 and Biggs *v.* Haddinott (1898) 2 Ch. 307. But the correctness of the said decisions was questioned by the House of Lords in the cases quoted above and the lease in Mahomed *v.* Ezekiel was upheld on the express provision in the mortgage bond that the mortgagee was to be in

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possession of the mortgaged property as a lessee only during the term of the mortgage and thus containing nothing preventing the mortgagor's right to redeem."

Mr. Dhurandhar, therefore, decreed that defendant No. 2 should continue in possession for three years, i.e., till the end of 1917 at the expiry of which period the land mortgaged should be restored to the mortgagor free from all incumbrances.

On an appeal being preferred, the appellate Court sent back the case for findings on issues relating to accounts. Mr. Dhekne, Subordinate Judge, recorded the findings. In disposing of the appeal, the Joint Judge held that the stipulation in the mortgage deed was not invalid as being a clog on the equity of redemption; he relied on Shephard and Brown's Transfer of Property Act, Note 1 to section 60 pp. 256, 257 of 7th edition, citing *Noakes & Co., Limited* v. *Rice* (1902) A. C. 24 cited with approval in *Rajmal* v. *Shivaji* (1903) 27 Bom. 154. He decreed that the plaintiffs should take into their possession all the mortgaged property except the Northern pieces in Survey No. 220 as having "Santra Plants" and "non-bearing other trees" which were to continue in the possession of the defendants till 1924 A. D. when it should be handed over by them to the plaintiffs in a condition fit for ordinary Bagayit or Jirayit cultivation. The plaintiffs should pay to the defendants Rs. 900 by yearly instalments of Rs. 100.

The plaintiffs appealed to the High Court.

G. S. Rao with *K. V. Joshi* and *B. K. Mehendale*, for the appellant:—The mortgagor's right of redemption cannot be fettered.

The special stipulation does that, and therefore it cannot be enforced. That part of the mortgage bond is invalid and inoperative: *Noakes* v. *Rice*[1] and *Rajmal* v. *Shivaji*[2].

[1] [1902] A. C. 24. [2] [1902] 27 Bom. 154.

[HEATON, Ag. C. J. :—But the question is when does the mortgagor's right become enforceable. Under section 60 of the Transfer of Property Act, the mortgagor has got a right only after the principal money has become payable.]

The mortgagor's right is inherent. At least the mortgagor in this case has a right after the expiry of 21 years. Further the suit is under the Dekkhan Agriculturists' Relief Act, and the mortgagor's right cannot be put off.

H. G. Kulkarni, for the respondents :—The stipulation does not constitute a clog on the equity of redemption. The Indian law is not the same as the English law on the point. Section 60 of the Transfer of Property Act is the only law which governs the rights of the mortgagor and the mortgagee, and the Indian law does not define anything as a clog on the equity of redemption. According to the strict terms of the deed, the suit is premature and the rights created by a contract between the parties should not be interfered with on the supposed application of the doctrine of the "clog on the equity of redemption". The terms of the contract should be strictly enforced.

HEATON, Ag. C. J. :—This is a case of some interest, partly because it is unusual itself, and partly because it has followed a somewhat surprising course. The plaintiff is a mortgagor and seeks to redeem. The mortgage is one of a very early date about 1867 or 1868, and it provides that the mortgagor was to receive Rs. 900; and that the mortgaged property was to be placed in the possession of the mortgagee who was to enjoy the land and trees. But it was evidently contemplated that the mortgagee should develop the land in some way, probably by planting fruit trees. The mortgage provided that redemption should not take

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place until after twenty-one years, and that if the mortgage was not redeemed then the mortgagee was to continue to enjoy the land and to take the profits in lieu of interest. The deed also provided that if the mortgagee should, at some future time after the expiration of the twenty-one years when the mortgagor sought to redeem, have planted trees, or something of that kind described in the deed as Udim (उदीम), which were bearing fruit, the mortgagee should not be required to give up possession until this Udim had come to an end; though meantime he should pay to the mortgagor the customary Khand (खंड). There were other detailed provisions in the document, which I think I need not set out, because what I have said gives a general idea of the main features of the document.

The twenty-one years must have come to an end about 1888 or 1889. It was not, however, until 1913 that the mortgagor's successors brought this suit for redemption, and it is found, indeed it is admitted by both sides, that at that time there were fruit bearing trees, and they are still there, which had been put down by the defendant. The Courts below were naturally a good deal exercised as to how redemption could, or on what terms it should, be permitted in those circumstances.

The trial Court came to the conclusion that the stipulation about the mortgagee continuing in possession, if there were fruit trees on the land, was a clog on the equity of redemption, and need not, and could not, therefore, bind the mortgagor. He made an order that defendant No. 2 should continue in possession for three years, *i. e.*, till the end of 1917, at the expiry of which period the land mortgaged should be restored to the mortgagor free from all incumbrances.

The defendant No. 2, the mortgagee, appealed. The appellate Court came to the conclusion that before

considering the case fully on the merits a good deal had to be determined, and it sent the case back with directions that practically involved the taking of an account from the date of the institution of the suit. Evidence was recorded and enquiries were made, and the Court of first appeal eventually made its own estimate of the account, at any rate from 1914, shortly after the suit was filed. It arrived at the cost of the fruit trees planted by the mortgagee, and arrived at the net income year by year. Finally it made the decree which appears at the end of its judgment.

That decree awarded immediate possession of part of the land to the plaintiff, but it postponed the mortgagor's taking possession of the remainder of the land, the remainder being that part on which these fruit trees had been planted, until the year 1924, and it directed that the mortgage debt of Rs. 900 should be paid by instalments.

Now, the first point we have to decide is whether the provision in the deed postponing the mortgagor's taking possession, so long as there were fruit bearing trees on the land, is a clog on the equity of redemption of the kind which must be regarded as invalid under the law in British India. Personally I do not think it is a clog. The contract is a very elaborate and a very peculiar one. I am quite unable to say with certainty whether, if this case came before an English Judge thoroughly conversant with the English law of mortgage, that Judge would find in this stipulation a clog on the equity of redemption, and therefore, cut it out of the mortgage contract. But of this I feel quite certain that the English law on the point is not the law which we have to apply. We have to apply the Transfer of Property Act, and the section in that Act which is applicable is section 60. That section begins

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"at any time after the principal money has become payable, the mortgagor has a right, on payment or tender at a proper time and place, of the mortgage money, if any, to require the mortgagee" to do certain things. Now the words "at any time after the principal money has become payable" must, as I think, mean become payable according to the terms of the mortgage contract, because there is no other way whatever except by reference to the mortgage contract which enables you to ascertain the amount payable or how or when it is to be paid. So that section 60, as it stands, merely enacts that redemption is to be according to the terms of the mortgage contract, and there is nothing in the Transfer of Property Act that I know of which says anything about clogs on the equity of redemption. So if we are to determine in this country whether a certain provision in a mortgage contract is contrary to law, we are not, as it seems to me, to look to the English rule. We must look to the law, applicable in British India. There is the law of contract itself which provides a great many instances in which provisions of various kinds are invalid, and failing everything else, there are certain broad general equitable principles which might be applied.

The rule in English law regarding a clog on the equity of redemption has, as I understand it, long ceased to be what can be described as an equitable principle. It is a rigid rule of law, and one as to which the English Judges themselves have on occasions pronounced very adverse opinions. So I do not think that equitable principles require us to apply the rigid rule which is applicable in England.

The contract, if you take it by itself, seems to me to be a perfectly fair one. It is meant to serve the principal purpose that the land is to be developed by the mortgagee, and I can find in it nothing which is either

unfair in itself, or which gives the slightest indication of their being anything in the nature of undue influence exercised by the mortgagee over the mortgagor. Nor is it suggested anywhere in the case that there is anything to object to in this contract unless you apply the rigid rule which is applicable in England.

Therefore, in my opinion, we have to go by the contract, or else we have to go by the Dekkhan Agriculturists' Relief Act which enables the Court in a redemption suit to set aside or modify the provisions of a contract. We cannot go by the law of contract pure and simple, because if we do so, I mean without reference to the Dekkhan Agriculturists' Relief Act, the suit is premature. There has been no payment of the mortgage debt, nor has there been any tender of the mortgage money, or offer of payment of any kind or demand for an account from the mortgagee; so no suit for redemption would lie under the Transfer of Property Act. And under the Dekkhan Agriculturists' Relief Act, an account has to be taken as provided by section 13. That must be an account from the beginning of the mortgage up to the date of the suit. No such account has been taken, although somewhat curiously, an account has been taken from the date of the suit to the year 1924. It seems to me, therefore, that the case has been disposed of without applying those provisions of the Dekkhan Agriculturists' Relief Act which are applicable to a suit of this nature.

CRUMP, J. :—This is a suit for redemption under the provisions of the Dekkhan Agriculturists' Relief Act, and it appears to me important to bear that in mind in considering the method in which it has been dealt with by the lower appellate Court.

Before coming to that aspect of the matter, I would state briefly the view which I have formed as to the

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document of mortgage which governs the relations of the parties to this suit. The document is exceedingly ill-drafted, and therefore, difficult of comprehension. But as I understand it, it falls into two parts, the first part providing that on payment of the principal sum on the expiry of twenty-one years, the mortgagor shall be entitled to recover the land and trees free of all charges. The second part of the document then goes on to provide that if the money is not so paid, the mortgagee will be entitled to remain in possession and to develop the land by growing crops upon it, which were obviously meant to be crops requiring considerable periods for their maturity, as plainly appears from the fact that Panmala crop is mentioned as an instance of the crop in contemplation by the parties. I do not read the document as establishing any fresh relation between the parties after the expiry of twenty-one years, and it appears to me that the relation continued to be that of the mortgagor and mortgagee.

It is true that the word "Khand" (खंड) is used as denoting payments to be made by the mortgagee to the mortgagor, but I do not think that the English word "rent" is an exact translation of that word, but rather the word "Khand", more particularly in the context in which it is used in this document, denotes the share of the crop to be paid by the mortgagee to the mortgagor, not necessarily in the capacity of a tenant. It seems to me, therefore, that up to the date of the suit the relation of mortgagee and mortgagor subsisted, and that under the terms of the contract itself a suit for redemption would have been premature had it not been for the terms of the special Act.

As to the argument based upon the principle militating against any clogs on the equity of redemption, I have only to say this much that I agree with

the judgment delivered by the learned Chief Justice that the matter, so far as this country is concerned, must be governed by the provisions of section 60 of the Transfer of Property Act, and it appears to me that if this document is construed with reference to those provisions, there is nothing in it which amount to what is known as a clog in the English law. That section sets out that "the mortgagor has a right to redeem at any time after the principal money has become payable", and I agree that the words "after the principal money has become payable" mean payable under the conditions of the contract. If then, the contract be such as I have indicated, the principal money would not become payable until such time as the mortgagee had reaped the benefit of the trees which the document permits him to plant. Therefore it is only under the provisions of the Dekkhan Agriculturists' Relief Act that the plaintiff is entitled to redeem. It follows, therefore, that it is to the provisions of that Act, and that Act alone, that we must look in considering the method in which the account is to be made between the parties.

Now it needs hardly to be said that under section 13 of that Act, the account is to be taken from the date of the transaction up to the date of the suit, and that when the money so due is determined, the Court shall make such decree as is contemplated in the Act. The Court may either make a decree for redemption, or may permit, if the mortgagee has not been fully paid, the mortgagee to remain in possession for such further period as it thinks fit. In the present case the Judge of the lower appellate Court has taken account up to a future date 1924, a procedure which appears to me is not only not contemplated by the Act, but in itself extremely undesirable. How such an account can be taken with any certainty is a matter which I do not

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understand but in view of the provisions of the relevant statute it is unnecessary to go into the details of that matter. It seems to me, therefore, that the decree which has been made is not one which can be sustained, as it is plainly contrary to the provisions of the law which we are bound to apply in this case.

HEATON, Ag. C. J.:—If the parties can agree, that will settle the matter. But failing an agreement, we shall have, so far as we can see at present, to remand the case in order that an account may be taken as required by section 13 of the Dekkhan Agriculturists' Relief Act. The matter can be mentioned again when we sit together which will be probably on Tuesday week.

HEATON, Ag. C. J., and CRUMP, J.:—As the parties have failed to arrive at a settlement in this matter, we in pursuance of the judgments already delivered, direct the case to be remanded, in order that accounts may be taken as required by section 13 of the Dekkhan Agriculturists' Relief Act. We therefore set aside the decree and direct that accounts be taken accordingly and a fresh decree be made.

Costs including the costs in this appeal will be dealt with by the lower Court.

Decree set aside and Case remanded.

J. G. R.