APPELLATE CIVIL.

Before Mr. Justice Baker.

1928
November 7

PARSHARAM YESHWANTSHET ALWE (ORIGINAL DEFENDANT No. 2), APPELLANT *v.* LAXMIBAI ALIAS AWADABAI, WIDOW OF BALAJI RAMCHANDRA SAMANT AND OTHERS (ORIGINAL PLAINTIFF AND DEFENDANTS), RESPONDENTS.*

Mortgage—Clog on equity of redemption—Permanent leases executed by mortgagor to mortgagee—Leases invalid—Right to question validity of such leases not barred by Article 44 of Indian Limitation Act.

Permanent leases executed by the mortgagor in favour of the mortgagee subsequent to the mortgage constitute a clog on the equity of redemption and are null and void.

Subrao Mangeshaya v. *Manjapa Shetti*,[1] followed.

Shankar Din v. *Munshi Gokul Prasad*,[2] *Kanhayalal* v. *Narhar*[3] and *Bhimrao* v. *Sakharam*,[4] distinguished.

The right to question the validity of such leases which are void in law is not barred under Article 44 of the Indian Limitation Act.

SUIT to redeem mortgage.

This was a Second Appeal against the decision of S. A. Naik, Esq., First Class Subordinate Judge at Ratnagiri, in Appeals Nos. 52 and 53 of 1925 filed against the decision of the Subordinate Judge of Devgad.

One Govind was the owner of the property in dispute. He mortgaged the property with Yeshwant (father of defendants Nos. 1 to 3) on March 21, 1897. He died in 1899 leaving a widow Annapurnabai, two sons Dattatraya and Tukaram and a daughter Lakshmibai (plaintiff). Tukaram was a lunatic. Dattatraya died in 1900. Tukaram being a lunatic, his mother Annapurnabai was in management of the property. On October 24, 1902, Annapurnabai executed a second mortgage in favour of defendants Nos. 1 to 3. On April 4, 1907, she as guardian of Tukaram passed a permanent lease of a portion of the lands in favour of

*Second Appeal No. 789 of 1926.

(1) (1892) 16 Bom. 705.
(2) (1912) 14 Bom. L. R. 1098 P. C.
(3) (1903) 27 Bom. 297.
(4) (1921) 23 Bom. L. R. 1268.

defendant No. 3; she also passed another permanent lease in favour of defendant No. 2 with respect to another portion of the lands on June 14, 1907.

On Tukaram's death his sister Lakshmibai who became entitled to the property filed the present suit for redemption on February 24, 1923. The trial Court decreed redemption, holding that the permanent leases executed by Annapurnabai were not binding on the plaintiff inasmuch as they operated as clogs on the equity of redemption and that the plaintiff's right to question the validity of such leases was not barred under Article 44 of the Indian Limitation Act as no action was necessary to set aside void transactions. This decree was confirmed on appeal with a slight variation.

Defendant No. 2 appealed to the High Court.

H. C. Coyajee, with *A. G. Desai*, for the appellant.

G. N. Thakor, with *T. N. Walavalkar*, for the respondents.

BAKER, J.:—The facts of this appeal are set out at length in the judgments of the Courts below, and since the appeal turns entirely on two points of law, I do not think it is necessary to repeat them at length. The plaintiff Laxmibai sues as the heir of her brother Tukaram to redeem the property described in the plaint from the mortgage of the defendants. The property originally belonged to her father Govind, who mortgaged it in 1897 with the father of defendants Nos. 1 to 3. After her father's death his heir was Tukaram, who was of unsound mind, and his mother Annapurnabai managed his affairs. On his behalf she executed a second mortgage in 1902 in favour of defendant No. 1, and in 1907 she executed two permanent leases of a part of the property mortgaged in favour of the defendants. The defendants contended that both the mortgages must be redeemed, that the suit was bad for

1928

PARSHARAM YESHWANTSHET v. LAXMIBAI

Baker, J.

misjoinder of causes of action, that the rent notes were executed for the improvement of the property and for legal necessity, and that by reason of them they were in adverse possession for more than 12 years. They also claimed a certain sum on account of improvements. The first Court, the Subordinate Judge of Deogad, held that the rent notes were not binding on the plaintiff, and that she was entitled to possession without having them set aside. He held that the plaintiff was entitled to possession on redeeming both the mortgages and after allowing the defendant certain sums of money for costs of improvement and costs of litigation, he declared that the sum due on the mortgages was Rs. 4,606. Defendant No. 2 appealed, and the First Class Subordinate Judge of Ratnagiri found that the leases, Exhibits 55 and 56, were not legal and valid, and that the plaintiff's right to question the validity of these leases as being clogs on the equity of redemption was not lost by reason of the law of limitation. He, therefore, dismissed the appeal after modifying the lower Court's decree by reducing the amount payable on the mortgages from Rs. 4,606 to Rs. 3,381 odd. Defendant No. 2 makes this second appeal, but the appeal is confined to issues Nos. 1 and 2 in the lower appellate Court, viz., whether the leases, Exhibits 55 and 56, are legal and valid, and whether the plaintiff's right to question the validity of these leases as being clogs on the equity of redemption is barred by the law of limitation.

Now there can be no doubt that these leases, although they do not cover the whole of the mortgaged property, will constitute a clog on the equity of redemption inasmuch as the plaintiff, the representative of the mortgagor, could not by paying the mortgage amount obtain possession of the whole mortgaged property during the continuance of these leases. It is also settled law that no clog can be placed upon the equity of redemption by

any arrangement contemporaneous with the mortgage, but it has been contended by the learned counsel for the appellant that this principle does not apply to an arrangement entered into by the mortgagor and the mortgagee not at the time of the mortgage, but subsequent to it. There is direct authority upon the point in *Subrao* v. *Manjapa*.[1] In that case the mortgage was of 1854, and a portion of the lands mortgaged had already been leased to the mortgagee by a permanent lease in 1853. In 1857 a fresh lease of the mortgaged property was passed by the mortgagor to the mortgagee. A suit to redeem by the mortgagor was contested by the mortgagee on the ground of the existence of these leases, and it was held by this Court that the plaintiff was not bound by the lease. The ruling is based on the English decision of *Hickes* v. *Cooke*[2] where it was held that no agreement between mortgagor and mortgagee for a beneficial interest out of the mortgaged premises (such as a lease), where the mortgage continues, ought to stand, if impeached within reasonable time, from the great advantage which the mortgagee has over the other party in such a transaction. It was relying on this case that the lower appellate Court held against the appellant-defendant on this point. This case of *Subrao* v. *Manjapa*,[1] has never been overruled, and has recently been followed with approval by the Patna High Court in *Ram Narain Pattack* v. *Surathnath Pandapadhya*.[3] Ordinarily speaking, this decision by a Bench of this Court would be binding on me, but it has been contended by the learned counsel for the appellant that there are more recent decisions of the Privy Council and of this Court which are inconsistent with the principles laid down in *Subrao* v. *Manjapa*,[1] and the first case he has quoted is *Shankar Din* v.

[1] (1892) 16 Bom. 705. [2] (1816) 4 Dow. 16 at p. 28.
[3] (1920) 5 Pat. L. J. 423.

1928

PARSHARAM YESHWANTSHET v. LAXMIBAI

Baker, J.

Munshi Gokul Prasad,[1] a decision of the Privy Council, and in particular he has relied on the remarks at page 1105, in which it is stated that there is nothing in law to prevent the parties to a mortgage from coming to any arrangement afterwards qualifying the right to redeem, and where the right to redeem is so qualified, a suit for redemption based on the mortgage cannot be maintained. That was a case which came within the purview of the Oudh Estates Act (I of 1869), and it was held that whatever may have been the mortgagor's right under the deed of 1846, the parties deliberately came to a settlement in 1870 by which his representatives, for certain additional benefit reserved to them under the razinamahs, agreed to subject their right of redemption to certain conditions. The question of the transaction operating as a clog on the equity of redemption did not arise. The remarks at page 1105 must be read in the light of the facts of that case. The effect of that arrangement was to qualify the right to redeem. In the present case, as I have already said, the mortgagor would not be able to recover possession of that portion of the mortgaged property which is covered by the leases even though he obtained a decree for redemption. Another case quoted by the learned counsel for the appellant is *Kanhayalal* v. *Narhar*,[2] in which it was held that it is open to a mortgagor and mortgagee to enter into a contract subsequently to the mortgage for the sale of the mortgaged property to the mortgagee, but that it must not be part and parcel of the original loan or mortgage bargain. This is a different point to the point which arises in the present case. Where the mortgagor sells his equity of redemption to the mortgagee, no question of a clog on the equity of redemption can arise since the equity of redemption no longer remains. Then the learned

[1] (1912) 14 Bom. L. R. 1098. [2] (1903) 27 Bom. 297.

counsel for the appellant has relied on the case in *Bhimrao* v. *Sakharam*.[1] The point in that case was whether the lease and the mortgage were contemporaneous or not, and the finding of the Court was that the two documents were parts of the same transaction, and, therefore, the contract constituted a clog on the equity of redemption. The question of the legal validity of a lease subsequent to the mortgage as constituting a clog on the equity of redemption was not considered at all. In his reply the learned counsel for the appellant has stated that he also relies on this case as showing that there is a very little difference between a contract by the mortgagee for sale and a contract to take the premises on a permanent tenure at a fixed rent, but in this case it was laid down that if the mortgagee had got a contract for the sale of the land, undoubtedly a Court of Equity would not allow him to take advantage of that contract, and reference is made to the case of *Samuel* v. *Jarrah Timber and Wood Paving Corporation*.[2] Then the learned counsel referred to Halsbury's Laws of England, Vol. XXI, paragraphs 274, 275, etc., with regard to restrictions on the right to redeem, where at page 144, paragraph 176, it is stated that the rule against clogging the equity of redemption does not invalidate subsequent and independent transactions between the mortgagor and mortgagee relating to the mortgaged property. The transactions referred to in the following sentence are, an option to purchase the property, and a sale or release of the equity of redemption: "Such a sale or release is, however, liable to be set aside if there has been any oppression or unfairness on the part of the mortgagee." But the concluding words of that paragraph are: "As regards leases by a mortgagor to his mortgagee, a lease for a long period at an

[1] (1921) 23 Bom. L. R. 1268. [2] [1904] A. C. 323.

1928

PARSHARAM YESHWANTSHET v. LAXMIBAI

Baker, J.

inadequate rent will not be upheld," and reference is made to the case I have already quoted, *Hickes* v. *Cooke*,[1] along with other cases. In the present case the lower appellate Court has found that as a matter of fact the terms of the leases were unfair. It does not, therefore, appear to me that any support to the appellant's contentions can be derived from Halsbury.

In these circumstances, having regard to the authorities which I have set out at some length, and in particular to the ruling in *Subrao Mangeshaya* v. *Manjapa Shetti*,[2] which stands at present and has not been dissented from, I am of opinion that the view of the lower appellate Court that these leases are invalid as creating a clog on the equity of redemption is correct.

The only remaining point which has been taken is that the claim of the plaintiff to set aside these leases is barred by limitation under Article 44 of the Indian Limitation Act. Now the point of limitation could only arise if these leases are not a clog on the equity of redemption. The finding on the first issue that they are a clog on the equity of redemption, and, therefore, invalid, is sufficient answer to the point of limitation. The leases are void, in my opinion, and not voidable, and therefore no action is necessary for their being set aside. Article 44 of the Indian Limitation Act refers to suits brought by a minor to set aside the unauthorised acts of his guardian, and does not seem to me to apply to the present case. The plaintiff attacks the leases on the ground that they were void in law and not that they were beyond the authority of the guardian of Tukaram. It is only in a suit for redemption by the mortgagor that the question of the validity of these leases would arise, since there could be no object in seeking to set aside

(1) (1816) 4 Dow. 16.

(2) (1892) 16 Bom. 705.

the leases so long as the mortgage itself subsisted and the defendants were entitled to possession under that.

For these reasons I am of opinion that the view of the lower appellate Court is correct, and should be confirmed, and the appeal dismissed with costs, the remaining points not having been argued.

Decree confirmed.

B. G. R.

APPELLATE CRIMINAL.

Before Mr. Justice Mirza and Mr. Justice Baker.

EMPEROR *v.* THAVARMAL RUPCHAND, ACCUSED.*

1928
November 9

Bombay Prevention of Gambling Act (Bom. Act IV of 1887), sections 4 (a), 6 and 7—Kacha Khandi transactions—American Futures—Teji Mandi transactions—Books registering wagers—Wagering contract—"Instruments of gaming"—Special warrant—Misdescription of property searched—Property otherwise sufficiently identified.

In July 1925 an Association called the Shree Mahajan Association having its offices at Motishaw's chawl in the city of Bombay was formed with the ostensible object of trading in cotton. The business carried on by the Association related to transactions in American Futures, *Teji Mandi* transactions in sales of cotton bales and *Kacha Khandi* transactions. The *Kacha Khandi* transactions were for sale or purchase of a unit of five cotton bales, in which no delivery was either given or taken and in which the transactions were closed on each Saturday, and differences were either paid or received. The members of the Association charged a brokerage of two annas per bale. The accused who was a member of the Association was prosecuted for keeping a common gaming house under section 4 of the Bombay Prevention of Gambling Act, 1887 :—

Held, (1) on the evidence, that the transactions of *Kacha Khandi*, American Futures and *Teji Mandi*, as put through by the accused, were wagers.

Doshi Talakshi v. *Shah Ujamshi Velsi*[1]; *Manilal* v. *Allibhai*[2]; *Jessiram Juggonath* v. *Tulsidas Damodar*[3] and *Thacker* v. *Hardy*,[4] referred to;

(2) that the books of the Association containing the register of such transactions were "instruments of gaming."

Emperor v. *Chaganlal*[5]; *Emperor* v. *Lakhamsi*[6]; *Emperor* v. *Manilal*[7] and *Emperor* v. *Tribhovandas*,[8] referred to;

*Criminal Appeal No. 643 of 1927.

(1) (1899) 24 Bom. 227.
(2) (1922) 24 Bom. L. R. 812.
(3) (1912) 37 Bom. 264.
(4) (1878) 4 Q. B. D. 685.
(5) (1904) 6 Bom. L. R. 249.
(6) (1904) 6 Bom. L. R. 1091.
(7) (1915) 17 Bom. L. R. 1080.
(8) (1902) 26 Bom. 533.