Privy Council Appeal No. 6 of 1921.

Oudh Appeals Nos. 2 of 1915 and 22 of 1918.

Mohammad Sher Khan - - - - - - *Appellant*

v.

Raja Seth Swami Dayal - - - - - - *Respondent*

Same - - - - - - - - - *Appellant*

v.

Same - - - - - - - - - *Respondent*

(*Consolidated Appeals*)

FROM

THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 9TH DECEMBER, 1921.

Present at the Hearing:

LORD BUCKMASTER.
SIR JOHN EDGE.
MR. AMEER ALI.
SIR LAWRENCE JENKINS.

[*Delivered by* SIR LAWRENCE JENKINS.]

These are consolidated appeals preferred by special leave of His Majesty in Council from two decrees dated the 9th February, 1915, and the 19th June, 1918, of the Court of the Judicial Commissioner of Oudh, which affirmed two decrees passed by the Subordinate Judge of Kheri on the 7th September, 1914, and the 17th April, 1916, in suits No. 234 of 1913 and No. 93 of 1915.

The question for determination is whether Mohammad Sher Khan, the mortgagor and appellant in both appeals, has a present

right on payment of the mortgage money to redeem the mortgaged property. This has been decided adversely to him in both the lower Courts.

The mortgage is dated the 9th of June, 1908, and is Exhibit A. 36 on the record. The sum of Rs. 82,000 is recited to be due, and the mortgagor declares " Therefore I . . . . do hereby mortgage for five years " the immoveable property there described. Then follow the terms.

Clause 1 provides for the payment of interest half-yearly at the rate of $9\frac{1}{2}$ annas per cent. per month, for compound interest, in the event of default, and that—

> " This system of payment of interest and of compound interest by six-monthly instalments will continue during the stipulated period as well as after that till redemption and payment of the entire amount."

Clause 2 is in these terms :—

> " After five years at the end of Jeth 1320 Fasli in the fallow season I shall pay at a time and in a lump sum the entire principal, interest and compound interest and redeem the mortgaged property."

Clause 3 provides :—

> " That if interest for four six-months be not paid in full, or if at the stipulated period, *i.e.*, after five years, I do not get the mortgaged property redeemed on payment of the entire amount of principal interest and compound interest, then in both cases the mortgagee will have the option either to take possession of the mortgaged property in lieu of the principal for a period of twelve years commencing from the date of entering into possession or to let his interest and compound interest run as usual, in which case I shall not raise the objection to the effect that the mortgagee did not take possession in order to let his interest accumulate—the mortgagee having the option to choose one of the two alternatives."

Clause 4 deals with mutation of names.

Clause 5 is in these terms :—

> " The mortgagee will remain in possession for twelve years from the date on which he takes possession of the mortgaged property and the mortgagor will not have the right of redemption during the period of twelve years."

Clause 6 stipulates for the appropriation of produce and profits in lieu of interest, and that during the period of possession neither the mortgagee will have any claim to interest nor the mortgagor to profits, and there will be no accounting as to shortage or surplusage of profits at the time of redemption.

Clause 9 provides :—

> " That on the expiry of twelve years at the end of Jeth, *i.e.*, on Puranmashi in the fallow season I shall redeem the mortgaged property on payment principal, interest and compound interest," and other specified payments.
>
> " Pending the payment of the entire demands due hereunder the mortgagee will as usual remain in possession and occupation of the mortgaged property in accordance with the above-mentioned conditions."

Interest fell into arrear, and at the stipulated time the mortgage-money was not paid. Thereupon suit No. 234 of 1913 was instituted by Raja Seth Swami Dayal, the mortgagee, for possession of the mortgaged property under the terms of the

mortgage. He was resisted by the mortgagor, who pleaded that he intended to redeem the property.

On the 7th September, 1914, the Subordinate Judge decided in favour of the mortgagee, who obtained possession on the 14th February, 1915. An appeal was preferred by the mortgagor to the Court of the Judicial Commissioner of Oudh, but it was dismissed on the 19th February, 1915, the Court at the same time declaring that the decree would not affect any right of redemption exercised in the manner provided by law before the delivery of possession. On the 25th February, 1915, the mortgagor applied for leave to appeal to His Majesty in Council, but his application was dismissed on the 26th April, 1915. On the 18th June, 1915, the mortgagor instituted suit No. 93 of 1915 for redemption. It was dismissed in the first Court on the 17th April, 1916, and this was affirmed on the 19th June, 1918, by the Appeal Court on the ground that the suit was premature. On the 23rd August, 1918, the mortgagor applied to the Court of the Judicial Commissioner for leave to appeal to His Majesty in Council, but without success.

Finally, the mortgagor, on an application here, obtained special leave to appeal from the appellate decrees in both suits on the 30th May, 1919.

Many questions were raised in the Courts below which have now disappeared, and all that now remains to be determined is whether the present claim to redeem is premature. Mortgages of immoveable property are governed by the provisions contained in Chapter IV of the Transfer of Property Act, 1882. In Section 58 four kinds of mortgage are described—a simple mortgage, a mortgage by conditional sale, an usufructuary mortgage, and an English mortgage. Section 98, headed "Anomalous Mortgages," contemplates a mortgage that does not fall under any of the four descriptions contained in Section 58, and is not a combination of a simple and an usufructuary mortgage or of a mortgage by conditional sale and an usufructuary mortgage. In the case of such a mortgage the rights and liabilities of the parties are to be determined by their contract as evidenced in the mortgage-deed and so far as such contract does not extend by local usage.

By Section 60 of the Act it is provided that at any time after the principal money has become payable the mortgagor has a right to redeem, and a suit to enforce it is called a suit for redemption.

The contest between the parties to this litigation turns upon whether the mortgagor's right to redeem is suspended by the provision in the mortgage which purports to entitle the mortgagee to remain in possession for twelve years from the date on which he took possession.

In the argument there has been considerable discussion as to the category to which this mortgage belongs, and more especially as to whether or not it is an anomalous mortgage. But their Lordships do not think it necessary to pursue this enquiry, for, in the view they take, the rights and liabilities of the litigants

must depend on the terms of the instrument as controlled by the Transfer of Property Act, for, even if it were an anomalous mortgage, its provisions offend against the statutory right of redemption conferred by Section 60, and the provisions of the one section cannot be used to defeat those of another unless it is impossible to effect reconciliation between them. An anomalous mortgage enabling a mortgagee after a lapse of time and in the absence of redemption to enter and take the rents in satisfaction of the interest would be perfectly valid if it did not also hinder an existing right to redeem. But it is this that the present mortgage undoubtedly purports to effect. It is expressly stated to be for five years, and after that period the principal money became payable. This, under Section 60 of the Transfer of Property Act, is the event on which the mortgagor had a right on payment of the mortgage-money to redeem.

The section is unqualified in its terms, and contains no saving provision as other sections do in favour of contracts to the contrary. Their Lordships therefore see no sufficient reason for withholding from the words of the section their full force and effect. In this view the mortgagor's right to redeem must be affirmed, and as both suits are now before the Board there will be no difficulty in passing one decree in both so framed as to give due effect to this right.

Though the appellant has succeeded in these appeals, by his procedure and dilatoriness he must be held responsible for this protracted litigation, and the consequent wasted expense; and to mark their disapproval of his conduct their Lordships will not interfere with the orders as to costs made by the lower Courts, nor will they allow him any costs of these appeals.

The decrees of the lower Courts should therefore be discharged except so far as they order payment of costs by the mortgagor.

There should then (in their Lordships' opinion) be one preliminary decree for redemption in both suits in accordance with O. 34 R. 7 of the Code of Civil Procedure, 1908. But in taking the accounts the period during which the mortgagee may have been in possession under the decree in suit No. 234 of 1913 should be excluded for, though the provisions of the mortgage entitling the mortgagee to possession cannot operate to defeat Section 60 of the Transfer of Property Act, effect should be given to them so far as they provide that the mortgagee is to appropriate in lieu of interest all the produce Mal and Sewai and profits of the mortgaged villages after payment of the Government revenue. And so, during this period, as in effect provided by the mortgage, neither will the mortgagee be accountable for profits nor the mortgagor for interest.

The decree should further provide that if payment is not made on the fixed day the mortgaged property should be sold.

Their Lordships will humbly advise His Majesty that the case ought to be remitted to the Court of the Judicial Commissioner of Oudh with directions to pass a decree in accordance with the opinion expressed. There will be no order as to the costs of these appeals.

In the Privy Council.

MOHAMMAD SHER KHAN

v.

RAJA SETH SWAMI DAYAL.

SAME

v.

SAME.

(*Consolidated Appeals.*)

DELIVERED BY SIR LAWRENCE JENKINS.

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