

Bijai Singh and Another and Babunandan and Others Vs Sarbdawan Singh and Others

Court: Allahabad High Court

Date of Decision: June 5, 1914

Acts Referred: Transfer of Property Act, 1882 â€” Section 83

Citation: (1914) ILR (All) 551

Hon'ble Judges: Muhammad Rafiq, J; Chamier, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

Chamier and Muhammad Rafiq, JJ.

This is an appeal in a suit brought for redemption of a usufructuary mortgage made on the 4th of

February, 1871, by the father of the respondent Bijai Singh in favour of Ram Din Singh, father of the four appellants. The mortgage was for a term

of forty years and was to be redeemed on the day following the completion of that term, hut if the mortgagor failed to redeem on that day the

mortgage was to hold good for a second term of forty years. It was also provided that the mortgagor should not be entitled to redeem the

mortgage with borrowed money. The mortgage money was paid into court, u/s 83 of the Transfer of Property Act, on the 10th of June, 1911, but

the appellants refused to accept it. The present suit was filed on 9th of the September, 1911. The defence was that the representative of the

mortgagor was not entitled to claim redemption of the mortgage except on the day following the expiry of the term of forty years. The Subordinate

Judge accepted this plea and dismissed the suit. On appeal the District Judge held that the mortgage deed did not show with certainty the day on

which redemption might be effected and that the provision that the mortgagee might retain possession for another forty years In case the mortgagor

failed to redeem at the end of the first term was penal and should not be enforced. Accordingly he decreed the claim.

2. In this appeal it is contended that the decision of the District Judge is erroneous.

3. The date given at the foot of the mortgage is Magh Sudi 14, Sambat 1967, the Fasli year being siated to be 1278. The corresponding date

according to the British calendar was the 4th of February, 1871, but is not given in the deed. According to the Fasli or Sambat year the term of

forty years expired on the 13th of February 1911, and redemption should have been effected on the 14th of February. According to the British

calendar forty years expired on the 3rd of February and redemption should have been effected according to the deed on the 4th of February, The

calendar now commonly employed in transactions of this kind is the British calendar, but it is not certain that two rustics, as the mortgagor and

mortgagee in the present case were, intended that the term of the mortgage should be calculated according to the British calendar. The deed is

written in the Nagri character and seems to have been the production of some village writer of documents. We are unable to say that the deed

indicates with certainty the date on which redemption might be effected. But assuming that some date is definitely fixed by the deed for redemption,

we are of opinion that the provision in question was designed to prevent redemption, or at all events to hamper (ho mortgagor in such a way as to

make redemption almost impossible. It is unnecessary to cite authority for the proposition that a Court of Equity will not permit any device or

contrivance designed or calculated to prevent or impede redemption. The appellants rely upon cases in which it has been held that the

postponement of the right to redeem till the end of a very long term of years, in one case ninety years, is not a ground for holding that the provision

should not be enforced--Muhomed Ibrahim v. Muhomed Abiz Kroshi (1910)8 Ind. Cas 1068. Ram Prasad v. Jagrup (1913) 10 A.L.J.157.

Puran Singh v. Kesar Singh (1907) P.R.C J.. 39 upon a large class of cases, of which that of Bansi v. Girdhar Lal Weekly Notes 1894 p. 143. is

an example, and upon the decision of Griffin, J. in Rambaran Singh v. Ramker Singh (1910) 10 Ind . Cas 23. affirmed in L. P. A. No. 73 of 1911.

4. The English Courts have shown a strong disinclination to uphold provisions restraining redemption for long periods, and we doubt whether they

would approve some of the Indian decisions on this question. We doubt also the soundness of the reason that has been given for upholding such

provisions in this country, namely, that the Indian Limitation Act allows a very long period for suits for redemption. But cases in which the parties

have merely agreed to fix a very long term for a mortgage are not to be compared with a case in which a very long term has been fixed and a

provision has been inserted in the deed which makes redemption very difficult, if not impossible, at the end of that term.

5. The present case is also clearly distinguishable from such cases as that of Bansi v. Girdhar Lal Weekly Notes 1894 p. 143. It is an old, and, we

think, a reasonable practice to provide that redemption shall take place only in the khali fast, in the month of Jeth, when the crops are off the

ground. The mortgagor is allowed a month in which to redeem the mortgage, and if he fails to redeem within the month he must Wait till the

following year. We have also seen mortgages in which it was provided that if the mortgagor did not redeem during the khali fad immediately

following the expiry of the term fixed he should not be entitled to redeem till after the expiry of several more years, and such provisions have after,

been enforced. But to give a man one day only in eighty years on which he may redeem is to make difficulties for him far greater than are to be

found in cases like Bansi v. Girdhar Lal Weekly Notes 1894 p. 148 or the other cases to which we have referred.

6. There remains to be considered the case of Rambaran Singh v. Ramker singh (1910)10 Ind . Cas. 248 decided by this Court. In that case the

mortgage was made on the 3rd of June, 1895, and provided that the mortgagor might redeem on Jeth Sudi Puranmashi 1315 Fasli, i. e. a little over

thirteen years after the date of the mortgage, and that if the mortgagor failed to redeem on that date, the mortgagee would be entitled to retain

possession for another term of thirteen years. This Court held that the provision should be enforced. Section 83 of the Transfer of Property Act had

been passed before that mortgage was made, a provision which has made the redemption of mortgages much easier than before, but there was no

such provision in force When the mortgage now in suit was made. The consequences of failure to redeem that mortgage on the day fixed were

much less serious than in the case before us and in that case the mortgagor was to have an unfettered right to redeem at the end of twenty-six

years, a period much shorter than the first term fixed by the mortgage now in suit. On these grounds that case may, if necessary, be distinguished

from the present one.

7. But it is impossible to lay down a hard and fast rule as to what should and What should not be regarded as an improper restraint or fetter on the,

right of redemption. The decision in each case must depend upon its own circumstances. We are satisfied that the provision for redemption in, the

present instance. was designed to make redemption very difficult, if not impossible. The stipulation that the mortgage should not be redeemed with

borrowed money, which is admittedly invalid, shows that the mortgagee intended to place every obstacle in the way of redemption.

8. The provision that redemption may take place on one day only in the course of eighty years is most oppressive. Many circumstances might

easily prevent redemption on that day, for example the illness of the mortgagor, the absence of the mortgagee, or the impossibility of discovering,

on account of the recent death of either mortgagor or mortgagee, what persons were entitled to redeem or to receive the mortgage money. The

shorter the time during which the money is to be paid the more difficult does redemption become. It was conceded in argument that a provision

making redemption possible only during two or three hours on a particular day during a long term of years should not be enforced. In our opinion

the lower appellate court was right in refusing to enforce the provision for redemption in this case. We dismiss the appeal with costs.