

1864.
SAKVA'RBAA'I
v.
BHAVA'NJI
RA'JE
DESHMUKH.

Arrears of maintenance should be awarded, at the same rate, from the death of the plaintiff's late husband as may be awarded prospectively, unless the defendant show that it has been already received by her from him, or that any portion has been so received. The plaintiff will also, under the same condition, be entitled to maintenance between the date of filing the suit and the date of the final decree: costs to follow the final decision.

Special Appeal No. 299 of 1864.

Aug. 31.

RA'MJI bin TUKA'RA'M..... *Appellant.*
CHINTO SAKHA'RA'M..... *Respondent.*

Mortgage—Security for Repayment of a Loan—Redemption—Improvements—Equitable Rule as to Repairs.

Where an instrument of mortgage, though in terms it transfers an estate on failure to repay the mortgage-money on a fixed day, yet appears clearly to have been entered into by parties for securing the repayment of a loan, the mortgagor, making the security subservient for the purpose for which it was created, may in equity and good conscience redeem the property by paying off the principal debt and the interest, though the stipulated time for payment has been allowed to pass by.

Claims made by a mortgagee in respect of money laid out in improvements after the expiry of the day fixed for repayment must for some time to come depend on an equitable consideration of all the circumstances of the case.

Ultimately the English rule should be adopted, under which the mortgagee is only allowed to claim for such outlay as has been required in order to keep the mortgaged premises in a good state of repair, and to protect title.

THIS was a Special Appeal against the decree of the District Judge of Puñá in Appeal Suit No. 1060 of 1862, confirming the decree of the Munsif of Puñá in Original Suit No. 413 of 1862.

The Appeal was heard by ARNOULD, Acting C. J., and NEWTON and JANA'RDHAN, JJ.

Shántárám Náráyan for the appellant.

Dhirajlál Mathurádás for the respondent.

The facts of this case sufficiently appear from the following judgment, delivered (on the 31st of August 1864) by ARNOULD, Acting C.J. :—

Rámji, the special appellant in this case (the plaintiff in the original suit), claimed to recover from Chinto, the special

respondent (the original defendant) two pieces of *mirds* land, mortgaged by his (Rámji's) father, to the special respondent on the 4th of January 1852. He stated in his plaint that he was ready to repay Rs. 200, which was the principal sum advanced on the mortgaged property, the interest, under the terms of the mortgage-deed, having been satisfied out of the produce of the land.

1864.
 RA'MJI
 TUKA'RA'M
 v.
 CHINTO
 SAKHA'RA'M.

The special respondent replied (1) that by the terms of the mortgage instrument it was expressly stipulated that if the principal money was not paid off within five years from the date of the mortgage, the mortgaged land was to become his property; (2) that after the expiration of the five years he had laid out Rs. 25 in improving the land, and had to pay one year's assessment, Rs. 2-4-7; so that his claim on it amounts to Rs. 227-4-7 (Rs. 200 and 27-4-7). The five years from the date of the mortgage expired on January 4th, 1857; the original suit was filed on August 7th, 1862.

The Munsif of Puñá threw out the special appellant's claim, on the ground that, as the principal sum had not been paid within the time limited in the mortgage instrument, the right of the mortgagor to redeem the land was extinguished, and the land had become the absolute property of the mortgagee. The Judge of Puñá confirmed the decree of the Munsif, on the same ground.

Several grounds of objection were set forth by the special appellant in his memorandum of appeal, but, as intimated in the course of the argument, none of them were held valid by this Court.

The Court, however, took time to consider how far the decrees of the Munsif and the Judge could be sustained on the ground on which they both proceeded, viz., that, the mortgage-money not having been paid within the time limited in the mortgage instrument, the right of the mortgagor to redeem on paying the amount due in respect of the mortgage was extinguished, and the property in the mortgaged land indefeasibly vested in the mortgagee.

The mortgage instrument in this case is of the kind usually termed a foreclosure mortgage; it stipulates that "if the mortgagor, or his widow after his death, fail to pay the money secured by the mortgage instrument within five years

1864.
 RA'MJI
 TUKA'RAM
 v.
 CHINTO
 SAKHA'RAM.

after its date (*i.e.*, on or before the 4th of January 1857), this mortgage is *láhán*," the meaning of which is that the mortgage is foreclosed, the right to redeem extinguished, and the property in the land absolutely transferred to the mortgagee.

The following is a translation of the instrument :—

"Mortgage passed on the 13th of Poush Shudhya of Shake 1773 (15th January 1851) to Ráje Shrí Chinto Sakháram Saptrishi of Kasbá, in the City of Puṇá, by Tukáram bin Mahádáji Máli Dhole of Puṇá Nisbat Máji, to the following effect :—There is a *málá* comprising 3 *bighás* of *mirás* land, part of Gadhaomeli at Mouje Mujri, belonging to myself and Sadáji bin Malhárji Dhole. Of this the land belonging to Sadáji, $1\frac{1}{2}$ *bighás*, is mortgaged to you. It is under your management. The remaining half of the land, *viz.*, $1\frac{1}{2}$ *bighás*, with trees, shrubs, and well, was mortgaged and given in (your) possession on the 15th of Ashád Vadya Shake 1772 (16th July 1850), after receiving Rs. 100 as consideration. Thereafter in the same year, on the 2nd Kártik Vadya (21st November 1850), a bond was passed for Rs. 14, in all this Rs. 114. Rs. 111 (are) received this day in cash—in all Rs. 225 (in letters, two hundred and twenty-five); of these twenty-five were returned. The remainder, Rs. 86, received in cash, and the old amount, Rs. 114—in all Rs. 200. For this I mortgage my land, *bighás* $1\frac{1}{2}$, bounded as follows :—

Boundaries.

"Land, *bighás* 3, is thus bounded :—Deducting therefrom one-half belonging to Sado, whatever produce may be got from the remaining $1\frac{1}{2}$ *bighás*, including the trees and shrubs and the well, the same you are to enjoy in lieu of interest. You may do what you think proper as regards leasing away the land: I am to look after the assessment and other expenses on the land. I will repay it to you with interest at the rate of twenty-four per cent. per annum. In case of any calamitous visitation from the heavens, or the king, I am myself the responsible party. I will pay your money five years hence. I will make no interruption in the mean time. After me A'mbábái, my wife by *muhurt* (second marriage among the lower class), will pay the money and redeem the *málá* land. If she does not pay the money in time, this mortgage is

láhán.* Nobody has a right thereto. This land is besides mortgaged by the agreement passed by Sadáshiv : that is a separate debt. This mortgage bond is duly written of my own free will and pleasure, and in sound mind. The date above mentioned is the 13th, but it really is the 2nd. The 4th January 1852.

1864.

RA'MJI
TUKA'RA'M
v.
CHINTO
SAKHA'RA'M.

[Signatures.]

(True translation)

(Signed) KHANDERA'V CHIMANRA'V,

19th August 1854.

Translator."

On this state of facts there can be no doubt that the decisions, both of the Munsif and of the Judge, were strictly conformable to the view of the law generally prevailing, especially at an earlier period, in the late Šadr Court, which, as a rule, gave a strict operation to instruments of this nature, and regarded the right of redemption as extinguished, and the right of property absolutely transferred, the moment the fixed time of payment had expired.

In adopting this construction the late Šadr Court certainly diverged from the long-established doctrine of the English courts of equity, viz., that whenever an instrument, though in terms transferring an estate, is originally intended between the parties as a security for money, it shall always be considered as a mortgage redeemable on payment of the amount it was given to secure (Story's Equity Jurisprudence, Sec. 1018). It does not appear that there is any law, or usage having the force of law, among Hindús justifying such a departure from the established rule of the English courts of equity, which is, besides, manifestly "a rule of good conscience."

This Court, therefore, quite concurring with the High Court of Madras (see the case of *Venkata Reddi, appellant, v. Parvati Ammal and others, respondents*, 1 Mad. H. C. Rep. 460) is of opinion that it must now be taken that the

* The etymology of this important word cannot be traced. Indeed it does not seem to be even a word by itself : for Molesworth does not give it a separate place. It appears in that work as an alliteration after, or at least coupled with, the word "*gáhán*" (mortgage).

2. The meaning of the phrase "*gáhán láhán*" as given in Molesworth is "closin } a pledge concern wherein the money loan with its accrued interest } exceeds the value of the pledge, by relinquishing the pledge."

cf. i
XV.
Cove
35
Wt

1864.
 RA'MJI
 TUKA'RA'M
 v.
 CHINTO
 SAKHA'RA'M.

law, on equitable grounds, will not in such cases enforce the absolute rights of the mortgagee to immediate possession, nor refuse the claim of the mortgagor to redeem, merely because the fixed period for payment specified in the mortgage instrument has elapsed. We adopt without alteration the following passage from the able judgment delivered in that case by the Madras High Court, as fully and correctly embodying our own view of what must now be taken to be the law on this matter:—

“ Where the instrument appears clearly, as in this case, to have been entered into by the parties for securing the repayment of a loan, the mortgagor, making the security subservient for the purpose for which it was created, may in equity and good conscience redeem the property by paying off the principal debt and the interest, though the stipulated time for payment has been allowed to pass by ; and so also in a suit for recovery of possession, so as to foreclose or conclude all right of the mortgagor in his property (which suit the mortgagee is entitled to bring), the Court in decreeing the right to possession should at the same time secure to the mortgagor an opportunity of redeeming the property, as he might have done before suit, by payment within a fixed time of the ascertained debt and interest which the mortgage instruments were given and intended to secure.”

It will be observed that, in the case under appeal the special respondent (the mortgagee) claims, in addition to the amount secured by the mortgage instrument, a further sum of Rs. 25, laid out by him in improving the land after the expiration of the period of five years limited in the mortgage instrument for payment of the mortgage debt.

In England, where the doctrine of the mortgagor's right to redeem after the expiry of the fixed period for payment, has been long established and generally known, the recognised rule is that “ the mortgagee will be allowed for *all repairs necessary for the support of the property*, but not for general improvements made without the acquiescence and consent of the mortgagor, which enhance the value of the estate, *especially if they are of such a nature as may cripple the right or power of redemption.*” Story's Equity Jurisprudence, Sec. 1016. “The mortgagee,” as Lord Langdale expressed it (in *Sandon v. Hooper*, 6 Beav. 246), “ has no right to lay out money in what he calls improving the property ; which may

be done in such a way as to make it utterly impossible for the mortgagee with his means ever to redeem. This has been termed *improving a mortgagor out of his estate.*

1864.
RA'MJI
TUKA'RA'M
v.
CHINTO
SAKHA'RA'M.

"The mortgagee has not a right to make it more expensive for the mortgagor to redeem than may be required for the purpose of keeping the property in a good state of repair, and for protecting the title to the property."

To apply this rule at once and without modification to cases in which mortgagees (relying on the law as understood to be settled by the late Śadr decisions) have laid out considerable sums in improvements on mortgaged property, would obviously not be equitable. Ultimately the English rule is that which should prevail; but until sufficient time has been allowed for the law, as laid down in the present decision, to become generally known, the determination of each case must be left in a great measure to depend on an equitable consideration of all the circumstances attending it.

The case immediately under decision presents no difficulty in the application of the rule, the sum claimed for improvements being very small, and the time that has elapsed since the fixed period for payment being inconsiderable.

The Court, therefore, reverses the decree of the Judge, and directs him to determine the following points:—

(1) How much is due by Rámji to Chinto on foot of the mortgage bond.

(2) How much, if anything, is due from Rámji to Chinto in respect of money proved by the latter to have been laid out by him in the improvement and repair of the mortgaged premises since the 4th of January 1857.

A new decree to be passed on the merits. Costs to follow the final decision.