

*Ganesh Hari Patvardhan contra.*

1865.

PARABHU'DA'S  
HIRA'CHAND  
v.  
DHONDU'  
BHIKAMBHAT.

NEWTON, J. :—The Assistant Judge has erred in holding that, under the Registration Act, preference should be given to the latter of two deeds of sale when registered, only if the earlier and unregistered deed of sale has not been carried into effect. By Act XIX. of 1843, any unregistered deed of sale is invalidated by a registered deed of sale for the same property : provided that the latter be authentic ; and this view of the enactment referred to has been taken by the Court in Special Appeal No. 4274 (a), and in other cases.

We reverse the decree of the Assistant Judge with costs ; and order that the field be made over to the special appellant.

*Appeal allowed.*

(a) 7 S. D. A. Dec. 357. *over-ruled like the above case.*

*Special Appeal No. 835 of 1865.*

1866.  
April 23.

SAKHA'RA'M NARASIMHA SARDESA'I.....*Appellant.*  
VITHU LAKHA' GOUDA', heir of Vithu Goudá,  
and RA'MA, heir of Fattá Vith Goudá... *Respondents.*

*Mortgage—Redemption before expiration of period.*

*Held* that, by Hindú, as well as by English, law, in the absence of circumstances or language indicating a contrary intention, the mortgagor cannot, without the consent of the mortgagee, redeem before the expiration of the period named in the proviso for redemption ; the principle being that, in the absence of stipulation, express or implied, to the contrary, the right to redeem and the right to foreclose must be regarded as co-extensive.

THIS was a special appeal against the decision of W. H. Newnham, Acting Senior Assistant Judge of the Konkan at Ratnágiri, reversing the decree of the Munsif at Málvan.

The plaintiff alleged that his father, Narasimharáv, being the owner of a saltpan at the village of Shiravádá, by deed of the 11th of February 1829, mortgaged it, in consideration of Rs. 100, to Lakhá bin Goudá, for a term of sixteen years.

1866.  
 SAKHA'RA'MN.  
 SARDESA'I  
 v.  
 GOUDA'  
 et al.

The plaintiff produced a copy of that mortgage, and prayed that he might be declared entitled to redeem.

The defendants, in reply, alleged that the plaintiff's brother, Báburáv Narasimha, by deed of the 23rd of May 1841, referring to the mortgage of 1829, and reciting that four out of the sixteen years yet remained unexpired, remortgaged the saltpan, to secure to Lakhá bin Goudá the sum remaining due for principal and interest on the mortgage of 1829, and a further advance, amounting in the aggregate to Rs. 195-6-0. This second mortgage provided that, on the expiration of the abovementioned period of four years, the mortgagee should remain in possession as tenant at Rs. 21 per annum. This document specified no term for such tenancy, and was very obscurely penned.

The defendant Vithú, son and heir of the mortgagee, Lakhá bin Goudá, and Fattá Vith Goudá, father of the defendant Ráma, having advanced to the said Báburáv Narasimha a further sum of Rs. 115-4-3, he executed a document in their favour, which was translated *vivá voce* by one of the court interpreters as follows :—

“Dúmálápatra : 10th Pousha Shudha, Shake 1777. Name of the year Rákshasa. The day of the week Thursday. To Fattá Vith Goudá and Vithu Lakhá Goudá Gámokár Shirvádekar, inhabitant, &c., by Báburáv Narasimha Sardesai Khatgávakar, inhabitant, &c. I do pass this dúmálápatra (supplementary writing) as follows :—My vatani saltpan at the village of Shiraváda was formerly mortgaged to you, a mortgage deed on a stamped paper having been passed in the name of Lakhá Vith Goudá. Besides that, on the aforesaid saltpan, I have this day received from you in cash Rs. 115-4-0. (Paying) the same with interest at the rate of two per cent., I will redeem the said saltpan twenty-five years from this day, that is to say, at the time of redeeming, after paying the money, as written in the mortgage deed, at that time the amount of this supplementary writing, Rs. 115-4-0. with interest at the rate of two per cent., to be first paid, at that time I will redeem the saltpan and other documents (sic).

Should any of my kinsmen raise a disturbance, I will pacify them. If I do not pacify them, and you be put to any expense on that account, or should there be any obstacle to your receiving the produce of the mortgaged property in lieu of interest, that money also I will pay with the interest at the rate of two per cent. If you should not receive interest on the said mortgaged property, and if some injury be caused to the said saltpan by order of Government, all this I will pay with interest at the rate of two per cent. I will not fail herein. I have passed this supplementary writing of my own free will. Dated 17th January 1856."

1866.  
SAKHA'RÁM N.  
SARDESA'I  
v.  
VITHU' L.  
GOUDA'  
et al.

[Signatures of Báburáv Narasimharáv and of two attesting witnesses.]

Exhibit No. 18, dated the 11th of March 1856, contained a ratification by the plaintiff of the aforesaid acts of his brother, Báburáv Narasimharáv.

The Munsif decreed that the plaintiff might redeem, on payment of Rs. 585-9-2.

The decision of the Senior Assistant Judge was as follows:—1st issue.—Can plaintiff redeem now? "On this issue I find that Sakhárám is not entitled to redeem yet. The original mortgage was for sixteen years only, but in 1856 Báburáv borrowed Rs. 115-4-0 more, and extended the period of the mortgage for twenty-five years more. The Munsif has recorded that it would not be fair to make this condition, agreed to by Báburáv, binding on Sakhárám; but he has not noticed the fact that, by the letter No. 18, Sakhárám agreed, in the same year, to the terms of No. 17. Sakhárám now denies having written this; but one of the attesting witnesses deposes to his having written it, and the writing of it appears certainly to be the same as that of other documents which he denied, and which have been held proved against him by the Munsif. I find it proved. The sum borrowed when it was written is paltry, only Rs. 6; but there was then a considerable sum secured on the property by previous deeds; and by the terms of No. 17, and by agreement, Sakhárám is debarred from redeeming until

1866.

SAKHA'RÁM N.  
SARDESA'I  
v.  
VITHU' L.  
GOUDA'  
et al.

twenty-five years from the date of No. 17. The Court has no power to exempt him from the consequences of his own act, in agreeing to the terms of No. 17. The other issues do not arise. The Munsif's decree is reversed; and the claim dismissed: costs on Sakháram."

The plaintiff, Sakháram, specially appealed to the High Court, on the grounds that the decision of the Senior Assistant Judge was contrary to law, in that: (1) The document No. 18, not being stamped, is invalid, and should not have been enforced; (2) The letter, exhibit No. 18, has been misconstrued, inasmuch as it was held to contain an assent on the part of the applicant to the terms of No. 17; (3) The lower court erroneously held that the simple fact of the appellant having, without any consideration, assented to a previous arrangement made by another, not originally binding upon the appellant, estopped him from afterwards disputing that arrangement; and (4) The court below gave too wide an effect to Nos. 17 and 18, in holding that those documents took away the appellant's right to maintain this action.

The case was heard before WESTROFF and TUCKER, JJ., on the 17th of April.

*Shántáram Náráyan*, for the appellant:—The stipulation as to the time of the repayment, of the sum secured by the further mortgage of the 17th of January 1856, does not preclude the appellant from redeeming at an earlier period than the expiration of the term of twenty-five years, if he should be able to find the means of paying off the amount due to the mortgagees for principal and interest: 1 Colbrooke's Digest, cviii.; cxi., cxii. This is so especially where, as here, the proviso relating to payment and redemption is obscure and ambiguous: *Luljoo v. Gungoo*, Morley's Digest, N.S., p. 265, plac. 50. The term of twenty-five years is so long as to amount to an unreasonable and inequitable bargain.

*Bhairavanáth Mangesh*, for the respondents:—The intention of the parties to the mortgage of the 17th of January 1856, that the mortgagees should enjoy the saltpan during

the whole time specified in that deed, is plain enough on the face of it; and becomes still plainer on looking at the previous transactions, in all of which the intention, that the mortgagee should possess the saltpan, until the periods mentioned in each deed had elapsed, is manifest. The term of twenty-five years not having elapsed, the plaintiff (the appellant) has not yet any title to redeem. Mortgages for long terms of years are common in the Mofussil of this Presidency.

*Cur. adv. vult.*

WESTROPP, J.:—We think that the intention of the parties was, that there should not be any right of redemption, until the expiration of the term of twenty-five years, mentioned in the mortgage of the 17th of January 1856.

Previously to the year 1845, some conflict of opinion seems to have existed amongst text-writers in England, as to the right of the mortgagor to redeem before the expiration of the period named in the proviso for redemption. Mr. Coote, in his work on mortgages (a), expresses an opinion in favour of the mortgagor; and cites in support of it *Talbot v. Braddy*. (b) That opinion, however, is ably controverted in the fifth volume of Jarman and Bythewood's *Conveyancing*, edited by Mr. Sweet (c), where it is shown that *Talbot v. Braddy* rested on special grounds, which rendered it of little or no value as an authority on the question. The well-established right in England of a mortgagee to six months' notice, previously to the payment of the mortgage money, seems to recognise the principle that an immediate right of redemption is not necessarily incident to a mortgage; *Sharpnell v. Blake*. (d)

The case of *Brown v. Cole* (e), decided by *Shadwell*, V. C., on the 13th of February 1845, is a direct authority upon the

(a) 2nd Edn., p. 33. \* See also Powell on Mortgages.

(b) 1 Vernon, 183, 394.

(c) Pages 93 to 95. Messrs. Burroughs and Gresson, in their treatise *The Irish Equity Pleader*, pp. 125, 126, also deny the right contended for by Mr. Coote.

(d) 2 Eq. Ca. Abridged, 603, pl. 34.

(e) 4 Simon 427.

1866.  
 SAKHA'RAM'N.  
 SARDESA'I  
 v.  
 VITHU' L.  
 GOUDA'  
 et al.

1866.  
 SAKHA'RA'MN.  
 SARDESA'I  
 v.  
 VITHU' L.  
 GOUDA'  
 et al.

question. It is matter of regret that the report of that case should be so meagre, as neither to state the authorities cited in the arguments of counsel, nor the reasons assigned by the Vice-Chancellor for his judgment. A demurrer was there allowed to a bill of redemption, filed before the mortgage had become absolute, notwithstanding that the mortgagor had tendered to the mortgagee the principal money, and interest up to the day named in the proviso for redemption. That case is a very strong one, and no appeal seems to have been preferred against the decision of the Vice-Chancellor, allowing the demurrer; which we presume to have proceeded upon the principle that, in the absence of any stipulation, express or implied, to the contrary, the right to redeem and the right to foreclose must be regarded as co-extensive.\*

In *Burrowes v. Molloy* (f), which was the converse of the present case, Lord St. Leonards refused to allow the mortgagee to foreclose before the expiration of the time specified. In *Cowdry v. Day* (g) the question as to the right to redeem before the day named, was once again raised before *Stuart, V. C.*, in November 1859; but was not decided, as the case was disposed of upon another ground. In the present state of the English authorities, however, we think that such a right cannot be regarded as existing in England: Fisher on Mortgages, page 80, para. 122, and page 88, para. 134.

The parties here being Hindús, we must also look to the Hindú law on this question. In 1 Colebrooke's Digest, cv., *Brihaspati* is quoted as saying: "When a house or field mortgaged for use has not been held to the close of its term, neither can the debtor obtain his property, nor the creditor obtain the debt." At paragraph cxviii. the same dictum is repeated with this addition: "After the period is completed, the right of both to their respective property is ordained; but, even while it is unexpired, they may restore their property to each other by mutual consent." In the present case we have not any such consent. In Morley's Digest

\* See the observations of Lord Kingsdown in 7 Moo. Ind. App. 355.  
 (f) 2 Jo. and Lat. 521. (g) 5 Jurist, N. S. 1199.

N. S., page 259, plac. 11, it appears that in *Anrood Singh v. Rajah Dummur Singh* (a suit between Hindús), and in *Oomrao Begum v. Inderjeet*, two cases which arose in the North-West Provinces, the right of the mortgagor to redeem, before the expiration of the term named in the mortgage, was denied by the Court.

1866.  
SAKHA'RAMN.  
SARDHAI  
v.  
VITHU' L.  
GOUDA'  
et al.

In S. A. No. 1007 of 1864, *Kahándás Múlji and another v. Mithábhái Jivandás and others, Forbes and Newton, JJ.*, on the 10th of July 1865, affirmed in this court a decree of the Senior Assistant Judge of Ahmedábád, which dismissed a redemption suit instituted before the term (ten years), for which the property was mortgaged, had expired.

Finding, then, the same principle to exist both in the English and the Hindú law, that the right of the mortgagor to redeem does not, in the absence of any circumstances or language indicating a contrary intention, arise any sooner than the right of the mortgagee to foreclose, we hold this suit to have been prematurely instituted; and must, therefore, affirm the decree of the Acting Senior Assistant Judge with costs.

TUCKER, J., concurred.

*Decree affirmed.*

*Special Appeal No. 140 of 1864.*

1864.  
Oct. 13.

RA'JI NAROTTAM ..... *Appellant.*  
PURUSHOTTAM GIRDHAR and another .... *Respondents.*

*Bhágdári tenure—Collector's authority.*

*Held that any interference by the Collector to assign, of his own authority, lands in a bhágdári village to a tenant for cultivation, is irregular and unauthorised.*

THIS was a special appeal from the decision of W. Sandwith, Senior Assistant Judge of Súrat, in Appeal Suit No. 5 of 1862, confirming the decree of the Munsif of Jambusar, in Original Suit No. 447 of 1860.