1872.
May 23.

[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 608 *of* 1871.

SHANKARBHA'I GULA'BBHA'I and others..........................*(Defendants) Appellants.*
KA'SSIBHA'I VITHALBHA'I......*(Plaintiff) Respondent.*

Mortgage—Redemption after fixed time has expired—Gahan lahan clause.

Since the decision of the case of Ramji v. Chinto, it has been the practice of the High Court on its appellate side and of the inferior Courts in the Bombay Presidency to treat *gahan lahan* mortgages (mortgages containing a proviso that if not redeemed within a certain fixed time they will be considered as converted into absolute sales) as redeemable, notwithstanding that such fixed time has expired—Such practice has proved beneficial and should be adhered to.

Ramji v. *Chinto* and the cases decided in accordance with it referred to and followed.

THIS was a special appeal from the decision of M. H. Scott, Extra Assistant Judge of the District of Ahmadabad, in appeal Suit No. 562 of 1869, affirming the decree of the Munsif of Nariád.

The facts sufficiently appear from the judgment of the Court.

The special appeal was argued before WESTROPP, C.J., and GIBBS and WEST, JJ.

Nanabhai Haridas, for the appellants.

Nagundas Tulsidas, for the respondents.

WESTROPP, C.J. :—This is a suit to redeem a mortgage.

Before the institution of this suit twelve years had expired since the day named in the mortgage, upon which, in default of payment, it was to become converted into a sale.

The defendants put forward as valid a deed (exhibit No. 7) whereby the mortgagor was represented as selling the equity of redemption to the mortgagee, but the Judge found the deed to be not genuine. By that finding this Court is bound on special appeal, so no question arises upon the deed of sale (exhibit No. 7).

1872.

SHANKAR-BHA'I GULA'BBHA'I v. KA'SSIBHA'I VITHAL-BHA'I.

However, it was contended for the defendants, the mortgagees, that the mortgage itself became converted into a sale on default of the mortgagor to repay the money borrowed upon the day named for that purpose in the deed of mortgage.

The recent decision (in 1871) of the Privy Council in an appeal from the late Ṣadr Adalat of Madras, *Pattabhiramier* v. *Vencatarow Naicken* (a), was cited for the mortgagees, in which it was held (in reversal of a decree of the Ṣadr Adalat) in a suit instituted in 1853 to redeem a mortgage containing a clause making it an absolute sale in default of redemption within a time certain, that in the Presidency of Madras, effect must be given to that clause and that the mortgagor ought not to be permitted to redeem after the day for payment has passed. That appeal was pending for an inordinately long time (ten years) and was eventually heard *ex parte*, there not being any appearance on behalf of the respondents.

The High Court of Madras has, in several reported cases, permitted redemption of such mortgages after the day named for payment had passed, in default of which payment the instrument of mortgage had stipulated that the transaction should cease to be a mortgage and should become an absolute sale: *Venkata Reḍḍi* v. *Parvati Ammal (b)*, *Vanneri* v. *Patanattil* (c), *Nallana* v. *Palani* (d). The first of these cases was decided in 1863—the two latter cases in 1865. None of the three are mentioned in the Report of the Privy Council case as having been cited by counsel, or referred to by their Lordships.

The question here resolved itself into this, whether, as a result of the Madras case, in which leave was given by the Privy Council to appeal in 1861, and which was not decided until 1871, the practice established in Bombay in 1864 by *Ramji* v. *Chinto* (e) ought to be discontinued.

We have, after much consideration, arrived at the conclu-

(a) 7 Beng. L. Rep. 136. (b) 1 Mad. H. C. Rep. 460.
(c) 2 *Ibid* 382. (d) 2 *Ibid* 420. (e) 1 Bom. H. C. Rep. 199.

sion that no such consequence ought to follow the final decision of the Madras case, and that none such was intended by the Privy Council.

Their Lordships, after stating that such contracts had been enforced in India, said (*f*) :—" If the ancient law of the country has been modified by any later rule, having the force of law, that rule must be founded either on positive legislation or on established practice."—After referring to certain Madras and Bengal regulations and to some cases, they continue :—" Their Lordships have been unable to discover that there has been any course of decisions in the Court of Madras which can be set against the authority just cited. The utmost that can be gathered from this record is, that some uncertainty concerning the operation of these contracts may have crept into the lower Courts of Madras" (p. 142) ; and lastly they say :—" Such a doctrine the (English equitable doctrine that the time stipulated in the mortgage deed is not of the essence of the contract) was unknown to the ancient law of India; and if it could have been introduced by the decisions of the Courts of the East Indian Company, their Lordships can find no such course of decisions. In fact, the weight of authority seems to be the other way. *It must not, then, be supposed that in allowing this appeal, their Lordships design to disturb any rule of property established by judicial decisions, so as to form part of the law of the forum, wherever such may prevail, or to affect any title founded thereon.*"

Those concluding words are of great importance.

Ramji v. *Chinto* was decided by Arnould, Acting Chief Justice, and Newton and Janardhan, J.J., in 1864. It is correctly stated in the judgment that the Bombay Ṣadr Adalat " as a rule gave a strict operation to instruments of this nature" (*i. e.* mortgages with a *gahán lahán* proviso), " and regarded the right of redemption as extinguished, and the right of property absolutely transferred, the moment the fixed time of payment had expired" without payment having been made.

(*f*) 7 Beng. L. Rep. 140, 141.

1872.

SHANKAR-BHA'I GULA'BBHA'I v. KA'SSIBHA'I VITHAL-BHA'I.

The decision of the Madras Ṣadr Adalat in *Pattabhiramsier* v. *Vencatarow Naicken,* in favour of redemption was not apparently cited in *Rámji* v. *Chinto,* but *Venkata Reḍḍi* v. *Parvati Ammal,* decided in 1863 by the High Court of Madras, was cited and relied upon by the Court.

The recognition of the right to redeem was, having regard to the previous decisions of the Ṣadr Adalat, perhaps somewhat a strong measure. It had, however, for a long time previously, been considered a desirable course to adopt, and eminent Judges of the High Court, who had formerly been Judges of the Ṣadr Adalat, regretted that their predecessors in the Ṣadr Adalat had, for the most part, enforced the condition for purchase in *gahan lahan* mortgages, as such a course had been found to promote most oppressive and grasping conduct on the part of money-lenders in the Mofussil. In the island of Bombay itself, the Courts (Mayor's Court, Recorder's Court, Supreme Court, High Court, Original Jurisdiction), although in matters of contract and succession bound to administer to Muhammadans and Hindus their respective laws, have invariably refused to enforce such conditions, and have acted upon the practice of English Courts of Equity in allowing redemption. Holding the views which I have mentioned, and encouraged by the example of the High Court at Madras, all of the Judges sitting at the Appellate Side, including some former occupants of the bench of the Ṣadr Adalat, were desirous that the course, which was adopted by the Judges who sat in the case of *Ramji* v. *Chinto,* should be the rule of future practice in the Mofussil.

That rule has, ever since the decision in *Ramji* v. *Chinto,* been uniformly and steadily acted upon, tempered, however, as it was in *Ramji* v. *Chinto,* by requiring the redeeming mortgagor, when the mortgagee, under the impression that he had become absolute vendee, had laid out money on the mortgaged premises for their improvement, to recoup the mortgagee to the extent of the value of such improvement, at the time of redemption: *Anandráv* v. *Rávji* (g); and ex-

(g) 2 Bom. H. C. Rep. 214.

penses connected with the Revenue Survey have also been so allowed: *Bápushá* v. *Ramji* (*h*).

Kedári v. *Atmárám* (*i*), from Wái in the dstrict of Sátára, in which *Rámji* v. *Chinto* was followed in 1866, is an example of the oppression exercised by money-lenders. The decision there made by myself and TUCKER, J., however, partly rested on the ground of fraud.

In *The heirs of Husen Beg* v. *Akúbái* (*j*) decided in 1865 by COUCH and WARDEN, JJ., which was from the Púna District, *Rámji* v. *Chinto* was followed; so too in *Muhammad* v. *Ibráhim* (*k*) in 1866, by TUCKER and WARDEN JJ., which was from Ratnagiri District; also in 1868 by COUCH, C.J., and NEWTON, J., in *Mancharshá* v. *Kamrunisá* (*l*). They there held that the mortgagor could redeem only on the condition of repaying to the mortgagee the expense of re-building a portion of the premises which had been accidentally burnt down, although that expense was more than double the price for which the premises had been conditionally sold to the mortgagee; [see further as to allowance for repairs *Rágho* v. *Anáji* (*m*)].

These are the reported cases in which the High Court of this Presidency has decreed redemption of *gahán lahán* mortgages.

The unreported cases are much more numerous. We do not profess to give by any means an exhaustive list, but amongst them are the following:—

Special Appeal No. 717 of 1863 (*Sadáshiv Vithal* v. *Dashrath Sadáshiv*) decided by COUCH and NEWTON, JJ., on the 5th of October 1864, decreeing redemption on payment, within six calendar months, of principal, interest, and costs, and money laid out by the mortgagee in buildings or other permanent improvements, making all just deductions for depreciation in such buildings and improvements by lapse of time or other causes, and in default of payment within

(*h*) *Ibid* 220. (*i*) 3 Bom. H. C. Rep. A. C. J. 11.
(*j*) 2 Bom. H. C. Rep. 337. (*k*) 3 Bom. H. C. Rep. A.C.J. 160.
(*l*) 5 *Ibid* 109. (*m*) *Ibid* 116.

1872.

SHANKAR-BHA'I GULA'BBHA'I v. KA'SSIBHA'I VITHAL-BHA'I.

that time, foreclosure, or sale at option of mortgagor. The mortgagee to be paid the amount due to him for principal, interest, costs, buildings, and improvements out of the proceeds of sale, and the surplus, if any, to be paid to the mortgagor (plaintiff).

Special Appeal No. 182 of 1865 from Ahmadabad District (*Hukábhái* v. *Khodábhái*) a similar ruling was made by FORBES and NEWTON, JJ.

Special Appeal No. 762 of 1865 (*Gopálrav* v. *Bhimráv*) from Dharwar, in which TUCKER and WARDEN, JJ., in 1866, decreed against a mortgagee in possession an account of rents and profits received, and on the other side an account of principal and interest, and on payment of balance by mortgagor, within six calendar months, redemption, and in default, foreclosure.

In Special Appeal No. 893 of 1864 (*Vináyak* v. *Bhivá*) from the Konkan, COUCH, C.J., and TUCKER, J. in 1866, made a similar decree.

Special Appeal No. 764 of 1865 (*Ráyappá* v. *Krishnáji*) from Dharwar, in which WARDEN and GIBBS, JJ., in 1866, decreed redemption on payment of principal and interest, and in default, foreclosure.

Special Appeal No. 772 of 1865 (*Appáji* v. *Revu*) from Púna, in which SAUSSE, C.J., and NEWTON, J., in 1866, decreed redemption on payment of principal and interest within six calendar months, and in default, foreclosure.

In Special Appeal No. 125 of 1866 (*Náráyanbhat* v. *Dinkar*), Tucker and Warden, JJ., in 1866 held the mortgagor entitled to redeem, though more than twelve years had elapsed since the time fixed for payment of the mortgage money.

In Special Appeal No. 651 of 1865 from Púna, redemption was decreed, and compensation to the mortgagee for improvements was directed to be paid by the mortgagor.

Special Appeal No. 218 of 1866 (*Krishnáji* v. *Hanmant*) where Tucker and Gibbs, JJ., in 1866 affirmed the decree of the District Judge of Súrat for redemption of a mortgage of 38 years' standing.

In Special Appeal No. 382 of 1866 (*Dulápá* v. *Sangápá*) from Dharwar, Tucker and Gibbs JJ., in affirming a decree awarding possession of the mortgaged premises to an unpaid mortgagee, recognized the right of the mortgagor to redeem on payment of the amount due on the mortgage.

Special Appeal No. 308 of 1867 (*Jámásji* v. *Maulvi Muhammad Sáheb*), in which Warden and Gibbs, JJ., affirmed the decree of the District Judge of Súrat, which affirmed that of the Principal Sadr Amín awarding redemption after expiration of the period fixed for repayment of the mortgage money.

Special Appeal No. 311 of 1867 (*Uderám* v. *Kalápá*) from Ahmadnagar, in which Couch, C.J., and Newton, J., in affirming a decree of the District Judge awarding possession to a mortgagee, did so expressly subject to the mortgagor's right to redeem, although the mortgage was *gahán lahán*.

Special Appeal No. 75 of 1868 (*Tátiá* v. *Rámkisangir*) from Púna—a strong case—Newton and Tucker, JJ.decreed redemption.

In Special Appeal No. 166 of 1868 (*Sakhárám* v. *Mor Joshi*) from the Konkan, redemption was decreed by Warden and Gibbs, JJ., although more than twelve years had elapsed from the time fixed for repayment of the mortgage money.

In Special Appeal No. 305 of 1869 from Púna (*Rámu* v. *Ramábái*), Warden and Lloyd, JJ., sanctioned a decree for redemption of two fields out of three. The third they held to have been surrendered by a *rázinámá* to the Collector in favour of the mortgagee by the mortgagor. The Senior Assistant Judge at Púna had decreed redemption of all three fields.

In Special Appeal No. 285 of 1869 (*Rámu* v. *Esáji*) GIBBS and MELVILL, JJ.) affirmed a decree of the Assistant Judge at Púna which affirmed a decree by the Munsif of Juner for redemption.

Special Appeal No. 75 of 1869 (*Rávji* v. *Pradhán Jivan Thakar*) was a case in which the mortgagee had held the land for more than twelve years after the day fixed for repayment

1872.

SHANKAR-BHA'I GULA'BBHA'I *v.* KA'SSIBHA'I VITHAL-BHA'I.

of the mortgage money, and had built a house upon the land. The Munsif of Kalian dismissed the mortgagor's plaint for redemption. The Assistant Judge at Tanna reversed that decree, and made a decree for redemption, but on the condition of the mortgagor paying to the mortgagee the value of the house as well as the debt. The High Court (GIBBS and LLOYD JJ.) refused to allow compensation for the house, inasmuch as the mortgagee had built it before the time fixed for repayment of the mortgage debt had arrived. On that point, they referred to 2 Bom. H. C. Rep. 225. They decreed redemption on payment of the money due, and directed the mortgagee to remove the house and restore the land to its original condition at the date of the mortgage.

In Special Appeal No. 223 of 1869 (*Rámshet* v. *Atmárám*) from Tanna, the mortgagor was, by Warden and Lloyd JJ., (who reversed the decrees of the Lower Courts,) held to be entitled to redeem, not only notwithstanding an admission which he had made before the institution of the suit, and that considerably more than twelve years had passed since the day named in the *gahán lahán* clause for repayment, but also notwithstanding that the mortgagee had sold it in 1855 as his absolute property, and that it had been twice afterwards sold in 1862 to the knowledge of the mortgagor, who took no steps then to claim it as his property. Certain issues having been directed by Warden and Lloyd, JJ., the case came up again upon a special appeal, No. 498 of 1870, [as *Rámshet* v. *Pandharináth* (*n*)] to the High Court before GIBBS and WEST, JJ., who doubted* but could not interfere with the previous decision in the High Court, which recognized the mortgagor's right to redeem under the special circumstances of the case. They, however, refused to direct any account of rents and profits against the mortgagees. They upheld an award of compensation to them for improvements; but ruled that no interest could be awarded on that compensation, though interest might be given on money expended in

(*n*) 8. Bom. H. C. Rep. A.C.J. 236.

* Note.—See however, *Vallabba Bhulá* v. *RámáSukhá*, S. A. No. 396 of 1871.

repairs. I refrain from expressing an opinion as to whether I could have concurred in allowing redemption in that case.

Sir Charles Sargent and Melvill, JJ., affirmed, in Special Appeal No. 456 of 1869 (*Jivanji* v. *Hanmantá*), the decrees of the Lower Courts granting redemption, although more than twelve years had elapsed since the expiration of the time allowed by the *gahán laián* clause for redemption, and held that clause 15, and not clause 12, of Section 1 of Act XIV. of 1859 was applicable to the case.

In Special Appeal No. 187 of 1870 (*Savráji* v. *Nanbáji*) Gibbs and Kemball, JJ., affirmed a decree of the Joint Judge of Púna, granting redemption after expiration of the times specified for repayment in the *gahán laián* clauses in certain mortgages.

In Special Appeal No. 37 of 1870, Gibbs and Melvill, JJ., affirmed decrees of the Munsif of Talegam and Assistant Judge of Puna, granting redemption, notwithstanding that the time specified for payment had elapsed.

In Special Appeal No. 497 of 1870 (*Krishnáji* v. *Anandráv*) from Púna, Gibbs and Melvill, JJ., decreed redemption on payment, within six calendar months, of the mortgage money, and Rs. 1,000 compensation for value of fruit and *Bábul* trees planted by the mortgagee.

In the year 1871 and in the current year there have been several decrees made in the High Court at its Appellate Side for redemption of mortgages (like those in the cases already enumerated) by way of conditional sale (*gahán laián*).

Enough has been said to show how completely the practice of allowing redemption has been established by the High Court of this presidency at its Appellate Side in such cases.

Numerous as are the decrees, which have been made in it for redemption of *gahán laián* mortgages (and there has not been any appeal to the Privy Council from any of them), they are as nothing compared to the number of decrees to the same effect which, during the last eight years, have been made in pursuance of the practice of this Court

1872.

SHANKAR-BHA'I GULA'BBHA'I v. KA'SSIBHA'I VITHAL-BHA'I.

through the Courts of the District Judges, Joint Judges, Assistant Judges, and Subordinate Judges, in all some ninety Courts or upwards subordinate to this Court, and with jurisdiction to hear redemption and foreclosure suits. Such decrees for redemption must have been made in many hundreds, probably in thousands, and it would create general confusion throughout this presidency, were we now to revert from the rule laid down in 1864 in *Rámji* v. *Chinto* to the practice of the Ṣadr Adalat.

We believe that their Lordships of the Privy Council, with their wonted caution, expressed themselves in the manner in which they did, in the passages quoted by us from the appeal from Madras in the commencement of this judgment, in order to prevent any such consequences, and to show that it was not their desire, by their decision, to disturb any such widely established practice as we have shown to exist here.

We believe, therefore, that we shall best give effect to their Lordships' intentions by adhering, as we purpose henceforward to do, to that practice which, on the whole, we have no doubt, has been highly beneficial to the people of this presidency.

We observe that their Lordships made no reference in their judgment to this presidency, or to the practice which has been firmly established in it for the last eight years.

For these reasons, we hold the appellants to have failed on the first point made in their memorandum of appeal. The second and third points were scarcely mentioned by their pleader, and are, in our opinion, of no avail to the appellants.

No objection having been taken to the details of the decree of the Extra Assistant Judge, we affirm it with costs.