

[APPELLATE CIVIL JURISDICTION.]

1872.
May 23.*Special Appeal No. 85 of 1871.*

KRISHNA'JI alias BA'BA'JI KESHAV..... *Appellant.*
 RA'VJI SADA'SHIV and another *Respondents.*

*Mortgage—Conditional Sale—Redemption by mortgagor—Limitation—
 Act XIV. of 1859, Sec. I cl. 15.*

Redemption by the mortgagor of mortgaged premises held by a mortgagee under a *gahán lahán* mortgage is not barred by the mortgagee's possession of the premises for the period of twelve years after the date on which according to the terms of the mortgage deed, the mortgage is to be converted into a sale. Such a case is governed by the provisions of Act XIV. of 1859 Sec. I cl. 15.

THIS was a reference to the full bench by Melvill and KEMBALL, JJ., of the question whether redemption is barred by a mortgagee's possession for the period of twelve years after the date on which, according to the terms of the mortgage deed, the mortgage is to be converted into a sale.

It is unnecessary for the purpose of this report to set out the facts of the case out of which the above question arose.

The reference was argued before WESTROPP, C.J., GIBBS, LLOYD, and KEMBALL, JJ. on the 29th of January 1872.

Shántarám Náráyan, for the appellant.

Bahiravnáth Mangesh, for the respondent.

Cur. adv. vult.

WESTROPP, C.J.:—The question referred to us for decision by MELVILL and KEMBALL, JJ., is whether redemption is barred by a mortgagee's possession for the period of twelve years after the date on which, according to the terms of the mortgage deed, the mortgage is converted into a sale. The learned Judges observed that the ruling in Special Appeal No. 735 of 1864 (as mentioned in the note to the 12th clause of section 1 of Act XIV. of 1859 in West's Acts) was in conflict with the decision made on the 17th of January 1870 in Special Appeal No. 456 of 1869.

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We have examined the record in Special Appeal No. 735 of 1864, and find that, although one of the points made on special appeal had reference to the time within which redemption might be made, yet that the special appellant, who was appellant in the Court of the District Judge, had not raised that point in the District Court, the questions there being (1) whether the full consideration of the alleged mortgage had been paid; (2) whether, if not, that would vitiate the sale; and (3) whether the Munsif was right in holding two specified *thikāns* to be one and the same field. The decree of the District Judge upon those points was simply affirmed by the High Court, and there is nothing to show that it permitted the point as to the time within which redemption might be had to be argued. We cannot, therefore, consider that case as an authority on the question of limitation.

In Special Appeal No. 893 of 1864 (*Vināyak Anant Bendre v. Bhivá bin Amrutá*) more than twelve years and less than sixty years had elapsed from the date named on which the mortgage was to become a sale in the event of non-payment of the mortgage money. Mr. Pinhey, the District Judge affirmed a decree of the Munsif, dismissing a suit by the mortgagor to redeem. The High Court (Couch, C. J., and Tucker, J.), following *Rámji v. Chinto (a)*, reversed the decrees of the Courts below, remanded the suit, ordered an account to be taken, and directed that the usual decree for redemption should be made by the lower Court.

In Special Appeal No. 125 of 1866 (*Nárāyanbhat v. Dinkar Ganesh Ok*), the Agent for Sardárs, having held that clause 12 of Section 1 of Act XIV. of 1859 was applicable to a case similar to that above mentioned, the High Court (TUCKER and WARDEN, JJ.), on the 17th of August 1866, reversed his decree, and declared that the proper period of limitation was that prescribed in clause 15 of Section 1 of Act XIV. of 1859.

WARDEN and GIBBS, JJ., in *Sakhárám v. Mor Joshi* (Special Appeal No. 166 of 1868) from the Konkan, decreed redemption, although more than twelve years had elapsed from the day fixed for payment.

(a) 1 Bom. H. C. Rep. 199.

Special Appeal No. 75 of 1869 (*Rávjí v. Pradhán*) mentioned in the judgment given to-day in *Shankarbhái v. Kasanbhái*, is another case to the same effect.

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In Special Appeal No. 456 of 1869 (*Jivanji Bhikáji v. Himmatráam Harirám*), the High Court (SARGENT and MELVILL, JJ.) upheld a decree of Mr. Ayerst, Acting Assistant Judge at Surat, to the same effect.

A still stronger case than any of the foregoing decisions is that in Special Appeal No. 229 of 1869 by Warden and Lloyd, JJ., who reversed a decree of Mr. Bosanquet, who had refused to permit a mortgagor to redeem land mortgaged in 1844 for five years, with the usual clause that in default of payment within that time, the mortgage should become a sale. Three years after the date of the mortgage the mortgagee entered into possession, and in 1850 the mortgagor had, in another suit brought by one Atmárám, in which the mortgagor was defendant, stated that he had sold the land in question here to the mortgagee. The mortgagor brought his suit for redemption in 1867. The High Court, being of opinion that what the mortgagor had said in 1850 was said with reference to the law as then viewed by the Šadr Adálat, and was not any admission of an actual *boná fide* sale, held the mortgagor entitled to redeem.* As to the legal effect of what the plaintiff there had said in 1850, it is unnecessary that, in the present case, we should give any opinion.

The question put to this Full Bench, on the examination of the records of the Court which we have made, seems to be already closed by authority. It has, however, been contended on behalf of the defendant, the mortgagee, that the last four cases are corollaries to the case of *Rámji v. Chinto (b)* which has itself been seriously questioned on the authority of a recent decision of the Privy Council in an appeal from Madras, and that if *Rámji v. Chinto* fall, they must fall with it. No doubt that would be so; but, on reconsi-

(b) 1 Bom. H. C. Rep. 199.

* Note.—See *Valabh Bhulá v. Rámá Lukha* (Special Appeal No. 396 of 1871.

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deration of *Rámji v. Chinto* in Special Appeal No. 608 of 1870. (*Shankarbhái v. Kasanbhái*) by Full Court, it has been determined, for the reason given in a judgment delivered to-day, that the doctrine in *Rámji v. Chinto* must be upheld in this presidency.

The principle on which *Rámji v. Chinto* was decided being *once a mortgage always a mortgage (c)*, namely, that the *gahán lahán* clause or stipulation for sale, conditional on default of payment within a fixed time, shall not be permitted to operate as a sale, but that the property, which has been pledged in security for the debt, shall still continue to be redeemable, it is impossible for the Court to hold that the instrument is not a mortgage. If it be a mortgage, it comes within Clause 15 of Section 1 of Act XIV. of 1859 (which specially prescribes the time within which mortgages shall be redeemable) and is taken out of the general clause (12) as to the period of limitation within which suits relating to immoveable property may be brought. Until the arrival of the period fixed for payment, the mortgagor, without the consent of the mortgagee, cannot, in the absence of circumstances or language indicating a contrary intention, redeem the mortgaged premises: *Sakhdrám v. Vithu (d)*.

The period, within which that right to redeem (in England styled the equity of redemption) may be exercised, is, by clause 15 of Section 1 of Act XIV. of 1859, fixed, in the case of moveable property, at thirty years, and in that of immoveable property, at sixty years, from the time of the deposit, pawn, or mortgage, or if, in the meantime, an acknowledgment of the title of the depositor, pawner, or mortgagor, or of his right of redemption, shall have been given in writing signed by the depository, pawnee, or mortgagee, or some person claiming under him, from the date of such acknowledgment in writing.

That being thus specially fixed by express provision of the Legislature, the Courts would legislate to the contrary, were they to fix twelve years from the time at which the right to redeem commenced, namely, the day fixed by the
 (c) *Newcount v. Bonham*, I. Vernon 7, (d) 2 Bom. H. C. Rep. 225.

mortgage for payment, as the period of limitation for suits to redeem under such circumstances as those mentioned in the question put to us.

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On principle then, as well as upon authority, we hold ourselves bound to answer the question referred to this full bench, "whether redemption is barred by a mortgagee's possession for the period of twelve years after the date on which, according to the terms of the mortgage deed, the mortgage is to be converted into a sale," in the negative.

We remit this cause (with the above answer) to the Second Division Bench for disposal.

NOTE.—On the same day a similar answer was given to the same question in Special Appeal Nos. 86 of 1871 and 107 of 1871 referred to a full bench.

[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 458 of 1869.

May 23

NA'RA'YAN and others..... *Appellants.*
SATVA'JI and others *Respondents.*

Hindu law—Mortgage—Interest exceeding principal—Dāmdupat—Reg. V. of 1827 section 12.

According to the Hindu law of *dāmdupat* interest exceeding the principal sum lent cannot be recovered at any one time.

Cases bearing upon the subject of *dāmdupat*, and how far and when that law is applicable to loans upon mortgage reviewed and considered.

THIS was a Special Appeal from the judgment of the Joint Judge at Puna.

The facts sufficiently appear from the judgment of the Court.

The Special Appeal was argued before WESTROPP, C.J. and WEST, J.

Ganpatráv Bháskar, for the appellants.

Shāntarám Náráyan, for the respondents.

Cur. adv. vult.