

## APPELLATE CIVIL.

*Before Sir Charles Sargent, Knight, Chief Justice, and Mr. Justice Birdwood.*

1885.  
June 18.

MAHOMED MUSE AND OTHERS, (ORIGINAL PLAINTIFFS), APPELLANTS, v.  
JIJBHAI BHAGVA'N AND OTHERS, (ORIGINAL DEFENDANTS), RESPONDENTS\*

*Mortgage—Redemption—Onerous condition in mortgage deed—Condition that after redemption the mortgagee should continue in possession as perpetual tenant not enforceable.*

A condition in a mortgage, that if the mortgagor redeems the property the mortgage right should be extinguished, but that the property should for ever remain in the possession of the mortgagee on his paying a fixed rent, is a condition which cannot be enforced in a Court of Equity.

THIS was a second appeal from the decision of C. E. G. Crawford, Assistant Judge (F. P.) of Surat at Broach, confirming the decree of R. S. Krishnumukhrám A. Mehta, Subordinate Judge (2nd Class) at Vágra.

The material facts of the case are as follows —

The plaintiffs sued to recover from the defendants possession of certain lands which they (the plaintiffs) alleged they had purchased from the owners by a deed of sale dated 29th September, 1877.

The defendants contended that the lands in question had been mortgaged to them on the 18th of November, 1864, by the proprietors for Rs. 1,999 on the condition, first, that the lands if not redeemed within three years of the date of the mortgage were to be considered as sold to them, and, secondly, that even if the lands were redeemed, they (the defendants) were to continue in possession on paying an annual rent of Rs. 2 *per bighá*.

The Subordinate Judge found both the plaintiffs' and the defendants' deeds proved, and rejected the plaintiffs' claim, holding that, though the defendants' conditional sale was not enforceable, they were entitled to remain in possession under the other condition of the mortgage. The Assistant Judge confirmed the decree of the Subordinate Judge.

The plaintiffs appealed to the High Court.

*Máneksháh Jehángírsháh* for the appellant.—The uninter-

\* Second Appeal, No. 604 of 1883.

rupted course of the decisions of this High Court renders the *gahán-lahán* clause in the defendants' mortgage not enforceable; but I submit that the condition, that the mortgagees, even after redemption, were to continue in possession as perpetual tenants on payment of a fixed rental, is in derogation of the right of redemption, and is oppressive, and not enforceable in a Court of Equity.

*Shivráam Vithál Bhándárkar* for the respondents.—The right of redemption is not affected. The defendants' bond creates a perpetual lease to take effect immediately on redemption. The present case is thus distinguishable from the case of *Rámji v. Chintó*<sup>(1)</sup> and similar decisions.

SARGENT, C.J.—The objection to the condition in the mortgage, that if the mortgagor redeemed the land, the mortgage right only should be extinguished, and the lands should remain in the hands of the mortgagee, he paying a rent of 2 rupees *per bighá*, has not been dealt with by the Assistant Judge, although it was raised by the fourth ground of the plaintiffs' appeal. Such a condition, although it does not exclude the right of redemption, fetters it with the onerous obligation of accepting the mortgagee as a perpetual tenant, and ought not, therefore, in our opinion, to be enforced in a Court of Equity.

We must, therefore, reverse the decree, and order that the plaintiffs be entitled to redeem within six months from the date of this decree on payment of the sum of Rs. 1,999, or to stand forever foreclosed. Parties to pay their own costs throughout.

*Decree reversed.*

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

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