

Government treasury. We submit that such an agreement would not be against public policy—*Sitaram Vinayak v. Ramchandra Babaji* (1).

*Mahadev B. Chaubal (amicus curiae)*, for the defendant was not called upon.

JUDGMENT.

SARGENT, C. J.—We think that the agreement must be held to be contrary to the spirit of s. 7 read with s. 23 of Bombay Act III of 1874 and to be, therefore, not legal.

*Order accordingly.*

18 B. 755.

[755] APPELLATE CIVIL.

*Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.*

SUNDAR MALHAR PATEL (*Original Defendant*), Appellant v. BAPUJI SHRIDHAR AND ANOTHER (*Original Plaintiffs*), Respondents.\*  
[4th December, 1893.]

*Mortgage—Redemption—Right to redeem made conditional on payment by mortgagor of another debt as well as mortgage debt—Effect of that other debt becoming barred by limitation—Right to redeem mortgage still subject to condition.*

A mortgage bond contained a clause stipulating that the mortgagors were not to redeem the mortgaged property without paying not merely the amount of the mortgage-debt and interest, but also the amount due on a certain bond executed at the same time as the mortgage in respect of money due under a decree, and that "unless the whole was paid off, neither the mortgagor nor any one else should have a claim."

The mortgagee subsequently obtained a decree on the instalment bond and made several attempts to execute it, but failed, his *darkhast* being eventually rejected as time-barred.

*Held* that the right of redemption was made conditional on the payment of what was due on the instalment bond—a condition which was unsatisfied as long as such sum remained unpaid, although in contemplation of law there might be no longer a bond debt still in existence owing to a decree having been passed on the bond, and that decree having become barred by limitation.

[R., 22 B. 520 (524); 28 B. 349 (353) = 6 Bom. L. R. 313; 11 Bom. L. R. 318 (327); 8 O. C. 132 (135).]

THIS was a second appeal from the decision of S. Tagore, District Judge of Sholapur-Bijapur.

In January, 1868, the defendant was the holder of a decree against the plaintiff for Rs. 566. The plaintiff being desirous of buying certain land from the defendant, and being unable to pay the purchase-money, the defendant agreed to sell him the land in the following terms:—1st, that the plaintiff should execute to the defendant a mortgage of the land for the 700; 2nd, that the plaintiff should execute to the defendant an instalment bond for Rs. 500 in respect of the amount due under the decree. These terms were accepted by the plaintiff, who on 11th January, 1868, executed both documents, *viz.*, the mortgage-deed and the instalment bond. The mortgage-deed contained a stipulation to the effect that the mortgagor

\* Second Appeal No. 898 of 1891.

(1) P. J. (1885) p. 24.

1893  
DEC. 4.  
—  
APPEL-  
LATE  
CIVIL.  
—  
18 B. 755.

should not redeem the property without also paying the amount of the instalment bond, and that unless the whole amount of Rs. 1,200 was paid, neither mortgagor nor any [756] one should have a claim. The mortgage bond was engrossed upon a paper the stamp of which would have been sufficient to cover the amount of Rs. 1,200.

In 1873 the defendant sued the plaintiffs on the instalment bond and obtained a decree which he made several attempts to execute, but failed, his last application being dismissed as barred by limitation.

In the year 1888, plaintiffs brought the present suit to redeem the mortgage of the 11th January, 1868, and to recover possession of the lands, alleging that the mortgage-debt had been liquidated from the profits of the land, and praying that an account of the profits should be taken, and if any surplus be found to be due to the defendants, the same might be made payable by instalments of Rs. 50 a year, as the plaintiffs were agriculturists.

The defendant contended that as there was a stipulation in the mortgage bond that the property should not be redeemed without paying the amount of the instalment bond, the plaintiff could not redeem on payment only of the mortgage-debt. He claimed Rs. 2,924-14-0 as due to him on the whole transaction.

The Subordinate Judge disallowed the defendant's contention with respect to the payment of the instalment bond, and held that Rs. 1,424-8-2 (Rs. 700 principal, Rs. 700 interest, and Rs. 24-8-2 on account of the local fund cess paid by the defendant) were due by the plaintiffs to the defendant. He made the amount payable by annual instalments of Rs. 200, and directed that on failure of the plaintiffs to pay any of the instalments at the stipulated time, defendant should realize the whole amount due by the sale of the mortgaged property.

Both parties appealed, and the Judge amended the decree by reducing the amount of each instalment to Rs. 150.

The defendant preferred a second appeal.

*Ghanasham N. Nadkarni*, for the appellant (defendant).

There was no appearance for respondents (plaintiffs).

#### JUDGMENT.

SARGENT, C. J.—The question in this case is as to the right of the defendant to insist on the payment of an instalment bond as [757] well as the mortgage-debt as a condition of the plaintiffs' redeeming the lands mortgaged by Ex. 11.

The mortgage bond commences by reciting that "it was given for the reason as follows":—That Rs. 1,200 were due to the defendant by the mortgagors, for part of which a bond for Rs. 500 had been given; that for the Rs. 700, the balance of the Rs. 1,200, the mortgagors say they will pay interest at  $1\frac{1}{4}$  Re. per cent. per month. "As security for this, they say they have mortgaged the land, and direct the mortgagees to give credit for the annual produce in the interest account on the Rs. 700." In the proviso for redemption the principal Rs. 700 is spoken of as being the consideration of the mortgage-bond; but it also provides that the plaintiffs are not to take back the land until the Rs. 700 and interest and the amount of the instalment-bond for Rs. 500 are paid, and that "unless the whole is paid off, neither the mortgagor nor any one else should have a claim." It is further to be remarked that the mortgage bears the stamp required by a mortgage-debt of Rs. 1,200.

It was contended by Mr. Ghanasham for the defendant that upon the proper construction of this instrument it must be taken that it was the intention of the parties to make the amount due upon the instalment bond a charge on the lands mortgaged. We do not think it necessary to express a decided opinion on this contention of the defendant, as we think that in any case the right of redemption was made conditional on whatever was due at the time on this instalment bond being paid—a condition which remained none the less unsatisfied, as long as such sum remained "unpaid"—although there might be no longer a bond debt in contemplation of law still in existence owing to a decree having been passed on the bond and although that decree had become barred.

We must, therefore, reverse the decree and send back the case for a fresh decision having regard to the above remarks.

Defendant's costs here and in the Courts below to be paid by plaintiffs.

*Decree reversed and case sent back.*

18 B. 758.

[758] APPELLATE CRIMINAL.

*Before Mr. Justice Jardine and Mr. Justice Ranade.*

QUEEN-EMPRESS v. KAHANJI.\* [11th December, 1893.]

*Penal Code (Act XLV of 1860), ss. 153, 117—Wantonly giving provocation with intent to cause riot—Abetment of riot by the public—Construction.*

In August, 1893, a riot took place in Bombay between Hindus and Mussalmans. The excitement caused by the riot had not entirely subsided, when the accused composed and published a poem, giving an account of the outbreak, and incidentally extolling certain classes of the Hindu community, namely the Ghatias and Kamatis, for the brave resistance which they had offered to the Mahomedan rioters. The poem extolled the Ghatias and Kamatis and then followed these lines:—

"May God give glory to you, confer joy on you night and day,  
Fight again for your country's good.  
Brave, brave are the Kamatis.  
Why fear for dying, brother, why fear for dying?  
Sooner or later, but only once, a man has to die."

The poem was written in Gujarati, a language not ordinarily spoken by the Ghatias and Kamatis or even by the Mahomedans. It did not appear that any copies of the work were distributed among the people who had taken part in the riot. Nor did any fresh riot take place subsequently to the publication of the work.

The accused were prosecuted and convicted under ss. 117 and 153 of the Indian Penal Code (XLV of 1860) on the ground that the lines quoted above, especially the words "Fight again," were a direct instigation to the Ghatias and Kamatis to renew the disturbances.

*Held*, that the meaning of the passages complained of was to be gathered from the whole poem. The general spirit of the poem was clearly in favour of peace and reconciliation. It consisted from beginning to end of a lamentation over the riots, and the destruction and death they had caused, and of repeated counsel to peace and harmony between Hindus and Mahomedans. And there was nothing to indicate that the author's intention was to instigate the Hindus or provoke the Mahomedans to renew the disturbances. The words "Fight again" were, no doubt, objectionable, but it would not be a proper construction of the words to allow them to override the whole context of the work.

\* Criminal Appeal No. 392 of 1893.