would not justify him in returning the plaint at that stage of the proceedings. The shape in which the suit was originally instituted is the test of jurisdiction.

We return the record and direct the Subordinate Judge to proceed with and determine the case. Costs of all proceedings subsequent to the order of the 1st October, 1894, to be costs in the cause.

Order accordingly.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Candy.

1895. August 12.

SAYAD ABDUL HAK SARDA'R DILER JUNG BAHA'DUR, C.I.E., (ORIGINAL PLAINTIFF), APPELLANT, v. GULA'M JILA'NI VALAD IMDA'D ALIKHA'N AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

Practice—Parties—Defendant who has assigned interest—No right to be made co-plaintiff—Plaintiff without right of action—Attempt to remedy defect by joining others in whom right supposed to lie—Civil Procedure Code (Act XIV of 1882), Sec. 27—Mortgage—Redemption after the expiry of a term—Right of redemption and foreclosure co-extensive—Power expressly given to the mortgagee to call in his money before the expiry of the term—Stipulation unilateral and void of consideration—Right to redeem fettered by confining it to a particular time or to a particular description of persons—Oppressive and unreasonable restraint on the right of redemption.

A defendant who has assigned all his rights in the subject-matter of the suit, and has no longer any interest in it, has no right to be made a co-plaintiff.

A plaintiff who has no right of action when he brings his suit cannot remedy the defect and acquire the right by joining with him persons who have the right of action.

The right of redemption and the right of foreclosure are always co-extensive, and from the postponement of the former the Court will infer an intention to postpone the latter in the absence of express provision on the point; where there is such express provision, giving the mortgagee power to foreclose at any time, any stipulation postponing the mortgagor's right to redeem is unilateral and void of consideration.

A Court of Equity will not enforce any agreement in restraint of the right of redemption which is oppressive and unreasonable as giving the mortgagee an advantage not belonging to the contract of mortgage.

A mortgagor cannot, by any contract entered into with the mortgagee at the time of the mortgage, give up his right of redemption or fetter it in any manner by confining it to a particular time or a particular description of persons.

* Appeal, No. 155 of 1893.

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APPEAL from the decision of L. G. Fernandez, First Class Subordinate Judge of Thána.

Redemption suit.

On the 1st October, 1877, defendant No. 1 mortgaged with possession certain inám villages and house property to defendant No. 2, Govind Bábá Gujar, in consideration of Rs. 9,999. The mortgage-deed stipulated (*inter alia*) that the mortgagor should not pay the debt within ten years and the mortgagee should not receive it within that period, and that notwithstanding the period of ten years, if owing to the mortgagor's negligence or for some reason or other an impediment should occur to the mortgagee remaining in possession, he should be at liberty to call in his money at once.

On the 25th September, 1878, defendant No. 1 executed another mortgage to defendant No. 2 for Rs. 5,000, which recited and confirmed the above-mentioned mortgage and contained a stipulation that the mortgagor should redeem the property after the expiration of a term of forty years to be commenced after the expiration of ten years mentioned in the first mortgage. It contained a further clause that if the mortgagor himself, his son or daughter paid the amount of the mortgage after the expiration of fifteen years from the date of the first mortgage, the mortgagee should receive the same and allow redemption; but this right of redemption after the expiration of fifteen years was personal and confined to the mortgagor, his son or daughter and was not to be transferred to any one, nor was it to pass by inheritance.

On the 19th August, 1892, defendant No. 1 conveyed his equity of redemption to the plaintiff, and on the same day executed a power of attorney in his favour.

Afterwards some correspondence took place between the solicitors of the plaintiff and the defendant with respect to the conditions of the mortgage, account and tender; and the solicitors having failed to come to terms,

The plaintiff now filed the present redemption suit against defendants Nos. 1 and 2, mortgagor and mortgagee, on the 3rd October, 1892.

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Defendant No. 2 answered (*inter alia*) that according to the agreement in the second mortgage-bond the plaintiff was not entitled to redeem till the expiration of the period mentioned therein; that the negotiations for compromise fell through owing to plaintiff's default, hence what was said during the course of the negotiations was not binding on him; that there was no legal tender, and that there were no terms of a penal character in the mortgage-deed.

While the suit was pending, defendant No. 1 presented an application to the Court that he should be joined as a co-plaintiff. A similar application was also made by the plaintiff. The Judge rejected both the applications and dismissed the suit on the ground that it was premature, the term of forty years mentioned in the second mortgage being binding on the plaintiff and his vendor.

The plaintiff appealed.

Macpherson with *Inverarity* and *Kálábhái Lallubhái*, for the appellant (plaintiff):—The provision as to the tying up of the equity of redemption for fifty years is untenable and cannot be relied on by defendant No. 2. It is utterly oppressive and unconscionable, especially when the relation between the parties was pleader and client—*Cowdry* v. *Day*[1]; *Mahomed Muse* v. *Jijibhai Bhagvan*[2]; *Trimbak* v. *Sakhárám*[3]. Such a provision when it is for a short time is allowed on the supposition that it is advantageous to the mortgagor.

The Judge was wrong in rejecting defendant No. 1's application for joining him as co-plaintiff. If the application had been granted, the nature of the suit would not have changed. It would still have remained a redemption suit.

K. R. Daftary for respondent No. 1 (defendant No. 1):—The application to join first defendant as co-plaintiff ought to have been granted under sections 27, 31 and 32 of the Civil Procedure Code. Our rights in the subject-matter of the suit ought to have been decided by the Judge—*Ayscough* v. *Bullar*[4].

(1) 29 L. J. Ch., 39.
(2) I. L. R., 9 Bom., 524.
(3) I. L. R., 16 Bom., 599.
(4) 41 Ch. Div., 341.

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Scott with *Nárâyan G. Chandávarkar* for respondent No. 2 (defendant No. 2):—The term of forty years mentioned in the second mortgage has not yet expired, and, therefore, the plaintiff has no cause of action.

With respect to the provision for redemption after the expiration of the stipulated term, we submit that cases in India cannot be decided by the strict principles of the Courts of Equity in England. It is a practice in India to have long terms for redemption. In *Sakhárám N. Sardesái* v. *Vithu* (1) there was a term of twenty-five years. In *Vadju* v. *Vadju*(2) the term was ten years; similarly in *Raghubár Dayál* v. *Budhu Lál*(3). In *Chandra Kumar* v. *Iswar Chandra*(4) the term was eight years. In *Lila Morji* v. *Vásudeo Moreshvar*(5) the term was fifteen years. In *Waghela Raisangji Sivasangji* v. *Miya Gulám Rassul*(6) the term was twenty-nine years. In a second appeal recently decided the term of thirty years was upheld. Even the Limitation Act lays down a period of sixty years for redemption. Therefore, according to Legislature even any period less than sixty years would be reasonable.

Next as to influence and pressure alleged to have been used by us against defendant No. 1. There was no fiduciary relation between defendants Nos. 1 and 2 at the time of the transaction. That relationship had ceased. They were not pleader and client at the time of the transaction. At that time defendant No. 1 was accompanied by two lawyers and, therefore, he cannot say that he was not properly advised in the matter. He admits in his deposition that he executed the mortgages of his own free will. A case like the present would be upheld in a Court of Chancery in England—*Mainland* v. *UpJohn*(7).

Inverarity in reply:—The mortgages in dispute are not like ordinary mortgages—Fisher on Mortgage, pp. 685-687; *George Talbot* v. *Edward Braddil*(8). In ordinary mortgages the remedies of the mortgagor and mortgagee are equal and co-extensive, while in the present case the mortgagor's remedy is postponed

(1) 2 Bom. H. C. Rep., 225.
(2) I. L. R., 5 Bom., 22.
(3) I. L. R., 8 All., 95.
(4) 6 Beng. L. R., 562.
(5) 11 Bom. H. C. Rep., 283.
(6) P. J., 1875, p. 5.
(7) 41 Ch. Div., 126.
(8) 1 Vern., p. 183.

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and the mortgagee is at liberty to demand his money at any time.

PARSONS, J.:—The first point I will consider is the alleged wrongful refusal by the lower Court to grant the application of defendant No. 1 to be made a co-plaintiff and the application of the plaintiff to be allowed to amend his plaint and make defendant No. 1 a plaintiff. I fail to see on what ground defendant No. 1 could ask to be made a co-plaintiff. He had assigned all his rights to the plaintiff and had no longer any interest in the subject-matter of the suit. His application was rightly refused. I hold that the application of the plaintiff was also rightly refused. It has been ruled in several cases, and it is clearly good law, that a plaintiff who has no right of action when he brings his suit cannot remedy the defect and acquire the right by joining with him persons who have the right of action. In the present case, however, if the plaintiff has no right of action, defendant No. 1 has none either, for the latter has parted with all his rights, and the equity of redemption remains in the plaintiff, the grantee. The provisions of section 27 of the Civil Procedure Code cannot possibly be applied to the case, for there has been no mistake in the matter. The fact is that no joinder can help the plaintiff. As assignee of defendant No. 1 he is the only person now entitled to sue for redemption, and the sole point to be determined is whether he has a present right to redeem the two mortgages in question.

The first of these mortgages (Exhibit 47) bears date the 1st October, 1877, and is for Rs. 9,999. Its material provision for redemption is contained in the 10th clause, which is as follows:—

"I am not to pay and you are not to receive the amount before the ten years' period mentioned above for the redemption of the mortgage expires. After the expiration of the ten years I will pay you what amount there may be found due to you on making an account together with interest, and redeem the mortgage."

The second (Exhibit 46) bears date the 25th September, 1878, and is for Rs. 5,000. It mortgages the same property and a

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little more, and its material provision for redemption is contained in the 2nd clause, which is as follows:—

"The above-mentioned inám villages and the estate are given into your possession for a further period of forty years, the same to commence immediately after the ten years' period mentioned in the mortgage-bond dated the 1st of October, 1877,—that is to say, the same are given into your possession for a period of fifty years under the two bonds together. Before the expiration of the said period I will not redeem the above-mentioned villages and estate."

It is plain that under these documents the mortgagor was restricted from paying off the mortgage-debt and redeeming the properties for a period of fifty years. It is argued that this stipulation is invalid on account of the fiduciary relations that existed between the mortgagor and the mortgagee, and *Cowdry v. Day*(1) is relied on in support of the argument. In that case the Vice-Chancellor observes that it is not usual to restrict by stipulation the right of the mortgagor to pay off the money for so long a period as twenty years, and he goes on to say: "The clause in question is a contract between solicitor and client. If it has an effect in any material degree prejudicial to the ordinary rights of a mortgagor, and is unusual in its terms, the solicitor must show that his client had sufficient advice and assistance to relieve him from the pressure arising from the relation of solicitor and client." I should hesitate to apply the principle enunciated in this case to the relationship of vakil and client as it exists in the Mofussil. A vakil is generally engaged for a particular case only and has not that influence over a client that a solicitor in England might be supposed to have. In the present case defendant No. 2 was employed by defendant No. 1 as his vakil for a case at the time of the first mortgage only, defendant No. 1 had a number of other vakils besides defendant No. 2—(defendant No. 2 says that he had very little work from defendant No. 1)—and defendant No. 2 acted as vakil against as well as for defendant No. 1. There is, therefore, a great distinction between the two cases. Even, however, if the principle of the case cited be applied, defendent No. 2 says that defendant No. 1 had his own vakils to

(1) L. J., 29 Ch., p. 39.

assist him in the matter of these mortgages—vakils who witnessed his signature to the second deed, and that at their suggestion and advice alterations were made distinctly in favour of defendant No. 1. Defendant No. 1 himself admits that he could have got the money by mortgaging the property to any one else, that he mortgaged it to defendant No. 2 of his own free will, and that no pressure of any kind was put on him by defendant No. 2. The very matters, therefore, that according to *Cowdry* v. *Day*(1) have to be shown, seem to be shown in the present case.

The next point to be considered is the term. No doubt a term of fifty years is a long period. We have, however, the explanation of defendant No. 2 himself as to why that term was fixed. I do not think that it is altogether satisfactory, but there is the fact that it was not considered by defendant No. 1 or his legal advisers an unreasonably long term when coupled with the other provisions in the bond as to redemption. Periods restricting redemption are undoubtedly much longer in this country than in England. In this country ten years is a common term. There are cases reported in which terms of fifteen years (*Lila Morji* v. *Vásudev Moreshwar*(2)), twenty-five years (*Govindráo* v. *Annaji*(3)), twenty-nine years (*Waghela Raisangji* v. *Miya Gulám Rásul*(4)), thirty years (*Vallabh Krishna* v. *Keval Bhagvan*(5)), and thirty-five years (*Ganesh* v. *Prabhákar*(6)) have been upheld. In the case at Printed Judgments, 1875, p. 5, the Judges said: "The terms (that although the whole sum of Rs. 21,001 should be paid off before the expiration of the twenty-nine years, the mortgagee should be entitled to remain in receipt of the rents and profits until the end of those twenty-nine years) may or may not have been hard, they were agreed to by adults, and there is neither allegation in the plaint nor proof in the cause that any undue advantage was taken." These observations are very appropriate to the stipulation in question in the present case. The Limitation Act, 1877, gives sixty years as the period within which suits for redemption or foreclosure can be brought. I may add that no case has been

(1) L. J., 29 Ch., p. 39.

(2) 11 Bom. H. C. Rep., 283.

(3) P. J., 1891, p. 241.

(4) P. J., 1875, p. 5.

(5) S. A. 766 of 1892, decided by this Court on 27th March 1894.

(6) S. A. 191 of 1893, decided August 12, 1895.

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cited to us in which a Court in India has held any period fixed by the parties to be bad on the ground of its being unreasonably long. In the case of *Mashook Ameen Suzzada* v. *Marem Reddy*(1) the Court allowed a usufructuary mortgage for a term of fifty years to be redeemed, but it does not profess to proceed on that ground, but because it regarded the transaction as a mortgage and redeemable on the usual terms. Moreover, the decision was dissented from in *Keshava* v. *Keshava* (2).

It was then argued that the first mortgage can be redeemed at the expiration of its ten years even if the second cannot be redeemed for forty years more. The words, however, in the above quoted 2nd clause in the second mortgage are decisive on this point. The property is given into the possession of the mortgagee for a period of fifty years under the two deeds, and the mortgagor binds himself not to redeem before the expiration of that period.

Then it is contended that the stipulation is bad, because the second mortgage postpones the right of redemption only and not that of foreclosure. This contention can only be good if there is some provision in the deed enabling the mortgagee to call in his money before the expiration of the term allowed for redemption. It would not be sufficient if the deed were silent on the point. By the law as administered in these Courts the right of redemption and foreclosure is always considered to be co-extensive, and if the right of the mortgagor to redeem were postponed, the right of the mortgagee to foreclose would be held to have been equally postponed by necessary implication. As authority for this proposition it is sufficient to cite the cases of *Sakhárám* v. *Vithu* (3); *Vadju* v. *Vadju* (4); *Raghubar Dayál* v. *Budhu Lál* (5); and the observations in the case of *Tiruganna Sambandha Pandara-Sannadhi* v. *Nallatambi*(6). We have only to see whether there is in the deed any provision which expressly gives the mortgagee the power of calling in his money at any time, which would have the effect of making the stipulation for post-

(1) 8 Mad. H. C. Rep., 31.
(2) I. L. R., 2 Mad., 45.
(3) 2 Bom. H. C. Rep., 225 (2nd Ed.).
(4) I. L. R., 5 Bom., 22.
(5) *Ibid.*, 8 All., 95.
(6) *Ibid.*, 16 Mad., 489.

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ponement of redemption unilateral and void of consideration; for, as observed by Fisher in his work on Mortgage at page 685, "Arrangements postponing redemption are supported on the ground that the contract is valuable to both parties, the mortgagee on the one hand being sure of a continuing security for his money, and the mortgagor being freed from the expense and trouble of seeking new lenders."

The 4th clause of the second deed allows the mortgagee to sell the property if any default is made in the payment of interest. This would not, I think, be such a provision. The 7th clause applies to the second mortgage clauses 4, 5, 6, 7, 9, 11, 12, 13 and 14 of the first mortgage. Of these, clause 11 is the most important. It is as follows:—

"The period mentioned above for paying the amount is up to ten years, but if owing to my negligence or for some reason or other an impediment occur to your continuing in the management of the villages, and should you demand payment, I will at once pay the amount without raising any objection as to there being yet some further time for payment to elapse; but it is at your option whether to receive or not to receive the amount."

It is obvious that under this clause the mortgagor might at any time be called on to pay up the money on the allegation of an impediment for which he was in no degree responsible. This throws on him a very severe burden, and it would, I think, be unjust and inequitable to uphold the fifty years' stipulation in favour of the mortgagee when such a provision as this exists to the detriment of the mortgagor. It would be quite as unreasonable a bargain as that which was held invalid in *Talbot* v. *Braddill*[1].

One further provision remains to be discussed. Under clause 2 of the second mortgage defendant No. 1 was allowed to redeem after fifteen years. The clause runs as follows:—

"But after you shall have enjoyed the income of the villages for ten years mentioned in the previous bond and five years under this bond, in all for fifteen years, if I myself, my son, or daughter, that is, any one of us three, pay whatever amount

(1) 1 Vern., 183.

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may be found to be due to you together with interest, you are to receive the same and to release the villages and the estate (from the mortgage). As to that you are not to plead the excuse of the period of forty years mentioned in this bond having (yet) to run out. But as I have received the present amount on agreeing to allow you to continue in uninterrupted possession of the above-mentioned villages for forty years after the expiry of the period mentioned in the previous bond, the right of redeeming the villages on payment of the amount after the expiry of the above-mentioned period of fifteen years does not vest in the heirs of myself, my son, or my daughter. Nor shall the said right pass to the acquirer of the rights of myself, my son, or my daughter by mortgage, sale or by any other manner. After the expiration of the fifteen years, the right of redemption is the personal right of us three, that is to say, it will be dependent upon (*i.e.*, confined to) three individuals, (*i. e.*), I myself, my son, and daughter. The same cannot be transferred to any one; nor shall it pass by inheritance."

This clause might be used to show that it was not the intention of the parties to make the fifty years' term an essential part of the contract (as to which point see *Shri Raja Setrucherla Ramabhadra Raju Bahadur* v. *Shri Raju Vircherla Surianarayanaraju Bahadur*(1). The chief point, however, argued on behalf of the plaintiff was that the restriction of the power of alienating the right of redemption after fifteen years thus conferred on the mortgagor is invalid, and that the plaintiff as the assignee of defendant No. 1 can now redeem, the fifteen years' term having expired. The cases of *Howard* v. *Harris*(2) and *Trimbak* v. *Sakhárám*(3) were cited in support of the argument. On the other hand, it was contended that the stipulation is a purely personal concession in favour of the mortgagor alone, and that there is nothing invalid or unreasonable in the parties agreeing that that concession should not be alienated or be enjoyed by any one else. That the cases cited only show that a prohibition of the alienation of the equity of redemption is bad, and do not apply to the present condition. No doubt there is some force in this contention, but it appears to

(1) I. L. R., 2 Mad., 314. (2) 1 Vern., 32.

(3) I. L. R., 16 Bom., 599.

me quite plain that the prohibition is not one that the Court can maintain. The fixing a fifteen years' term in itself shows that the fifty years' term was considered to be excessively long and so oppressive to the mortgagor. The concession was intended to mitigate that severity. It is clear that defendant No. 1 would have no money of his own with which to redeem this mortgage. When, therefore, the mortgagee inserts a condition that renders redemption by the mortgagor under the concession impossible, he does away at once with all the good the concession was intended to do to the mortgagor. The conclusion is obvious, either the original term of fifty years must be set aside as unusually long and oppressive, or full effect must be given to the concession, and to give that effect the prohibition against alienation must be set aside. Whichever way the case is looked at, the result is the same. I am only surprised that the right of the plaintiff to redeem has been resisted. Putting aside the assignment, the plaintiff, as the agent of defendant No. 1, could on his behalf and with the money of defendant No. 1 now in his hands at once redeem the mortgage. He could do so to-morrow if this suit were dismissed to-day. It is, I think, much to be regretted that defendant No. 2 should have withdrawn from his letter of the 17th September, 1892, in which he expresses his willingness to allow the plaintiff to redeem, and so have caused all this litigation. The lower Court has disposed of the suit upon this preliminary point. We reverse the decree on such point, and remand the case to the lower Court to be determined on the merits.

All costs incurred to be costs in the cause to be dealt with in the final decree to be passed.

CANDY, J. :—On the 1st October, 1877, Gulám Jiláni passed to Govind Bábá, a pleader of the Thána District Court, the mortgage-deed (Exhibit 47), by which, in consideration of Rs. 9,999, bearing compound interest at 12 per cent., the mortgagor mortgaged his share in two inám villages and also in certain house property in the town of Thána. The house property was to remain in the mortgagor's possession, but the mortgagee was to have possession of the inám property under the following clauses of management :—

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1. The 1st clause related to the existing conditions of management between the mortgagor and his co-sharer, which were to continue as between the mortgagee and the said co-sharer.

2. Rs. 100 was to be debited to the mortgagee every year on account of a kárkún.

3. The mortgagee was to have possession for ten years, receiving profits and deducting expenses out of the balance, taking Rs. 1,200 every year on account of interest, and crediting what remained, if anything, towards payment of principal. Any deficiency in the sum of Rs. 1,200 was to be made good by the mortgagor, a balance was to be struck at the end of Diváli, interest at 12 per cent. per annum being chargeable.

4. Every Kartik (the month after Diváli) the mortgagor was at liberty to pay Rs. 700 in a lump sum, the same being credited to principal.

5. Expenses of suits against tenants for the recovery of rents were to be debited to the mortgagor.

6. The mortgagee was at liberty to grant remissions according to custom in connection with the salt lands.

7. The mortgagor was to be debited with the expense of repairs to embankments.

8. The mortgagor was to be in possession of the house property at Thána.

9. The mortgagor was to make the necessary petitions to the Collector, in order that the mortgagee should have possession of the inám property.

10. The mortgagor was not to pay, and the mortgagee not to receive, the debt before the expiration of the ten years. On an account being made up after the ten years, should the mortgagor fail to pay what was due, the mortgagee was at liberty, after giving notice, to sell.

11. Notwithstanding the period of ten years, if owing to the mortgagor's negligence or "for some reason or other an impediment" should occur to the mortgagee remaining in possession, he was at liberty to call in his money at once.

12. The mortgagor was to give the mortgagee a power of attorney for the management for the ten years.

13. If the mortgagee owing to the mortgagor's objection should lose possession of the property, the latter was to give possession to the former for a further period in order to make up the ten years.

14. The mortgagee was to take the profits from the cucumber beds.

On the 25th September, 1878, Gulám Jiláni executed a further mortgage-bond to Govind Bábá, in which the mortgage of 1st October, 1877, was recited, and the mortgagor in consideration of a further sum of Rs. 5,000, to bear compound interest at 12 per cent. per annum, mortgaged with possession the following property:—the shares in the inám villages and in the house property at Thána above described and also in certain garden land (*wádi*) at the village of Káshimire. Then followed the following clauses:—

1. The bond of 1st October, 1877, was confirmed, the said transaction being kept "quite separate and independent."

2. "The above-mentioned inám villages and the estate are given into your possession for a further period of forty years, the same to commence immediately after the ten years' period mentioned in the mortgage-bond dated the 1st of October, 1877, that is to say, the same are given into your possession for a period of fifty years under the two bonds together. Before the expiration of the said period, I will not redeem the above-mentioned villages and estate. But after you shall have enjoyed the income of the villages for ten years mentioned in the previous bond and five years under this bond, in all for fifteen years, if I myself, my son or daughter, that is, any one of us three, pay whatever amount may be found to be due to you together with interest, you are to receive the same and to release the villages and the estate (from the mortgage). As to that you are not to plead the excuse of the period of forty years mentioned in this bond having (yet) to run out. But as I have received the present amount on agreeing to allow you to continue in uninterrupted possession of the above-mentioned villages for forty years after the expiry of

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the period mentioned in the previous bond, the right of redeeming the villages on payment of the amount after the expiry of the above-mentioned period of fifteen years does not vest in the heirs of myself, my son, or my daughter. Nor shall the said right pass to the acquirer of the rights of myself, my son, or my daughter, by mortgage, sale or by any other manner. After the expiration of the fifteen years, the right of redemption is the *personal* right of us three, that is to say, it will be dependent upon (*i. e.*, confined to) three individuals, (*i. e.*), I myself, my son, and daughter. The same cannot be transferred to any one; nor shall it pass by inheritance."

3. The third clause embodied clauses 1, 2 and 3 of the previous bond, but provided that Rs. 1,800 (*i. e.*, Rs. 1,200 under the first bond and Rs. 600 under the second bond) should be deducted on account of interest from the profits of the villages, and the mortgagor was to make good any deficiency at the end of July every year, and in default was to pay interest at 12 per cent. on the balance due.

4. "Should I fail to pay in full from the income of the villages or by private settlement, at the end of July in the succeeding year, Rs. 1,800 on account of interest and the balance of Rs. 1,800 on account of the preceding year, together with interest thereon as mentioned above, you are at liberty to sell the whole of the villages and the estate either by a private or public sale, without taking into consideration the ground of the period (for payment) not having elapsed."

5. The mortgagor was not to claim redemption after the expiration of the period without paying in the succeeding year all principal and interest that might be due, and no objection on account of limitation or *dámdupat* was to be pleaded.

6. The words "at the end of July" were to be substituted for "at the end of Diváli" in the previous bond. With that exception clause 4 of the previous bond was kept intact.

7. Also clauses 4, 5, 6, 7, 9, 11, 12 and 14 of the previous bond were kept intact and made applicable. So, too, with clause 13, "forty years" being read for "ten years."

8. The garden land at Kashimire and the house property at Thána were to be in the mortgagee's possession, who after deducting all expenses was to credit the mortgagor with the balance of the profits.

9. The mortgagee was to have full authority to make repairs to the house property at Thána or to rebuild, and, the mortgagor was to pay 12 per cent. interest on the sums expended by the mortgagee, which were to be added to the mortgage-debt. The mortgagee was at liberty, if necessary, to sell the mortgagor's share in the house property or garden land.

10. Expenses of litigation in connection with the said property were with interest to be added to the mortgage-debt.

11. This clause repeated the conditions of management of the inám villages existing between the mortgagor and his co-sharer.

12. This clause related to petitions to the Collector, &c.

On the 19th August, 1892, Gulám Jiláni executed a sale-deed to Abdul Hak, by which for the consideration of Rs. 33,791 (of which Rs. 2,101 were paid in cash and Rs. 31,690 were deposited in a bank for the purpose of paying off Govind Bábá's mortgage), Gulám Jiláni's share in the inám villages and *wádi* above mentioned were sold. It was recited that the share in the house property at Thána had been sold by Govind Bábá in 1890 for Rs. 4,334. The conveyance further recited that the period of fifteen years of the mortgage was to expire in September, 1892, and, therefore, Gulám Jiláni executed a general power of attorney in the name of Abdul Hak, enabling the latter to file a suit for redemption, if necessary. This power of attorney is Exhibit No. 4, and bears even date with the sale-deed (45). It gives power to Abdul Hak to redeem the property and to get from Govind Bábá a re-conveyance effected in Gulám Jiláni's name according to law in respect thereof.

Accordingly on 3rd September, 1892 (see Exhibit 48), Abdul Hak's solicitor wrote to Govind Bábá reciting the above facts and asking for an account of the mortgage. Govind Bábá's solicitor replied on 17th September, 1892: "It seems your client is not aware of the distinct clause in the Maráthi mortgage-deed, dated the 25th September, 1878, executed by Mr. Gulám Jiláni,

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prohibiting and debarring the assignees of the former from redeeming the mortgaged properties for a period of fifty years from the 1st day of October, 1877, of which period fifteen years will elapse on the 30th instant, and giving power to the mortgagor, his son, or daughter only to redeem the mortgaged properties within the said period of fifteen years. Your client has, it seems, purchased the equity of redemption. Our client, however, is ready and willing, in order to avoid litigation and without prejudice to his right to rely upon the covenant or proviso above alluded to and any other objection he can legally raise in future, to allow your client to redeem the mortgaged properties, provided he pays within ten days from the receipt by you hereof the whole of the balance, *viz.*, Rs. 30,009-4-10, due under the mortgages up to the end of this month as per account in Maráthi herewith sent, and further interest up till payment, and also all costs of and incidental to the approval, execution of the reconveyance and correspondence relating thereto." Abdul Hak's solicitor replied on 20th September, admitting full knowledge of the contents of the mortgage-deeds, and protesting that the accounts submitted were not proper, and that an inspection of all vouchers and account should be allowed. Govind Bábá's solicitor replied on 21st September, saying: "Your client is certainly not entitled to any inspection of our client's account books. In making request for the same he seems to forget that he is the intending purchaser and not the mortgagor of the property mortgaged to our client. Our client is ready and willing to show the accounts to the proper party entitled to see the same. Our client will, however, have no objection to produce his account books for inspection in our office, if your client has the proper authority from the mortgagor to take such inspection, and if you will give a personal undertaking to pay our costs of and incidental to the giving of such inspection and all correspondence in reference thereto."

The solicitors, however, failed to come to terms; and the present suit was filed on 3rd October, 1892, by Abdul Hak, who made Gulám Jiláni defendant (he did not appear) and Govind Bábá defendant No. 2. This last-named defendant, the mortgagee, pleaded that the right to redeem would not accrue to Abdul

Hak for thirty-five years; and on the ground that no cause of action had accrued to the plaintiff, the Subordinate Judge dismissed the suit with costs.

Abdul Hak has appealed, and several points were taken by his learned counsel. I do not think it is necessary to discuss them all. But I think that the suit for redemption should be allowed to proceed on the broad and simple ground that a Court of Equity will not enforce any agreement in restraint of the right of redemption which is oppressive or unreasonable as giving the mortgagee an advantage not belonging to the contract of mortgage.

In the first place, it cannot, I think, be contended that this is a case where the continuance of the enjoyment of the mortgaged property for the prescribed period of fifty years formed a material part of the contract, and thus it would be inequitable to deprive the mortgagee of this right. The mortgagee was not, if a certain period of enjoyment was assured to him, to be content with the rents and profits in complete satisfaction of his whole claim. The mortgagee deposed that he suggested the term of fifty years, because he was to improve the property. But he was to charge all expenses to the mortgagor; and thus it cannot be said that by reason of the very nature of the mortgage and the circumstances of the contract the mortgagee is entitled to resist redemption, on the ground that the period of fifty years must be taken to form a material part of the contract itself, and to have been named not only for the protection of the mortgage-debtor, but also for that of the mortgage-creditor. By the 4th clause of the second mortgage, if the annual payment of Rs. 1,800 was not made good from the income of the villages and by the mortgagor personally, the mortgagee was at liberty to sell the whole of the villages and the estate, and to recover the balance, if any, from the mortgagor personally. So, too, by the 11th clause of the first bond, which was kept intact, if "for some reason or other" the mortgagee was obstructed in possession of the property, he could at once call in his money. And yet it is contended that the mortgagor's assignee cannot tender the mortgage-debt and seek redemption of the property. It seems to me that the obligations of the parties being not mutual or reciprocal, it would be inequitable to allow

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this contention to prevail. It should be noted that the 10th clause of the first deed was not made applicable in the second deed, *i. e.* the clause by which the mortgagor was not to pay and the mortgagee not to receive the debt before the expiration of the stipulated period. That was a clause by which the obligations of the parties were made mutual and reciprocal. But, it is said, the mortgagor with his eyes open executed the second mortgage and he had the opportunity of independent advice; why, then, should he be relieved from the condition inserted in the second mortgage-deed that the right of redemption after fifteen years was to be *personal*, attaching only to himself or son or daughter (admittedly he had no issue then born to him), and not attaching to his assignee, who could only redeem after the expiration of the period of fifty years? The answer is that he could not contract himself out of the right of alienation which is an essential incident of the estate which he has in the property by virtue of his equity of redemption. See *Trimback* v. *Sakháram* (1). In *Mainland* v. *UpJohn* (2). Mr. Justice Kay referred to "rules of equity which in the jurisdiction which has been sometimes called the 'paternal' jurisdiction of Courts of Equity, were forced upon a mortgagee whatever contract he chose to make with the mortgagor; the Court did interfere with his contract, and so to speak, altered the contract between the mortgagor and mortgagee by disallowing these advantages for which the mortgagee had stipulated." In *Howard* v. *Harris* (3) the contract was "I myself or the heirs males of my body may redeem." It was held that the assignee would also have a right to redeem.

In the present suit the circumstances are such that it would savour of undue technicality, as much as want of equity, if the claim for redemption is dismissed. For the mortgagor is himself a party to the suit; he is desirous that the account should be taken and redemption decreed. Abdul Hak, it is true, is not merely an "intending purchaser" with a power of attorney enabling him to ask for an account from the mortgagee, but is actually the transferee of Gulám Jiláni's right, title and interest in the mortgaged property. If the dismissal of the present suit

(1) I. L. R., 16 Bom., 599 at p. 602. (2) 41 Ch. D., 126 at p. 137.
(3) 1 Vern., 32 and 190.

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must be affirmed, then apparently all that Abdul Hák must do is to reconvey the estate to Gulám Jiláni, on condition that it should be conveyed back to him after redemption in accordance with the previous agreement to sell, and the claim for redemption would commence afresh. It is said that the contract that the mortgagor himself or his son or daughter (he having no issue at the time) might redeem after fifteen years was a concession and should not be extended by the application of any rules of equity. But it is easy to see that it was a concession in word only and not in fact. If the mortgagor was not by the concession to be permitted to raise money by mortgage or sale of the property in order to effect the redemption after fifteen years, then there was no concession at all. For it is not pretended that Gulám Jiláni had any other means of raising funds for the purpose.

It may be, as Lord Bramwell said in *Salt* v. *Marquess of Northampton* (1), that the equitable rules as to the right of redemption were devised by the piety or love of fees of those who administered equity. But certainly if the conclusions which I have noted above are correct, then we cannot in the present case "think the equitable rule unreasonable," nor is there cause for regret that we "have to disregard the express agreement of a man perfectly competent and advised by competent advisers." The case just quoted is instructive. All the Judges—North J., in the Court of first instance, Cotton, Lindley and Bowen, L.JJ., in the Court of Appeal, and Lords Selborne, Bramwell, Morris and Hannen in the House of Lords—held that if the transaction in question was a mortgage, then the rule must prevail that "equity will permit of no attempt to clog, fetter or impede the borrower's right to redeem and recover what may still remain in equity his own," and so though Earl Compton deliberately, and after taking independent advice, contracted that should he die in the life-time of his father the policies (the subject of the mortgage) should belong absolutely to the mortgagee-lenders, the Court set aside that part of the contract and allowed Earl Compton's father as the representative of his son's estate to redeem the mortgage. It is true that in the present case the language of the contract is somewhat different. Here the mortgagor said: "After the ex-

(1) (1892) Ap. C., p. 1 at p. 19.

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piration of the fifteen years, the right of redemption is the personal right of us three, *i. e.*, it will be confined to three individuals, myself, my son and daughter (the latter not being at present in existence), the same cannot be transferred to any one; nor shall it pass by inheritance." Suppose the mortgagor had died in 1879, the year following the mortgage; would the Court refuse to allow his heir to redeem on the expiration of the fifteen years? I think it would not, but the equitable rule would be applied. Why, then, should not the same rule be applied when the person interested in the equity of redemption is the transferee, the original mortgagor being alive and consenting to redemption? The rule is general; it is that a mortgagor cannot by any contract entered into with the mortgagee at the time of the mortgage give up his right of redemption or fetter it in any manner by confining it to a particular time or to a particular description of persons. (See the notes to *Howard* v. *Harris* in White and Tudor's Leading Cases in Equity, 6th Ed., Vol. II, p. 1183.) It is true that the doctrine established by Courts of Equity in England, that the time stipulated in the mortgage-deed is not of the essence of the contract, has been held by the highest authority—*Pattabhiramier* v. *Vencatarow*(1)—to be "unknown to the ancient law of India; and if it could have been introduced by the decisions of the Courts of the East India Company, their Lordships can find no such course of decisions. In fact, the weight of authority seems to be the other way." But the other portion of the rule has been applied to India. As shown above, this Court has refused to give effect to a proviso in a mortgage-deed which deprived the mortgagor of right of alienation which he had in the land by virtue of his equity of redemption. Once admit that by the contract a right of redemption was given to the mortgagor after fifteen years (whether as a pretended concession or otherwise), and then the application of the rule must follow. As the money was to be repaid, let the words be ever so much fettered, they all signify nothing. (See *Ord* v. *Smith*(2).)

For these reasons, I think that the decision of the Subordinate Judge dismissing the suit on the preliminary point must be reversed, and the case must go back to the lower Court.

Decree reversed.

(1) 13 Moore's I. A., p. 571. (2) Select Cases in Chancery, p. 31.