his own costs of this appeal. Otherwise in default of such payment within the period of two months, the decree of the District Judge to stand reversed and that of the Subordinate Judge restored with costs in this and the lower Appellate Court on the plaintiffs (appellants).

1903.

SITARAM v. SHRIDHAR.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Aston.

KANHAYALAL BHIKARAM AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* NARHAR LAXMANSHET VANI (ORIGINAL DEFENDANT No. 2), RESPONDENT.*

1903. *January* 23.

Mortgage—Redemption—Clog on the equity of redemption—Agreement of sale of the mortgaged property subsequently to mortgage.

It is open to a mortgagor and mortgagee to enter into a contract subsequently to the mortgage for the sale of the mortgaged property to the mortgagee. But it must not be part and parcel of the original loan or mortgage bargain.

Ramji v. *Chinto* (1 Bom. H. C. R. 199) followed and applied.

SECOND appeal from the decision of Dayaram Gidumal, District Judge of Khándesh, reversing the decree passed by E. F. Rego, Subordinate Judge at Erandol.

Suit for redemption. In 1848 the plaintiff's grandfather Hirachand mortgaged the house in question for Rs. 818 with possession to Ramchandra, ancestor of defendants 1—4. The deed of mortgage was dated the 8th April, 1848, and the mortgage-debt was made repayable on the 8th October, 1848. The deed contained a *gahan lahan* clause, which provided that if the mortgagor did not redeem within the time fixed he should for ever be foreclosed. On the 11th October, 1849, the mortgagee had the mortgage-deed registered; and on the 13th March, 1856, he had it again registered apparently on account of some defect in the first registration.

The mortgage-debt was not paid within the stipulated period. About a year after the time fixed for repayment the mortgagor Hirachand being pressed for payment of the mortgage-debt sold the equity of redemption to Ramchandra (the mortgagee). No

* Second Appeal No. 369 of 1902.

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conveyance or other writing showing the sale was executed, but in the mortgagee's books the house was entered as having been purchased and the mortgage account was closed.

On the death of Ramchandra (the mortgagee) his property was divided among his heirs, and the house in question fell to the share of defendant 2.

The plaintiffs denied the sale to Ramchandra. On the 7th January, 1898, they gave notice to defendants of their intention to redeem. To this notice the defendants gave no reply.

On the 24th August, 1899, the plaintiffs filed this suit to redeem the mortgage of 1878.

Defendant 2 contended that the plaintiffs had no right to redeem inasmuch as the house had been sold to Ramchandra.

The Subordinate Judge held that the sale by Hirachand to Ramchandra was not proved and passed a decree for redemption ordering that "plaintiffs pay Rs. 878 to defendant 2 within six months from this date and redeem the property in suit."

On appeal the District Judge reversed the decree, and holding that the house had been sold by the mortgagor to Ramchandra dismissed plaintiffs' suit. His reasons were as follows:

I hold on the above facts that the mortgagor being unaware of his legal rights believed that he was bound by a *gahan lahan* clause; that the mortgagee also believed that under that clause he could foreclose and become absolute owner, and that the mortgagor and the mortgagee being both unaware of the principle adopted afterwards in *Ramji* v. *Chinto* ((1864) 1 Bom. H. C. Rep. 199) proceeded to settle the transaction; that the mortgagor did pay Rs. 10 or 12 for repairs and wind up the account by selling the house for the mortgage-debt.

In the present case .... in consequence of his ignorance of the law he (mortgagor) believed that the mortgagee had it in his power to foreclose. But I go further and say that there was a fresh transaction also. It is probable that the mortgagor had obtained time after his default, but when that time expired he told the mortgagee in effect: "I am not able to pay up and so I sell you the land and I am going to pay you what you have spent on the repairs."

According to the Printed Judgments of 1897, page 75, we have to see whether there is any evidence of a fresh transaction. Had the mortgagee foreclosed at once on the date of the default in the absence of the mortgagor it might have been said he had acted purely on the *gahan lahan* clause, but the evidence shows that a year elapsed thereafter and that there was a *distinct sale* by the mortgagor. I hold, therefore, that I. L. R. 14 Bom. 78 does not apply to this case and there is evidence of a fresh transaction within the meaning of the Printed Judgments of 1897, page 75.

The plaintiffs appealed to the High Court.

S. R. Bakhale for appellants (plaintiffs) :—The lower Appellate Court has wrongly held that there was a fresh transaction of sale. Even after the alleged sale transaction, the mortgagee or his representatives got the original mortgage-deed registered on two occasions. The entries made in his own books by the mortgagee that the property had been sold to him by the mortgagor are no evidence against us. The so-called fresh transaction took place under a wrong impression of both parties as to the legal effect of the *gahan lahan* clause. The original mortgage, therefore, is still in existence and is redeemable: *Ramji* v. *Chinto*[1] and *Abdul Rahim* v. *Madhavrav*.[2]

N. M. Samarth for respondent (defendant 2) :—The lower Appellate Court has found on the oral and documentary evidence in the case that there was a distinct and independent transaction of sale about a year after the *gahan lahan* clause had come into operation. The sale was no doubt consequent on the *gahan lahan* clause, but it was independent of it. An account was made up of the mortgage. The repairs effected by the mortgagee were valued, and as the mortgagor was to pay the mortgagee the costs thereof, the amount was added to the mortgage-debt. The valuation of the property was made and it was found that the debt and the costs of the repairs exceeded the estimated value of the property by Rs. 10 or 12. The mortgagor paid to the mortgagee the amount found due, viz. Rs. 10 or 12, to complete the transaction of sale, and the parties thenceforward treated the property as having been sold. The evidence of those who were present at the transaction and the entries made in the mortgagee's account books at the time justify the lower Appellate Court's finding that there was a distinct fresh transaction of sale. This is a finding of fact arrived at after a careful consideration of the evidence in the case and this Court cannot disturb it in second appeal. Where there is such a fresh transaction of sale the equity of redemption is lost: *Janardhan* v. *Govind*.[3] The ignorance of the parties

(1) (1864) 1 Bom. H. C. Rep. 199. (2) (1889) 14 Bom. 78.
(3) (1897) P. J. p. 75.

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as to the legal effect of the *gahan lahan* clause is immaterial: *Vishnu* v. *Kashinath*.[1]

CHANDAVARKAR, J.:—The law is well established that, though once a mortgage always a mortgage and no clog can be placed by the mortgagee on the mortgagor's equity of redemption, it is open to both of them to enter into a contract subsequent to the mortgage for the sale of the mortgaged property to the mortgagee. That principle was enunciated by the Court of Appeal in England in the case of *Lisle* v. *Reeve*,[2] where Vaughan Williams, L.J., said: "I did not understand the defendant's counsel to dispute that it is competent for a mortgagee to enter into an agreement to purchase from the mortgagor his equity of redemption. The only objection to such an agreement is, that it must not be part and parcel of the original loan or mortgage bargain. The mortgagee cannot, at the moment when he is lending his money and taking his security, enter into an agreement, the effect of which would be that the mortgagor should have no equity of redemption. But there is nothing to prevent that being done by an agreement which in substance and in fact is subsequent and independent of the original bargain." The decision of the Court of Appeal in *Lisle* v. *Reeve* [2] has been affirmed by the House of Lords.[3] That being the law, and it being in accordance with the Full Bench case of *Ramji* v. *Chinto*[4] and the other decisions of this Court following it, it is not clear from the judgment of the District Judge in the case before us whether he had the law fully in his mind in holding that the plaintiffs had lost their right to redeem in consequence of a fresh transaction between them and the defendant. The facts found by the District Judge are shortly these. The mortgagor mortgaged the property with possession and the deed contained the usual *gahan lahan* clause. The mortgagor failed to pay within the stipulated period, and about a year after his failure the parties made up an account of the mortgage and it was agreed that the mortgagor should sell the property to the mortgagee. The mortgagor paid Rs. 10 or 12

(1) (1886) 11 Bom. 174.
(2) (1902) 1 Ch. 53.
(3) (1902) A. C. 461.
(4) (1864) 1 Bom. H. C. 199.

to the mortgagee for costs of repairs and the mortgagee continued in possession as owner. They acted upon that understanding for several years. It is this "fresh transaction" which, according to the District Judge, extinguished the mortgage and passed the property to the mortgagee as purchaser. But though this was a fresh transaction the question still remains, was it independent of the mortgage? Though it is not clear whether the District Judge had fully in mind the legal principle to which we have referred at the outset, yet he has found very distinctly that the mortgagor entered into the fresh transaction under the belief that he was bound by the *gahan lahan* clause; and that the mortgagee entered into it because he also believed that he could become absolute owner under it. The necessary inference from that finding is that the agreement for the sale of the property to the mortgagee which the District Judge calls "a fresh transaction" was not a bargain independent of the mortgage, but was based upon the *gahan lahan* clause in the mortgage-deed. It was virtually a transaction enforcing that clause, and, therefore, it falls within the principle laid down by this Court in the leading case of *Ramji* v. *Chinto*.(1) It cannot be contended in such a case that the principle of either estoppel or acquiescence concludes the mortgagor and bars his right to redeem. He is not estopped because he did not by any declaration, act or omission cause or permit the mortgagee to believe that the mortgage had become extinguished. The mortgagee was as much responsible for the belief as the mortgagor. The parties did, indeed, act for several years upon the understanding that the mortgage had been converted into a sale, but, as held in *Abdul Rahim* v. *Madhavrav*,(2) that is not sufficient to extinguish the mortgagor's equity of redemption where the understanding and the conduct of the parties was solely due to their belief as to the *gahan lahan* clause and was not the consequence of any transaction independent of the mortgage. We must, therefore, reverse the decree and remand the appeal to the District Judge for passing a proper redemption decree including costs.

Decree reversed. Case remanded.

(1) (1864) 1 Bom. H. C. 199. (2) (1889) 14 Bom. 78.