

law by this Court in *Bapuji Narayan Sane v. Bapujirao bin Subhanrao*⁽¹⁾ and in *Santaji bin Pallu v. Bhayaji bin Raghun*⁽²⁾. Nor can the mortgagor dispute his own right to mortgage and that for the reason that in a mortgage the mortgagor covenants that at all events he has a good title : per Lord Kenyon in *Cripps v. Reads*⁽³⁾; see also *Narayan Khandu Kulkarni v. Kalgaunda Birdar Patel*⁽⁴⁾. If the mortgage is not proved, the suit fails, independently of the question of title.

It is true that it has been the practice of this Court to pass a decree for redemption in a case in which the plaintiff has sued in ejectment. That, as remarked in *Parshotam Bhaishankar v. Rupal Zunjar*⁽⁵⁾, is purely in the exercise of the Court's discretionary power; and it can hardly be maintained that the plaintiff failing in an ejectment suit ought to pray for the alternative relief by way of redemption, when the Court is not bound to grant it as a matter of right.

For these reasons the decree is reversed and the suit remanded to the Subordinate Judge's Court for trial on the merits according to law. All costs to be costs in the cause.

Decree reversed.

R. R.

(1873) P. J. 49.

(3) (1796) 6 T. R. 606.

(2) (1876) P. J. 17.

(4) (1889) 14 Bom. 404.

(5) (1895) 20 Bom. 196.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Hayward.

CHHAGAN CHUNILAL BHAI GUJARATI (ORIGINAL PLAINTIFF),
APPELLANT, v. SUKA VALAD BARKU AND ANOTHER (ORIGINAL
DEFENDANTS), RESPONDENTS.*

1911.

July 24.

Contract—Instalments—Default in payment—Waiver—Effect of the waiver.

The plaintiff agreed to sell certain lands to the defendants for Rs. 1,000 in 1901 and put the latter in possession thereof the same day. The material stipulations in the contract were as follows:—(1) that the purchase money

* Second Appeal No. 290 of 1910.

1911.

CHHAGAN
v.
SUKA
VALAD
BARKU.

should be paid annually by instalments of Rs. 100 each on a certain day fixed in the contract; (2) that in case of default in the payment of the first instalment on the due date, the plaintiff should be entitled to recover it as rent and sue for possession of the lands; (3) that, in case of default in the payment of any three or four subsequent instalments on the due dates the plaintiff should be entitled to recover possession of the lands and claim the unpaid instalments as rent; and (4) that on payment of all the instalments the title to the lands should be treated as having passed to the respondent by sale, but that in the meanwhile the plaintiff should continue owner thereof. In 1908, the plaintiff filed the present suit to recover possession of the lands, alleging default in the payment of the instalments which became due in 1904, 1905 and 1906. The lower Courts dismissed the suit on the ground that the plaintiff had waived the payment of the first two instalments, and probably the third also. On appeal:—

Held, confirming the decree, that as to the first three instalments the plaintiff dealt with the defendant in such a way as to show that he did not insist on payment on the dates fixed in the contract; that, therefore, after that course of conduct, he was not warranted in law in enforcing payment according to the strict terms of the contract without previous intimation to the defendant to that effect.

Cornwall v. Henson⁽¹⁾, followed.

SECOND appeal from the decision of J. Scotson, Assistant Judge of Khandesh, confirming the decree passed by R. B. Bhangavkar, Subordinate Judge at Amalner.

Suit to recover possession of land.

The land in dispute was sold by the plaintiff to the defendants in 1901. The terms of the deed of sale were: (1) that the purchase money Rs. 1,000 should be paid in equal yearly instalments on the dates specified; (2) that in default of payment of the first instalment on the due date, the plaintiff was to be entitled to recover it as rent and sue for possession of the land; (3) that in case of default in the payment of any three or four subsequent instalments on the due dates, the plaintiff was at liberty to recover possession of the lands and claim the unpaid instalment as rent; and (4) that on payment of all the instalments the title to the lands should be treated as having passed to the defendants but that in the meanwhile the plaintiff should continue owner thereof.

(1) [1900] 2 Ch. 298.

The first of these instalments fell due on the Margshirsh, Sud 5, Samvat 1959 (28th December, 1902). It was not paid on the due date; but was allowed by the plaintiff to be paid nearly ten months later. When the second instalment fell due in the month of Margshirsh of Samvat 1960, the plaintiff gave time to pay it till the harvest of Samvat 1961. It was paid more than one year after it became due. The plaintiff alleged that the instalments of the years 1961, 1962 and 1963 were not paid at all. He, therefore, filed the present suit to recover possession of the lands.

The Subordinate Judge held that the clause about possession on default of payment of the first or subsequent year's instalment was penal; that Rs. 100 were paid and accepted as the instalment of the first year and that the plaintiff was not entitled to claim possession under the terms of the contract.

On appeal, the Assistant Judge confirmed this decree on the ground that there was distinct waiver as regards two of the instalments and most probably as regards the third; and that after such a course of conduct it was incumbent on the plaintiff to give notice to the defendants that in future he intended to enforce the terms of the contract.

The plaintiff appealed to the High Court.

Coyaji, with *W. B. Pradhan*, for the appellant.

M. V. Bhat, for the respondent.

The following cases were referred to: *Kashiram v. Pandu*⁽¹⁾ and *Jethabhai v. Nathabhai*⁽²⁾.

CHANDAVARKAR, J. :—The appellant brought the suit, out of which this second appeal arises, to recover possession of the two lands in dispute under the terms of a contract for sale in writing between him and the respondent. By that contract, entered into in 1901, the appellant agreed to sell to the respondent the lands for Rs. 1,000. The respondent was put in possession thereof on the day of the contract. The material stipulations in the contract were these :—(1) that the purchase money should be paid annually by instalments of Rs. 100 each

(1) (1902) 27 Bom. 1 at p. 10.

(2) (1904) 28 Bom. 399 at p. 407.

1911.

CHHAGAN
v.
SUKA
VALAD
BARKU.

1911.

CUNHAGAN
 v.
 SUKA
 TALAD
 BARRU.

on a certain date fixed in the contract; (2) that in case of default in the payment of the first instalment on the due date, the appellant should be entitled to recover it as rent and sue for possession of the lands; (3) that, in case of default in the payment of any three or four subsequent instalments on the due dates, the appellant should be entitled to recover possession of the lands and claim the unpaid instalments as rent; (4) that on payment of all the instalments, the title to the lands should be treated as having passed to the respondent by sale, but that in the meantime the appellant should continue owner thereof.

The appellant alleged in his plaint that there had been default by the respondent in the payment of the instalments of 1904, 1905 and 1906. He, therefore, sued for possession on the ground that there had been a breach of contract by the respondent and that the latter had by non-payment of instalments put an end to the contract.

The lower appellate Court, agreeing in that respect with the Court of first instance, has found upon the evidence that there was "distinct waiver" by the appellant "as regards two of the instalments and most probably as regards the third". The appellant bases his claim for possession on three subsequent defaults. But the lower appellate Court has held that he is not entitled to it, because, after he had dealt with the respondent in respect of the first three instalments in such a manner as to lead the latter to believe that he would not insist on the payment of the instalments on the due dates, and that "he had no intention of carrying out the forfeiture clauses of the contract", "it was incumbent on him" to give the respondent "notice that in future he intended to enforce the terms of the contract".

We concur in this view of the law upon the facts found. The appellant seeks relief substantially on the ground that the respondent abandoned the contract for sale and put an end to it by failing to pay the instalments on the dates fixed in the contract. The question is—has there been abandonment on the part of the respondent? As to the first three instalments, the appellant dealt with the respondent in such a way as to show that he did not insist on payment on the dates fixed by the

contract. After that course of conduct, he was not warranted in law in enforcing payment according to the strict terms of the contract, without previous intimation to the respondent to that effect.

The case resembles, in its essential features, *Cornwall v. Henson*⁽¹⁾. In that case, there having been default by the vendee (who as in the present case had been put in possession on the date of the contract) in the payment of the purchase money by instalments on the due dates, the vendor resumed possession. The vendee sued for specific performance; and the question was whether the vendee had by his conduct abandoned the contract. It was found on the facts that the vendee had been generally in arrear with the instalments but that the vendor had from time to time allowed a postponement. All instalments had been accordingly paid by the vendee but after due date in each case, except the last. As this last instalment had not been paid on the due date, the vendor claimed to treat the contract as abandoned by the vendee. It was held that he could not so claim. The Master of Rolls in his judgment said: "I think it is plain that the vendor never brought to the mind of the purchaser, so long as they were in communication with each other, that if he did not pay the last instalment the vendor would treat the contract as abandoned".

The decree must be confirmed with costs, without prejudice to the rights, if any, of the appellant to recover any instalment or instalments under the contract, and to his right to possession, in case any instalment accruing hereafter under the contract is not paid on the due date fixed thereby.

Decree confirmed.

R. R.

(1) [1900] 2 Ch. 298.

1911.

CHHAGAN
v.
SUKA
YALAD
BARKU.