APPELLATE CIVIL

Before Mr. Justice Gajendragadkar and Mr. Justice Vyas.

1952 Nov. 5

BANSILAL RAMGOPAL BHATTAD (ORIGINAL DEFENDANT No. 5), APPELLANT *v.* HARISCHANDRA TATYA BHAMBURE (ORIGINAL PLAINTIFF), RESPONDENT.*

Bombay Money-lenders Act (Bom. XXXI of 1947), s. 23—Suit for recovery of loan—Decree—Appeal by debtor—Act coming into force during pendency of appeal—Whether debtor entitled to invoke protection of s. 23—Retrospective statute—Duty of Court of appeal.

Section 23 of the Bombay Money-lenders Act, 1946, has retrospective application, and it can be invoked by a debtor in appeal if the Act did not apply at the time when the dispute between the parties was decided by the trial Court.

Bhagwant Rao v. *Damodhar*,[1] and *Brajendrakumar Datta Roy* v. *Susheelachandra Chakrabarti*,[2] referred to.

Any law which affects substantive rights of parties should ordinarily be construed as prospective, but the Legislature is competent to pass Acts affecting vested rights and to make them retrospective. Since the ordinary presumption is that such legislation is prospective, a contrary intention can be inferred only if the words used by the Legislature are clear and unambiguous and unmistakably point to its intention to make the provisions in question retrospective. If the provisions of any act are retrospective, it does not make any material difference that the Act came into force after the decision of the trial Court; the proceedings in appeal are in substance a continuation of the suit and it is open to the appellate Court to apply the provisions in deciding the dispute between the parties before it.

Quilter v. *Mapleson*,[3] and *Shantiniketan Co-operative Housing Society* v. *Madhavlal*,[4] referred to.

There is nothing in the scheme of the Bombay Money-lenders Act, 1946, to justify departure from the rule that in the case of a retrospective statute the Court of Appeal must give effect to such a statute if it comes into force after the decision of the trial Court and while the appeal is pending.

In effect s. 23 of the Act enacts the Hindu law rule of *damdupat* enunciated in *Ganesh Dharnidhar Maharajdev* v. *Keshavrav Govind Kulgavkar*.[5]

Nathubhai Panachand v. *Mulchand Harichand*,[6] and *Gopal Ramchandra* v. *Gangaram Anand Shet*,[7] referred to.

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* Second Appeal No. 684 of 1949.

(1) [1938] Nag. 91.
(2) (1935) 63 Cal. 368.
(3) (1882) 9 Q. B. D. 672.
(4) (1935) 37 Bom. L. R. 955.
(5) (1890) 15 Bom. 625.
(6) (1868) 5 Bom. H. C. R. A. C. J. 196.
(7) (1895) 20 Bom. 721 (F. B.).

SECOND APPEAL from the decision of V. A. Naik, Esquire Assistant Judge, Satara, varying the decree passed by V. N. Palekar, Joint Civil Judge at Satara.

Suit for redemption and possession.

On September 4, 1884, Govind executed a possessory mortgage in favour of one Tukaram for Rs. 1,350. The mortgagee was to remain in possession of the mortgaged property in lieu of interest. The period stipulated was 10 years and interest agreed was 6 per cent. per annum at compound rate. Between the same parties another mortgage was executed in respect of the same property on May 1, 1887, for Rs. 150. The interest agreed under this mortgage was 12 per cent. per annum.

On November 6, 1943, Govind's grandson Harichand (plaintiff) filed a suit against the heirs of Tukaram and their alienee Bansilal (defendant No. 5) for redemption of the first mortgage.

On October 31, 1945, the trial Court on taking accounts passed the usual preliminary decree ordering the plaintiff to pay to defendant No. 5 the sum of Rs. 13,533-3-1.

On December 12, 1945, the plaintiff preferred an appeal to the Court of the Extra Assistant Judge at Satara, which came on for hearing on December 23, 1948. In the meanwhile on November 17, 1947, the Bombay Money-lenders Act, 1946, came into force. At the hearing the plaintiff relied upon s. 23 of the Act which limited the power of the Court to award interest up to a sum equal to principal. The appellate Court held that the plaintiff was entitled to invoke the protection of the section in appeal and in consequence the decretal amount was reduced to Rs. 4,102-0-0 being double the amount of principal of the two mortgages, viz. Rs. 1,500 and the costs of improvements effected by the mortgagee.

Defendant No. 5 appealed to the High Court.

S. R. Parulekar, for the appellant.

K. N. Dharap, with *M. M. Virkar* and *P. V. Vaze,* for the respondent.

GAJENDRAGADKAR J. Section 23 of the Bombay Money-lenders Act, XXXI of 1947, provides that, notwithstanding anything contained in any agreement or any law for the time being in force, no Court shall in respect of any loan whether advanced before or after the date on which this Act comes

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into force, decree on account of interest, a sum greater than the principal of the loan due on the date of the decree. Is the rule laid down in this section retrospective and can it be invoked by a debtor in an appeal against his creditor when the Act did not apply at the time when the dispute between the parties had been decided by the trial Court? These are the two questions which arise for our decision in the present appeal.

The appeal arises out of a suit for redemption. The mortgage sought to be redeemed was a possessory mortgage and it was executed by the plaintiff's grandfather in favour of Tukaram on the 4th September 1884 for Rs. 1,350. The property mortgaged was a house. The mortgagee was to remain in possession of the property in lieu of interest. The period stipulated was ten years and the interest agreed was 6 per cent. per annum, compound interest. Between the same parties another mortgage was executed in respect of the same property on May 1, 1887, for Rs. 150. The interest agreed under this mortgage was 12 per cent. per annum. On December 12, 1933, the mortgagee assigned his rights under the said two mortgages in favour of defendant No. 5 for Rs. 1,500. The present suit was instituted by the mortgagor's grandson on November 6, 1943, in which he asked for accounts and claimed the redemption of the first mortgage. Defendant No. 5 resisted this claim on several grounds. He denied that the plaintiff was the grandson of the original mortgagor. He pleaded that the suit was incompetent since the plaintiff had not offered to redeem both the mortgagees executed by the mortgagor in favour of the same mortgagee. He alleged that he had made certain improvements and he claimed in the alternative that the mortgagor was bound to reimburse him for these improvements and for the repairs made by him to the mortgaged property. A similar claim was made by him in respect of the house tax and other dues paid by him for the property under mortgage. The learned trial Judge held that the plaintiff was entitled to sue and that the suit to redeem only one mortgage was competent. The claim of defendant No. 5 for the improvements and for repairs, as well as for the dues paid by him in respect of the mortgaged property was upheld and the amount due under the mortgage was determined on taking accounts. Ultimately a decree was passed permitting the plaintiff to redeem the mortgage on payment of Rs. 13,533-3-1 with costs and future interest at 3 per

cent. to defendant No. 5. This decree was passed on the October 31, 1945. The suit had been filed by the plaintiff *in forma pauperis,* and when he went in appeal against this decree on December 12, 1945, he was allowed to file the appeal as a pauper. The appeal was decided on the December 23, 1948. Meanwhile on May 31, 1947, the Bombay Money-lengers Act had come into force. The appellant relied upon the provisions of s. 23 of this Act, with the result that the whole complexion of the dispute between the parties was materially changed. The main point which the appellate Court was called upon to consider was, whether the plaintiff was entitled to invoke the protection of s. 23 against defendant No. 5. The lower appellate Court held that he was and in consequence the decretal amount was reduced to Rs. 4,102. Against this decree defendant No. 5 has preferred the present appeal and on his behalf Mr. Parulekar has contended that the lower appellate Court was wrong in applying the provisions of s. 23 retrospectively to the dispute between the parties in the present case.

There is another minor point which Mr. Parulekar has raised and which may be disposed of at this stage. Mr. Parulekar contends that the lower appellate Court has found that the mortgagee was entitled to be reimbursed in respect of the house tax which he has paid; but through oversight effect has not been given to this finding while the decretal amount was determined. Mr. Dharap for the respondent agrees that the failure of the learned Judge to give effect to his own finding must be rectified and by consent an amount of Rs. 894 would, therefore, have to be added to the decretal amount.

In considering the question as to whether the provisions of s. 23 of the Bombay Money-lenders Act are retrospective or not, Mr. Parulekar has asked us to bear in mind that these provisions are not merely procedural; they affect the vested rights of the creditors, and Mr. Parulekar says that it is well settled that any law which affects substantive rights of parties should ordinarily be construed as prospective. That no doubt is true. But, on the other hand, it is also well settled that Legislature is competent to pass Acts affecting vested rights and to make the said Acts retrospective. When the Legislature purports so to act, it must appear from the words used by the Legislature beyond any doubt that the intention of the Legislature was to make the provision in question retrospective. Since the ordinary presumption is that such

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legislation is prospective, a contrary intention can be inferred only if the words used by the Legislature are clear and unambiguous and they unmistakably point out that it is intended to make the said provision retrospective. If the provisions of any Act are retrospective, then it cannot be validly contended that these provisions should not be applied by the Court of Appeal. If, for instance, s. 23 is retrospective it would apply to a suit which may have been filed before the Act came into force, but which has not been decided in the trial Court. This position is not and cannot be disputed. In our opinion, it would not make any material difference that the Act came into force after the decision of the trial Court; because if an appeal is preferred against the decree of the trial Court, the proceedings in appeal are in substance a continuation of the suit and it would be open to the appellate Court to apply the said section in deciding the dispute between the parties before it. In this connection I may conveniently refer to the decision in *Quilter* v. *Mapleson*,[1]. This decision is often cited in dealing with similar questions. In this case the Court had to consider the effect of the Conveyancing and Law of Property Act, 1881, which had come into operation after the decision of the dispute between the parties in the trial Court and while the appeal was pending. Section 14 (2) of the said Act was applicable to breaches taking place not only after the Act came into operation, but also to those which had been committed before the Act and to proceedings pending when the Act came into operation. And it was held that in view of these provisions the Court of Appeal was bound to apply those provisions to the dispute between the parties pending before it (p. 678):

> "On an appeal strictly so called," observed Jessel M. R., "such a judgment can only be given as ought to have been given at the original hearing; but on a rehearing such a judgment may be given as ought to be given as if the case came at that time before the Court of first instance."

Bowen L. J. concurred with this conclusion and said (p. 678):

> "The rules were intended to enable the Court of Appeal to do complete justice. If the law has been altered pending an appeal, it seems to me to be pressing rules of procedure too far to say that the Court of Appeal cannot decide according to the existing state of the law."

[1] (1882) 9 Q. B. D. 672.

The same principle was accepted by this Court in *Shantiniketan Co-operative Housing Society* v. *Madhavlal*.[1] Therefore we must consider the question as to whether s. 23 is retrospective or not in the light of the words used in the section itself.

In our opinion, these words are so clear and emphatic that it would be difficult to accept the contention that Legislature intended the rule laid down in this section to be prospective. The rule has been deliberately put in a negative form with a view to make it clear that its application is intended to be enforced in all cases falling under this section. The plain effect of this section is that the rule of *dam-dupat* shall apply in respect of any loan whenever it may have been advanced. Legislature knew that the Act would come into force on a particular date and so it has deliberately stated that the provisions of this section should apply in respect of all loans, whether they were advanced before or after the date on which the Act comes into force. Looking at this section by itself apart from the other provisions of the Act to which we will presently refer, the conclusion seems to be inescapable that the rule laid down in this Act is intended to be retrospective.

Mr. Parulekar, however, contends that the present suit cannot be said to be in respect of any loan at all. He relies upon the definition of the word "loan" as it originally stood in s. 2 (*9*). "Loan" was originally defined as meaning "an advance at interest by way of credit whether of money or in kind," and Mr. Parulekar's case is that an amount advanced on the security of mortgaged property cannot be said "to be an advance by way of credit." It is true that the expression "by way of credit" has been subsequently deleted from the definition of "loan" by Bombay Act XIII of 1951. But, at the time when the appeal was decided, the original definition was still in force and it is on this definition that Mr. Parulekar seeks to take the present suit out of the ambit of s. 23 even if it was retrospective. Unfortunately for Mr. Parulekar, however, this point has already been decided by this Court against him. In *Emperor* v. *Jhaverilal Maganlal*[2] the learned chief Justice and myself have held that the expression "loan" as originally defined in s. 2 (*9*) of this Act covers a loan which is secured as well as a loan which is unsecured. Therefore, we must hold that the loan in suit is a loan as defined by s. 2 (*9*) of the Act.

[1] (1935) 37 Bom. L. R. 955 at p. 960.

[2] (1949) 51 Bom. L. R. 991.

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Mr. Parulekar then contends that even if s. 23 be held to be retrospective, the Court of Appeal cannot apply this section because the policy of the Act appears to be that the provisions of this Act should be applied only by the trial Court. Our attention has been invited to the provisions of ss. 10, 14 and 24, in which the words "the Court" are used, and it is contended that these words denote the trial Court and not the Court of Appeal. But even if the words "the Court" may be assumed to refer to the trial Court, these words are not used in s. 23 at all. In s. 23 the Legislature has provided for the rule in negative terms and it lays down that

> "no Court shall.....decree, on account of interest, a sum greater than the principal of the loan due on the date of the decree."

It is true that under s. 14 (*4*) the powers conferred upon the Court under the said section are expressly conferred upon any Court in appeal or in revision.

That, however, may be as a matter of precaution, because the Legislature may have thought that a doubt may arise as to whether the special power conferred upon the Court while passing an order of conviction against a money-lender for an offence under this Act could be exercised by the Court of Appeal or not. In our opinion, there is nothing in the scheme of this Act which would justify our departing from the usual rule that in the case of a retrospective statute the Court of Appeal must give effect to such a statute if it comes into force after the decision of the trial Court and while the appeal is pending. In support of his argument that s. 23 should not be construed as being retrospective, Mr. Parulekar has strongly relied upon the definition of the expression "suit to which this Act applies" contained in s. 2 (*17*) of this Act. Mr. Parulekar's argument is that if s. 23 is construed as being retrospective, the said view would be repugnant to the obvious inference which arises from the definition of the expression "suit to which this Act applies." Now, this particular class of suits is defined as meaning

> "Any suit or proceeding (*a*) for the recovery of a loan made after the date on which this Act comes into force, (*b*) for the enforcement of any security taken, or any agreement, made after the date on which this Act comes into force in respect of any loan made either before or after the said date, or (c) for the redemption of any security given after the date on which this Act comes into force in respect of any loan made either before or after the said date."

The argument is simple and clear. Section 23 is a part of the Act, and s. 2 (*17*) defines the suits to which this Act, including s. 23, applies. It is clear that suits for the recovery of a loan made before the date on which this Act comes into force do not fall within this definition. So the Act, including s. 23, cannot apply to such a suit. If a contrary view is accepted on the ground that s. 23 is retrospective, it gives rise to a repugnancy between s. 2 (*17*) and s. 23. We are free to confess that we have been impressed by this argument and that we are rejecting it not without some hesitation. If this argument were to prevail, the only way to avoid the repugnancy would be to put a very narrow construction on s. 23, which would be inconsistent with the plain object with which this section has been enacted. The whole of this Act is a remedial measure and the rule laid down in s. 23 in particular is obviously intended to protect debtors from the exorbitant demand as to interest which could be made by creditors in the absence of the rule of *dam-dupat*. If the rule laid down in s. 23 is clearly intended to apply to loans made before the Act came into force, any attempt to reconcile this clear provision of s. 23 with the requirement of the definition contained in s. 2 (*17*) would virtually destroy a part of the material provision of s. 23 itself. We are reluctant to adopt such an interpretation of s. 23 when, in our opinion, it would plainly defeat the beneficent purpose of the section itself. Besides, the repugnancy exists not between two substantive sections of the Act, but between a defining section and a substantive section; and it is possible to hold that in fact there is no such real repugnancy at all. Section 2 (*17*) has defined "suits to which this Act applies" more for the purpose of confining some of the special provisions of this Act to the narrower class of suits falling within this definition. That is why this expression is used only in some special sections of the Act such as ss. 10, 14, 21, 25 and 29. Section 10 deals with the power of the Court trying such a suit to stay a suit by a money-lender not holding a licence. Section 14 has already been considered; it refers to the special power of the Court to cancel or suspend the licence of the offending money-lender. Section 21 empowers the Court trying such suits to frame a preliminary issue as specified in this section. Section 25 provides for the limitation on rates of interest awardable in such suits. And s. 29 authorises the Court to reopen transactions between the parties in such suits. In other words, it would be legitimate to

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hold that the expression "suits to which this Act applies" has been defined for the purpose of making it clear that the special powers conferred on the Courts by the aforesaid sections are intended to be applied only to such suits and not to suits in which the dispute between the creditor and the debtor relates to a loan advanced prior to the Act. If this be the true position then it would be permissible to hold that having regard to the object with which s. 2 (*17*) has defined a particular class of suits, there is no real repugnancy between the said definition and s. 23 of the Act. It may be that s. 2 (*17*) could have been better worded so as to avoid any apparent conflict between it and s. 23; but as has been observed by Maxwell,

> "Where the main object and intention of a statute are clear, it must not be reduced to a nullity by the draftman's unskilfulness or ignorance of the law, except in a case of necessity, or the absolute intractability of the language used." ("The Interpretation of Statutes", Ch. IX, p. 236, Ninth Edn.).

Having given our careful consideration to the question we have come to the conclusion that there is really no repugnancy between s. 23 and s. 2 (*17*) of the Act as contended by Mr. Parulekar. Mr. Parulekar has suggested that we should hold that s. 23 applies only to such prior loans in respect of which a security has been taken or an agreement made after the Act came into force, and by this interpretation Mr. Parulekar attempts to bring such suits within the ambit of s. 2 (*17*) (*b*) and (*c*). It is no doubt an ingenious argument but we are not disposed to accept the argument because in our opinion it would introduce in s. 23 a very material limitation which is not warranted by the words used in the section itself. Incidentally, it may be pointed out that s. 23 provides that the rule enunciated by it has to come into force "notwithstanding any law for the time being in force." Usually the expression used in such context is "notwithstanding any *other* law for the time being in force." Technically speaking it may be possible to urge that the expression "notwithstanding any law for the time being in force" may cover even the definition contained in s. 2 (*17*) of this Act, and in that case the argument of repugnancy would not be valid.

Mr. Parulekar has attempted to support his contentions by referring to the decisions of the Nagpur and the Calcutta High Court on analogous legislation. In *Bhagwant Rao and another* v. *Damodhar and others,*[1] the Nagpur High Court had

[1] [1938] Nag. 91.

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to consider whether s. 9 of the Nagpur Act was retrospective. This Act had come into force on the 1st April 1935. Section 9 was subsequently amended on the 19th March 1937, the result of the amendment being that it was made clear that the power conferred by the said section could be exercised both by the original and the appellate Court. The point which the Court had to consider was whether in view of this amendment the appellate Court could exercise the power when the amendment had been made subsequent to the decision of the suit from which the appeal had arisen. This naturally raised the larger question as to whether the section was retrospective or not. The section itself is somewhat similar to s. 23, but in one important particular it differs. It provided that the rule mentioned in the section should apply, unless the Court is satisfied that the money-lender had reasonable grounds for not enforcing his claim earlier; and it appears from the judgment of Chief Justice Stone that it is this proviso which weighed with the learned Judges in coming to the conclusion that s. 9 was not retrospective. I may add that the judgment of the learned Chief Justice has set out the two rival contentions, one in favour of the retrospective character of the section and the other against it; but, with respect, these rival contentions do not appear to have been specifically considered and the conclusion seems to have been based more on the strength of the proviso as I have just mentioned. A similar proviso is to be found in s. 4 of the Bengal Money Lenders Act, VII of 1933, which in other particulars is similar to s. 23 of our Act. In *Brajendrakumar Datta Roy* v. *Shusheelachandra Chakrabarti*[1] the Calcutta High Court have also held that s. 4 of the said Act is not retrospective, principally on the ground that the proviso indicates that Legislature intended that the whole section should be prospective. Therefore, these two decisions do not afford much assistance in dealing with the question with which we are concerned. We must decide the point by reference to the words used in s. 23 itself and as I have already indicated we have come to the conclusion that these words clearly and unambiguously indicate that the rule laid down in this section has to be retrospectively applied. Therefore, we must hold that the appellate Court was right in giving the debtor the protection of this rule.

Incidentally, we may be permitted to point out that the rule laid down by s. 23 which is now applicable to all loans virtually affirms the view expressed by Mr. Justice Telang in

[1] (1935) 63 Cal. 368.

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the judgment which he delivered for a Division Bench in *Ganesh Dharnidhar Maharajdev* v. *Keshavrav Govind Kulgavkar*[1]. The rule of *dam-dupat* is a rule of Hindu law. The reason for this rule was that no rule of limitation for the recovery of debts was originally recognised under Hindu law. The result was that a creditor in many cases was entitled to recover by way of interest an amount far in excess of the principal itself. It was, therefore, necessary to impose a restriction on the amount of interest and that in the main is the genesis of this rule. This rule was applied by this Court in *Nathubhai Panachand* v. *Mulchand Hirachand*.[2] While laying down the rule, however, an exception was made in the case of a mortgage where the mortgagee enters into possession and is accountable to the mortgagor in respect of the rents and profits received by him. In other words, as a result of this exception the rule of *dam-dupat* was inapplicable in the case of mortgages the terms of which necessitate the existence of an account current between the mortgagor and the mortgagee, whatever the state of the account may be. In *Ganesh Dharnidhar Maharajdev* v. *Keshavrav Govind Kulgavkar*[1], Sargent C. J. and eelang J. took the view that though the original rule was based on equity, the blind application of the exception would itself some times lead to most inequitable results and so they held that even as to the mortgages where the mortgagee is accountable to the mortgagor, the applicability of the rule of *dam-dupat* should depend upon the state of the accounts when taken. If it is found on taking accounts that the mortgagor is rendered liable to pay an unconscionably larger amount than the principal itself the rule of *damdupat* should be applied. This view, however, was overruled by a Full Bench in *Gopal Ramchandra* v. *Gangaram Anand Shet*[3]. It is noticeable that in the judgment of the Full Bench which was delivered by Chief Justice Sargent himself the only reason given for overruling the view in *Shri Ganesh Dharnidhar Maharajdev* v. *Keshavrao Govind Kulgavkar*[1] to which the learned Chief Justice himself was a party, is that the earlier view had been (p. 728):

"uniformly understood and acted upon since 1868, and that the long course of decisions requires us to hold that the exclusion of the law of *dam-dupat* in the case of mortgages depends on there being an account current between the parties and not upon the state of the account."

[1] (1890) 15 Bom. 625. [2] (1868) 5 Bom. H. C. 196.

[3] (1895) 20 Bom. 721.

Thus, in effect, the rule enunciated by Mr. Justice Telang in 1891 has become a part of the statutory law in 1947.

The result is, the appeal substantially fails. The decree has, however, to be modified by adding to the decretal amount Rs. 894 as already mentioned.

Decree varied.

M. W. P.

APPELLATE CIVIL

Before Mr. Justice Gajendragadkar and Mr. Justice Vyas

SONI CHHAGANLAL JETHALAL AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS *v.* GOKALDAS MANSUKH AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Nov. 6 1952

Transfer of Property Act (V of 1882), s. 60—Clog on equity of redemption—Applicability of English doctrine in India—Long term of redemption when a clog on equity—Mortgage with a period of 99 years—Mortgagee stipulating for collateral and illegitimate advantages—Whether terms amount to clog on equity.

The English doctrine of the clog on equity of redemption, which is applied in India as a rule of justice, equity and good conscience, is consistent with the provisions of s. 60 of the Transfer of Property Act, 1882, itself. The section so clearly recognizes the right to redeem that a mortgagor can legitimately invoke the protection of the doctrine in proper cases. However, in applying the doctrine care must be taken not to apply the English precedents without scrutiny because the question as to what amounts to a clog on the equity of redemption is always a question of fact.

Mohammad Sher Khan v. *Seth Swami Dayal*,[1] and *Mehrban Khan* v. *Makhna*,[2] relied upon.

Since the words "in the absence of a contract to the contrary" which are used in some of the sections of the Transfer of Property Act are absent in s. 60, it is a legitimate inference that if an agreement is made between the mortgagor and the mortgagee which obstructs, hampers or fetters the mortgagor's right to redeem, it is invalid. The principle "once a mortgage always a mortgage" is a well

* Second Appeal No. 869 of 1949.

[1] (1921) L. R. 49 I. A. 60. [2] (1930) L. R. 57 I. A. 168.