

**(1924) 04 AHC CK 0041**  
**In the Allahabad High Court**

Thakur Behari Lal and Others

APPELLANT

Vs

Thakur Shib Lal and Others and Thakur Mohan singh and  
Another

RESPONDENT

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**Date of Decision :** 14-04-1924

**Acts Referred:**

Transfer of Property Act, 1882 — Section 77

**Citation :** 82 Ind. Cas. 25

**Hon'ble Judges :** Neave, J; Daniels, J

**Bench :** Division Bench

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## Judgement

1. This was a suit for redemption of a mortgage, dated the 23rd November 1880. There had been a previous mortgage, dated the 17th November 1860, between the ancestors of the parties but this was superseded by the later mortgage. The principal terms of the later mortgage-deed were that the mortgagees were to take possession and to receive the profits in lieu of interest. They were however to pay to the mortgagors an annual sum of Rs. 25 described as malikana, the mortgagors agreeing that they had no further claim against the mortgagees beyond this malikana. It is further stipulated in the deed that there shall be no accounting except as to the Rs. 25 which the mortgagors were to receive every year. It is not disputed that this malikana was never paid. Both the Courts below have granted a decree for redemption on payment of the principal mortgage-money after deducting Rs. 25 a year from 1886 to the date of suit.

2. In appeal three points have been taken by the learned Counsel for the appellants.

3. The first is that as the mortgage was a usufructuary one the mortgagees were not bound u/s 77 of the Transfer of Property Act to account to the mortgagors.

4. The second is that if this view is accepted the mortgagors' only means of recovering the arrears is by a separate suit and that the claim in respect of it is barred by limitation.

5. The third point relates to an area of 7 bighas 18 biswas which was taken up by Government at some time between 1860 and 1880 for the Canal Department. Compensation was paid for this to the mortgagees. Later on the land was restored to the original owners on repayment of the compensation money. The defendants' case was that they took this land back as owners and not as mortgagees.

6. The learned Counsel for the appellants has relied on a ruling in *Shafi-un-nissa v. Fasalrab* 7 Ind. Cas. 293 : 7 A.L.J. 787, in support of his contention that u/s 77 of the Transfer of Property Act there can be no accounting between the parties. In our opinion the ruling has no application to the facts of the present case. In that case the mortgagor had undertaken to pay a certain amount annually in addition to the profits of the land. In the present case the mortgagees undertook to pay Rs. 25 a year out of the profits. But the fact that a fixed sum was stipulated every year instead of a variable amount to be determined after calculating the profit or loss of the particular year does not appear to affect the question. In this view of the case no question of limitation arises.

7. In view of our finding on the first point the second point taken by the appellants must be decided against them.

8. Dealing with the third point it is clear that the intention of the Government was to return the property to the parties from whom it had been originally taken including the mortgagees, but in any case it appears from the recital in the second mortgage-deed that the property mortgaged was the same as in the earlier deed. From this it must be inferred that the parties had arrived at a settlement among themselves with regard both to the property acquired by Government and restored to them and as to the compensation money paid.

9. The result is that the appeal fails on all three points and it is dismissed with costs including in this Court fees on the higher scale.