

APPELLATE CIVIL.

Before Chatterjea and Duval JJ.

INDRA NARAIN SHAU

v.

DWIJABAR SAMANTA.*

1919

April 23.

Mortgage—Paddy loan—Lands mortgaged to secure repayment of price of paddy—Money charged upon immoveable property—Limitation—Limitation Act (IX of 1908), Sch. I, Art. 132.

Where paddy had been borrowed on an agreement to repay the price of the paddy with interest thereon, on default, the mortgagee being entitled to recover the same by attachment and sale of the mortgagor's lands which were given in mortgage, in a suit to enforce the mortgage bond :—

Held, that the money was charged upon immoveable property, and Art. 132, Sch. I of the Limitation Act was applicable.

Rashbehari Das v. Kunjabihari Patra (1) distinguished.

Sripati Lall Dutt v. Sarat Chandra Mondal (2) and *Nilmony Singha v. Haradhan Das* (3) referred to.

SECOND APPEAL by Indra Narain Shau, the plaintiff.

The defendant had taken a loan of 6 *aras* of paddy from the father of the plaintiff and had executed a mortgage bond mortgaging the lands owned and held by him as security for the payment of Rs. 192, the money value of the paddy. The defendant undertook to repay the paddy on the 12th February 1905, and agreed that, in default of repayment within the term, he would, after the expiry of the term, pay

* Appeal from Appellate Decree, No. 2556 of 1917, against the decree of Barada Prasad Roy, Subordinate Judge of Midnapore, dated Sep. 12, 1917, reversing the decree of Amrita Lal Mukerjee, Munsif of Midnapore, dated Aug. 23, 1916.

(1) (1915) 24 C. L. J. 348.

(2) (1918) 22 C. W. N. 790.

(3) (1909) 13 C. W. N. clxxxiv, n.

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interest at the rate of $1\frac{1}{2}$ pice per rupee per month on the sum of Rs. 192. The plaintiff instituted this suit on 16th May 1916 for Rs. 600 and obtained a decree in the Court of the Munsif of Midnapore which was reversed on appeal by the Subordinate Judge of Midnapore. Thereupon, the plaintiff preferred this second appeal to the High Court.

Babu Upendra Narain Bagchi (for *Babu Amarendra Nath Bose*), for the appellant. The bond in suit shows that the return of the price of the paddy was a charge upon immoveable property, and hence Article 132 of the first schedule of the Limitation Act applies, this suit being one to enforce payment of money charged upon immoveable property. In *Rashbehari Das v. Kunjabihari Patra* (1), which is against me, the exact terms of the mortgage bond are not reported; and I rely on the unreported decision of Mookerjee J. in *Nilmony Singha v. Haradhan Das* (2), and on *Sripati Lall Dutt v. Sarat Chandra Mondal* (3).

[CHATTERJEA J. We have sent for that judgment and will hear the other side now.]

Babu Satcouripati Rii, for the respondent. In the case of paddy loans, if the paddy is not repaid the mortgagee in every such case can only sue for the recovery of money (*viz.*, the price of the paddy).

[CHATTERJEA J. But here the bond actually makes the price of the paddy a charge upon the land.]

In every mortgage bond there must be a recital of the price of the paddy or else the stamp duty cannot be realised. Considering the conflict between *Rashbehari Das's Case* (1) and *Sripati Lall Dutt's Case* (3), this question should be referred to a Full Bench.

(1) (1915) 24 C. L. J. 348.

(2) (1909) 13 C. W. N., clxxxiv, n.

(3) (1918) 22 C. W. N. 790.

The appellant was not called upon to reply.

CHATTERJEA AND DUVAL JJ. This appeal arises out of a suit upon a mortgage-bond.

Various defences were raised in the case.

The Courts below have found in favour of the plaintiff upon all points except that the lower Appellate Court has held that the suit is not governed by Article 132, schedule I, of the Limitation Act and that as it was instituted more than 6 years after the due date of payment, it was barred by limitation.

The mortgagor borrowed a certain quantity of paddy from the plaintiff and agreed to repay the paddy with interest at a certain rate mentioned in the bond. It is mentioned in the bond that the paddy was sold for Rs. 192. Then the stipulation in the bond is as follows:—"If I don't repay the paddy within the period aforesaid, then on the expiry of the aforesaid period you will be entitled to recover the price of the paddy with interest thereon at the rate of 1½ pice per rupee per month, together with costs of Court by attachment and sale of the aforesaid lands (together with the crops thereon) which are given in mortgage for the repayment thereof."

It appears, therefore, that the money (the price of paddy with interest) was charged upon immoveable property. The learned Subordinate Judge held that Article 132 was not applicable, relying upon a decision of this Court in the case of *Rashbehari Das v. Kunjabihari Patra* (1), in which it was held that a suit upon a mortgage bond to secure the repayment of the loan of certain paddy was not a suit to enforce payment of money charged upon immoveable property. But all the terms of that mortgage bond do not appear from the report of the case, and the judgment

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seems to have proceeded on the ground that no money was charged upon the property.

The question whether money is charged upon immoveable property must depend upon the terms of the bond in each case.

In the present case, as already stated, the mortgagee was expressly given the right to recover the price of the paddy with interest thereon at $1\frac{1}{2}$ pice per rupee per month (together with costs of Court) by attachment and sale of lands which were given in mortgage for the repayment thereof. There was, therefore, a clear charge upon the land for the price of the paddy.

We may refer to the case of *Sripati Lall Dutt v. Sarat Chandra Mondal* (1), where Fletcher and Shamsul Huda JJ., in a somewhat similar case, held that the case would come under Article 132 of the Limitation Act. There the plaintiff lent a certain quantity of rice and the bond provided that if default was made in the *kists* the mortgagees would be competent to realize the money which would be due at the rate of Rs. 6 per *map*, and that the realization might be made by sale of the mortgaged property mentioned in the schedule to the bond and of all other moveable and immoveable properties belonging to the mortgagors. The learned Judges distinguished the case of *Rashbehari Das v. Kunjabihari Patra* (2).

We may also refer to the case of *Nilmony Singha v. Haradhan Das* (3). In that case the interest was payable in kind (paddy) and the case was held by Mookerjee J. to be governed by Article 132.

In the present case, as stated above, the bond expressly provided that the mortgagee would be entitled to realise the price of the paddy together

(1) (1918) 22 C. W. N. 790. (2) (1915) 24 C. L. J. 348.

(3) (1909) 13 C. W. N. clxxxiv, n.

with interest at $1\frac{1}{2}$ pice per rupee per month, by the sale of the mortgaged property.

We are accordingly of opinion that the case is governed by Article 132 of the Limitation Act.

The decree of the lower Appellate Court is therefore set aside and that of the Court of first instance restored with costs.

G. S.

Appeal allowed.

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APPELLATE CIVIL.

Before Chatterjea and Duval JJ.

PORAN MATIA

v.

INDRA SENI.*

1919

May 28.

Raiyati Holding—Registered lease—Oral surrender—Bengal Tenancy Act (VIII of 1885), s. 86 (i)—Evidence Act (I of 1872), s. 92, proviso 4.

Even where the original lease is a registered one, a raiyat can orally surrender his holding under s. 86 of the Bengal Tenancy Act if it was not for a fixed period and if possession is given up.

Khankar Abdur Rahman v. Ali Hafiz (1) and *Brajonath Sarma v. Maheswar Gohani* (2) referred to.

Sarat Chandra Sinha v. Nritya Gopal Biswas (3) distinguished.

SECOND APPEAL by Poran Matia and another, the plaintiffs.

* Appeal from Appellate Decree, No. 551 of 1917, against the decree of W. N. Delevingne, District Judge of Midnapore, dated Jan. 30, 1917, affirming the decision of T. P. Chatterjee, Munsif of Midnapore, dated July 29, 1915.

(1) (1900) I. L. R. 28 Calc. 256. (2) (1918) 28 C. L. J. 220.

(3) (1910) 13 C. L. J. 284.