

## FULL BENCH.

Before Rankin C. J. and C. C. Ghose, Buckland, B. B. Ghose and Mukerji JJ.

SAYAMALI MOLLA

v.

ANISUDDIN MOLLA.\*

1929

July 4.

*Limitation—Mortgage—Suit for redemption—Indian Limitation Act (IX of 1908), Sch. I, Arts. 132, 148.*

Whenever a suit for redemption is brought by a person entitled to redeem against a mortgagee, Article 148 of the Limitation Act (IX of 1908), and no other Article, applies to it.

*Nidhiram Bandopadhyaya v. Sarbessur Biswas* (1) explained.

FULL BENCH REFERENCE.

In 1904, one Bainuddin mortgaged a plot of land to Anisuddin Molla, the first defendant. In 1908, he again mortgaged the same plot of land, together with another plot, to Sayamali Molla, the plaintiff. In 1911, Anisuddin brought a suit on his mortgage, without impleading Sayamali, the puisne mortgagee, and got a decree for sale. In 1915, Sayamali also brought a suit on his mortgage against Bainuddin, his transferee, and Anisuddin. This suit was dismissed against Anisuddin, as no relief was claimed against him, and decreed against Bainuddin and his transferee, on the 8th May, 1915. Thereafter, on the 15th August, 1916, Anisuddin had the land, mortgaged to him, sold in his decree, bought it himself and obtained possession. Sayamali also executed his decree and had both the plots of land sold and bought them himself on 19th November, 1920, but he obtained possession of the second plot only.

Thereafter, on the 17th June, 1925, this suit was brought by Sayamali for redemption of plot No. 1, on payment of the mortgage money due to Anisuddin and for possession of the said plot. The trial court

\*Full Bench Reference, No. 2 of 1929, in Letters Patent Appeal, No. 105 of 1928, from Appeal from Appellate Decree, No. 434 of 1928.

dismissed the suit on the ground of limitation under Article 132 of the Limitation Act (IX of 1908). The Additional District Judge affirmed that and the learned Judge in the High Court, on appeal, upheld that decision. On that, an appeal, under the Letters Patent, was preferred and the Division Bench, hearing that appeal, referred the matter to a Full Bench.

The Order of Reference was on the following terms:—

RANKIN C. J. In 1904, Bainuddin mortgaged the suit land to the first defendant, who may be referred to as "the defendant." In 1908, he gave another mortgage of it to the plaintiff. In 1911, the defendant sued to enforce his mortgage, but did not implead the plaintiff. He got a decree for sale on 30th November, 1911. In 1915, the plaintiff, without impleading the defendant, obtained a decree for sale in a suit to enforce the second mortgage. The defendant, in 1916, became auction-purchaser under his decree and the plaintiff, in 1920, did the like. The plaintiff, in 1925, sued to redeem the first mortgage.

All three courts have held that the suit is barred by Article 132 of the first schedule to the Limitation Act, 1908. They have followed a decision of this Court in *Nidhiram Bandopadhyaya v. Sarbessur Biswas* (1)—a decision which has been followed once at least in this Court [*Nil Madhab Mahapatra v. Joy Gopal Mahanti* (2)] and in Madras more than once, but has been dissented from in *Ranjhari Koer v. Lala Kashi Nath Sahai* (3). It is also inconsistent with *Priya Lal v. Bohra Champa Ram* (4), and was doubted in *Basanta v. Indore Singh* (5).

The propositions to be examined are : (1) that a suit by a second mortgagee to redeem the first is a suit to enforce payment of money charged upon immoveable property (Article 132); (2) that it is not a suit against a mortgagee to redeem (Article 148).

The learned Judge, who tried this case in Second Appeal lays stress upon the principle that the right of a mortgagee to redeem is only ancillary to his right "to work out his remedy against the mortgaged estate by foreclosure." He has not, however, considered the bearing of this principle on a case, where the puisne mortgagee has already foreclosed, so that his debt has been discharged and his charge no longer exists (Code of Civil Procedure, Order XXXIV, rule 3).

A reference to the passage quoted by the learned Judge from Fisher on Mortgages (para. 1448) and to the cases cited therein will show that the reason why, to a suit by a puisne mortgagee to redeem a prior mortgage, the mortgagor is a necessary party is that the form of decree in such a case, is that the second mortgagee redeems the first and that thereupon, the mortgagor must redeem the second or stand foreclosed: the mortgagor on this footing is interested not only in any account which may be taken, but otherwise—namely to preserve his property. In a simple case, in which the second mortgagee has already foreclosed and cut off his mortgagor's equity of redemption, it would seem, however, that he redeems the first mortgage as owner.

(1) (1909) 14 C. W. N. 439.

(3) (1926) I. L. R. 5 Pat. 513.

(2) (1925) 91 Ind. Cas. 719.

(4) (1922) I. L. R. 45 All. 268.

(5) (1920) 2 Lah. L. J. 419.

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The reasoning in *Nidhiram's case* (1) had reference to the facts that the sale, under the decree upon the first mortgage, was in 1893 and that, under the decree on the second mortgage, was in 1895, the suit by the second mortgagee, having been instituted in 1894. It was partly directed to answering a contention that Article 134 applied to give the plaintiff 12 years from the date of his purchase. On that point, it was said: "The second mortgagee by his purchase at the sale in satisfaction of his mortgage debt cannot acquire any right of redemption, which he had not as mortgagee." On the question of Article 148, the only reasoning is this—"The omission of the prior mortgagee to include the second mortgagee in his suit has been held by this Court not to deprive the second mortgagee of his right to redeem the prior mortgage, but it cannot be held that this interpretation of the law, which is intended merely to save his right as second mortgagee, gives him any additional right or extends the period during which, under the law he can sue to enforce his rights."

The question is what is the period during which, under the law, a mortgagee can sue to enforce his right of redemption. In my opinion, that is stated *prima facie* by Article 148. No doubt, if a mortgagee does not, within 12 years of the due date, sue to enforce his mortgage, he ceases to be a mortgagee and, in that event, the foundation of his right to redeem will be gone. But, if within the time allowed by law, he does sue to enforce his mortgage, let us say, by foreclosure; if he impleads all proper parties (prior encumbrancers are not even proper parties when the sole object of the suit is to cut off the equity of redemption); and if he gets a decree, let us again say for foreclosure; I do not see why he cannot, thereafter, bring a suit for redemption without impleading the *quondam* mortgagor, at any time within sixty years from the due date of his own mortgage. If the prior mortgagee has sued to enforce his security, without impleading the puisne mortgagee, neither the decree, nor the sale (if there is one) will affect the right of the second mortgagee to redeem. It does not matter whether the failure to implead the puisne mortgagee is explained by ignorance of his existence or by default or design; and the respective dates of the decrees do not determine the existence or non-existence of the right to redeem.

Does it then make any difference that the suit by the second mortgagee was a suit for sale? I think not. In *Har Pershad Lal v. Dalmardhan Singh* (2) Mitra J. said: "The decree obtained by the first mortgagee is valid in law \* \* \* notwithstanding that the present defendants were not impleaded \* \* \*. It was, however, imperfect, and the sale under it had the same imperfection, the right of the defendants to reopen the decree and the sale proceedings continuing to exist." When in that position, a sale is held under the second mortgagee's decree [and such a sale is valid and within his rights: *Debendra Narain Roy v. Ramtaran Banerjee* (3)] the purchaser, whether he be the second mortgagee himself or a stranger, gets (*prima facie* at all events) the title of the mortgagor at the date of the second mortgage—that is, he gets the property subject to the first mortgage: not for all purposes in the sense that he can ignore the sale under the first mortgage (one cannot always ignore transactions between third parties) but in the sense that he becomes an owner of property subject to an incumbrance and the right to redeem that incumbrance is not ousted by the previous sale. He cannot claim as against the first mortgagee or as against the purchaser under the first decree to get or to retain possession without paying off the incumbrance. He can claim to get the property on redeeming the incumbrance. He does not have in either case to sue the mortgagor for any money or to enforce any charge for the payment of money.

(1) (1909) 14 C. W. N. 439.

(2) (1905) I. L. R. 32 Calc. 891, 903.

(3) (1903) I. L. R. 30 Calc. 599.

He has not got a charge and he may not even be a creditor. It is the first mortgagee or his purchaser who can be treated as if his title were no more than a charge for money.

Whether, and in what circumstances, if any, the first mortgagee, if he gets into possession, under his purchase, can claim to lessen the period prescribed by Article 148 by alleging adverse possession, is a question which does not arise in this case.

The learned Judge very properly followed the previous decisions in this Court, but I think that this case should be referred to a Full Bench. The questions for consideration, I would state thus :—

Whether Article 132 applies to this case ?

Whether *Nidhiram's case* (1) was rightly decided ?

Whether the suit is barred by limitation ?

The appeal is referred for the final decision of the Full Bench under the Appellate Side Rules, Chapter VII, rule 2.

GHOSE J. I agree.

*Mr. Hiralal Chakravarti* (with him *Mr. Shyama-das Bhattacharya*), for the appellant. The question is whether Article 132 or Article 148 of the Limitation Act would apply in this case. *Prima facie*, Article 148 would apply. If the puisne mortgagee is not made a party in the prior mortgagee's suit, his rights remain unaffected. *Umes Chunder Sircar v. Zahur Fatima* (2), *Het Ram v. Shadi Ram* (3), *Matru Lal v. Durga Kunwar* (4), *Sukhi v. Ghulam Safdar Khan* (5), *Debendra Narain Roy v. Ramtaran Banerjee* (6).

This is a suit for redemption, pure and simple. Under the Transfer of Property Act, my client had the right to redeem; further by his purchase he has stepped into the position of the mortgagor. Article 132 of the Limitation Act would not apply in this case.

*Mr. Surendranath Basu, II*, for the respondent. Article 132 of the Limitation Act would apply in this case. The mortgage was a simple mortgage. A simple mortgage is a charge on the immovable property within the meaning of that Article: *Girwar Singh v. Thakur Narain Singh* (7). The right to redeem is co-extensive with the right to

(1) (1909) 14 C. W. N. 439.

(2) (1890) I. L. R. 18 Calc. 164 ;

L. R. 17 I. A. 201.

(3) (1918) I. L. R. 40 All. 407 ;

L. R. 45 I. A. 130.

(4) (1919) I. L. R. 42 All. 364 ;

L. R. 47 I. A. 71.

(5) (1921) I. L. R. 43 All. 469 ;

L. R. 48 I. A. 465.

(6) (1903) I. L. R. 30 Calc. 599.

(7) (1887) I. L. R. 14 Calc. 730.

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foreclose or sell and, in this case, the period, within which that could be availed of, would be 12 years. The word mortgage in Article 148 contemplates "English mortgage."

*Prannath Roy Chowdry v. Rookea Begum* (1),  
*Vasudeva Mudaliar v. Srinivasa Pillai* (2).

The mortgagee has no right to bring this suit now. He has waived his rights under the mortgage and is satisfied with the decree. *Het Ram v. Shadi Ram* (3), *Gopee Bundhoo Shantra Mohapattur v. Kalee Pudo Banerjee* (4).

*Cur. adv. vult.*

B. B. GHOSE J. The facts of the case, giving rise to this Reference, are these: One Bainuddin mortgaged a plot of land to the defendant No. 1 in 1904. In 1908, he again mortgaged this piece of land with another plot (No. 2 in the schedule of the plaint) to the plaintiff. Defendant No. 1 (who will be referred to as the defendant) brought his suit on his mortgage, in 1911, without impleading the plaintiff and obtained a decree for sale against the mortgagor alone on 30th November, 1911. Plaintiff brought a suit to enforce his mortgage in 1915. He made the present defendant a defendant in the suit, along with the mortgagor and a transferee from him. The defendant set up his prior mortgage and plaintiff's suit as against him was dismissed, as the plaintiff did not ask for any decree against him. Plaintiff obtained the usual decree for sale as against the other defendants in that suit, on 8th May, 1915. Defendant in this case put the property mortgaged to him to sale in execution of his mortgage decree and purchased it himself, on 15th August, 1916, and obtained possession.

Plaintiff afterwards executed his decree and purchased both the mortgaged properties on 19th November, 1920, but obtained possession only of plot

(1) (1859) 7 Moo. I. A. 323.

(2) (1907) I. L. R. 30 Mad. 426 ;

L. R. 34 I. A. 186.

(3) (1918) I. L. R. 40 All. 407 ;

L. R. 45 I. A. 130.

(4) (1875) 23 W. R. 338..

No. 2. Plaintiff brought the suit, out of which the appeal to this Court arose, on 17th July, 1925, for redemption of plot No. 1 of the plaint, on payment of the mortgage money due on the mortgage of defendant and for possession. Defendant No. 2 is a brother of defendant No. 1 and defendant No. 3 is said to be a tenant under the other defendants. These two may be left out of consideration.

Various points were raised in defence by the written statement of the first two defendants. Defendant No. 3 did not appear. All the courts have thrown out the suit on the ground that it is barred by limitation, and this question has caused the Reference to the Full Bench.

All the three courts concurred in holding that the suit was barred under Article 132 of the Limitation Act, purporting to follow a decision of this Court in *Nidhiram Bandopadhyaya v. Sarbessur Biswas* (1). The questions referred to the Full Bench are:—

- (1) Whether Article 132 applies to this case?
- (2) Whether *Nidhiram's case* (1) was rightly decided?
- (3) Whether the suit is barred by limitation?

I think it necessary to make some preliminary observations as to the rights of the parties under the circumstances stated above. It seems to have been suggested that plaintiff's right has been affected in some manner, as he did not redeem the defendant when he brought his suit. Under Order XXXIV, rule 1 of the Civil Procedure Code, a puisne mortgagee may sue for sale without making a prior mortgagee a party to the suit. No doubt if he seeks to redeem a prior mortgagee in his suit for sale he may make the prior mortgagee a party and complete decree may then be made as in Form No. 8, Appendix D, of the Civil Procedure Code. But, if a person is joined as a defendant, for enforcement of the right under a mortgage, he should be dismissed from the action as soon as he sets up a prior title. See

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*Nilakant Banerji v. Suresh Chandra Mullick* (1). The fact that plaintiff's suit on his mortgage was dismissed as against defendant does not affect his right of redemption, if it is not extinguished in any other manner.

When a puisne mortgagee is not made a party to a suit by the first mortgagee, his rights are not affected by the decree or sale thereunder, and the puisne mortgagee has still the right to redeem the prior mortgage; *Ram Narain Sahoo v. Bandi Pershad* (2). He may notwithstanding the prior decree bring a suit on his mortgage. *Debendra Narain Roy v. Ramtaran Banerjee* (3). The rights of rival purchasers, when the first mortgagee brings his suit, without impleading the puisne mortgagee, obtains a decree against the mortgagor only and purchases the property himself and the mortgaged property is sold a second time, at the instance of the puisne mortgagee and purchased by himself were considered in the case of *Gopee Bundhoo Shantra Mohapattur v. Kallee Pudo Banerjee* (4). The purchaser under the first decree purchases the outstanding interest of the mortgagor only and the puisne mortgagee's rights are not affected in any way. It should be noted that in the present case the puisne mortgagee seeks to redeem as the purchaser of the equity of redemption and the suit of the plaintiff as against the mortgagor was properly constituted, for when he brought his suit the equity of redemption of the mortgagor had not passed away from him. There can be no question that the plaintiff would have the right to redeem if his suit is not barred by limitation.

Now, I shall consider the question as to which Article of the Limitation Act is applicable to this suit for redemption. Plaintiff's suit has been dismissed on the ground that Article 132 of the Act is applicable to this case. That Article refers to a suit "to enforce payment of money charged upon

(1) (1885) I. L. R. 12 Calc. 414; (2) (1904) I. L. R. 31 Calc. 737.

L. R. 12 I. A. 171. (3) (1903) I. L. R. 30 Calc. 599.

(4) (1875) 23 W. R. 338.

“immovable property.” In my judgment, by no straining of language, can a suit for redemption fall under that Article, as it is not a suit to enforce payment of money. The special Article applicable to a suit for redemption is Article 148, which gives sixty years, as the period from the date when the right to redeem accrues. In this case, the due date under the first mortgagee’s bond is not in evidence, but the suit was brought within sixty years of the date of the mortgage. So if this Article is applicable there is no question that the suit is within time, and is not barred by limitation.

But it is said that the case of *Nidhiram Bandopadhyaya v. Sarbessur Biswas* (1) is authority for the proposition that Article 132 applies to this case. It seems to me that, if the facts of that case are properly analysed, it would appear that the learned Judges did not profess to lay down any such rule. There the suit on the first mortgage was brought on 28th March, 1892, and the sale at which the mortgagee purchased was held on 21st March, 1893. The puisne mortgagee was not made a party to the suit. The first mortgagee sold his interest to another person on 14th July, 1893. The puisne mortgagee then brought his suit on 6th November, 1894, that is to say, after the proceedings in the suit on the prior mortgage had been brought to an end, and himself purchased the property at the sale on 20th July, 1895, without making the previous purchaser a party to the suit. In the result, the owner of the equity of redemption, not being impleaded, the only right that was transferred by the decree on the puisne mortgagee and the sale thereunder was the right under the plaintiff’s own mortgage. The second mortgagee could no doubt bring a fresh suit against the owners of the equity of redemption to enforce his mortgage within the period of limitation, which suit would be governed by Article 132 of the Limitation Act. But he did not do so. He brought a suit after his right to enforce

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his mortgage was barred, for a declaration of his right to redeem the prior mortgage. The question which the learned Judges were asked to consider was, whether "the time within which the second mortgagee, "who has purchased the property in execution of a "decree in a suit subsequently brought by him, to "enforce his mortgage, or as in this case, his "transferee, has to bring a suit, commences to run "from the due date of the mortgage debt or from the "date of his purchase." They held, and in my opinion rightly, that limitation to enforce his mortgage would run from the due date on the mortgage. The learned Judges proceed to say, "The second mortgagee, by his "purchase at the sale in satisfaction of his mortgage "debt cannot acquire any right of redemption *which "he had not as mortgagee."* I think what they meant was, as the right to enforce the puisne mortgage was barred by limitation, the transferee from the mortgagee had no right in the property to enable him to redeem the prior mortgage. The same observation was made by the learned Chief Justice, in his Order of Reference, with which I fully agree. It is unfortunate that the language used by the learned Judges in *Nidhiram's case* (1) lends itself to misconstruction, if dissociated from the facts of the case. But I think they never meant to lay down a rule of limitation for an action to redeem which is not warranted by the provisions of the Limitation Act. It seems to me what they intended to say was that the plaintiff had no subsisting right to redeem.

I do not consider it necessary to elaborate the discussion, but it seems to me, whenever a suit for redemption is brought by a person entitled to redeem against a mortgagee, Article 148 of the Limitation Act, and no other Article, applies to it.

I have now only to refer to Fisher on Mortgages (para. 1448) cited by the learned Judge who first tried the case in Second Appeal. The learned Chief Justice has pointed out the reason why in England the mortgagor is a necessary party to a suit by a

(1) (1909) 14 C. W. N. 439.

puisne mortgagee to redeem the prior mortgagee. The cases cited in Fisher show that the reason of the rule that, if a puisne mortgagee seeks to redeem, he must foreclose all subordinate rights including the ultimate equity of redemption, is that the right to redeem to those persons would otherwise remain open, thus exposing the prior mortgagee to another suit. Where, as in this case, the puisne mortgagee has already obtained a decree on his mortgage, he is entitled to redeem a prior mortgagee in a subsequent suit. The law in England is thus stated in Fisher on Mortgages, para. 1693: "the second or other puisne mortgagee may foreclose those subsequent without joining those prior to themselves, for the latter can suffer no damage. The subsequent mortgagees, it is true, are left without the opportunity of redeeming all prior to them in the *same suit*."

The answers I propose to the questions put to us are:—

(1) No. Article 148 is applicable.

(2) *Nidhiram's case* (1) was rightly decided on its facts. If, however, it is supposed that it was decided in that case that a suit for redemption, such as this, is governed by Article 132, then it was wrongly decided.

(3) The suit is not barred by limitation.

The case has been referred to this Bench for final decision. But the suit, having been dismissed on the ground of limitation, the other issues raised in the case have not been decided by the courts below, and no other question was argued before us. None of the parties, however, examined any witness at the trial. The questions, therefore, which now require decision are covered by issues Nos. 4 and 5, and the case should be remitted to the trial court for decision of those issues. Reference may be made to the cases of *Umes Chunder Sircar v. Zahur Fatima* (2), *Sukhi v. Ghulam Safdar Khan* (3), *Jnanendra Nath Singh Roy v.*

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(1) (1909) 14 C. W. N. 439.

(3) (1921) I. L. R. 43 All. 469;

(2) (1890) I. L. R. 18 Calc. 164;

L. R. 48 I. A. 465.

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*Shorashi Charan Mitra* (1), regarding the rights of the parties subsisting under their respective mortgages.

The defendant has claimed to redeem the plaintiff in his turn and his right to redeem the plaintiff would depend on the question as to the preferential right to the equity of redemption under the respective sales held under the decrees obtained by the parties on their mortgages. In deciding that question, reference may be made to the following cases: *Gopee Bundhoo Shantra Mohapattur v. Kalee Pudo Banerjee* (2), *Dirgopal Lal v. Bolakee* (3), *Ram Narain Sahoo v. Bandi Pershad* (4). If the defendant is held entitled to redeem, he would be able to do so on payment of a proportionate part of the mortgage money chargeable on plot No. 1, as the plaintiff has himself purchased a portion of the property under his mortgage, *viz.*, plot No. 2. It would then be necessary to take evidence as to the respective value of the two plots. The case should be finally determined by the trial court after taking into consideration all the circumstances.

The appellant must get his costs of the Second Appeal to this Court, of the Letters Patent Appeal and of this Reference.

RANKIN C. J. I agree with the judgment of Mr. Justice B. B. Ghose and have only to make clear that the observations made by me in the Order of Reference are to be taken to be superseded by this judgment.

C. C. GHOSE J. I agree with the judgment delivered by Mr. Justice B. B. Ghose.

BUCKLAND J. I also agree.

MUKERJI J. I also agree.

N. G.

(1) (1922) I. L. R. 49 Calc. 626.

(2) (1875) 23 W. R. 338.

(3) (1879) I. L. R. 5 Calc. 269.

(4) (1904) I. L. R. 31 Calc. 737.