

1885 s. 80 of the Evidence Act it was admissible without proof that  
 the Durga Sonar who made the deposition was the same Durga  
 Sonar then being tried.

QUEEN  
 EMPRESS  
 v.  
 DURGA  
 SONAR.

This was a gross blunder. Without the deposition there is no sufficient evidence to warrant a conviction of the prisoner, and we accordingly set aside the conviction and direct his discharge.

*Conviction set aside.*

## APPELLATE CIVIL.

*Before Mr. Justice Mitter and Mr. Justice Field.*

1885. PERGASH KOER AND ANOTHER (PLAINTIFFS) v. MAHABIR PERSH.  
 April 20. NARAIN SINGH AND ANOTHER (DEFENDANTS).\*

*Mortgage—Conditional Sale—Foreclosure—Suit for possession on foreclosure—Regulation XVII of 1806, ss. 7, 8—Act IV of 1882 (Transfer of Property Act) ss. 2, clause (c) and 86.*

The procedure laid down in the Transfer of Property Act may be applied to the case of foreclosure of a mortgage executed before the Act came into operation, provided it be so applied as not to affect the rights saved by s. 2, clause (c) of the Act.

Where, therefore, under the provisions of Regulation XVII of 1806 notice of foreclosure had been served on a mortgagor by conditional sale, the mortgage having been executed, and the foreclosure proceedings taken before the Transfer of Property Act came into force, and after the expiry of the year of grace the money not having been paid, the mortgagee instituted a suit for possession on foreclosure, and when such suit was defended by a third party who had purchased the mortgaged property at an execution sale and obtained possession before the commencement of the foreclosure proceedings and the necessary notice had not been served upon him,

*Held*, that it was competent to the Court to apply the procedure prescribed by the Transfer of Property Act and grant the mortgagee a decree in the terms of s. 86, substituting the period of "one year" for the period of "six months" therein mentioned. *Ganga Sahai v. Kishen Sahai* (1) referred to.

In this suit the plaintiffs sought to obtain possession on foreclosure of a two-anna nine-pie share, out of five annas six pie out

\* Appeal from Original Decree No. 277 of 1883, against the decree of Baboo Amrit Lal Pal, Rai Bahadur, Second Subordinate Judge of Sarun, dated the 22nd of September 1883.

of eleven annas share of mouzah Dhowpole, the eleven annas constituting the whole of the mouzah. They alleged that the property in suit had been mortgaged by the first defendant Solookut Deo Narain Singh to their father, since deceased, by a deed of conditional sale, dated the 1st July 1873, to secure the repayment of a sum of Rs. 2,000; that the date fixed for repayment had passed without the principal or interest being repaid; and that consequently under the provision of Regulation XVII of 1806 they had caused the requisite notice and copy of their petition for foreclosure to be served on the first defendant, the mortgagor, and the year of grace having expired on the 3rd Assar 1285, corresponding with the 16th June 1878, they brought this suit to obtain possession.

They further alleged that after the service of the notice and copy of their petition on the first defendant they learnt that in execution of a decree against the first defendant the property in suit had been sold and purchased by him *benami* in the name of the second defendant his son, Mahabir Pershad Narain Singh, and they consequently added him as a *pro forma* defendant. In their prayer they asked for a declaration that the first defendant's right to redeem was lost, and that they might have possession of the property, and they also added a prayer for "other relief, which according to law might be deemed proper to be awarded to them." They also claimed mesne profits.

The first defendant did not appear or contest the suit, but the second defendant filed a written statement, alleging, that inasmuch as he was in possession of the property by virtue of his purchase which took place on the 10th April 1876, and the notice was not served upon him, the foreclosure proceedings were *ab initio* bad as against him. He denied that he had purchased as *benamidar* for his father, and stated that the plaintiffs were well aware of the fact of his purchase and possession long before they caused the notice to be served on his father. The lower Court found as facts that the mortgage was a valid one, that the notice of foreclosure was served on the first defendant, and that the purchase by the second defendant was prior to the date of the plaintiffs' application for foreclosure; that the second defendant was a necessary party to the foreclosure proceedings; and

1885

---

 PERGASH  
 KOOR  
 v.  
 MAHABIR  
 PERSHAD  
 NARAIN  
 SINGH.

1885  
 PERGASH  
 KOBR  
 v.  
 MAHABIR  
 PERSHAD  
 NARAIN  
 SINGH.

that as the notice was served on him, the plaintiffs were not entitled to succeed unless they established the fact that the second defendant was a mere *benamidar* for his father; that there was no evidence to show that they were not aware of the second defendant's purchase before instituting the foreclosure proceedings, and that they had failed to prove that the second defendant had purchased *benami* for his father.

At the hearing the plaintiffs contended that, if upon the facts they were not entitled to succeed, still it was open to the Court to make a decree under the provisions of s. 86 of the Transfer of Property Act (IV of 1882) in compliance with the prayer for "other relief;" but the Court held that inasmuch as the suit was based upon foreclosure proceedings taken before that Act came into operation, and as it had not been instituted under its provisions, and did not contain the necessary allegations to entitle plaintiffs to a decree under that section, the Act did not apply; and as it would be changing the entire character of the suit, the Court refused to grant any such relief, and having regard to the above findings, dismissed the suit but made each party bear their own costs.

The plaintiffs now appealed to the High Court upon amongst other grounds that there was nothing in the frame of the suit or in the circumstances of the case to disentitle them from obtaining a decree under s. 86 of the Transfer of Property Act, and that the lower Court erred in not granting them that relief.

Baboo Mohesh Chunder Chowdhry and Munshi Mahomed Yusuf for the appellants.

Mr. C. Gregory and Baboo Durga Das Dutt for the respondent.

The judgment of the Court (MITTER and FIELD, JJ.) was delivered by

MITTER, J.—This suit was based upon a mortgage deed called *bye-bil-wuifa*, executed by the defendant No. 1 in favor of the plaintiff's father, on the 21st July 1873. Under this deed a two-anna nine-pie share, out of five annas six pie, out of eleven annas of the mouzah in dispute, which eleven annas constituted an entire estate, was mortgaged. The plaintiff alleged that on the

15th June 1877 an application was made to the District Court for service of notice under Regulation XVII of 1806 ; that this notice was served upon the mortgagor ; and that as the money due under the mortgage was not paid within the time allowed by the Regulation, the right to redeem was barred. It was further stated in the plaint that, some time after the notice had been served, the plaintiffs came to know that the share mortgaged had been sold in execution of a decree against the mortgagee, and purchased by the mortgagor himself in the name of his son, the defendant No. 2. Accordingly the defendant No. 2 was made a defendant in the suit. The prayer in the plaint was for a decree for possession upon foreclosure of the mortgage, and also for "other relief" which according to law it might be deemed proper to grant.

The suit was defended only by defendant No. 2, and the principal ground of defence was that he was the real purchaser of the property mortgaged ; that since the date of his taking possession under the purchase, he has been in exclusive possession of it, and that his father has nothing to do with it.

He further alleged that this purchase took place before the application under Regulation XVII of 1806 was made to the District Court, and therefore the suit could not be decreed inasmuch as no notice had been served upon him.

There are other questions in the case, but the lower Court has found all of them in favor of the plaintiffs. It has been found that the mortgage was executed ; that the money covered by it was really advanced to the father ; and that the notice was served upon the mortgagor, defendant No. 1. But the lower Court dismissed the suit upon the ground that the plaintiff failed to prove that the defendant No. 2, the son, was the *furzi* or *benamidar* of the father, defendant No. 1.

There was a further contention before the lower Court on behalf of the plaintiffs, *viz.*, that supposing, for want of notice upon defendant No. 2, no decree absolutely foreclosing the mortgage could be made in this suit, there was nothing to prevent that Court from making a decree under s. 86 of the "Transfer of Property Act" of 1882. With reference to this contention the Subordi-

1885

---

 PERGASH  
 KORB  
 &  
 MAHABIR  
 PERSHAD  
 NARAIN  
 SINGH.

1885  
 PRGASH  
 KOER  
 v.  
 MAHABIR  
 PERSHAD  
 NARAIN  
 SINGH.

nate Judge says that there was no prayer to this effect in the plaint, nor would the words "other relief" include it. He accordingly refused to accede to this prayer, which was made at the time of the last hearing. The Subordinate Judge, therefore, dismissed the suit altogether.

Against this decision the plaintiffs have appealed. The evidence adduced by the defendant No. 2 to prove that he was separate from his father is, as remarked by the lower Court, hardly satisfactory; and it being a presumption of Hindu law that the members of a family, and especially such members as these, namely, father and son, are joint, I should be inclined to presume that the purchase was made by the joint family. But as my learned brother is not prepared to go to this length, I would not press this view of the case to deprive the mortgagor of his right of redemption. It is, however, quite clear to us that the lower Court was in error in dismissing the suit altogether. We are of opinion that the lower Court was not right in refusing to make a decree in this case under s. 86 of the "Transfer of Property Act."

Our attention has been drawn to a decision in *Ganga Sahai v. Kishen Sahai* (1). In that case the question was whether the procedure part of the "Transfer of Property Act" would apply to mortgages executed before the Act came into operation. This question was referred to a Full Bench, and the majority of the Judges were of opinion that this question should be answered in the affirmative. The Chief Justice, however, dissented from the view taken by the majority of the Judges.

Section 2 of the "Transfer of Property Act" says: "In the territories to which this Act extends for the time being, the enactments specified in the schedule hereto annexed shall be repealed to the extent therein mentioned. But nothing herein contained shall be deemed to affect (a) the provisions of any enactment not hereby expressly repealed; (b) any terms or incidents of any contract or constitution of property which are consistent with the provisions of this Act, and are allowed by the law for the time being in force; (c) any right or liability arising out of a legal relation constituted before this Act comes into force, or

(1) I. L. R. 6 All., 262.

any relief in respect of any such right or liability ; or (d) save as provided by section fifty-seven and Chapter IV of this Act, any transfer by operation of law or by, or in execution of, a decree or order of a Court of competent jurisdiction : and nothing in the second chapter of this Act shall be deemed to affect any rule of Hindu, Mahomedan or Buddhist law." We are concerned only with clause (b) of this section. I think that the words, "or any relief in respect of any such right or liability" have preserved to a mortgagor of the description under consideration the right which he had under the Regulation of 1806 viz., to pay off the mortgage money, and thus prevent the mortgage being foreclosed within one year from the date of notice. That being so, it seems to me that the procedure laid down in the "Transfer of Property Act" will apply, but it will not affect this right. Section 2 does not say that nothing herein contained shall apply to any transaction entered into before the Act was passed, but it says, "nothing herein contained shall be deemed to affect any right or liability." Therefore the procedure laid down in the Act may be applied subject to this restriction that it should not be so applied as to affect the rights saved by s. 2. With this qualification, if I may be permitted to say so, I agree with the majority of the Judges of the Full Bench. Therefore applying the provisions of the "Transfer of Property Act," in the way mentioned above, I think that the plaintiffs in this case are entitled to a decree in the terms of s. 86 of that Act. In this view of s. 2 of the "Transfer of Property Act," my learned colleague agrees. We therefore direct that a decree be drawn up in the manner provided by s. 86, substituting "one year" for "six months" mentioned therein. But as in this case the plaint was not properly drawn up, and as no application was made in the lower Court (in proper time) to amend the plaint so as to include in it an express prayer for a decree under s. 86 of the "Transfer of Property Act," we think that each party should bear his own costs in this as well as in the lower Court.

*Appeal allowed.*

1885

PERGASH  
KORR  
vs.  
MAHABIR  
PESSEAD  
NARAIN  
SINGH.