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inoperative beyond the date on which the estate was devested. This is not in accordance with the tenor of the observations of the Privy Council in *Shri Raghunadha* v. *Sri Brozo Kishoro* (1) (See also Mayne's 'Hindu Law', section 198). The analogy of the first defendant's estate is rather to that of a limited owner like a widow than to that of a life owner. There is a vested reversion or remainder where there is a life estate. But both in the case of the widow and in the case of a person in the position of the first defendant the holder for the time being represents the estate completely. If a debt or alienation by a widow for proper purposes would bind the reversion it stands to reason that a debt contracted, or alienation made by the first defendant must be dealt with on the same footing. We, therefore, allow the appeal with costs here and in the Court below.

APPELLATE CIVIL.

Before Mr. Justice Krishnaswamy Ayyar and Mr. Justice Ayling.

1910. December, 14, 15.

1911. January, 18.

RAJAI TIRUMAL RAJU BAHADUR VARU AND OTHERS (SECOND PLAINTIFF AND HIS LEGAL REPRESENTATIVE), APPELLANTS,

v.

PANDLA MUTHIAL NAIDU AND OTHERS (DEFENDANTS 2 TO 8), RESPONDENTS.*

Mortgage, validity of, when only part of the consideration paid—Mortgagee in possession cannot prescribe for higher interest by asserting a larger amount as due—Limitation Act, Schedule II, Articles 148, 144.

Where only a part of the consideration for a mortgage has been paid, the mortgage is a good security for the amount that has validly passed. The mortgagee by remaining in possession for more than 12 years under such a mortgage, cannot by merely claiming to hold for the full amount, acquire by prescription a right to hold as mortgagee for such full amount.

Notwithstanding the assertion by the mortgagee of a larger interest than was validly passed to him by the mortgage, article 148 of the Limitation Act will apply to a suit for redemption by the mortgagor. Article 144 will not apply as article 148 specially provides for the case.

APPEAL against the decree of T. M. Rangachariar, Subordinate Judge of North Arcot, in Original Suit No. 2 of 1906.

(1) (1876) 3 I. A., 154. *Appeal No. 145 of 1906.

The facts are stated in the judgment of the Lower Court as follows:—

Suit to recover Rs. 38,527-3-0. The suit was launched by the Regulation Collector on behalf of the Rajah of Karvetnagar. The present plaintiff is the son of the late Rajah.

On the 24th May 1882, the late Rajah and his father executed to the first defendant and to the father of the second defendant a usufructuary mortgage deed for Rs. 24,600. *A* is the registration copy of this deed filed by consent of parties. The deed stipulates that the annual income of the village should be taken as Rs. 1,764 of which Rs. 1,476 should be taken by the mortgagees (every year) for the interest due on the amount secured (calculated at 6 per cent. per annum) and that the balance, namely Rs. 288, should be paid by the mortgagees into the taluk treasury on account of the peishcush of the village.

The plaint is dated 29th June 1903 and the cause of action is set forth in the plaint in this wise: The sum of Rs. 24,600 secured by the mortgage deed is made up of Rs. 17,309-13-4, alleged to have been due on account of the decree in Original Suit 24 of 1881 on the file of the North Arcot District Court, and Rs. 587-15-7 alleged to have been due on account of the decree in Original Suit 25 of 1881 on the file of the same Court and other sums, and that the amounts alleged to have been due on account of the said two decrees are larger than the amounts actually due thereunder. And the agreement to pay the said two amounts as per the mortgage deed is void owing to want of sanction of the Court under section 257A, the Code of Civil Procedure.

Plaintiff arrives at the amount sued for thus:—

The principal legally due under the deed is Rs. 6,702-3-1. Defendants were entitled to interest on that amount only at the stipulated rate. Therefore the difference between Rs. 1,476 and the interst due on Rs. 6,702-3-1 should have gone towards the liquidation of the latter amount. In so calculating, the amount became discharged prior to 1st July 1888. Indeed the defendants had to the credit of the plaintiff, Rs. 983-15-11 on that day. On the 1st July 1900 the sum in the hands of the defendants to the credit of the plaintiff had risen to Rs. 38,527-3-0 including interest at 12 per cent. per annum in consequence of defendants having continued to remain in possession of the mortgaged village

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till that day when the Court of Wards took possession of the village under Madras Act IV of 1899.

Among other objections to the suit, defendants contend that they having been in possession of the village under the terms of the mortgage deed for more than 12 years, they have acquired a valid title as usufructuary mortgagees with all the rights mentioned in the mortgage deed by prescription. Defendents say that in consequence plaintiff's suit must be held time-barred, the title of the defendants having become perfected owing to the lapse of time. The point is covered by the 7th issue:—

Whether the defendants have acquired by prescription the right of a usufructuary mortgagee for the amount mentioned in the mortgage deed.

Defendants' Vakil relies on the case reported in 12 Mad., L.J., 410. He also relies on cases in 9 Mad., 244 and 13 Mad., 407 as well as on the case in 27 Bom., 515 at page 537.

The position established by these cases is that a limtted right can be acquired by prescription, that a person having no legal title at the inception, can acquire a valid title by prescription, that in finding what that right is, the Court ought to see what was the right which he openly enjoyed to the knowledge of the owner or his representive for the time being, and not what was the right which actually existed at the beginning. In this case, defendants obtained the mortgage under the terms above set forth. The usufructuary mortgage is a limited right. Defendants were in possession of the mortgaged village admittedly under the terms of the mortgage deed for over 12 years, and the rights set up by them are the rights as set forth in the mortgage deed. Therefore the rights as stated in the mortgage deed were acquired by the defendants and their title therefore became perfected.

In this view of the case, the lower Court dismissed the suit.

Second plantiff appealed.

The Hon Mr. *L. A. Govindaraghava Ayyar* and *A Ramachendra Ayyar* for second appellant.

K. Srinivasa Ayyangar for *P. R. Sundara Ayyar* for respondents.

AYLING, J. (Appeal 145 of 1906).—The plaintiffs' predecessors in title gave a usufructuary mortgage to the first defendant and the second defendant's father for Rs. 24,600 in the year 1882. Part of the consideration for the bond consisted of Rs. 17,000 stated to be due under decrees previously obtained.

against the mortgagors. It is contended for the plaintiff that this sum was in excess of the amount actually due under the decrees and that the agreement to pay was in contravention of section 257 (*a*) of the old code and therefore void. The Court below has given no finding on the question no evidence having been taken on the point. Assuming the plaintiff's contention to be well founded, the further point arises whether the defendants having been in possession for more than 12 years under the usufructuary mortgage for Rs. 24,600, they have acquired a prescriptive title to that mortgage interest. The District Judge has decided in their favour. On appeal it is argued for the appellant that there was a good usufructuary mortgage for Rs. 7,600 at all events, and, the possession of the mortgagee having commenced under a valid mortgage for that sum, the defendants could not by assertion of a larger interest acquire a prescriptive title to it.

The first question we have then to consider is whether there is a good usufructuary mortgage for Rs. 7,600. There is nothing to show as pointed out in *Srinivasa Swami Aiyangar* v. *Athmarama Aiyar* (1), that the parties expressly stipulated that the mortgagee should not take effect unless the whole consideration was really and validly given by the mortgagee. It cannot be said that there is an implied understanding in the case of every mortgage where less than the full consideration is advanced by the mortgagee that the mortgage should fall through unless the balance of the consideration is made good. It may also be that, if there is an agreement to advance the full consideration for the mortgage and there is a breach of the agreement on the part of the mortgagee, section 39 of the Indian Contract Act will as suggested in *Subba Rau* v. *Devu Shetti* (2), justify the mortgagor in putting an end to the contract of mortgage. It seems to us that the mortgagor may treat the mortgage as good to the extent of the consideration received and sue for damages for non-payment of the balance as suggested in *Anakaran Kasmi* v. *Saidamadath Avulla* (3) and expressly decided in *Chinnayya Rawutan* v. *Chidambaram Chetti* (4). He may allow the mortgagee to treat the mortgage as good and to sue the mortgagor for sale as in *Rajane Kumar Dass* v. *Gaur Kishore*

(1) (1909) I. L. R., 32 Mad., 281. (2) (1895) I. L. R., 18 Mad., 126.
(3) (1878) I. L. R., 2 Mad., 79. (4) (1878) I. L. R., 2 Mad., 212.

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Shaha (1) or for foreclosure as in *Munshi Bajrangi Sahai* v. *Udit Narain Singh* (2). The decision in *Subba Rau* v. *Devu Shetti* (3) which treated the mortgage as invalid because part only of the consideration agreed upon was advanced was based on the view that the mortgagor cancelled the mortgage and the mortgagee had acquiesced in the cancellation. Where part of the consideration is void, or fails, or the mortgagee makes default in paying it, the right principle seems to be that the mortgage is good to the extent of the consideration that has validly passed. In Jones on Mortgages, Vol. I, section 378, the rule is thus stated "If the mortgagee advance only a part of the sum contemplated in the mortgage it is a valid security for so much as he does advance and for so much only. For the advances actually made the mortgage is good against the mortgagor's assignee in bankruptcy." A number of American cases are cited at the foot in support of the above principle. Mr. K. Srinivasa Aiyangar who appeared for the respondents pressed upon our attention the case of *Walker* v. *Carleton* (4) as a decision in his favour. Apart from the fact that the decision is adversely criticised by the learned author, the case appears to be clearly distinguishable because the mortgagor gave a separate note payable in a shorter time for the part of the consideration, which was all that was advanced. Putting aside this case therefore as inapplicable the whole weight of authority appears to be in favour of the rule enunciated in the passage cited. Mr. Srinivassa Aiyangar further contended that to give effect to the mortgage as good for the consideration actually given would be to make a new contract between the parties. We do not think the argument is sustainable. It would be perfectly open to the mortgagor as already pointed out, treating the whole contract as valid and enforceable, to recover damages for the partial breach. If then the mortgage of the entire property for the consideration that validly passed between the parties is a valid transaction, there is no foundation for the further contention that the mortgagees have acquired a prescriptive title to the usufructuary mortgage interest of Rs. 24,600. If the defendants were entitled to remain in possession as mortgagees under the valid mortgage for Rs. 7,600 time could not run in

(1) (1908) I. L. R., 35 Calc., 1051. (2) (1906) 10 C. W. N., 932.
(3) (1895) I. L. R., 18 Mad., 126. (4) 97 Ill., 582.

favour of the defendants for the acquisition of a larger interest by their mere assertion of it to the knowledge of the mortgagor. Under the terms of the mortgage instrument exhibit A, interest was payable at 8 annas per cent. per mensem. The usufructuary mortgage of the property was till the principal and interest were paid off. The income of the entire mortgaged property receivable by the mortgagees was fixed at Rs. 1,764, out of which Rs. 1,476 was to be appropriated towards interest, estimated to be due at the rate mentioned and the balance of Rs. 288 towards the Peish kist. If the consideration for the mortgage became void to the extent of Rs 17,000, a proportionate amount of the annual interest would not be payable out of the income fixed, but under section 76 of the Transfer of Property Act, clause 6, the sum was liable to be debited against the mortgagee in reduction of the principal sum due under the mortgage. But whether this is so or not, the question as to what becomes of the available surplus does not affect the relation of mortgagee. Notwithstanding then the invalidity of part of the consideration that the mortgagee's right to possession under the mortgage remains. Article 148 applies to a suit for redemption or for recovery of possession of immoveable property mortgaged. Notwithstanding any assertion by the mortgagee of a larger interest than was validly passed to him under the mortgage. Article 144 has no application where other special provison is made by the Limitation Act for a suit for possession of immoveable property. It cannot be denied that article 148 is such a provision. The mortgagor's right of redemption is not extinguished, and as the whole property had been validly mortgaged the sixty years period under Article 148 applies. This was the decision of the Privy Council in *Khiarajmal* v. *Daim* (1). The mortgagees were bound to pay part of the income of the mortgaged property of which they had possession as a subsistence allowance to the mortgagor. Under an invalid sale the mortgagees purchased the mortgagor's interest though the sale was in somebody else's name *benami* for them. The Privy Council said "as between mortgagor and mortgagee neither exclusive possession by the mortgagee for any length of time short of the statutory period of sixty years nor any acquiescence by the mortgagor not amounting to a release of the equity of redemption

(1) (1905) I. L. R., 32 Calc., 296.

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will be a bar or defence to a suit for redemption if the parties are otherwise entitled to redeem." This view was followed in *Muzaffer Alikhan* v. *Parbati* (1). The same principle was applied in *Ali Muhammad* v. *Lalta Bakhsh* (2), *Rairu Nayar* v. *Moidin* (3) and *Byari* v. *Puttanna* (4). As the mortgagor has a subsisting right to redeem and to recover possession the mortgagee cannot prescribe for a larger interest, we must set aside the decree of the Subordinate Court and remand the case for disposal according to law. The cost hitherto incurred will abide and follow the result.

APPELLATE CIVIL.

Before Mr. Justice Munro and Mr. Justice Abdur Rahim.

1909. November, 26

1910. May, 6. September, 27 November, 23

1911. March, 22.

FAKIR NYNAR MUHAMAD ROWTHER, MINOR BY HIS MOTHER AND NEXT FRIEND, NATHER AMMAL *alias* PATHUMUTHI BIBI (PLAINTIFFS), APPELLANTS,

v.

KANDASAWMY KULATAU VANDAN AND OTHERS, (DEFENDANTS AND LEGAL REPRESENTATIVE OF 1ST DEFENDANT) RESPONDENTS. *

Muhammadan Law—Gift under, Validity of—Transfer of possession when unnecessary—Possession of donor necessary to validate gift.

To make a valid gift under Muhammadan law the donee should be put in possession. But where the donee is a minor at the time of the gift and the donor remains in possession of the property as guardian of the donee on his behalf the gift would be valid under Muhammadan law. Unless the subject matter of a gift is in the possession of a trustee or agent of the donor whose custody is regarded in law as the custody of the donor, the owner of a property, if not in possession, cannot make a valid gift of it or rather a gift made by him, will not pass the ownership to the donee until the donee of the property takes possession by the donor's consent.

SECOND APPEAL against the decree of Lionel Vibert, District Judge of Coimbatore, in Appeal Suit No. 49 of 1906, presented against the decree of D. K. Virasawamy Aiyar, District Munsif of Udamalpet, in Original Suit No. 840 of 1904.

(1) (1907) I. L. R., 29 All., 640 at p. 64. (2) (1878) I. L. R., 1 All., 655.
(3) (1890) I. L. R., 13 Mad., 39. (4) (1891) I. L. R., 14 Mad., 38.

* Second Appeal No. 529 of 1907.