# APPELLATE CIVIL.

1877
*April* 19.

*Before Mr. Justice Pearson and Mr. Justice Spankie.*

DAÍA CHAND AND OTHERS (DEFENDANTS) *v.* SARFRAZ ALÍ AND OTHERS (PLAINTIFFS).*

*Acknowledgment of subsisting right—Act XIV of* 1859, *s.* 1, *cl.* 15—*Act IX of* 1871, *sch. ii, art.* 148—*Limitation—Mortgagor—Mortgagee—Suit for redemption—Onus probandi—Unnecessary proof of mortgage where acknowledgment was made prior to* 1859.

In a suit for redemption of landed property the plaintiffs, representatives of the mortgagors, relied on an acknowledgment of the mortgagors' title contained in an entry in the settlement records of the year 1841 which was attested by the representatives of the mortgagees, defendants in the suit; and the lower Courts having differed as to whether the acknowledgment was sufficient without proof that it was made within sixty years from date of the alleged mortgage, *held*, that inasmuch as there was no limitation to suits for redemption of mortgage of landed property prior to Act XIV of 1859, it was unnecessary to ascertain when the mortgage was effected, the acknowledgment of 1841 being an acknowledgment of a right still subsisting, and one which fulfilled the requirements of art. 148, sch. ii, Act IX of 1871.

THE facts connected with the present case are fully reported in the appeal to the Full Bench of the High Court (1) which confirmed the decision of the Senior Judge of the Division Bench, remanding the case to the Court of first instance for decision on the merits.

The Senior Judge of the Division Bench, in the judgment delivered by him on the 8th April, 1875, observed that whether the plaintiffs' ancestors were the mortgagors, and whether the mortgage was made by them in 1811 for a consideration of Rs. 241, were questions which would have to be determined before it could be decided whether the suit could be maintained, and that even if it were established that the plaintiffs' ancestors were the mortgagors, unless it were shown that the mortgage was not made before 1811, it might be found that the suit was barred by limitation. Relying on these observations, the Munsif who tried the case on the remand held that notwithstanding the acknowledgment of 1841, the plaintiffs

*Special Appeal, No. 1471 of 1876, from a decree of Rai Shankar Das, Subordinate Judge of Saharanpur, dated the 6th November, 1876, reversing a decree of Rai Izzat Rai, Munsif of Muzaffarnagar, dated the 7th August, 1876.

(1) I. L. R., 1 All., 117.

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were bound to prove that the mortgage was effected, as alleged in the plaint, in 1811, and that the acknowledgment of 1841 was, therefore, made within the period of sixty years allowed for redemption. Finding that the documentary evidence of settlement records in the case showed that the settlement of the lands in dispute, along with other lands, had been made from 1211 Fasli (corresponding with the year 1802--1803) with the ancestors of the defendants who then held possession, the Munsif concluded that the plaintiffs' allegation that the mortgage had been effected in 1811 had failed of proof. He, therefore, dismissed the suit on the ground that the acknowledgment of 1841 was insufficient by itself to support the claim for redemption until it was shown to have been made within sixty years from the date of the alleged mortgage. The plaintiffs appealed from this decision, and the Subordinate Judge, holding that the burden of proof as to the acknowledgment of 1841 not having been made within the period of sixty years from the date of the mortgage rested upon the defendants, mortgagees, and finding that the said defendants had failed to prove when the said mortgage was effected, reversed the decision of the Munsif, and decreed the suit for redemption of the property, with costs and interest.

The defendants, in special appeal to the High Court, urged that the Subordinate Judge had wrongly placed the *onus* of proof as to the acknowledgment of 1841, it being incumbent upon the plaintiffs to show when the alleged mortgage was effected, and that the said acknowledgment was made within the statutory period, and that it was not necessary for defendants to prove that such acknowledgment did not operate to renew the period of limitation, the finding of the Subordinate Judge as to the said acknowledgment having been made within sixty years from the date of the mortgage being purely conjectural, and without any evidence on the record to show when the mortgage was effected.

Mr. *Howard*, Babu *Jogindro Nath Chaudhri*, and Lala *Ram Prasad*, for appellants.

Pandits *Ajudhia Nath* and *Bishambhar Nath*, for respondents.

The judgment of the Court was delivered by—

PEARSON, J.—The provisions of cl. 15, s. 1, Act XIV of 1859, relating to suits against a mortgagee for the recovery of immoveable

property mortgaged, were modified by art. 148, sch. ii, Act IX of 1871, principally in this respect, that the acknowledgment in writing of the mortgagor's title or right of redemption, from the date of which a new period of limitation is allowed to commence, is required to be made within the period of limitation originally prescribed and reckoned from the date of the mortgage; the reason of the modification is, I conceive, discoverable by reference to s. 29 of the last mentioned Act, which declares that at the determination of the period limited to any person for instituting a suit for possession of any land, his title to such land shall be extinguished. The intention of the legislature was to allow a further period of limitation to run from the date of an acknowledgment, not of rights already extinct, but only of rights still subsisting.

Before the enactment of cl. 15, s. 1, Act XIV of 1859, there was no limitation to suits for the redemption of mortgage of landed property. In 1841, therefore, when the acknowledgment, found in the settlement record of that year, was made by the defendants in this suit, or their forefathers, that they held the property in suit as mortgagees, there was nothing in the law to preclude the mortgagors from suing for the redemption of the mortgage. In other words, the right acknowledged was a right not extinguished by lapse of time, but still subsisting, the acknowledgment fulfils the intention and satisfies the requisition of the clause in art. 148, sch. ii, Act IX of 1871, modifying the provisions of cl. 15, s. 1, Act XIV of 1859, and renders it unnecessary to enquire and ascertain when the mortgage, acknowledged in 1841, was actually made.

From this point of view, it is immaterial whether the first two pleas in the appeal now before us are good. The plea of *res judicata* set forth in the last ground of the appeal is certainly not established.

The only question remaining for trial was whether the property in suit was mortgaged to the defendants' ancestors by the ancestors of the plaintiffs. That question has been determined in the affirmative by the lower appellate Court whose finding on the point is not impugned by the special appellants.

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I would affirm the lower appellate Court's decree, and dismiss the appeal with cost.

SPANKIE, J.—I am of the same opinion.

*Appeal dismissed.*

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*May* 8.

## APPELLATE CIVIL.

*Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Oldfield.*

NEHALO (APPELLANT) *v.* NAWAL AND OTHERS (RESPONDENTS).*

*Act IX of* 1861, *ss.* 1, 6—*Fresh application—Guardian—Minor—Power to appoint—Previous orders not conclusive.*

A Court is not precluded from entertaining a fresh application for the guardianship of a minor under s. 1 of Act IX of 1861, by the circumstance that a previous application of the same sort has been refused.

IN the year 1872 one Ram Dyal applied to the Judge of Meerut, under Act IX of 1861, for the custody and guardianship of a female minor, alleging that the maternal uncle, with whom the minor then resided, was not a fit and proper person to have charge of her. The Judge refused to grant Ram Dyal's application, and Ram Dyal did not appeal from this order.

The present application to the Judge was made by Musammat Nehalo, wife of the minor's first cousin, praying that the Court would appoint the petitioner guardian of the minor, and remove the minor from the custody of persons who were arranging an improper marriage for her. The Judge rejected the petition, holding that he had no power to deal with the subject-matter of it, under Act IX of 1861, as that Act applied only to minors respecting whose custody or guardianship the Court had passed no order, whereas an order had been passed rejecting Ram Dyal's application in 1872, with respect to the guardianship of the minor in question. The Court considered that it was thus precluded, under the terms of s. 6, Act IX of 1861, from entertaining any fresh application, whilst the order on Ram Dyal's application remained undisturbed.

* Miscellaneous Regular Appeal, No. 17 of 1877, from an order of H. W. Dashwood, Esq., Judge of Meerut, dated the 4th December, 1876.