

On special appeal by the defendants to the High Court it was contended that the claim to the additional plots of land was barred by s. 7, Act VIII of 1859.

Lala *Lalta Parshad* and Babu *Baroda Parshad*, for the appellants.

Pandit *Ajudhia Nath* and Pandit *Nand Lal*, for the respondents.

The judgment of the High Court, so far as it related to this contention, was as follows :

As to the first plea, it would seem that the reason for which the former suit was withdrawn was that a fresh suit might be brought which should include a portion which had been omitted before of the claim arising out of the cause of action, and the permission to bring the new suit must be reckoned to be permission to supply the former omission. This being so, we are of opinion that the additional portion of the claim in this suit is not barred by s. 7, Act VIII of 1859. A similar view was taken in special appeal case No. 180 of 1876, decided by a Bench of this Court on the 28th April last (1).

PRIVY COUNCIL.

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Nov. 3 & 4.

PRESENT :

Sir James W. Colville, Sir Barnes Peacock, and Sir Robert P. Collier.

NARAIN SINGH AND OTHERS (PLAINTIFFS) v. SHIMBHOO SINGH AND OTHERS (DEFENDANTS).

On appeal from the High Court of Judicature, North-Western Provinces.

First and Second Mortgages—Dispossession of Second Mortgagee—Cause of Action—Limitation—Interest.

Z, being indebted to *A*, executed in his favour a written mortgage of certain lands, in which it was agreed that if the debt was not repaid within a fixed time *A* should be put into possession of the lands. Subsequently *Z* executed in favour of

(1) In that case the application for permission to withdraw the former suit was based on the ground that a portion of the claim arising out of the cause of action had by mistake been omitted to be included in the plaint with which that suit had been commenced, and on that ground permission for the withdrawal of the suit, and to bring a fresh suit, was accorded. Under these cir-

cumstances the Court (Pearson and Spangie, J.J.) was of opinion that it would not be fair or reasonable to hold that the aforesaid portion of the claim could not be entertained in the fresh suit, although it might be true that the defect in the former plaint might have been amended without recourse to the provisions of s. 97 of Act VIII of 1859.

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P, to whom also he owed money, a second mortgage of the same lands subject to the same condition. *P* not receiving payment within the stipulated time, sued *Z* on the mortgage and obtained a decree for possession of the lands, under which he was put into possession in the year 1846. After *P* had obtained his decree, *A*, whose debt had likewise remained unpaid, brought a suit as first mortgagee against *Z* and *P* for the possession of the lands, and obtaining a decree, recovered possession in the year 1847, dispossessing *P*. In the year 1870, the heirs of *Z* having paid off the debt due to *A*, resumed possession, whereupon the heirs of *P* applied to be restored to possession in execution of the decree obtained by *P* in 1846. This application having been rejected on the ground that that decree had been fully executed when *P* obtained possession under it, the heirs of *P* instituted a suit against the heirs of *Z* to recover possession and for interest during the time they were dispossessed.

Held by their Lordships of the Judicial Committee, reversing the decision of the High Court, that the heirs of *P* were entitled to possession on *A*'s mortgage being paid off, and that their cause of action accrued and limitation ran against them from the time when the heirs of *Z* resumed possession.

Held, also, that they were not entitled to a decree for the interest accruing during the time they were dispossessed.

This was an appeal from a decree of a Division Bench of the High Court at Allahabad, dated the 13th May, 1873, reversing the decree of the Subordinate Judge of Aligarh, dated the 23rd November, 1872 (1).

Mr. *Doyle* appeared for the appellants, who were the plaintiffs in the original Court.

Mr. *Joseph Graham* appeared for the respondents.

The facts of the case and the questions arising for determination on the appeal are fully stated in their Lordships' judgment, which was delivered by

SIR BARNES PEACOCK.—In this case the plaintiffs, as sons and heirs of Pohoop Singh, a mortgagee, seek to recover possession of 20 biswas of the zemindari right of mauza Lalipoor. The defendants in the suit are the representatives of the mortgagor. The plaintiffs state that they claim to establish their right as mortgagees in virtue of their title as heirs of their defunct father, Pohoop Singh, "in that, under a mortgage-deed dated Phagoon Badi 7th, Sumbut 1896, Pohoop Singh, the ancestor of the plaintiffs, having obtained a decree from the Sudder Ameen's

(1) See H. C. R., N.-W. P., 1873, p. 163.

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Court, was put in possession on the 31st August, 1846." Most of the defendants admit the claim, but the defendants Man Singh, Shimboo, Girdharee, and Motee, put in an answer, by the second paragraph of which they admitted that under the former decree the plaintiffs' ancestor was in possession for upwards of a year; but they set up, in the fourth paragraph of the same written statement, that "the mortgage alleged by the plaintiffs is wholly unfounded. The defendants' ancestor did not receive the mortgage-money from the ancestor of the plaintiffs; and Pohoop Singh, the ancestor of the plaintiffs, was a person notorious for his expertness in court affairs. He had, with a view to deprive Asaram and Sheo Lall of their mortgage-money, obtained by deception a decree on the mortgage-deed in suit; and the defendants' father had, according to the Shasters, no right to transfer and waste the defendants' ancestral property without any legal necessity to satisfy illegal demands. Hence, under the Shasters also, the mortgage alleged by the plaintiffs is invalid, and the claim is unjust."

Now, having admitted that the plaintiffs did obtain possession. by virtue of a decree, and that he remained in possession for a year, the defendants also, in the same written statement, alleged that the mortgage was collusive and a benami transaction. But although the written statement must be taken altogether, it does not necessarily follow that the whole of the defendants' statement is to be taken as proved in their favour, if they offer no evidence whatever in respect of the allegation that the mortgage was a fraudulent transaction.

It appears, then, that the plaintiffs' ancestor did get into possession on the 31st August, 1846. In 1847 he was dispossessed in a suit which was brought against him by the first mortgagees, Asaram and Sheo Lall. He was then turned out of possession, and remained out of possession from 1847 down to the year 1870. The precise terms of the mortgage-deed do not appear, but, as far as can be collected, it was a mortgage-bond, by which it was stipulated that in the event of the non-payment of the mortgage debt within five years, the mortgagors would cause a mutation of names, and the plaintiffs be put into possession.

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It appears that the plaintiffs' ancestor did get possession under that document, and it appears to their Lordships that the decree obtained upon that document gave the plaintiffs as mortgagees a title to the land as against the defendants, but it gave them no title as against the prior mortgagees, Asaram and Sheo Lall. When Asaram and Sheo Lall turned the plaintiffs' ancestor out of possession, it did not destroy his title and right to the land. It may have given him a right of action as against the mortgagors for having mortgaged to him when they had previously mortgaged to Asaram and Sheo Lall, but it did not destroy the right which the plaintiffs obtained against the defendants by virtue of the mortgage and of the judgment which they had obtained upon it.

The first Court laid down certain issues : first, whether the original mortgagors executed the mortgage-deed in respect of the property in suit on receiving the full mortgage-consideration, or whether it was collusively secured without payment of any mortgage-consideration, and whether the mortgage-deed could take effect against the defendants according to the Hindu law. The Judge says in his judgment:—"It is apparent that plaintiffs' predecessor on the former occasion obtained a decree for possession on proving the mortgage-deed, and the payment of mortgage-consideration ; and the fact of the decree having been made is admitted by defendants. Again, all the defendants, excepting four, two of whom have made no defence, confess the claim, which is further supported by the evidence of Maulvi Inayat Ali, pleader, Chunni Lall, patwari, and two other persons, both named Hulasi, witnesses for plaintiffs. The plea urged by defendants must therefore be over-ruled ; and they have failed to refute the claim." He therefore gave a decree in favour of the plaintiffs.

Upon that an appeal was preferred by Shimbhoo alone to the High Court ; and one of his grounds of appeal is that there was "no cause of action and foundation for the plaintiffs' suit ; neither the deed of mortgage nor the decree has been produced ; the conditions agreed upon between the parties cannot be ascer-

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tained." The High Court, having heard the case argued, gave judgment, and reversed the decision of the first Court. They say that "the High Court's order of the 1st April, 1872, could not give any legitimate cause of action (1). Nor did any right of action accrue to the plaintiffs by reason of the satisfaction of the debt of Asaram and Sheo Lall, and the recovery of possession of the estate by the mortgagors or their heirs." It appears to their Lordships that there was a mistake on the part of the High Court in holding that no cause of action accrued to the plaintiffs, by reason of the satisfaction of the debt of Asaram and Sheo Lall, and the recovery of possession of the estate by the mortgagors or their heirs. It appears to their Lordships that when the first mortgage was paid off in 1870 the title of the plaintiffs, which had all along been a good title as against the mortgagors, was a valid title as against every one. Then when their title became a valid and a good title the mortgagors had no right to enter upon the possession of their land. But the mortgagors did enter into possession of it and keep the possession from the plaintiffs; and it appears to their Lordships, that having the right and title to the land when the first mortgage was paid off, the entry of the mortgagors upon that land to which the plaintiffs had obtained a right under the second mortgage gave them a cause of action against the mortgagors, the defendants. The Court proceed: "The right of the plaintiffs or their forefather to possession was created by the mortgage-deed of 1840, and was capable of being legally enforced within a period of twelve years. It was the subject of a former suit and of a decree which was fully executed." So it was; but then that decree gave the plaintiffs a title. The High Court proceeded: "The dispossession of Pohoop Singh after the execution of that decree was not an illegal proceeding." It is true it was not an illegal proceeding, because he was dispossessed by persons who had better title, namely, the first mortgagees. The Court go on: "Although he was thereby deprived of the right he had obtained,

(1) Before bringing their suit the plaintiffs had endeavoured to recover possession of the lands by applying for execution of the decree obtained by Pohoop Singh in 1846. The "High Court's order of the 1st April, 1872,"

here referred to, rejected that application on the ground that Pohoop Singh's decree had been fully executed when, in 1846, he was put in possession of the land.

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he had a remedy, of which he might have availed himself, by suing within the proper period for the recovery of the money lent by him to the mortgagors. The present suit is clearly inadmissible, and cannot be decreed even against the confessing defendants."

The High Court held that the plaintiffs' suit was barred by limitation.

It appears, however, to their Lordships, that the plaintiffs having a good title when the first mortgagees were paid off in 1870, their cause of action accrued when the defendants after that period entered into possession of the estate to which they had no title. It appears, therefore, to their Lordships, that there was an error in the decision of the High Court so far as it regards the question of limitation.

But it is said that there was no sufficient evidence that the decree had been obtained by Pohoop Singh, the plaintiffs' ancestor. In the first place, as already stated, the written statement of the defendants admits that there was that former decree. They say that "under the former decree the plaintiffs' ancestor was in possession for upwards of a year," and then he was turned out by the first mortgagees. Again, when Asaram and Sheo Lall, the first mortgagees, brought an action against the second mortgagee, Pertab Singh, the ancestor of the plaintiffs, and Lulloo and others, the zemindars, the mortgagors were also made parties to that suit. And in that suit it appears that the decree of Pertab Singh against the zemindars was in evidence. The Sudder Court says:—"The plaintiffs sued Lulloo and others, zemindars of the above-named village, for possession on a mortgage-bond dated the 18th Kowar, 1859 Sumbut; but in consequence of their having omitted to specify the nature of the tenure, they were nonsuited. Pohoop Singh also sued the zemindars on a mortgage-bond, and obtained a decree, which was upheld in appeal." There was a finding then in that case that Pohoop Singh did sue the zemindars on the mortgage-bond, and that he obtained a decree against them. Further, when the first mortgage had been paid off, and the plaintiffs had

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been dispossessed by the mortgagors, they attempted to execute a second time the decree which their ancestor had obtained against the mortgagors, and they applied to the Court for an execution of that decree. The Munsif decided that they were entitled to have an execution. In that suit, Shimbhoo, who is the present defendant, was one of the parties, and in that case the judgment was produced. The Munsif says:—"The record of the case having been brought forward, it appears that the objection of the defendants, judgment-debtors," that is, Shimbhoo, one of the present defendants, "is that Pohoop Singh, the original decree-holder and deceased ancestor of the plaintiffs, had been put in possession by the Court after the passing of the decree." It appears, therefore, to their Lordships, that there is sufficient evidence in the cause to justify the first Court in coming to the conclusion that the plaintiffs were mortgagees, and that they obtained possession under a decree founded upon that mortgage.

The judgment of the High Court being erroneous, it becomes necessary to consider whether the decision of the first Court can be maintained to the full extent.

Now the claim made in the plaint is "to recover possession as mortgagees over the entire 20 biswas zemindari right of mauza Lallpoor, pargana Goree, within the jurisdiction of the Iglass Tahsili, valued at Rs. 5,000,"—the valuation is not a matter of importance,—“the principle amount of the mortgage-loan, and to recover Rs. 6,999-15-0 interest thereon during the period of the mortgagee's dispossession, as per detail given below, aggregating Rs. 11,999.” Now the plaintiffs, although they were turned out of the land, might have sued for the interest. All that they are entitled to, as it appears to their Lordships, is to recover possession of the land; and when they have got possession of the land, if the mortgagors apply to redeem, the question will be—how much is due to the plaintiffs as mortgagees under their mortgage, and how much they are entitled to receive before the mortgagors can redeem? The Judge of the first Court appears to have given them a decree not only for possession of the land, but also for 6,999 rupees interest, in addition to the possession of the land. His judgment is not very clear, but it is necessary to make the point perfectly clear as to

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what the judgment ought to be. He says:—"Claim to recover possession as mortgagees over the entire 20 biswas zemindari right in mauza Lallpoor, pargana Goree, valued at Rs. 5,000, principal of the mortgage-loan, and Rs. 6,999-15-0 interest on the mortgage-amount." Then he says:—"Ordered that plaintiffs' claim be decreed with costs against the defendants, that the pleaders get their fees." Then he says:—"Subject-matter of decree. Recovery of possession as mortgagees over the entire 20 biswas right in manza Lallpoor, pargana Goree, valued at Rs. 5,000, the principal amount of the mortgage-loan, and of Rs. 6,999-15-0 interest on the mortgage-amount for the period of the plaintiffs' dispossession: total Rs. 11,999-15-0." If by that decree the lower Court intended to give the plaintiffs a decree not only for recovery of the possession of the land, but also to recover Rs. 6,999 in money as interest, it appears to their Lordships that that judgment, so far as giving a decree for the money as interest is concerned, was erroneous.

Their Lordships therefore think that the decision of the High Court ought to be reversed, and that the decision of the first Court should be modified by confining the recovery of the plaintiffs merely to the possession of the land. In that case, the plaintiffs having got possession of the land, the question, as before observed, will remain open until the defendants seek to redeem the land. Then the question will arise—how much is due to the plaintiffs as the second mortgagees, and for what amount they are entitled to hold possession of the land under their mortgage?

Their Lordships, therefore, upon the whole, will humbly recommend Her Majesty to reverse the decree of the High Court, and to affirm the decision of the lower Court, so far only as it decrees possession to the plaintiffs of the land sought to be recovered in the suit. Their Lordships are also of opinion that the appellants are entitled to the costs of this appeal.

Agent for the appellants: Mr. T. L. Wilson.

Agents for the respondents: Messrs. Oehme and Summerhays.