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June 8.

Before Mr. Justice Straight, Offy. Chief Justice, and Mr. Justice Tyrrell.

SITLA BAKHSH, MINOR BY HIS GUARDIAN PUNNO KUAR, AND
ANOTHER (DEFENDANTS) v. LALTA PRASAD (PLAINTIFF) *

Mortgage—Mortgage by conditional sale—Foreclosure—Suit for possession of mortgaged property—Regulation XVII of 1806, s. 8—Conditions precedent—Demand for payment of mortgage-money—Proof of service of notice—Proof of notice being signed by the Judge—Proof of forwarding copy of application with notice—Act IV of 1882 (Transfer of Property Act).

The provisions as to the procedure to be followed in taking foreclosure proceedings under Regulation XVII of 1806 are not merely directory, but strict satisfaction of the prescribed conditions therein laid down precedes the right of the conditional vendee to claim the forfeiture of the conditional vendor's right, and the various requirements of that section have to be strictly observed in order to entitle a mortgagee to come into Court, and, upon the basis of the observance of those requirements, to assert an absolute title to the property of the mortgagor. *Norender Narain Singh v. Dwarka Lall Mundur* (1) and *Mudho Pershad v. Gajadhar* (2) followed.

In a suit for possession of immoveable property by a conditional vendee under a deed of conditional sale, alleged to have been foreclosed under Regulation XVII of 1806, it appeared that, except a recital in the application for foreclosure itself, there was nothing to show that any preliminary demand was ever made upon the mortgagors for payment of the mortgage-debt; that there was no proof of the "notice" itself having been served upon the mortgagors, which it lay upon the plaintiff to establish; that there was nothing to show that the notice which was issued was signed by the Judge to whom the application was made; and that it was not proved that a copy of the application was forwarded along with the notice to the mortgagors, or that its terms were ever brought to their knowledge.

Held, applying to the case the principles stated above, that the provisions of Regulation XVII of 1806 had not been satisfied, and that the plaintiff had not fulfilled his obligation, namely, to prove affirmatively that those provisions were strictly followed.

Held also that to treat the suit as one instituted under the Transfer of Property Act, and to allow the plaintiff to obtain such relief as he would be entitled to by that Act, would be to countenance an entire change in the nature and character of the suit as it was originally instituted, and that this was not sanctioned by the law.

THE plaintiff in this case claimed possession of an eight annas share of a village called Bharauli as the conditional vendee under a deed of conditional sale, dated the 13th December 1864, which

* First Appeal No. 145 of 1885, from a decree of Syed Farid-ud-din Ahmad, Subordinate Judge of Cawnpore, dated the 15th January, 1885.

(1) I. L. R., 3 Calc. 397; L. R., 5 Ind. Ap. 18.

(2) I. L. R., 11 Calc. 111; L. R., 11 Ind. Ap. 186.

had been foreclosed under Regulation XVII of 1806. He stated in his plaint as follows :—

“ An application for foreclosure was presented on behalf of the plaintiff on the 12th June, 1832, regarding an eight annas zamindari share of the said village, excepting the eight annas zamindari share owned and possessed by himself, and after deducting Rs. 780 received on account of interest, that application was valued at Rs. 20,387-4-0. But the mortgage-money, including principal and interest or any portion thereof, was not deposited on behalf of any defendant, in consequence of which the plaintiff, at the end of the usual year of grace, became absolute owner, entitled to the proprietary possession of the remaining eight annas zamindari share, together with all the rights and interests appertaining thereto. The plaintiff acquired that on the 10th July, 1833, the date on which the year of grace expired; but the defendants, who are in possession, have not delivered possession, but have refused to do so, and that is the date on which the cause of action accrued.”

The Court of first instance (Subordinate Judge of Cawnpore) gave the plaintiff a decree for possession of the property. The defendants Sitla Bakhsh (a minor represented by his mother and guardian,) and Sonidha Kuar appealed to the High Court, impugning the decree on grounds which are stated in the judgment of the Court.

Mr. C. H. Hill, Pandit Sundar Lal, Pandit Bishambhar Nath and Pandit Nawal Bihari, for the appellants.

Mr. Habibullah, Pandit Ajudhia Nath and Munshi Kashi Prasad, for the respondent.

STRAIGHT, Offg. C. J.— This is an appeal from a decision of the Subordinate Judge of Cawnpore, passed upon the 15th January, 1885. There were several defendants to the suit, but we are only concerned in the appeal to this Court with one Sitla Bakhsh, a minor, who is represented by his mother, Musammat Panno Kuar, as his guardian *ad litem*, who is the sole appellant. The suit was brought by the plaintiff-respondent, as the proprietor of eight annas in a certain property, to obtain possession of that property, on the basis of a document of the 13th December, 1864, which, the plaintiff contends, amounted to a conditional sale-deed, and certain foreclosure proceedings taken thereon. It is, in fact, upon the strength of a statutory title, which he says that he obtained by the operation of Regulation XVII of 1806, that he claims to be entitled to possession of the property to which he lays claim. Now the relief which is asked in the plaint is that “ a decree for proprietary possession of eight annas zamindari share out of the entire

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sixteen annas zamindari in mauza Bharauli, pargana Bindki, tahsil Kaliyanpur, in the Fatehpur district, with all the rights appertaining to the aforesaid zamindari, may be passed in the plaintiff's favour against all the defendants by actual dispossession of Pahlwan Singh, Sitla Bakhsh, Musammatt Ohhogar Kuar, and Lala Har Prasad, defendants, and by extinction of the rights of the above-named defendants, by protecting the right of Sheo Ram defendant, and declaring the want of title of Balmukand, *pro forma* defendant." It is therefore quite clear from the mode in which this suit was presented in the Court below, that it was a suit based upon the statutory title which the plaintiff alleged he obtained under the Regulation I have already mentioned, and it was for the possession of the property upon the strength of that statutory title. Hence it follows that unless it is clearly and satisfactorily established that the provisions of the 8th clause of Regulation XVII of 1806 were satisfied, the plaintiff cannot succeed in the present suit. The case has taken considerable time in argument, but has not been unnecessarily protracted, because the points that have been raised by the learned counsel for the appellant were well worthy of attention. The first contention was, that the father of Sitla Bakhsh, the appellant, having purchased at an auction-sale held in execution of a decree obtained upon a bond of 1859, which was prior in date to the mortgage or conditional sale-deed upon which the plaintiff claims, he therefore had a prior lien to the plaintiff, and was entitled to remain in possession of the property as being the owner of a prior charge. I have already indicated that in regard to that contention of the learned counsel for the appellant, it appears to me to turn upon a question of fact, namely, whether the purchase by the father of Sitla Bakhsh was made at a sale in execution of a decree passed upon an instrument which created a prior charge to that of the plaintiff. Now, as a matter of fact, it seems to me that the Subordinate Judge was right in the conclusions at which he arrived, and has correctly held that, regarding all the circumstances, the sale at which the appellant's father purchased the share in this very village was a sale in execution of the simple money-decree, which had been obtained by one Har Dayal and some one else against Gulab Rai and Kishen Dayal. I therefore, as regards this contention, was against the

learned counsel for the appellant, and did not require to be addressed on this point by the learned Pandit who appears for the respondent. The next objection taken was that, upon a true construction of this deed of the 13th December, 1864, the instrument was not in the nature of a conditional sale, and that it was nothing more nor less than a simple mortgage, which, under certain circumstances, could and would become a usufructuary mortgage. Of course, if this construction is a well-founded one, it is obvious that this suit, which is a suit for possession of the property under a title created by the foreclosure proceedings of 1882, cannot succeed, and that we have no power to decree possession to the plaintiff as a usufructuary mortgagee. I think, however, it will be best for me, assuming for the purpose that the document constituted a conditional sale, to deal with the case in reference to the third contention of the appellant's learned counsel, which is based upon the informality or rather invalidity of the foreclosure proceedings taken by the plaintiff. I adopt this course in order to avoid the possibility of conflict between two Division Benches of this Court as to the construction to be placed upon the instrument of the 13th December, 1864, for though I do not wish to commit myself definitively to the opinion, I confess I entertain grave doubts as to whether it was correctly held on a former occasion that that document did amount to a conditional sale. I will, however, not dispose of the case upon that ground, because even assuming it to be the instrument contended for by the plaintiff, I think the suit fails by reason of the conditions precedent of the Regulation XVII of 1806 not having been satisfied. It may be taken as undoubted law, which their Lordships of the Privy Council have laid down in the most explicit terms in *Norender Narain Singh v. Dwarka Lall Mundur* (1) and *Madho Pershad v. Gajadhar* (2), that the provisions as to the procedure to be followed in taking foreclosure proceedings under Regulation XVII of 1806 are not merely directory, but that strict satisfaction of the prescribed conditions therein laid down precedes the right of the conditional vendee to claim the forfeiture of the conditional vendor's right; and it is clear, not only by these decisions of their Lordships, but by a long course of decisions of this and other Courts in India, that the various requirements of that

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section have to be strictly observed in order to entitle a mortgagor to come into Court, and upon the basis of the observance of the requirements of that section to assert an absolute title to the property of the mortgagor. In this case there is no evidence that the requirements of the 8th clause of the Regulation have been complied with. First, there is nothing to show, except a recital in the application itself, that any "demand" was ever made upon the mortgagors for payment of the mortgage-debt. As to the necessity of this preliminary demand, there are rulings of this Court to be found in *Behari Lal v. Beni Lal* (1) and *Karan Singh v. Mohan Lal* (2), and an unreported ruling of the late Chief Justice and Mr. Justice Duthoit in First Appeal No. 50 of 1884. Next, there is no proof of the "notice" itself having been served upon the mortgagors, which it lay upon the plaintiff to establish. Further, there is nothing to show that the notice which was issued was signed by the Judge to whom the application was made. Indeed, it would seem not to have been, nor is it proved that a copy of the application was forwarded along with the notice to the mortgagors, or that its terms were ever brought to their knowledge. Without referring in detail or dealing at length with the reasons given by their Lordships in the two rulings of the Lords of the Privy Council to which I have referred, it seems to me that, applying the principles of these rulings to the facts before us, we have no alternative but to hold that the provisions of the Regulation have not been satisfied, and that the plaintiff has not fulfilled his obligation, namely, to prove affirmatively that those provisions were strictly followed. These observations are sufficient for the purpose of dealing with this appeal.

Before leaving the matter, however, I must refer to the suggestion made by the learned Pandit for the respondent that we should treat this suit as one instituted under the Transfer of Property Act, and that we should allow his client to obtain such relief as he would be entitled to by that Act.

I cannot adopt this suggestion. To do so would be to countenance an entire change in the nature and character of the suit from the shape in which it was originally instituted, and this I do not think is a course sanctioned by law.

(1) I. L. R., 3 All. 408. (2) I. L. R., 5 All. 9.

The appeal must be, and is, decreed. The plaintiff's suit will stand dismissed with reference to the interests of Sitla Bakhsh and Musammat Sonidha Kuar with costs in proportion in this Court and in the lower Court.

TYRRELL, J.—I entirely concur.

Appeal allowed.

Before Mr. Justice Oldfield and Mr. Justice Mahmood.

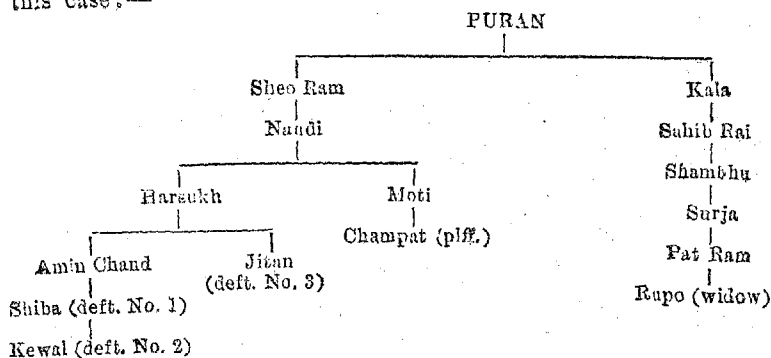
CHAMPAT (PLAINTIFF) v. SHIBA AND ANOTHER (DEFENDANTS)*

Hindu Law—Stridhan—Succession.

Upon the death of a childless Hindu widow who had been married in one of the four approved forms of marriage, S, one of the collateral relatives of her husband, stating that his minor son had been adopted by her, obtained possession of certain property which had formed her *stridhan*, and mutation of names was effected in the minor's favour in the revenue records. A suit was instituted against S and his son by C, on the allegation that he and J, who were collateral relatives of the widow's husband, were entitled, under the Hindu Law, to succeed in moieties to the properties left by her as her *stridhan*, and claiming recovery of possession of half her property. In defence, the adoption was pleaded, and another plea was that the widow had left a brother, who in the absence of the adoption, would succeed to the property to the exclusion of the plaintiff. The Court of first instance held that the alleged adoption had not been proved. In the lower appellate Court the plea as to adoption was given up.

Held that, upon the facts found, the plaintiff was the heir of the deceased widow, and as such entitled to succeed to her *stridhan* under the Hindu Law. *Thakoor Deyhee v. Daluk Ram* (1) followed. *Munia v. Puran* (2) distinguished.

The following table shows the relationship of the parties to this case:—



* Second Appeal No. 1442 of 1885, from a decree of C. W. P. Watts, Esq., District Judge of Saharanpur, dated the 16th July, 1885, reversing a decree of Maulvi Syed Tajammul Husain, Munsif of Shamli, dated the 8th December, 1884.

(1) 11 Moo. I. A. 135. (2) I. L. R., 5 All. 310.