1886

QUEEN-EMPRESS v. JANKI PRASAD.

it was delivered to execute it. He would in fact have failed in his duty in not executing it; and any resistance to him will be resistance to a public servant in the execution of his duty as such. The officer was acting under s. 353 of the Indian Penal Code, in good faith, under colour of his office. I may notice as bearing on the question that the act of the accused does not cease to be an offence on the ground that the act was done in the exercise of the right of private defence, as there is no such right under s. 99, Indian Penal Code, against an act done or attempted to be done by a public servant acting in good faith under colour of his office, though that act may not be strictly justifiable by law. Looking to the facts of the case, I am of opinion that the option of a fine may be given, and I alter the sentence in each case to a fine of Rs. 10, or rigorous imprisonment for one month.

Conviction affirmed.

APPELLATE CIVIL.

1886
May 4.

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

NURA BIBI (PLAINTIFF) *v.* JAGAT NARAIN AND OTHERS (DEFENDANTS) *

Mortgage—Joint mortgage—Redemption by one mortgagor—Suit by other mortgagor for his share—Suit for redemption—Act IV of 1882 *(Transfer of Property Act), ss.* 95, 100—*Limitation—Act XV of* 1877 *(Limitation Act), sch* ii, *Nos.* 134, 148—*Burden of proof.*

K and *J* jointly mortgaged 36 sahams or shares of an estate to *C*, giving him possession. *C* transferred his rights as mortgagee to *T* and *M*. In execution of a decree for money against *K* held by *M*, *K's* rights and interests in the mortgaged property were sold, and were purchased by *P*, whose heirs paid the entire mortgage-debt. *R*, an heir of *J*, sued the heirs of *P*, to recover from them possession of *J's* sahams in the mortgaged property, on payment of a proportionate amount of the mortgage-money paid by *P*. The plaintiff alleged that the mortgage to *C* had been made forty years before suit. The defendants contended that a much longer period had expired since the date of the mortgage, that forty-one years had elapsed since *C* transferred his rights as mortgagee, that they had redeemed the property twenty-one years ago and had been since its redemption in proprietary and adverse possession of the sahams in suit, and that the suit was barred by limitation. Neither party was aware of the date of the mortgage, and neither adduced any proof on the point.

* Second Appeal No. 1098 of 1885, from a decree of F. E. Elliot, Esq., District Judge of Allahabad, dated the 26th June, 1885, reversing a decree of Rai Pandit Indar Narain, Munsif of Allahabad, dated the 2nd January, 1885.

1886

NURA BIBI v. JAGAT NARAIN.

Held, applying the equitable principle adopted in ss. 95 and 100 of the Transfer of Property Act (IV of 1882), that the owner of a portion of a mortgaged estate which has been redeemed by his co-mortgagor, has the right to redeem such portion from his co-mortgagor, and a suit brought for that purpose would be in the nature of a suit for redemption, and would naturally fall within the definition of No. 148, sch. ii of the Limitation Act (XV of 1877), and it was not possible for one of two mortgagors, redeeming the whole mortgaged property behind the back of the other, to change the position of that other to something less than that of a mortgagor, or to abridge the period of limitation within which he ought to come in to redeem.

Held, therefore, that No. 148 and not No. 134 of sch. ii of the Limitation Act was applicable to the suit.

Umrunnissa v. *Muhammad Yar Khan* (1) distinguished. *Pancham Singh* v. *Ali Ahmad* (2) referred to.

Held also that the defendants being admittedly in possession, though the existence of a mortgage as the origin of their possession was conceded by them, it lay upon the plaintiff to give *primâ facie* proof of the subsistence of that mortgage at the date of suit, but that assuming that notice was given to the defendants by the plaintiff to produce the mortgage-deed, and that they failed to do so, very slight evidence would have been sufficient to satisfy the obligation which lay on the plaintiff. *Kishan Dutt Ram* v. *Narendar Bahadoor Singh* (3) referred to.

THE facts of this case were as follows:—Two Muhammadan ladies, named Khuban Bibi and Jan Bibi, owned respectively 31 sahams or shares and 5 sahams or shares of a certain estate. They jointly mortgaged the 36 shares to one Chitu, giving him possession. Chitu transferred his rights as mortgagee to persons called Teja Bibi and Makhdum Bakhsh. Makhdum Bakhsh held a decree for money against Khuban Bibi, and he caused her rights and interests in the property to be put up for sale in execution of that decree, and the same were purchased by one Panna Lal, whose heirs paid the mortgage-debt. The plaintiff in this case was the heir of Ramzan, one of the heirs of Jan Bibi. She claimed to recover from the heirs of Panna Lal possession of Jan Bibi's 5 sahams, on payment of a proportionate amount of the mortgage-money paid by Panna Lal.

The plaintiff alleged that the mortgage to Chitu had been made forty years before suit.

The defendants set up as a defence that a much longer period than forty years had expired since the date of the mortgage; that

(1) I. L. R., 3 All. 24. (2) I. L. R., 4. All. 58.
(3) L. R., 3. Ind. Ap. 85.

forty-one years had passed since Chitu had transferred his right as mortgagee ; that they had redeemed the mortgage 21 years ago, and had been since its redemption in proprietary and adverse possession of the shares in suit ; and that the suit was barred by limitation.

The Court of first instance (Munsif of Allahabad) gave the plaintiff a decree, applying No. 148, sch. ii of the Limitation Act, and holding as follows on the question of limitation :—

"The plea of limitation which has been set up is, in the opinion of the Court, untenable. To render a claim barred by limitation it is necessary that full sixty years should elapse after the expiry of the term of the mortgage. The defendants do not know when the mortgage was originally made to Chitu. The plaintiff also is unaware of this. The burden of proving that sixty years have elapsed, however, rests with the defendants ; but they have failed to adduce any proof and therefore the plea set up by them fails. The burden of proof is thrown on the defendants for two reasons—(i) because they affirm a fact which the plaintiff denies, and (ii) because the burden of proof rests with the party which would be the loser if no evidence were given by either party. The law takes great care that mortgaged property should not pass from the hands of the original owners to the hands of strangers. The defendants try to create their proprietary title in the property, and therefore the burden of proof should be thrown on them."

The defendants appealed, contending that the suit was governed by No. 134, and not No. 148, of the Limitation Act ; and that the burden of proof as to limitation was on the plaintiff, and not on them.

The lower appellate Court (District Judge of Allahabad) held on these points as follows :—

"With regard to the first of these two contentions, the appellants seek to show that art. 148 applies only to an original mortgagee, and not to others to whom a mortgage has been transferred, and that as the defendants-appellants, if not, as they assert, proprietors, must be held to have purchased the mortgage from the

1886

NURA BIBI v. JAGAT NARAIN.

mortgagees, the case comes under art. 134 and is governed by the twelve years' period of limitation. No authority has been cited in support of this contention, and I am unable to see that the plaintiff-respondent is other than the owner of an equity of redemption, suing a mortgagee to redeem or recover possession of immovable property, or that the circumstances, as stated above, deprive the plaintiff-respondent of the longer period of limitation prescribed by art. 148.

"But on the second point I hold the lower Court's finding to have been mistaken. The *onus* lies on the plaintiff, and not on the defendants-appellants. I quite concur in the finding that the defendants cannot be said to have had proprietary possession. They purchased the equity of redemption of Khuban's shares only, not of those of Jan Bibi's; and the fact that the mortgage was executed jointly by Khuban and Jan, and that the appellants paid off the whole, does not seem to give them any better position than that of mortgagees in respect of Jan Bibi's shares. They acquired in those shares the right of the mortgagee and nothing more.

"But it is clearly the duty of the plaintiff to prove that the suit has been instituted within sixty years of the time when the right to redeem accrued. Her suit is possible only under art. 148, and she has therefore come into court on the averment implied in its conditions: neither the fact that the averment is challenged by the defendants, or that they admit a mortgage, seems to me to shift the burden on to them.

"The point was not made the subject of a clear issue by the lower Court, though considered in its decision and presumably argued before it. The plaintiff-respondent's pleader has been offered, and has declined, further opportunity of adducing proof. It is apparent that the plaintiff-respondent is in fact unable to give such proof. She stated in her plaint that the original mortgage took place forty years ago, but the defendants-appellants have proved that forty-one years have elapsed since the transfer by Chitu, the original mortgagee, to Teja Bibi and Makhdum Bakhsh.

"Under these circumstances, I am of opinion that the plaintiff-respondent's suit must fail."

The plaintiff appealed to the High Court.

Pandit *Sundar Lal*, for the appellant.

Babu *Jogindro Nath Chaudhri*, for the respondents.

STRAIGHT, Offg. C.J., and TYRRELL, J.—We think the lower Courts were right in holding that the period of limitation applicable to a suit of this nature is that provided by art. 148 of Act XV of 1877. It was so decided by Pontifex, J., in an unreported Calcutta case mentioned on page 162 of Mr. Mittra's excellent work on Limitation; and our only difficulty is a Full Bench ruling of this Court in *Umrunnissa* v. *Muhammad Yar Khan* (1), which at first sight appears to be at variance with this view. Upon examination, however, it will be seen that the applicability of art. 148 to the facts of that case was never raised or considered, the arguments and *ratio decidendi* being confined to the question of whether, assuming art. 144 to supply the limitation, there had been adverse possession on the part of the defendants which would defeat the plaintiff's suit. It was held that there had not; but beyond this the decision did not and could not go, and the point now before us may therefore be regarded as *res integra*. In the ruling of Pontifex, J., above adverted to, that learned Judge speaks of the co-mortgagor who redeems the entire mortgage as "standing in the shoes of the mortgagee" in respect of such portion of the redeemed property as belongs to the other mortgagor, and this Bench decided much to the same effect in *Pancham Singh* v. *Ali Ahmad* (2). The equitable principle recognised in these rulings is now embodied in s. 95 of the Transfer of Property Act, which declares that "where one of several mortgagors redeems the mortgaged property and obtains possession thereof, he has a charge on the share of each of the other co-mortgagors for his proportion of the expenses properly incurred in so redeeming and obtaining possession." What that charge carries with it is explained in s. 100 of the same statute, which says that, where "by operation of law the immoveable property of one person is made security for the payment of money to another, all the provisions hereinbefore contained as to a mortgagor shall, as far as may be, apply to the owner of such property, and the provisions of ss. 81 and 82 and all

(1) I. L. R., 3 All. 24. (2) I. L. R., 4 All. 58.

1886

NURA BIBI v. JAGAT NARAIN.

the provisions hereinbefore contained as to a mortgagee instituting a suit for the sale of the mortgaged property shall, so far as may be, apply to the person having such charge." We only refer to these provisions, which cannot govern the mortgage in the present case, which was long antecedent to the Transfer of Property Act, by way of analogy ; but applying the equitable principle that they adopt, the effect is the same, namely, that the owner of a portion of a mortgaged estate, which has been redeemed by his co-mortgagor and in its entirety, has the right to redeem such portion from his co-mortgagor, and a suit brought for that purpose will be in the nature of a suit for redemption. Such a suit naturally falls within the definition of art. 148 of Act XV of 1877, and we fail to appreciate how it is possible for one of two mortgagors, redeeming the whole mortgaged property behind the back of the other, to change the position of that other to something less than that of a mortgagor, or to abridge the period of limitation within which he ought to come in to redeem.

The only remaining question is as to whether the learned Judge rightly held the burden of proof to be on the plaintiff. The defendant is admittedly in possession, and, in our opinion, though the existence of a mortgage as the origin of such possession was conceded by him, it lay upon the plaintiff to give *primâ facie* proof of the subsistence of that mortgage at the date of suit.—*Kishan Dutt Ram* v. *Narendar Bahadoor Singh* (1). We assume that notice was given to the defendants by the plaintiff to produce the mortgage-deed, and that they failed to do so, and under these circumstances very slight evidence would have been sufficient to satisfy the obligation which lay on the plaintiff. But she produced none ; and though offered an opportunity to bring forward further evidence, her pleader declined to do so. Under these circumstances, we think the learned Judge below was right, and the appeal is dismissed with costs.

Appeal dismissed.

(1) L. R., 3 Ind. Ap. 85.