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plaintiffs, and is the subject of the mortgage, and the plaintiffs are entitled to recover it as mortgagees in the way in which they claim.

The case appears to have been very carefully investigated by the Subordinate Judge, and unless their Lordships could see that he was wrong in the way he has dealt with the accounts, and the various facts in the case, they would not come to the conclusion that his decree ought to have been reversed by the High Court. The result is that their Lordships will humbly advise Her Majesty that the decree of the High Court should be reversed, and the appeal thereto dismissed with costs, and the decree of the Judge of Gorakhpur varied by omitting that part of it which directs the deed of sale to be cancelled. The costs of this appeal will be paid by the respondents.

*Appeal allowed.*

Solicitors for the appellants: Messrs. *Walkins and Lattey.*

Solicitors for the respondents: Messrs. *Barrow and Rogers.*

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## APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.*

MURLIDHAR AND OTHERS (PLAINTIFFS) v. KANCHAN SINGH  
AND OTHERS (DEFENDANTS). \*

*Mortgage—Conditional sale—Foreclosure—Suit for possession—Regulation XVII of 1806, s. 8—Cause of action—Limitation—Act XIV of 1859, s. 1 (12).*

A suit for foreclosure was brought in 1886 upon a mortgage by conditional sale executed in 1846, the condition being for payment within five years from that date. The deed provided that, in default of payment within the prescribed period, the property mortgaged "will be foreclosed (*haibat*), and this mortgage-deed will be considered as an absolute sale-deed." Between 1846 and 1886 no foreclosure proceedings or other steps were taken by the mortgagee, and no admission of liability was made by the mortgagor.

*Held* that, by reason of Act XIV of 1859 (Limitation Act), the plaintiff's remedy was barred during the currency of that Act, and that the time within which

\* Second Appeal No. 653 of 1887 from a decree of W. Blennerhassett, Esq., District Judge of Cawnpore, dated the 6th January, 1887, confirming a decree of Munshi Kalwant Prasad, Subordinate Judge of Cawnpore, dated the 6th May, 1886.

he was entitled to maintain an action for foreclosure, if he had taken the proper proceedings, expired in 1863.

*Held* also that, even if foreclosure proceedings under Regulation XVII of 1806 had been taken, the cause of action was the original non-payment of the money on the due date, and the provisions of the Regulation could not create a fresh cause of action. *Denonath Gangooly v. Nursingh Proshad Doss* (1) referred to.

THIS was a suit for foreclosure of a deed of mortgage by conditional sale executed on the 4th February, 1846, by the predecessor in title of the defendants in favour of the ancestor of the plaintiffs. The deed was as follows :—

“ Musammat Kishen Kuar, widow of Shankar Bakhsh, deceased zamindar of mauza Kakadeo, &c., pargana Jajman, having presented herself in the Cawnpore Registration Office, solemnly and truly declared that she is in possession and enjoyment of a 4 pies 11 krants share in each of the villages Kakadeo and Benaikpur, pargana Jajman, and that there was not and is not any other sharer, partner or claimant in the said share belonging to her at the time of the execution of the present deed. Now she has voluntarily and willingly mortgaged the said share in its entirety together with all the boundaries and rights, barren and waste lands, *jhil* and *jhabar*, *jalkar* and *bankar* lands, ponds and groves and trees both bearing and not bearing fruit, *sair* and saltpit and other zamindari dues appertaining thereto, bounded as below, for Rs. 200 of the *kuldar* coin, the half of which amounts to Rs. 100 of the same coin, to Shitab Rai, son of Panjab Rai, caste *Kayasth*, for a term of five years as a conditional sale, and does hereby promise to repay the said sum with interest at Re. 1 per cent. per mensem within the said term without any objection or excuse, and that during the said term of mortgage she the mortgagor will remain in possession and will make the collections and will bear the profit and loss and be responsible in civil and criminal cases, and the mortgagee shall have nothing to do with them. But if she fail to pay the principal with interest, then after the expiration of the period specified herein, the aforesaid share will be foreclosed (*baibat*) in lieu thereof, and this mortgage-deed will be considered as an absolute sale-deed. I have

(1) 14 B. L. R., 87.

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therefore written these few lines by way of mortgage as a conditional sale to serve as an authority."

No foreclosure proceedings were taken in respect of this deed under Regulation XVII of 1806. The present suit was instituted on the 7th October, 1886, in the Court of the Subordinate Judge of Cawnpore, and the plaintiffs claimed foreclosure in default of payment of Rs. 1,151, the amount which they alleged to be due, as principal and interest, under the deed.

The only plea of the defendants in answer to the suit which it is necessary to notice, was that the suit was barred by limitation. Upon this the Subordinate Judge observed :—

"Although there was a time fixed in the deed of mortgage for payment of the loan, which time has long elapsed, yet at the time of the execution of the mortgage, or while Act XIV of 1859 or Act IX of 1871 was in force, no period was fixed for the presentation of an application for foreclosure, for which proceedings then used to be taken under Regulation XVII of 1806—see *Buldeen v. Golab Koonwer* (1). The ruling referred to by the pleaders for the defendants, *Ram Chunder Ghosaul v. Juggut Monmohiney Dabee* (2) does not seem to be applicable. Besides this, the Court must follow the rulings of the Allahabad High Court, and hold that the plea of limitation does not affect the claim."

On the merits, however, the Subordinate Judge was of opinion that there was no consideration for the deed of the 4th February, 1846, and accordingly dismissed the suit. The plaintiffs appealed to the District Judge of Cawnpore, whose judgment on the appeal was as follows :—

"The claim is for foreclosure on a conditional deed of sale alleged to be executed on the 4th February, 1886, the term for payment being five years, and it is clear that for forty years the plaintiff has made no claim, and the defendant has not in any way admitted the correctness of the mortgage. It appears to me that previous to Act XIV of 1859, the plaintiff would have been bound

(1) N.-W. P. H. C. Rep., 1867, p. 102.

(2) I. L. R., 4 Cal., 283.

to take foreclosure proceedings within twelve years from his cause of action. See Regulation III of 1793, and *Prannath Roy Chowdry v. Rookea Begum* (1).

“I can find nothing in Act XIV of 1859 operating to change this period of limitation, and the ruling quoted by the lower Court in the appellant’s favour insists on the necessity of such admissions in order to extend the period of limitation. Accordingly I find the suit barred by limitation. It is unnecessary to determine the remaining grounds of appeal. Appeal dismissed with costs.”

The plaintiffs appealed to the High Court.

Babu *Joyindro Nath Chaudhri*, for the appellants.

Munshi *Kashi Prasad* and Pandit *Sundar Lal*, for the respondents.

EDGE, C.J., and TYRRELL, J.—This was a suit for foreclosure of a mortgage by way of conditional sale executed on the 4th February, 1846, the condition being for payment within five years of that date. The suit was brought in October, 1886, and the Judge below has found that no claim was made by the mortgagees for forty years and that there was no admission of liability by the mortgagor during that period. The Judge, we think, rightly held that by reason of Act XIV of 1859 the plaintiff’s remedy was barred during the currency of that Act. In that view we agree with him. In our opinion the time within which the plaintiff was entitled to maintain an action for foreclosure, if he had taken the proper proceedings, expired in 1863. A great deal of the argument before us was directed to show that the cause of action in a case like this arose not on the non-payment at due date but on the expiration of the year of grace provided for by Regulation XVII of 1806. It now appears that no proceedings were taken under that Regulation at all. But even if they had been taken, we should be prepared to hold that the cause of action was the original non-payment of the money on the due date, and that the provisions in Regulation XVII of 1806, which was passed for the protection of mortgagors, could not create a fresh cause of action. To hold as was contended before us would

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involve this absurdity, that the non-compliance by an alleged mortgagor with the *parwana* obtained *ex parte* by an alleged mortgagee would create a cause of action whether there had been a mortgage or not. As far back as 1874, Mr. Justice Markby in an elaborate judgment decided that foreclosure proceedings under the Regulation in question did not create a cause of action: *Denonath Gangooly v. Narsingh Proshad Doss* (1). The appeal must be dismissed with costs.

*Appeal dismissed.*

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 November 10

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight and Mr. Justice Mahmood.

BALKISHAN AND ANOTHER (DEFENDANTS) v. KISHAN LAL (PLAINTIFF).\*

*Pending suits—Malikana—Recurring liability—Different reliefs claimed—Res judicata—Different subject-matters claimed—Judgment in first suit going to root of plaintiff's title—"Final" judgment—Judgment liable to appeal or under appeal—Effect of final decree in first suit pronounced subsequent to decision in second suit of lower appellate Court, but before hearing of second appeal in second suit—Civil Procedure Code, ss. 12, 13, 582, 587, 647.*

The pendency of litigation regarding rent, *malikana*, or other demand for one year does not, under s. 12 of the Civil Procedure Code, bar a suit between the same parties in which the same demand is made for a subsequent year, inasmuch as the reliefs claimed in the two cases are different. Ss. 12 and 13 of the Code compared.

For the purposes of the rule of *res judicata*, it is not essential that the subject-matters of the present and the former litigations should be identical. Where a recurring liability is the subject of claim, a previous judgment dismissing a suit between the same parties upon findings which do not go to the root of the title on which the claim rests, but relate merely to a particular item or instalment, cannot operate as *res judicata*. But if such previous judgment negatives the title and main obligation itself, the plaintiff cannot re-agitate the same question of title by claiming a subsequent item or instalment. *The Rajah of Pittapur v. Sri Rajah Rau Buchi Sittaya Garu* (2) referred to.

\* Second appeal No. 806 of 1887 from a decree of Saiyid Farid-ud-din Ahmad, Subordinate Judge of Agra, dated the 27th November, 1886, confirming a decree of Babu Alopi Prasad, Munsif of Mathura, dated the 21st August, 1886.

1) 14 B. L. R., 87.

(2) L. R., 12 I. A., 16.