

appeal must be decreed, and, the decree of the District Judge being set aside, that of the Assistant Collector must be restored, with costs to the successful party in proportion to his success in all Courts.

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Appeal decreed.

YOUNG, J.—I concur.

[A similar interpretation was placed upon the above-mentioned section of the N.-W. P. Rent Act by Edge, C. J., and Brodhurst, J., in the case of *Bhagwan Din v. Mosai*, Second Appeal, No. 431 of 1888, decided on the 4th February 1890—W. K. P.]

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Brodhurst.

ANANDI RAM AND OTHERS (PLAINTIFFS) v. DUR NAJAF ALI BEGUM
(DEPENDANT.)*

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June 27.

Mortgage—Payment of Government revenue by mortgagees in possession to save the property—Payment of mortgage-money into Court by mortgagors and relinquishment of possession by mortgagees—Subsequent suit by mortgagees to recover the Government revenue paid by them by sale of the mortgaged property—Act IV of 1882 (Transfer of Property Act) s. 83.

The plaintiffs were mortgagees in possession of certain shares in a village under a mortgage which, as to the principal amount advanced, was a simple mortgage, as to the interest a usufructuary mortgage. The mortgagees, to save the property from sale, paid up certain arrears of Government revenue. Subsequently, the defendant, who was the representative of the mortgagors, under s. 83 of the Transfer of Property Act (IV of 1882), paid the original sum due under the mortgage into Court. The mortgagees withdrew the money so paid in and deposited the mortgage-deed in Court. The mortgagees then, after relinquishing possession of the mortgaged property, sued to recover the money which they had paid as Government revenue by sale of the mortgaged property.

Held that though the mortgagees might originally have treated the amount paid by them as Government revenue as part of the mortgage-money, they did not by such payment obtain a lien independently of their position as mortgagees, and when once they had abandoned their lien on the mortgaged property by accepting the money paid into Court by the mortgagors and by relinquishing possession of the mortgaged property, they could not afterwards revive it; and their suit, which was for realization of the Government revenue paid by them, by sale of the mortgaged property, must fail.

* Second Appeal No. 1266 from a decree of T. R. Redfern, Esq., District Judge of Bareilly, dated the 1st May 1888, reversing the decree of Maulvi Abdul Kayyum, Subordinate Judge of Bareilly, dated the 15th November 1887.

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Semble, a mortgagee, who had given up his lien under circumstances similar to those above described, might bring a simple money suit to recover money paid by him to save the property from sale in execution for arrears of Government revenue.

Kinnu Ram Das v. Mozaffer Hosain Shaha (1); *Lachman Singh v. Salig Ram* (2); *Achut Ramchandra Pai v. Hari Kamti* (3); *Girdhar Lal v. Bholu Nath* (4); *Parsotham Das v. Jaijit Singh* (5); *Nikka Mal v. Sulaiman Shaikh Gardner* (6); *Kristo Mohinee Dossee v. Kaliprosono Ghose* (7); and *Nugenderchunder Ghose v. Sreemutty Kaminee Dossee* (8) referred to.

The facts of this case are fully stated in the judgment of the Court.

Mr. *Roshan Lal* and *Babu Durga Charan Banerji*, for the appellants.

Munshi *Madho Prasad* and *Mir Zukur Husain*, for the respondent.

EDGE, C. J., and BRODHURST, J.—The suit out of which this appeal has arisen was one in which the plaintiffs sought a decree for sale against certain shares in a village under the following circumstances. The plaintiffs were mortgagees of the shares in question. The mortgage was a simple mortgage, so far as the principal was concerned, and a usufructuary mortgage so far as the interest on the principal moneys lent was concerned. The plaintiffs, whilst they were in possession as usufructuary mortgagees, paid certain arrears of the Government revenue due in respect of those shares. It may be taken that those payments were made to protect the mortgaged property from sale under s. 166, of Act XIX of 1873. If those arrears had not been discharged and the property had been sold under s. 166, s. 167 would have applied, for the purchaser would have taken the property free from any incumbrance, except those, if any, specified in clauses A and B of that section. After those payments were made, the defendant, who is the representative of the mortgagors, paid into Court, under s. 83 of the Transfer of Property Act, Rs. 25,000, which was the amount which had been advanced under the mortgage. Upon that the plaintiffs presented a petition saying that they would take out the Rs. 25,000 in satis-

(1) I. L. R., 14 Calc., 809.

(5) Weekly Notes, 1890, p. 90.

(2) I. L. R., 8 All., 384.

(6) I. L. R., 2 All., 193.

(3) I. L. R., 11 Bom., 313.

(7) I. L. R., 8 Calc., 402.

(4) I. L. R., 10 All., 611.

(8) 11 Moo. I. A., 241.

faction of the mortgage, and they would in future claim the money paid in respect of arrears of the revenue. They also deposited in Court the mortgage-deed and obtained the payment out to them of the Rs. 25,000.

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The first Court decreed the claim to some extent. The District Judge of Bareilly dismissed the claim altogether. We should mention that it was provided in the mortgage-deed as follows:—
“At the time of the settlement, whatever reduction or enhancement may happen in the Government revenue, we mortgagors take upon us.” The arrears of the revenue which were paid by the plaintiffs represent an enhancement within the meaning of that clause in the mortgage-deed. Mr. *Durga Charan*, who has argued this case very fully and with much ability, has contended that his clients, the plaintiffs-appellants here, upon payment of those arrears of the revenue, obtained a charge in equity upon the property, and a charge which was quite independent of the mortgage which they had held; further, a charge in enforcement of which they are entitled to a decree for a sale of the property, notwithstanding their having abandoned their lien under the mortgage. He has cited to us a great number of authorities, most of which are referred to in the case of *Kinnu Ram Das v. Mozaffer Hosain Shaha* (1). Those authorities which he has cited to us which do not appear to be referred to specifically in that case are the cases of *Lachman Singh v. Salig Ram* (2); *Achut Ramchandra Pai v. Hari Kanti* (3); *Girdhar Lal v. Bhola Nath* (4); *Parsotam Das v. Jaijit Singh* (5); *Nikka Mal v. Sulaiman Sheikh Gardner* (6). There is no doubt that, with the exception of the case of *Kristo Mohinee Dossee v. Kaliprosono Ghose* (7), and the case of *Kinnu Ram Das v. Mozaffer Hosain Shaha* (1), there seems to have been a consensus of opinion in the High Courts in India that a payment of money under such circumstances as the payment in this case of the arrears of the revenue created a charge in equity in favour of the person paying the money. In the case of *Kinnu Ram Das v. Mozaffer Hosain Shaha*

(1) I. L. R., 14 Calc., 809.

(4) I. L. R., 10 All., 811.

(2) I. L. R., 8 All., 384.

(5) Weekly Notes, 1890, p. 90.

(3) I. L. R., 11 Bom., 313.

(6) I. L. R., 2 All., 193.

(7). I. L. R., 8 Calc., 402.

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(1) a majority of three Judges in a Court of five held that such a payment did not create a charge. The majority held that where a mortgagee paid money under such circumstances the mortgagee might add it to the amount of his mortgage and thereby extend his lien. We have no doubt that when money is paid by a mortgagee to protect the mortgaged property from sale for arrears of the Government revenue the mortgagee is entitled to add the amount so paid to the principal money due under his mortgage, and that in such a case the mortgage cannot be redeemed without paying those moneys; and further, that if the mortgagee proceeds to enforce his mortgage by sale of the mortgaged property, he can do so for the amount then due, which would include the amount so paid for arrears of revenue as well as any principal or interest outstanding. We do not think that the cases relied on by Mr. *Durga Charan*, even if they are good in law, and we do not intend to question them, put the case any higher than this, that a person who made a payment to save the property from sale on execution under circumstances which would make s. 69 of the Indian Contract Act applicable, obtained by such payment a charge in equity on such property. Although we think that it is not necessary to decide in this case whether a mortgagee making such payment would be entitled to bring a simple money-suit for the money paid, still we may point out that the case of *Lachman Singh v. Salig Ram* (2) and the case of *Parsotam Das v. Jaijit Singh* (3) are authorities to show that he might maintain such a suit. Those authorities are fortified by the decision of their Lordships of the Privy Council in *Nugenderchunder Ghose v. Sreemutty Kaminee Dossee* (4). It is true that the latter case turned on the effect of s. 9 of Act I of 1845, but that Act was repealed so far as the Lower Provinces of Bengal were concerned by Act II of 1859, and so far as these provinces are concerned by Act XIX of 1873. Still, the principle of the judgment in that case applies, whether the section to be considered is s. 9 of Act I, of 1845, or s. 69 of the Contract Act. It is not necessary to go further into that matter, because any right which the plaintiffs

(1) I. L. R., 14 Calc., 809.

(2) I. L. R., 8 All., 384.

(3) I. L. R., 11 Bom., 310.

(4) I. L. R., 10 All., 611.

might have had as a personal remedy against the defendant has been long since barred by limitation. We do not think it necessary to express any opinion as to whether the majority of the Calcutta High Court in the case of *Kinnu Ram Das v. Mozaffer Hosain Shaha* reported in (1) or the minority which represents in that judgment the previous consensus of opinion of the Indian Courts (excepting the case reported in I. L. R., 8 Calc.), and which minority has been followed since in Bombay and Madras, was right. In our opinion, whatever may be the position or right of a person paying money under such circumstances, who is not a mortgagee, the position of a mortgagee making such payments is this : if he makes such payment and wishes to seek a direct remedy against the mortgaged property in respect of them by a suit for sale of that mortgaged property, he must do so in his character and position as mortgagee, for it was in that character and position, and that only, he paid the money. He must, if he desires to bring the property to sale in respect of such payments, add on those payments to the principal money due under the mortgage. In other words, in our opinion, a mortgagee making such payments as mortgagee, does not, by reason of making those payments, obtain a lien independently of that under his mortgage. In this case the plaintiffs have lost their lien under the mortgage by having abandoned it, by having deposited the mortgage in Court to be handed over to the defendant, by having taken out of the Court the money which the defendant said was due on the mortgage, and by having quitted possession in favour of the mortgagor, the defendant. Having abandoned their lien and rights as mortgagees, it appears to us that the plaintiffs cannot revive them in order to sustain a suit for money which they could have added to the original mortgage-debt, and in respect of which they were entitled to continue in their character as mortgagees and to hold on to the deed of mortgage. S. 83 of the Transfer of Property Act is a section that was passed not only in the interest of mortgagors but in the interest of mortgagees. It was a section by which it was intended that a mortgage might be discharged by the mortgagor without any litigation, and it contemplated a mortgagee taking out of Court in satisfaction of the money due to him the

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money which had been paid in by the mortgagor, although the mortgage-debt at the time might exceed the money paid in. It provides that the mortgagee "on presenting a petition (verified in manner prescribed by law for the verification of plaints) stating the amount then due on the mortgage and his willingness to accept the moneys deposited in full discharge of such amount and on depositing in the same Court the mortgage-deed," &c. It appears to us immaterial that the plaintiffs here added a paragraph to their petition stating that they reserved their rights in respect of the money paid for arrears of revenue. The result is, we are of opinion that this suit cannot be maintained and we dismiss the appeal with costs.

Appeal dismissed.

Before Mr. Justice Mahmood and Mr. Justice Young.

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July 3.

NAUBAT SINGH AND OTHERS (DEFENDANTS) v. INDAR SINGH AND ANOTHER (PLAINTIFFS)*

Limitation—Suit by mortgagor to recover money due on a registered mortgage-deed—Act XV of 1877 (Limitation Act), sch. ii, Nos. 113 and 116.

A suit by a mortgagor to recover money due on a registered mortgage-deed, together with damages for non-payment, is not a suit to which the period of limitation prescribed by the Limitation Act (Act XV of 1877), sch. ii, No. 113 (for specific performance of a contract) is applicable. The period of limitation applicable to such a suit is that prescribed by No. 116 of sch. ii. of the said Act (for compensation for the breach of a contract in writing registered); and the time from which limitation will run against the mortgagor is, in the absence of any specific provision to the contrary, the date of the execution of the mortgage-deed. *Gauri Shankar v. Surju* (1); *Husain Ali Khan v. Hafiz Ali Khan*, (2); *Nobocomar Mookhopadhaya v. Siru Mullick* (3); *Vythilinga Pillai v. Thetchanamurti Pillai* (4); and *Ganesh Krishn v. Madharav Raji* (5) referred to.

The facts of this case are fully stated in the judgment of Mahmood, J.

Hon. T. Conlan and Munshi Sukh Nandan Lal, for the appellants.

* First appeal No. 161 of 1888 from a decree of Maulvi Zain-ul-Abdin, Subordinate Judge of Moradabad, dated the 26th June 1888.

(1) I. L. R., 3 All. 276. (3) I. L. R., 6 Calc. 94.
(2) I. L. R., 3 All. 600. (4) I. L. R., 3 Mad. 76.
(5) I. L. R., 6 Bom. 75.