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1889
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Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight and Mr. Justice Mahmood.

ASHFAQ AHMAD AND OTHERS (PLAINTIFFS) *v.* WAZIR ALI AND OTHERS (DEFENDANTS.)

Mortgage—Joint Mortgage—Redemption of the whole by one co-mortgagor—Rights of redeeming co-mortgagor as against the others—Limitation—Act XV of 1877 *(Limitation Act) Schedule II. Art.* 148.

Where one of several co-mortgagors redeems the whole mortgage he thereby puts himself into the position of the mortgagee as regards that portion of the mortgaged property which represents the interests of the other co-mortgagors, and the period of limitation applicable to a suit for redemption brought by the other co-mortgagors is that provided for by Art. 148 of Sch. II of the Limitation Act (XV of 1877). Such period begins to run from the date when the original mortgage was redeemable and not from the date of its redemption by the aforesaid co-mortgagor. *Nura Bibi* v. *Jagat Narain* (1) and *Raghubir Sahai* v. *Bunyad Ali* (2) followed: *Umr-un-nissa* v. *Muhammad Yar Khan* (3) distinguished: *Ram Singh* v. *Baldeo Singh* (4) referred to.

In this case one Ahmad Ali, the common ancestor of both parties, mortgaged certain property by a usufructuary mortgage on the 5th July 1822. Ahmad Ali died in 1825 leaving four daughters who also subsequently died. After this Khwaj Bakhsh, the husband of one of them, redeemed the whole of the property in 1828. On the 5th February 1886, the plaintiffs, who were the representatives of one of the daughters of Ahmad Ali, brought their suit against the defendants, who were representatives of the other three

(1) I. L. R. 8 All., 295.
(2) Weekly Notes 1886, p. 152.
(3) I. L. R. 3 All., 24.
(4) Weekly Notes 1885, p. 300.

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daughters, to recover possession of a ¼ share of the property redeemed by Khwaj Bakhsh. The Court of first instance decreed the plaintiffs' claim. The defendants then appealed, and the lower appellate Court decreed the appeal and dismissed the plaintiffs' suit, on the ground that it was barred by limitation; holding that, if the plaintiffs claimed on the hypothesis that the defendants, the representatives of Khwaj Bakhsh were representatives of the original mortgagee, then Art. 148 of the second schedule of the Limitation Act applied and limitation began to run from the date of the original mortgage in 1822; while on any other hypothesis the possession of Khwaj Bakhsh and his representatives would have been adverse and the suit would be barred under Art. 144 of Sch. II of the same Act. The case came in second appeal before Mahmood, J., who, by his order of the 17th July 1888, directed it to be laid before the Chief Justice for orders as to its being referred to a Division Bench. Subsequently, on the recommendation of Straight and Mahmood, J.J., the case was laid before a bench consisting of Edge, C. J., Straight and Mahmood, J.J.

Mr. *Abdul Majid* and Pandit *Moti Lal*, for the appellants.

Pandit *Sundar Lal*, for the respondents.

EDGE, C. J.—This was a suit for redemption of mortgage. The original mortgage was a usufructuary mortgage of 1822. One of mortgagors redeemed the whole of the property in 1828. This suit was brought against his heirs on the 5th February 1886. The lower appellate Court dismissed the suit on the ground that it was barred by limitation. In my opinion the limitation applicable in a case of this kind is the limitation which would have been applicable if the original mortgagee or his heirs had been the defendants to the redemption suit, that is, if Art. 148 of the Limitation Act applies, the period does not run from the date of the redemption of the whole property by one of the co-mortgagors, but from the time it would have run against the original mortgagee if he had been a defendant in the suit. As I understand the law, when one of two or more co-mortgagors redeems the whole, he, as to the portion which represents the interest of his co-mortgagors, stands in the

shoes of the mortgagee from whom he redeems, and, standing in those shoes, it appears to me that he has got the same rights and the same liabilities. If Art. 148 applies, as I think it does, this suit is barred by time. If the ruling of the Full Bench in the case of *Umr-un-nissa* v. *Muhammad Yar Khan* (1) be correct and exhaustive, then also the suit is barred, as more than 12 years have run since the date of the redemption of the mortgage by the ancestor of the defendants; so in either case the plaintiffs' suit must fail. The ruling of the Full Bench above referred to was explained by my brother Straight and my brother Tyrrell in the case of *Nura Bibi* v. *Jagat Narain* (2). It appears from that explanation that the attention of the Full Bench was not drawn to the question whether Art. 148 of the Limitation Act was one applicable to the case. There the attention of the Full Bench having been confined to the article before them, the result arrived at was that Art. 144 was held applicable. This appeal therefore must be dismissed with costs.

STRAIGHT, J.—The facts out of which the question raised by this reference arose are very fully stated in the referring order of my brother Mahmood and it is wholly unnecessary to repeat them now. The learned Chief Justice has summarised the position of the parties to the litigation out of which this appeal arose by saying that this is a suit by the plaintiffs, appellants before us, for redemption of their share of certain property mortgaged in the year 1822 from the defendants-respondents, who are the representatives of one of the original mortgagors, who in the year 1828 redeemed the whole of the mortgaged property. The three questions stated by my brother Mahmood in his referring order are :—

(1) Is this suit governed by Art. 148 or Art. 144 of the Limitation Act?

(2) If by Art. 148, is the starting point of the period of limitation the date of the mortgage of 1822 or the date of the redemption of 1828?

(3) If Art. 144 applies, is the defendants' possession acquired under the redemption of 1828 to be taken as adverse to the plaintiffs' from that date?

(1) I. L. R. 3 All. 24. (2) I. L. R. 8 All. 295.

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It will be convenient for me at once to deal with the obvious matter that was passing through the mind of my brother Mahmood at the time he made the reference of these questions with regard to the applicability of Art. 144 to facts like those disclosed here. No doubt what was present to his mind was a decision of the Full Bench passed in the year 1880 and reported in I. L. R., 3 All. 24 (*Umr-un-nissa* v. *Muhammad Yar Khan*). I have already, as the learned Chief Justice has observed, taken occasion, in conjunction with my brother Tyrrell, in the case of *Nura Bibi* v. *Jagat Narain* (1) to explain the circumstances under which that particular ruling was delivered by the Full Bench. Having again refreshed my memory by reference to it, I am convinced that I was right in saying that the whole argument of the Full Bench proceeded upon the assumption that Art. 144 of the Limitation Act was the article applicable to those particular facts, and, assuming that particular article applicable, the question was whether, as stated in the order of reference of the two learned Judges, there had been such physical possession as would lay the foundation for finding adverse possession. I am quite convinced that the equitable principle which was then recognised, under which a co-mortgagor redeeming for his other mortgagors was entitled upon redemption of the whole mortgage to hold their share as against them as security for the mortgage, was never referred to or discussed, and there was at that time no statutory provision in force which could have been brought to the attention of the Judges of the Full Bench to show that Art. 148 was the Limitation article applicable. Therefore, in so far as there is anything in that case to militate with the contention now raised, it must be taken that that case never did decide and must not be regarded as an authority for deciding that Art. 148 is not applicable to such facts as we have here. Therefore it must be dismissed from consideration in dealing with the questions submitted to us.

Then arises the question whether Art. 148 is applicable, and if so from what date does the limitation begin to run? Does it run from the date of the original mortgage, or does it run from the date

(1) I. L. R. 8 All. 295.

of the redemption of the whole mortgage by one of the co-mortgagors? As to Art. 148 being applicable, I have no doubt. I have already committed myself to that view in the case of *Nura Bibi* v. *Jagat Narain* (1) and there have been several other rulings to the same effect; among others, one reported in the Weekly Notes of 1889, page 152, *Raghubir Sahai* v. *Bunyad Ali*. Further, even before the Transfer of Property Act came into operation, I took the view that a co-mortgagor redeeming the whole mortgage stood in the shoes of the original mortgagee and was entitled to all the rights and the incidents connected with his estate. The principle that underlies that is, that he, having paid off the obligation to the creditor, is entitled to take advantage of all the incidents connected with the security as it stood in the hands of the mortgagee, or, in other words, he is entitled to all the rights and incidents connected with the mortgage as they were in the hands of the mortgagee at the time the redemption took place. Amongst others he cannot say that a new mortgage transaction commenced from that particular date, but his position as mortgagee stands upon the same footing as it would have if the original mortgagee had assigned over to him by sale his mortgagee interest. Not only do I think that a co-mortgagor redeeming the whole mortgage stands in the position of the original mortgagee, but that time runs from the date of the original mortgage. No doubt this view is inconsistent with one expressed by the late Chief Justice, Sir Comer Petheram, in the case of *Ram Singh* v. *Baldeo Singh* (2). That learned Judge was of the same opinion as I am, as to the applicability of Art. 148 to the facts then before him. But it does not appear to have been seriously discussed before him as to what was the precise date from which the limitation would run. Mr. *Abdul Majid* is entitled to use that judgment in his favor, and it is entitled to all the respect which every utterance of that learned Chief Justice deserves. But I cannot myself agree with the view that the limitation runs from the date when the redemption took place. It must, in my opinion, relate back to the date of the original mortgage, and upon this I have explained my reasons in the case

(1) I. L. R., 8 All. 259. (2) Weekly Notes 1885, p. 300.

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of *Nura Bibi* v. *Jagat Narain* (1). The conclusion I have arrived at is the same as that of the learned Chief Justice, *viz.*, that this suit was barred and that this appeal must be dismissed with costs.

MAHMOOD, J.—The facts of the case, as also the points of law raised by the arguments of the parties before me when the case first came up before me in the Single Bench, are fully stated in my order of the 17th July 1888, and I regard what I then said as a portion of my judgment to-day.

That order shows that, at any rate, the case was a fit one for being disposed of by a Bench consisting of more than one Judge, and it was in consequence of that circumstance that the case was laid before my brother Straight and myself; and by our order of the 6th December 1888 it was laid before the learned Chief Justice for consideration as to whether it may not go before a Bench of three Judges. It is in consequence of this circumstance that this is the third time that this Court is hearing the case, and it has not been due to any other cause than my desire to obtain such authoritative ruling upon the points raised in the case as this Court can give.

The points which arise in the case have been so completely dealt with by the learned Chief Justice and my brother Straight that I should be unnecessarily taking up their time if I dwelt upon the same points or made any endeavour to give expression to any exposition of the law which would minutely deal with the various cases that may arise under it. The question, however, upon which the fate of the case turns requires two things: first, that it should be held by us that Art. 144 of Sch. II of the Limitation Act has no reference to suits of this character; and secondly, that suits of this character are governed by Art. 148. Upon both these questions I, who am never content with dealing with any case without dealing also with the *ratio*, *viz.*, the essential steps of reasoning upon which the judgment proceeds, have no hesitation in saying, with all deference, that the judgment of the Full Bench in *Umr-un-nissa* v. *Muhammad Yar Khan* (2) proceeds upon a theory of law as to the application of the Art. 144 which I find it impossible to accept. Not-

(2) I. L. R. 3 All. 24. (1) I. L. R. 8 All. 295.

withstanding the clear distinction which my learned brother Straight drew in the case of *Nura Bibi* v. *Jagat Narain* (1) the result of what we have held to-day is to say that the Full Bench ruling need no longer be referred to for the purpose of finding out the periods of limitation for suits.

Again it is also clear, and I do not wish to add a single word to what has fallen from my brother Straight upon the subject, that the ruling referred to in my referring order, *viz.*, *Ram Singh* v. *Baldeo Singh* (2) cannot possibly be consistent with the *ratio* upon which our judgment proceeds. The truth is, as I understand the law, that there are various manners and methods whereby a person may stand in the shoes of a mortgagee. There may be a case such as that of an assignee, or there may be a case such as that which the broad principle of equity known as sub-rogation involves. A co-sharer suing for the redemption of the whole of the property and obtaining redemption thereof is not a person in adverse proprietary possession, as the Full Bench ruling would probably require. He is simply by sub-rogation on the same footing as an ordinary person would be as representing the mortgagee, or rather the mortgagee's interest in the property *quâ* such of his co-sharers as have not either secured redemption or sued for it.

When in a suit the question arises whether or not a co-sharer can obtain his share from a redeeming co-sharer, the case to my mind is a suit such as Art. 148 contemplates, and such a suit is governed by the 60 years' period. In the present case the original mortgage was so old as the 5th of July 1822. There was no endeavour made to prove that the redemption which took place in 1828 was other than an ordinary redemption by one co-sharer of other co-sharers' property; the present defendants represent the right of the redeeming co-sharer and they are entitled to rely upon the same limitation as Art. 148 would require.

There is, however, because it is on account of that reference of mine that the case has come up before us, one point more that I wish to add. The reference of course relates to four properties, as

(1) Weekly Notes 1885, p. 300.

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mentioned in my referring order, and what we have held with regard to this mortgage renders it unnecessary for us to consider the other mortgages mentioned in the judgment of the Court below. The view we have now taken defeats the whole suit. The result is exactly what the learned Chief Justice and my brother Straight have said, *viz.*, that this appeal stands dismissed with costs.

Appeal dismissed.

APPELLATE CIVIL.

1891
February 16.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

MARIAM BIBI (PLAINTIFF) *v.* SAKINA AND OTHERS (DEFENDANTS).*

Pardah-nashin woman—Conditions necessary to the valid execution of a document by—

Where a deed executed by a *pardah-nashin* woman is sought to be set aside, it is for the party wishing to uphold the deed to show affirmatively that the transaction intended to be carried out by the deed was a reasonable one, that the executant was fully cognizant of the meaning and legal and practical effect thereof and that she executed the same with her full and free consent, that is to say, that she had independent advice on the subject and was not otherwise, as, *e. g.*, by reason of bodily or mental infirmity, or by reason of fraud or coercion practised upon her, incapable of giving a rational consent to the transaction.

One Mariam Bibi a *pardah-nashin* lady of some 70 years of age, and more or less illiterate, executed on the 11th September 1888, a deed which purported to divest her immediately of all her property in favor of her son Murtaza Husen, who was dumb and imbecile, her daughter Sakina, who was named in the deed as guardian of Murtaza Husen, and that daughter's son, Muhammad Yakub. Muhammad Yakub was betrothed to a daughter of one Fakir Husen and one of Sakina's daughters was married to one Shakurul Husen. Those two persons, *viz.*, Fakir Husen and Shakurul Husen were mainly instrumental in procuring the execution of the deed in question. The deed was drafted in very artificial language, and it was not shown that the executant ever understood its contents or effect. The executant was moreover at the time of execution in ill health and great mental distress, owing to the death of her son, Muhammad Husen, which had happened some months previously. The deed was also executed in the absence of the person who was at that time the executant's chief adviser and the manager of her property. Lastly, it appeared that as soon as the executant came to know what the true nature of the deed was and that proceedings had

* First Appeal No. 189 of 1889 from a decree of Maulvi Shah Ahmad-ullah, Subordinate Judge of Allahabad, dated the 20th August 1889.