

conferring on the mortgagee a collateral advantage is enforceable, provided that it is not objectionable on the ground of unfairness or unreasonableness. The covenant in the mortgage-deed which is in question in this case does not affect the right of the mortgagor to redeem the mortgaged property upon payment of the amount due upon the mortgage. It no doubt confers a collateral advantage upon the mortgagee, but the mortgagee cannot be deprived of that advantage unless, as has been stated above, the covenant can be repudiated on the ground of its being oppressive or unfair. The question whether the covenant in this case is objectionable on the ground last mentioned, was not considered in the Court below, and it is a question which that Court may have to consider when the case goes back to it, but I agree in holding that the said covenant does not fetter the mortgagor's right of redemption, and is not open to objection on that ground. I agree in the order proposed by the learned Chief Justice.

Appeal decreed and cause remanded.

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February 12.

Before Sir Arthur Strachey, Knight, Chief Justice, and Mr Justice Banerji.
SHEO NARAIN (PLAINTIFF) v. CHUNNI LAL AND OTHERS
(DEFENDANTS).*

Civil Procedure Code, section 244—Execution of decree—Representative of party to the suit—Second mortgagee taking a mortgage during the pendency of a suit on the first mortgage.

Held, that a second mortgagee who takes his mortgage during the pendency of a suit on the first mortgage is a representative of the mortgagor within the meaning of section 244 of the Code of Civil Procedure. *Madho Das v. Ramji Patak* (1) referred to.

THE suit out of which this appeal arose was a suit for sale on a mortgage of the 5th June, 1885. The mortgage sued upon was executed pending a suit by the respondents on an earlier mortgage over the same property taken by the respondents in 1882. The respondents in that suit obtained a decree for sale on the 30th September, 1885. In his plaint in the present suit the plaintiff stated that the respondents "are impleaded as defendants on account of their decree of the 30th September, 1885,

* First Appeal No. 160 of 1898, from a decree of Maulvi Syed Siraj-ud-din, Subordinate Judge of Agra, dated the 29th March 1898.

(1) (1894) I. L. R., 16 All., 286.

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and that the entire amount of the said decree was satisfied without anything remaining due, but nevertheless they say their debt is still due; the plaintiff therefore is willing to pay the portion of their demand found in the Court's opinion to be still remaining due." The respondents in their written statement denied that the amount due to them had been fully satisfied, and contended that according to a correct account Rs. 29,000 odd was still due to them under their decree, and that the claim was barred by section 244 of the Code of Civil Procedure. On this question the Court of first instance framed two issues. Issue 10 was "whether the whole money due to the defendants 2 and 7 has been satisfied, or a sum of Rs 29,534 is still due?" Issue 13 was "whether the suit as against these defendants is barred by section 244 of the Code?" On these points the Court below held that in fact the whole amount due under the decree had been paid, but that the plea which the plaintiff raised as to such payment and as to the incorrectness of the defendants' accounts was barred by section 244. The Court accordingly made the plaintiff's decree subject to his paying to these two defendants the amount of their decree. The plaintiff thereupon appealed to the High Court.

Munshi *Ram Prasad* and Pandit *Moti Lal*, for the appellant.

Babu *Jogindro Nath Chaudhri* and Pandit *Sundar Lal*, for the respondents.

STRACHEY, C. J.—The only question in this appeal is whether the Court below has rightly made the plaintiff's decree conditional on the payment by him to the respondents of the amount due under their decree of the 30th September, 1885. The plaintiff sued on a mortgage of the 5th June, 1885. The respondents were prior mortgagees under a mortgage of 1882. At the time when the mortgage to the plaintiff was executed a suit on the respondents' mortgage was pending. The respondents obtained a decree on their prior mortgage on the 30th September, 1885. In paragraph 8 of the plaint in the present suit for sale the plaintiff states that the respondents "are impleaded as defendants on account of their decree of the 30th September, 1885, and that the entire amount of the said decree was satisfied without anything remaining due, but nevertheless they say their debt is still due; the plaintiff therefore is willing to pay the portion of their

demand found in the Court's opinion to be still remaining due." The respondents in their written statement denied that the amount due to them had been fully satisfied, and contended that according to a correct account Rs. 29,000 odd was still due to them under their decree, and that the claim was barred by section 244 of the Code of Civil Procedure. The issues framed by the Court below as between the plaintiff and the respondents were issues 10 and 13. Issue 10 was "whether the whole money due to the defendants 2 and 7 has been satisfied, or a sum of Rs. 29,534 is still due?" Issue 13 was "whether the suit as against these defendants is barred by section 244 of the Code?" On these points the Court below held that in fact the whole amount due under the decree had been paid, but that the plea which the plaintiff raised as to such payment and as to the incorrectness of the defendants' accounts was barred by section 244. The Court accordingly made the plaintiff's decree subject to his paying to these two defendants the amount of their decree.

Now whether this view is correct depends on, first, whether the plaintiff was a representative of a party to the decree of the 30th September, 1885, within the meaning of section 244; and, secondly, whether he is attempting to raise in this suit any question which under section 244 can only be determined by order of the Court executing that decree and must not be raised by separate suit.

As to the first of these questions, the plaintiff took his mortgage of the 5th June, 1885, during the pendency of the suit in which the decree of the 30th September was passed. He therefore took it subject to the decree, and the decree was binding on him so far as the property comprised in his mortgage was concerned. In the case of *Madho Das v. Ramji Patak* (1), an opinion was expressed that a purchaser *pendente lite* from a defendant mortgagor should be treated as a representative of the defendant in execution of decree within the meaning of section 244, the reason being that such a purchaser is bound by the decree and should therefore be allowed to make any objection in the execution department which the parties to the decree or any one else bound by it would be competent to make. And it does

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seem reasonable that no distinction should be made so far as the competency to make objections in execution is concerned between one person who is bound by the decree and another. A purchaser from the defendant mortgagor *pendente lite* is just as much bound by the decree as a purchaser from the judgment-debtor after the decree, and I can see no reason why he should be in an inferior position so far as section 214 is concerned. If that is a correct view as regards a purchaser *pendente lite* in a suit on a mortgage, I think that it must be equally true of a mortgagee who takes a mortgage during the pendency of such a suit. The remarks in the case of *Madho Das v. Ramji Patak*, to which I have referred, were no doubt made *obiter*. The decree against the judgment-debtor was a simple money decree, creating no charge on specific property, to which of course different considerations apply. I think, however, that the observations are sound and reasonable, and that a mortgagee taking *pendente lite*, like the present plaintiff, ought to be regarded as a representative of the mortgagor defendant in the sense that, being bound by the decree afterwards passed, he is competent, under section 244 of the Code, to raise in the execution of that decree any of the questions mentioned in that section.

The only remaining question is whether such a point is raised in the present suit and ought to have been raised before the Court executing the decree of the 30th September, 1885. The question raised—and the only question raised in the present suit—is whether that decree has been fully satisfied or not. If it has been fully satisfied, then admittedly the present respondents cannot stand in the plaintiff's way. If it has not been fully satisfied, then the plaintiff could only get a decree in the present suit conditional on his payment of whatever is due under that decree. Under cl. (c) of section 244, that question being one of the discharge or satisfaction of the decree, could only have been determined by order of the Court executing the decree, and therefore could not be determined by a separate suit. Proceedings in execution of that decree were taken from time to time, and the present plaintiff could then have raised precisely the contentions which he raises now as to the manner in which under the decrees the proceeds of the property sold should have been

appropriated. I do not say that the plaintiff cannot even now raise these contentions before the Court executing the decree. We do not now decide any question as to whether that decree has or has not been satisfied. All that we decide is that the plaintiff cannot, in the present suit, raise the contention of its being satisfied, and of the incorrectness of the defendants' account which he has sought to raise. The result is that the decision of the Court below was right as regards these respondents, and that the appeal of the plaintiff as regards them must be dismissed with costs. We extend the time for payment of the sum of Rs. 29,534 until the 9th August of this year.

BANERJI, J.—I also would dismiss the appeal. The question raised between the parties to this appeal was whether or not the amount of the decree obtained by the respondents on the 30th September, 1885, on their prior mortgage of the 26th April, 1882, has been discharged. A further question arises whether the above question can be determined in this suit by reason of the provisions of section 244 of the Code of Civil Procedure. The application of that section depends on, first, whether the appellant is a representative of a party to the suit within the meaning of that section; and, secondly, whether the question now raised is one of the questions which can be determined by a Court executing the decree under section 244. That the question raised in this suit is a question on which the application for execution of the respondents can be opposed admits of no doubt. The appellant alleges that if a proper account be taken of payments made in respect of the decree of the 30th September, 1885, in accordance with the terms of that decree nothing is due upon the decree. That is clearly a question relating to the discharge or satisfaction of the decree, and can be determined under section 244 of the Code, provided that the appellant fulfils the condition of being a representative of a party within the meaning of that section. I agree in holding that being a transferee *pendente lite*, and being thus a person who is bound by the decree, he must be deemed to be the representative of the judgment-debtor to the decree, namely, the mortgagor. This was the view held in the case of *Madho Das v. Ramji Patak* (1), and to that view I still adhere. The

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question, therefore, of the discharge or otherwise of the respondent's mortgage is not a question which could be determined in this suit. This is sufficient for the disposal of the appeal, and it is not necessary to decide whether or not, as a matter of fact, the amount of the respondent's mortgage has been fully satisfied. I concur in the order proposed by the learned Chief Justice.

Appeal dismissed.

FULL BENCH.

Before Sir Arthur Strachey, Knight, Chief Justice, Mr. Justice Banerji and Mr. Justice Aikman.

MATHURA SINGH (PLAINTIFF) v. BHAWANI SINGH AND OTHERS
(DEPENDANTS)*

Act No. XV of 1877 (Indian Limitation Act), section 14—Limitation—“other cause of a like nature” to defect of jurisdiction—Error in procedure.

In cases in which section 14 of the Indian Limitation Act, 1877, is pleaded as protecting the plaintiff from the bar of limitation, if there was an inability in the Court to entertain the former suit produced by any cause not connected in any way with want of good faith or due diligence in the plaintiff, that cause is of like nature to defect of jurisdiction within the meaning of section 14. It is not necessary that the cause which prevented the former Court from entertaining the suit should be a cause which was independent of and beyond the control of the plaintiff.

Hence where the inability of the Court to entertain the former suit arose from misjoinder of plaintiffs and causes of action, and there was on the plaintiff's part in the former suit no want of good faith or due diligence, the plaintiff was held entitled to the benefit of the time during which he was prosecuting the former suit, that is, from the time when the plaint in that suit was filed until the time when it was returned to the plaintiffs for amendment.—*Chander Madhub Chuckerbutty v. Ram Koomar Chowdry* (1), *Brij Mohan Das v. Mannu Bibi* (2), *Deo Prasad Sing v. Pertab Kairree* (3), *Bishambhur Haldar v. Bonomali Haldar* (4), *Ram Subhag Das v. Gobind Prasad* (5), *Jema v Ahmad Ali Khan* (6), *Mullick Kefait Hossein v. Sheo Pershad Singh* (7), *Bai Jamna v. Bai Ichha* (8), *Narasimma v. Muttayan* (9), *Tirtha*

* First Appeal No. 166 of 1898, from a decree of Maulvi Syed Zain-ul-abidin, Subordinate Judge of Ghazipur, dated the 30th March 1898.

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| (1) (1866) B. L. R., Sup. Vol., 553; 6 | (5) (1880) I. L. R., 2 All., 622. |
| W. R., C. R., 184. | (6) (1890) I. L. R., 12 All., 207. |
| (2) (1897) I. L. R., 19 All., 348. | (7) (1896) I. L. R., 23 Calc., 821. |
| (3) (1883) I. L. R., 10 Calc., 86. | (8) (1886) I. L. R., 10 Bom., 604. |
| (4) (1899) I. L. R., 25 Calc., 414. | (9) (1890) I. L. R., 13 Mad., 431. |