of that decree-holder, and with what was said in *Tarruck Chunder Bhuttacharjee* v. *Divendro Nath Sanyal* (1). The learned vakil for the respondents relies on the ruling in *Ranee Nyna Kooer* v. *Doolee Chund* (2). There are observations in the judgment in that case which do support the plea taken on behalf of the respondent; but I do not agree with them, and, as has been shown, the weight of authority is clearly in favour of the appellant. The appellant asks for execution to the extent of half of the decretal amount only, and to this he is entitled. For the above reasons I allow the appeal with costs, and setting aside the orders of the Courts below, I direct that the decree be executed in favour of Moti Ram for recovery of half the amount of the decree. The appellant will have his costs in the lower appellate Court. As in the Court of the Munsif the appellant asked for execution of the whole decree, I make no order as to the costs in that Court.

Appeal decreed.

1904
February 4.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt.

JAI RAM (PLAINTIFF) *v.* MAKUNDA AND OTHERS (DEFENDANTS).*

Wajib-ul-arz—Conditions enabling co-sharer on payment of revenue due to take over the share of a defaulter—Mortgage by conditional sale—Act No. IV of 1882 *(Transfer of Property Act), section* 58*—Limitation—Act No. XV of* 1877 *(Indian Limitation Act), schedule II, article* 148.

The wajib-ul-arz of a certain village provided that if any co-sharer was in default in payment of Government revenue, certain persons—co-sharers in the patti and in the village amongst them—might, on discharging the unpaid revenue due by the defaulter, take possession of his share, though without power to partition and without power to transfer or sell. Also that if within twelve years the defaulter or his heir wished to take back the property, he could get it in the month of Jeth on payment of the amount of default without interest and without being entitled to a rendition of accounts. The wajib-ul-arz went on to provide that after the term of twelve years the heirs of the defaulter should not get the property, but the person who had paid up the arrears of revenue should be the owner.

Held that, notwithstanding the provision last mentioned, the position of the person who had obtained possession under the wajib-ul-arz by paying arrears of revenue due by a defaulter was that of a mortgagee under a

* Appeal No. 49 of 1903, under section 10 of the Letters Patent.

(1) (1883) I. L. R. 9, Calc., 831, at pp. 835 and 836.

(2) (1874) 22 W. R., 77.

1904

JAI RAM v. MAKUNDA.

mortgage by conditional sale as defined in section 58 of the Transfer of Property Act, 1882, and that the defaulter or his representative, in the absence of a suit for foreclosure, had a period of sixty years within which the arrears of revenue might be paid up and the property redeemed.

THE wajib-ul-arz of the village of Kursanda provided that if any co-sharer should be in default in payment of Government revenue, certain categories of persons, including "co-sharers in the patti and in the village," might, on payment of the arrears of Government revenue, take possession of the share of the defaulter, though without power to partition and without power to sell or transfer. The wajib-ul-arz also provided that if within twelve years the defaulter or his heir wished to get back the property, he could get it in the month of Jeth on payment of the amount of the default without interest and without being entitled to a rendition of accounts. The wajib-ul-arz further went on to say that after the said term, *i.e.* the twelve years, the defaulter and his heirs could not recover possession, but the person put into possession after payment of arrears of revenue would become the owner.

On the 18th of July, 1885, one Sohan Pal, a lambardar, was put into possession of certain shares in the village belonging to certain defaulting pattidars by an order made by a Deputy Collector apparently in accordance with the provisions of the wajib-ul-arz. On the 22nd of May, 1901, a suit was filed by one Jai Ram in the Court of the Munsif of Mahaban, in which he claimed as purchaser of the rights of the said defaulting pattidars to recover, upon payment of the revenue due by them in 1885, possession of the shares which they had then forfeited from the representatives in title of Sohan Pal, the lambardar. The Munsif, on a construction of the village wajib-ul-arz, dismissed the plaintiff's suit upon the ground that he had not come into Court within twelve years from the date of the dispossession of the pattidars through whom he claimed. On appeal to the District Judge of Agra this decree was affirmed.

The plaintiff then appealed to then High Court, and his appeal coming before a single Judge of the Court was dismissed. From the judgment dismissing this appeal the plaintiff filed the present appeal under section 10 of the Letters Patent.

Munshi *Gobind Prasad*, for the appellant.

Pandit *Madan Mohan Malaviya*, for the respondent.

STANLEY, C. J., and BURKITT, J.—This is an appeal under section 10 of the Letters Patent of this Court from the judgment of one of the learned Judges of the Court, which affirmed in appeal the decision of the two lower Courts. The suit was one in which the plaintiff, Jai Ram, claimed possession of certain property in a village, on the allegation that he had tendered to the defendants a sum of money which, according to him, the predecessor in title of the defendants had paid on account of Government revenue due from the predecessors in title of the plaintiff. The learned Judge of this Court is of opinion that the proceedings under which the predecessor in title of the defendants was put in possession of the property in suit were proceedings under section 157 of the North-Western Provinces Land Revenue Act, No. XIX of 1873. In our opinion the learned Judge was mistaken in that matter. As far as we can see, section 157 of the Act just cited has nothing to do with this case. In it no action whatever was taken by the Collector, nor was any report made to the Commissioner for sanction to the transfer of the patti of the defaulting pattidar to a solvent pattidar. It is in our opinion abundantly clear that the transfer took place under the provisions of the wajib-nl-arz of the mahal.

What happened was that some time in 1885 an application was made to the Deputy Collector, Het Ram, by one Sohan Pal, who was the lambardar of the village, alleging that as lambardar he had been compelled to make certain payments of revenue due from four men, whom he named, who were pattidars in the village. He went on to say that these men had left the village, but had leased their interest in it to one Jhandu, who also had failed to pay the quota of Government revenue due from his lessors. The applicant then prayed that *under the provisions of the wajib-ul-arz*, inasmuch as he, the lambardar, had paid on behalf of the defaulting pattidars the revenue due from them, he should be put into possession of the shares in the village belonging to the defaulters. This application appears to have been granted. On the 18th of July, 1885, the applicant,

1904

JAI RAM v. MAKUNDA.

Sohan Pal, the lambardar, was put into possession of the shares in question.

Matters remained in this position until the present suit was instituted in May, 1901 (that is to say 16 years afterwards), by the present plaintiff appellant. He derives his title by purchase from the defaulting pattidars mentioned above. He alleges that he tendered to the defendants the amount of the revenue due from the defaulters in 1885, and called on them to surrender possession to him of the shares which had belonged to the defaulters. On refusal he instituted this suit.

The defence set up and accepted by the lower Courts practically is that the defendants and their predecessor in title, Sohan Pal, held adverse possession of those shares from the time when they were put into possession of them in 1885, and so had acquired a prescriptive title. In our opinion the defence cannot be supported. It is perfectly clear that the transfer of possession from the defaulting pattidars to Sohan Pal, who paid up revenue due from them, was made under the provisions of clause (6) of the wajib-ul-arz of the village. That clause is one which contains the "mutual arrangements" made between the pattidars as to the transfer and return of shares of defaulters. It provides that if any sharer is in default in payment of Government revenue certain categories of persons can, one after the other, on payment of the default, take possession of the property of the defaulter. Among these categories one is "co-sharers in the patti and in the village," which of course would include the lambardar of the village. The condition is that the person so discharging the unpaid revenue due by defaulters shall take possession of their shares, though without power to partition and without power to transfer or sell. But the wajib-ul-arz goes on to say that if within 12 years the defaulter or his heir wishes to take back the property he shall get it in the month of Jeth on payment of the amount of default without interest and without being entitled to a rendition of accounts. Then, after certain provisions as to the construction of wells, the wajib-ul-arz goes on to say that after the said term (*i.e.* the 12 years) the defaulter or his heirs shall not get the property and the person put therein shall be the owner thereof.

It is on the wording of these clauses that the lower Courts held that the defendants here, with their predecessors in title, had acquired a prescriptive title to the property of which they had taken possession in 1885. *Primâ facie* the words of the wajib-ul-arz appear to confer an absolute interest in the property after the lapse of 12 years. But the wajib-ul-arz cannot be construed so as to override the general law of limitation. The transaction which here happened between the predecessors in title of the plaintiff and of the defendants was clearly this, that the lambardar, Sohan Pal, was put in possession of the property of the defaulting pattidars on condition of paying revenue due from it, and there was this condition, that if that money were not repaid to him within 12 years he should be the absolute owner.

These terms seem to us exactly to describe a mortgage by conditional sale, as defined in section 58 of the Transfer of Property Act, where the mortgagor ostensibly sells the mortgaged property on condition that on default of payment of the mortgage money on a certain day the sale shall become absolute. Here the shares of the defaulting pattidars were transferred to the mortgagee, Sohan Pal; the price was the amount of the revenue which was in default, and the condition was that if that money was not repaid within 12 years the transfer to Sohan Pal should be absolute. This transaction then in our opinion was a mortgage by conditional sale, and as such it is subject to the law of limitation. By article 148 of the second schedule to the Limitation Act of 1877 it is provided that a suit against a mortgagee to redeem or to recover possession of mortgaged property has a limitation of 60 years. We are of opinion then that this plaintiff is in the position of a mortgagor by conditional sale to whom a period of 12 years was given within which to pay the mortgage money, who did not so pay, and who therefore has a period of 60 years within which to sue for redemption in the absence of a suit for foreclosure.

For the above reasons we must set aside the decree of the learned Judge of this Court and also the concurrent decrees of the District Judge and Munsif of Mahaban, and as the suit has been decided on a preliminary point, and as we have

1904

JAI RAM v. MAKUNDA.

reversed the decision on that point, we remand the record under section 562 of the Code of Civil Procedure, through the Court of the District Judge, to the Court of first instance to be replaced on the file of pending suits and decided according to law. The appellant is entitled to his costs in all three Courts.

Appeal dismissed and cause remanded.

1904

February 4.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt.

KAMTA PRASAD AND ANOTHER (DEFENDANTS) *v.* SHEO GOPAL LAL (PLAINTIFF).*

Act No. IX of 1872 *(Indian Contract Act), sections* 10, 11, 64 *and* 65—*Minority—Contracts by infants—Void contract—Repayment of advance on contract made by an infant.*

Held that a mortgage entered into by an infant is not merely voidable, but void *ab initio*.

Held also that sections 64 and 65 of the Indian Contract Act 1872, apply only to contracts between competent parties and are not applicable to a case where there is not and could not have been any contract at all. *Mohori Bibee* v. *Dharmodas Ghose* (1) followed.

The plaintiff in this case sued to have a mortgage-deed executed by him in favour of the defendant and registered on the 3rd of May, 1900, declared null and void, on the grounds that the plaintiff was a minor at the time of execution of the mortgage and that he had received no consideration. The defendant pleaded that the plaintiff was 22 years of age at the time of execution of the mortgage, and that in any case he represented himself as of full age and could not now plead that he was not, and that the mortgage-deed was executed in good faith and for valid consideration, out of which Rs. 566-6-0 was paid before the Sub-Registrar. The Court of first instance (Munsif of Bansi) dismissed the suit. On appeal by the defendant, the lower appellate Court (Additional Subordinate Judge of Gorakhpur) confirmed the decree of the first Court. That Court found as a fact that the plaintiff was a minor

* Second Appeal No. 1178 of 1901, from a decree of Babu Ramdhan Mukerji, Additional Subordinate Judge of Gorakhpur, dated the 27th of June, 1901, confirming a decree of Babu Kalka Singh, Munsif of Bansi, dated the 9th of May, 1901.

(1) (1902) I. L. R., 30 Calc., 539.