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IN THE MATTER OF THE PETITION OF CHANDO BIBI.

surmount the difficulty is not a successful one. We prefer to follow the view expressed by our brother Burkitt in a case on all fours with this, namely, on application in F. A. No. 1 of 1901, *Musammat Haidari* v. *Musammat Hayat Begam*, disposed of by him on the 3rd June 1901, and which is as yet unreported. We adopt the view there expressed, that "in a case like the present it is impossible to say that the property mentioned is in danger of being '*wrongfully*' sold in execution of the decree held by the opposite party." Section 492 requires, moreover, that it must be '*proved*' that the property in dispute is in danger of being '*wrongfully*' sold. To hold in an application like the present that this was proved would be to decide the appeal, which is not before us. For the above reasons we discharge the rule with costs.

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December 3.

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

DIP SINGH (PLAINTIFF) *v.* GIRAND SINGH AND ANOTHER (DEFENDANTS).*

Act No. XV of 1877 (Indian Limitation Act), section 19—Limitation—Acknowledgment of existence of mortgage assigning a wrong date thereto.

Where parties, defendants to a suit for redemption of a mortgage, had in a previous suit, in which it had been sought to eject them as trespassers, set up the existence of a mortgage, under which they alleged that they were in possession, but had assigned, as was found by the lower appellate Court, a wrong date to such mortgage, it was *held* that the mere attribution of a wrong date to the mortgage under which the defendants claimed to be in possession would not of itself prevent the acknowledgment so made by them from being a good acknowledgment for the purposes of section 19 of the Indian Limitation Act, 1877, in a subsequent suit for redemption of the mortgage.

THIS was a suit for redemption of a mortgage alleged to have been made in the year 1842. The mortgagor was one Maharaj Singh and the mortgagees were the predecessors in title of the present defendants. In execution of a money decree against Maharaj Singh, his equity of redemption in the mortgaged property was sold and was purchased by one Hori Lal, who is the predecessor in title of the plaintiff. Hori Lal, in 1887, instituted a suit for ejectment of the defendants as

* Appeal No. 15 of 1903, under section 10 of the Letters Patent.

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trespassers. In answer to that suit the defendants pleaded that they were not trespassers, but were mortgagees in possession under a mortgage executed in 1842 by Maharaj Singh to Kanchan Singh and others to secure a sum of Rs. 150, and they alleged that from that time their ancestors and themselves had been in possession of the property. The suit was accordingly dismissed. On the 14th of June 1900 the suit out of which the present appeal arose was instituted, in which it was sought to redeem the mortgage of 1842. The Court of first instance (Munsif of Kaimganj) dismissed the suit as barred by limitation. The plaintiff appealed. The lower appellate Court (District Judge of Farrukhabad) found that the mortgage set up was not made in 1842, but that there was a mortgage of some earlier date, and therefore that the plaintiff could not make use of the admission made by the defendants in the former suit of 1887, as an acknowledgment, within the meaning of section 19 of the Indian Limitation Act, 1877, which would save limitation. That Court accordingly held the suit to be time-barred and affirmed the decision of the Munsif. The plaintiff appealed to the High Court and this appeal coming before a single Judge of the Court was dismissed under section 551 of the Code of Civil Procedure. The plaintiff thereupon appealed under section 10 of the Letters Patent.

Pandit *Mohan Lal Nehru*, for the appellant.

Babu *Jogindro Nath Chaudhri*, for the respondents.

STANLEY, C. J. and BURKITT, J.—Upon the question of limitation raised in this suit we are unable to see our way to agree in the view expressed by the learned District Judge, which commended itself also to the learned Judge who disposed of this case under section 551 of the Code of Civil Procedure. The suit is one for redemption of a mortgage alleged to have been made in the year 1842. The mortgagor in that instrument was one Maharaj Singh and the mortgagees were the predecessors in title of the defendants respondents. In execution of a money decree which had been obtained against Maharaj Singh, his equity of redemption in the mortgaged property was sold and purchased by one Hori Lal, who is the predecessor in title of the plaintiff appellant. Hori Lal

instituted a suit in the year 1887 for recovery of possession of the mortgaged property, alleging, as he believed at the time, that the defendants respondents were merely trespassers. A defence was filed to that suit by the defendants respondents, in which, denying the allegation that they were trespassers, they set up the case that they were mortgagees in possession of the property. They stated in clear terms that the property was mortgaged with possession in the year 1842 by Maharaj Singh to Kanchan Singh and several others, to secure a sum of Rs. 150, and that from the date of that mortgage the ancestors of the defendants respondents, the mortgagees, and afterwards the defendants respondents, had been in possession of the property under the mortgage. The plaintiff's suit was accordingly dismissed. Thereupon the present suit was filed on the 14th of June, 1900, for redemption of the mortgaged property. The suit was ultimately dismissed on the ground that it was barred by limitation. The learned District Judge, after carefully reviewing the evidence, came to the conclusion that the admission contained in the defence, to which we have referred, in the suit brought in 1887, namely, that the defendants were in possession under a mortgage made in the year 1842, was made in error; that there was no mortgage of that date, but that there was a mortgage of an earlier date, and that this being so, the plaintiff could not rely upon the written statement which the defendants had filed as amounting to an acknowledgment under section 19 of the Indian Limitation Act. He observes in the course of his judgment:—"The second alleged acknowledgment refers to the written statement of the respondents in the course of a suit in 1887, in which they set up this identical mortgage, which they declared to be of the year 1842, as a bar to ejectment. This would have been a valid acknowledgment had there not been an error as to the date. Taken broadly, when a man makes an acknowledgment with regard to the existence of one thing, he cannot be held to make an acknowledgment with regard to a totally disconnected thing, and an acknowledgment made under a misapprehension as to relevant facts can only be held to be no acknowledgment at all." We wholly fail to follow the learned District Judge

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in the conclusion at which he arrived on this point. The statement contained in the defence filed in the suit of 1887 was a clear and explicit acknowledgment that the defendants in that suit were in possession of the property as mortgagees, and amounted to a plea that if the plaintiff sought to get possession of the mortgaged property he must first redeem their mortgage. The mere fact that the mortgage was erroneously stated to be a mortgage of the year 1842 did not take away from the admission its efficacy under section 19 of the Indian Limitation Act. But then it is contended on behalf of the defendants respondents that, admitting that that statement in the defence did amount to an acknowledgment, which would under ordinary circumstances take the case out of the bar of the Statute, it was open to the defendants to rely upon the fact—if it be a fact—that at the time when the acknowledgment was given more than 60 years had elapsed from the date of the mortgage, and that the suit was therefore barred; that the acknowledgment was inefficacious, the suit having been already barred. This might be so if they had been able to satisfy the *onus* which clearly lay upon them of satisfying the Court that the mortgage was executed upwards of 60 years prior to the filing of the written statement in the suit of 1887, but they have failed to do so. Consequently, as it appears to us, that acknowledgment must be treated, so far as this appeal is concerned, as an acknowledgment that at the time when it was made the mortgage was a subsisting mortgage, whatever be its date. We only decide in this appeal that the claim of the plaintiff has not been shown to be statute barred, and that the decision of the learned District Judge, which has been upheld on appeal to this Court, cannot be supported. We decide no other question. We accordingly allow the appeal, set aside the decisions of the various Courts before which this matter has come, and remand the case under the provisions of section 562 of the Code of Civil Procedure to the Court of first instance through the lower appellate Court, with directions that it be readmitted under its original number in the register of pending suits and be determined on the merits.

It is to be understood that we decide nothing on the merits of the case. It will be on the plaintiff to establish the terms of

the alleged mortgage. All that we hold is that upon the facts which have been brought before the lower appellate Court and this High Court there was no justification for dismissing the suit upon the question of limitation which was raised before those Courts. Costs in all Courts will follow the event.

Appeal decreed and cause remanded.

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Before Mr. Justice Blair and Mr. Justice Banerji.

HABIB-UL-RAHMAN (JUDGMENT-DEBTOR) *v.* RAMSAHAI AND ANOTHER (DECREE-HOLDERS).*

1904

January 19.

Civil Procedure Code, section 341—Execution of decree—Arrest of judgment-debtor—Non-payment of subsistence money—Re-arrest of judgment-debtor not barred.

A judgment-debtor was arrested in execution of a decree against him, but was liberated owing to non-payment by the decree-holders of subsistence money for the debtor. *Held* that such arrest was no bar to the re-arresting of the judgment-debtor in execution of the same decree. *Subba* v. *Venkata* (1) followed.

THIS was an appeal arising out of an application for execution of a decree. The decree was passed on the 11th of July 1899, and three applications for execution were made, on each occasion asking for the arrest of the judgment-debtor. On the 29th of May 1901 the judgment-debtor was arrested at the instance of the decree-holders, but was liberated shortly afterwards because the decree-holders did not deposit the necessary subsistence money. On the 9th of September 1901 the decree-holders again applied for a warrant for the arrest of the judgment-debtor. The judgment-debtor objected that he could not be again arrested in execution of the same decree, but the executing Court (Subordinate Judge of Saharanpur) disallowed his objection and directed a warrant to issue. On appeal by the judgment-debtor, the lower appellate Court (Additional District Judge of Saharanpur) affirmed the order of the Court of first instance. The judgment-debtor thereupon appealed to the High Court.

* Second Appeal No. 40 of 1903 from a decree of Mr. A. Yusuf Ali, Additional Judge of Saharanpur, dated the 4th December, 1902, confirming a decree of Babu Madho Das, Subordinate Judge of Saharanpur, dated the 31st May 1902.

(1) (1884) I. L. R., 8 Mad., 21.