

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkill.
 DEBENDRA MOHAN RAI (PLAINTIFF) v. SONA KUNWAR AND OTHERS
 (DEFENDANTS).*

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 January 8.

Act No. IV of 1882 (Transfer of Property Act), section 83—Mortgage—Payment of mortgage money into Court—Payment made to credit of mortgagee and a third person.

Held that a payment of mortgage money into Court purporting to be made under section 83 of the Transfer of Property Act, 1882, but made not to the credit of the mortgagee alone, but to the credit of the mortgagee and a third person, was not such a payment as would entitle the mortgagor to the benefit of the provisions of section 83, nor would the omission of the mortgagee to take any notice of such irregular payment be any bar to his bringing a suit for sale on his mortgage.

ON the 27th of November 1895 the defendants executed a mortgage in favour of the plaintiff to secure a loan of Rs. 1,200 with interest at the rate of Re. 1-8-0 per centum per mensem, and compound interest calculated with yearly rests. The loan was for a period of two years certain; but before the expiration of the two years, namely, on the 15th of June 1897, the defendants, acting apparently under section 83 of the Transfer of Property Act, paid into Court Rs. 1,209-4-0, the amount which they alleged to be then due by them to the plaintiff for principal and interest. This money, was however, deposited, not to the credit of the plaintiff alone, but to the credit of the plaintiff and one Babu Gaur Hari Chakravarti. Notice of the deposit was given to the plaintiff, but he took no steps to draw it out, nor did he take any objection to the deposit except as to the sufficiency of the sum paid in.

On the 16th of February 1898 the plaintiff sued to recover the amount then due on the mortgage by sale of the mortgaged property. The Court of first instance (Subordinate Judge of Benares) found that the payment into Court made by the defendants on the 15th of June 1897 was, having regard to the terms of the mortgage-deed, premature, and therefore not a payment within the meaning of section 83. Consequently it gave a decree for sale of the mortgaged property; but inasmuch as the plaintiff, after having received notice of the deposit, delayed to take proceedings for the recovery of the debt, it came to the conclusion that he was not entitled to

* Appeal No. 31 of 1903, under section 10 of the Letters Patent.

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interest after the due date of the mortgage, namely, the 27th of November 1897, and for the same reason it refused to give the plaintiff the costs of the suit.

Against this decree the plaintiff appealed, claiming in the appeal interest up to the date of payment and also the costs of the suit. The defendants did not appeal, that is to say, they acquiesced in the finding of the Subordinate Judge that the payment into Court was not valid within the meaning of section 83 of the Transfer of Property Act. The lower appellate Court (District Judge of Benares) came to the conclusion that the Court of first instance was wrong in holding that the payment into Court was premature; and, having considered what sum was actually due on the mortgage, found that the plaintiff was not entitled to interest or costs, and dismissed the appeal.

The plaintiff appealed from this decree to the High Court, and his appeal coming before a single Judge of the Court was dismissed. The plaintiff thereupon preferred the present appeal under section 10 of the Letters Patent.

Babu Jogindro Nath Chaudhri, for the appellant.

Babu Surendra Nath Sen, for the respondents.

STANLEY, C.J., and BURKITT, J.—This is an appeal under section 10 of the Letters Patent, brought by the plaintiff in a suit to raise the amount due to him on foot of a mortgage of the 27th of November 1895. The mortgage was executed by the defendants in favour of the plaintiff to secure a loan of Rs. 1,200 and interest at the rate of Re. 1-8-0 per cent. per mensem with compound interest calculated with yearly rests. The loan was for a period of two years certain. But before the expiration of the two years, namely, on the 15th of June 1897, apparently acting under the provisions of section 83 of the Transfer of Property Act, the defendants paid into Court a sum of Rs. 1,209-4-0, the amount alleged to be then due by them to the plaintiff for principal and interest. Notice of this payment was given to the plaintiff, but no steps were taken by him to withdraw the money, nor was any objection taken to the deposit, save as to the insufficiency of the sum so paid in. The defendants did not comply with the provisions of section 83. They deposited the money to the

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account of the mortgagee, but, for some reason or other best known to themselves, they associated with the mortgagee one Bābu Gaur Hari Chakravarti. The Court of first instance, in the suit which was brought by the plaintiff to raise the amount of the mortgage debt by sale of the mortgaged property, found that the payment into Court made by the defendants on the 15th of June 1897 was, having regard to the terms of the mortgage-deed, premature, and therefore not a payment within the meaning of section 83. Consequently it gave a decree for sale of the mortgaged property; but inasmuch as the plaintiff, after having received notice of the deposit, delayed to take proceedings for the recovery of the debt, it came to the conclusion that he was not entitled to interest after the due date of the mortgage, namely, the 27th of November 1897, and it for the same reason refused to give the plaintiff the costs of the suit.

Against this decree the plaintiff appealed, claiming in the appeal to have interest up to the date of payment and also claiming the costs of the suit. No appeal was preferred by the defendants. They acquiesced in the finding of the learned Subordinate Judge, that the payment into Court was not valid, within the meaning of section 83 of the Transfer of Property Act. On appeal to the learned District Judge, he came to the conclusion that the Court of first instance was wrong in holding that the payment into Court was premature; and having considered what sum was actually due on foot of the mortgage, came to the conclusion that the plaintiff was not entitled to interest or the costs of the suit, and dismissed the appeal. No question, we may observe, was raised in that appeal in regard to the finding of the Court of first instance that the payment into Court was not a valid payment. Consequently, the learned District Judge had no other course open to him but to dismiss the appeal. If the defendants had, by a cross appeal, questioned the propriety of the decision of the Court below as regards the validity of the payment into Court, then the District Judge would have been bound to have dismissed the suit, inasmuch as he found that a sufficient sum had been paid into Court to the credit of the mortgagees under section 83.

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From the decree of the District Judge an appeal was preferred to this Court, when the matter was fully considered. The learned Judge before whom the appeal came, expressed the opinion that if in the appeal the propriety of the construction of the mortgage-deed had been challenged, he would have found it difficult to adopt the interpretation put upon it by the learned District Judge, an interpretation which, he observed, was based on a wrong reading of the deed. But inasmuch as no ground of appeal was directed to this question the learned Judge did not entertain it. As this was a question of law which had been discussed in the lower appellate Court, having been considered necessary for the due determination of the issues before that tribunal, we are disposed to think that the learned Judge of this Court might well have entertained it. We do not, however, think it necessary to go into this question, inasmuch as there is another question which is fatal to the respondents' case. As we have pointed out, the money was deposited by the defendants not to the account of the mortgagee alone, but to the account of the mortgagee and a person who happens to be his pleader in the present suit. This payment was clearly not a payment within the meaning of section 83. Payment under section 83 must be a payment to the account of the mortgagee alone, so that the mortgagee may, on receipt of the notice of deposit, apply to the Court by petition and forthwith obtain payment, without the concurrence or sanction of any other person. The section confers on mortgagors an exceptional privilege, which other debtors do not enjoy, of paying the amount of their debt into Court and so relieving themselves of any further liability. An exceptional privilege of the kind, however, must not be abused, and a mortgagor who does not strictly observe the provisions of the section, but makes a payment which involves the necessity of a decision of the Court as to the rights of parties other than the mortgagee, cannot be regarded as having made the payment within the meaning of the section. The deposit in this case, even if it were a good deposit in other respects, could not have been drawn out without the concurrence of or notice to the vakil to whose credit it had been

deposited jointly with the mortgagee. As, then, we are of opinion in this case that there has been no valid deposit under section 83, it appears to us that the plaintiff is clearly entitled to the amount of his mortgage debt together with interest after the due date up to the date of payment, and we think that the justifiable omission on his part to take any notice of such a deposit as was made in this case clearly does not disentitle him to interest or to his costs of the suit. We therefore allow this appeal, set aside the decree of this Court and of the lower appellate Court, and modify the decree of the Court of first instance by allowing the plaintiff interest at the stipulated rate up to the date of payment and also his costs of suit. The plaintiff will be entitled to the costs of this appeal and also in all courts. We extend the time for payment up to the 15th of April 1904.

Appeal decreed.

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Before Mr. Justice Blair and Mr. Justice Banerji.

MASIT-UN-NISSA AND OTHERS (DEFENDANTS) v. PATHANI AND OTHERS
(PLAINTIFFS).*

1904
January 18.

*Muhammadian Law—Legitimacy—Presumption arising from relations
between the parents.*

Under the Muhammadan law the mere continuance of cohabitation under circumstances in which no obstacle to marriage exists is not alone sufficient to raise a presumption of marriage, but to raise such a presumption it is necessary that there should be not only a continued cohabitation but a continued cohabitation under circumstances from which it could reasonably be inferred that the cohabitation was a cohabitation as man and wife, and there must be a treatment tantamount to an acknowledgment of the fact of the marriage and the legitimacy of the children. *Khajah Hidayat Oollah v. Rai Jan Khanum* (1) and *Ashrafud Dowlah Ahmed Hossein Khan Bahadur v. Hyder Hossein Khan* (2) referred to.

THE suit out of which this appeal arose was brought by one Musammat Pathani and her four minor children to recover joint possession of a share in the property of a deceased Muhammadan, Wazir Muhammad Khan, who was alleged by the plaintiff Pathani to have been her husband, the father of her children, and for mesne profits of the property claimed.

* First Appeal No. 176 of 1901, from a decree of Babu Prag Das, Subordinate Judge of Saharanpur, dated the 4th July 1901.

(1) (1844) 3 Moo., I. A., 295. (2) (1866) 11 Moo., I. A., 94.