

order of the 1st of February, 1902, and direct that the partition proceedings be stayed pending the decision of the question which has been raised by a competent Civil Court. The effect of our order will be to render abortive any proceedings which have been taken subsequent to the order of the 1st of February, 1902.

*Appeal decreed.*

1903

JAMNA  
PRASAD  
v.  
BALMUKAND.

1903  
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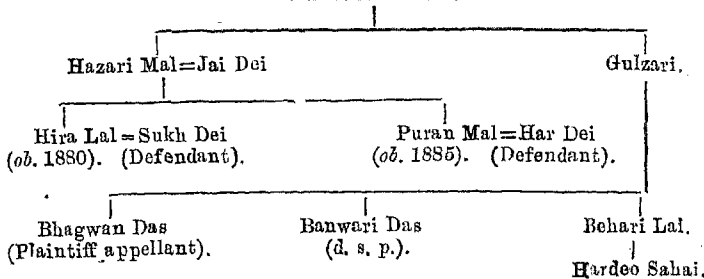
*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkill.*  
BHAGWAN DAS (PLAINTIFF) v. HAR DEI AND ANOTHER (DEFENDANTS).  
*Act No. IV of 1882 (Transfer of Property Act), section 95—Suit for contribution—Plaintiff not in possession of mortgaged property—Interpretation of Statute—Act No. XV of 1877 (Indian Limitation Act), schedule II, Article 132.*

*Held* that section 95 of the Transfer of Property Act, 1882, cannot be interpreted absolutely according to the letter of the section, for it would then have reference to cases of usufructuary mortgage only, which could not have been the intention of the Legislature. To give effect to what was apparently the intention of the Legislature, it is necessary to read the section in some such way as the following:—"Where one of several mortgagors redeems the mortgaged property and obtains possession thereof, if the mortgagee be in possession, he has a charge, &c."

Where, therefore, a person who had a mortgagor's interest in a decree for sale on a mortgage satisfied the decree and then brought a suit for contribution against his co-mortgagors without having obtained possession of the mortgaged property, it was *held* that the suit was maintainable and was governed as to limitation by article 132 of the second schedule to the Indian Limitation Act, 1877. *Moidin v. Oothumanganni* (1) and *Ghulam Maula Khan v. Baano Khanam* (2) referred to.

THE suit out of which this appeal arose was one for contribution to which the plaintiff claimed to be entitled as a co-mortgagor who had paid up the mortgage debt. The parties were related in the manner shown in the following table:—

HARSUKH RAI.



\* First Appeal No. 111 of 1901, from a decree of Babu Achal Bihari, Additional Subordinate Judge of Moradabad, dated the 14th February, 1901.  
(1) (1888) I. L. R., 11 Mad., 416. (2) (1901) Oudh Cases, Vol. IV, p. 278.

1903

BHAGWAN  
DAS  
v.  
HAR DEI.

The property mortgaged formerly belonged to Harsukh Rai. On the 8th of September, 1878, Hazari Mal and Puran Mal executed a mortgage of it in favour of Jauhari Mal and Sri Ram. In 1880 Hira Lal died, leaving a widow, Musammat Sukh Dei; and in 1885 Puran Mal died, leaving a widow, Musammat Har Dei. On the 7th of March, 1887, the mortgagees obtained separate decrees on their mortgage against Hazari Mal, Jai Dei and Har Dei. Hazari Mal died shortly after the date of these decrees. On the 20th of September, 1888, Bhagwan Das and Banwari Das paid a sum of Rs. 4,040 towards satisfaction of the decree obtained by Sri Ram, and subsequently Rs. 139-15-0 towards the same decree. The decree was thus satisfied. On the 19th July, 1889, Bhagwan Das and Banwari Das also satisfied the decree held by Jauhari Mal. Musammat Jai Dei died in 1893. The present suit was brought by Bhagwan Das in his own right and as representative of Banwari Das, then deceased, on the 4th of September, 1900, to recover from Musammat Sukh Dei, the widow of Hira Lal, and Musammat Har Dei, the widow of Puran Mal, one-half of the amounts so expended, by sale, if necessary, of one-half of the property mortgaged.

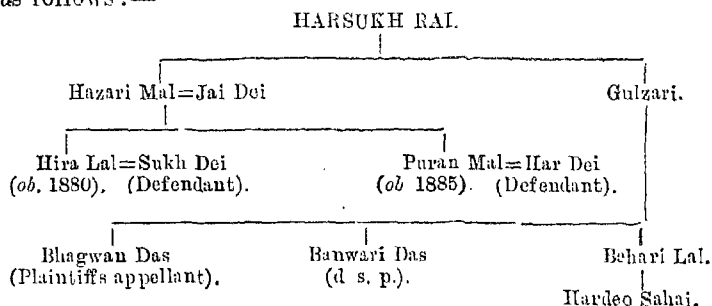
The Court of first instance (Additional Subordinate Judge of Moradabad) dismissed the suit as barred by limitation, holding that article 99 of the second schedule to the Indian Limitation Act, 1877, applied. The plaintiff appealed to the High Court.

Munshi *Gokul Prasad* and Pandit *Madan Mohan Malaviya*, for the appellant.

Pandit *Sundar Lal*, for the respondents.

STANLEY, C. J., and BURKITT, J.—The main question in this appeal depends upon the true construction of section 95, a carelessly drafted section of the Transfer of Property Act. The suit is one to raise the amount of the contribution to which the plaintiff claims to be entitled from the owners of portion of certain mortgaged property, by reason of the payment by him of the entire mortgage debt. The mortgaged property formerly belonged to one Harsukh Rai, and it will be

convenient to give a short pedigree of the family. It is as follows:—



1903

BHAGWAN  
DAS  
v.  
HAR DEI.

Hira Lal died in 1880, leaving his widow, Musammat Sukh Dei (defendant in this suit). Puran Mal died in 1885, and his widow, Musammat Har Dei, is the first defendant. Musammat Jai Dei died in 1893. Banwari Das died without issue, leaving his brother, Bhagwan Das, his heir, Behari Lal being then dead. On the 8th of September, 1878, Hazari Mal and Puran Mal executed a mortgage in favour of Jauhari Mal and Sri Ram of 10 biswas of mauza Mithan and mauza Sikandarpur. The mortgagees brought suits to raise the amount of the mortgage debt against Hazari Mal, Musammat Jai Dei and Musammat Har Dei, the widow of Puran Mal, who was then dead, and obtained separate decrees against these parties on the 7th of March, 1887. After the date of these decrees Hazari Mal died, and after his death, namely on the 20th of September, 1888, the plaintiff, Bhagwan Das, and his brother, Banwari Das, paid a sum of Rs. 4,040 towards satisfaction of the decree obtained by Sri Ram, and subsequently a sum of Rs. 139-15-0 on foot of the same decree. These two sums, amounting together to Rs. 4,179-15-0, satisfied the decree of Sri Ram. On the 19th of July, 1889, the plaintiff and his brother, Banwari Das, also paid into Court the sum of Rs. 2,770-4-9 in satisfaction of the decree of Jauhari Mal. This payment also completely satisfied that decree. It is admitted that Hazari Mal and Puran Mal were joint at the date of the execution of the mortgage of the 8th of September, 1878, and that they became separate in 1885, before the death of Puran Mal. The present suit is brought by the plaintiff in his own right and as the legal representative of Banwari Das for

1903

BHAGWAN  
DAS  
v.  
HAR DEI.

recovery of one-half of the sum so paid, as we have mentioned, in discharge of the decrees obtained on foot of the mortgage, by sale, if necessary, of a 5-biswa share in each of the villages, of Sikandarpur and Mithan, which belonged to Puran Mal, alleged to be in the possession of the defendant, Musammat Har Dei, the widow of Puran Mal.

The learned Subordinate Judge held that the suit was barred by limitation; that the article of the Limitation Act applicable to the case was article 99 of schedule II of that Act, and that as the suit was brought more than three years from the respective dates of payment of the mortgage debt the claim was barred. It was alleged that the share of the villages which was in the possession of the defendant, Musammat Har Dei, did not form any portion of the mortgaged property. An issue was framed as to this; but the learned Subordinate Judge considered it unnecessary to determine it having regard to his decision on the main question.

The case for the appellant is that the article applicable to the claim is article 122, the suit being one to enforce payment of a charge upon immovable property, and that having been brought within 12 years from the time when the mortgage debt was discharged, his claim is not barred. The decision of this question largely depends upon the true meaning of section 95 of the Transfer of Property Act. That section runs as follows:—  
“Where one of several mortgagors redeems the mortgaged property and obtains possession thereof, he has a charge on the share of each of the other co-mortgagors in the property for his proportion of the expenses properly incurred in so redeeming and obtaining possession.” The plaintiff appellant’s contention is that by virtue of this section a charge in his favour on the share of the defendants was created for the proportion of the debt incurred in redeeming the property attributable to that share.

On the part of the respondents the contention is that section 95 is only applicable where one of several mortgagors not merely redeems the mortgaged property, but also *obtains possession* of it; and that as the plaintiff did not in this case obtain possession of the mortgaged property upon redemption the section has no application. Not merely, according to this con-

1903

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BHAGWAN  
DAS  
V.  
HAR DEE.

tion, must the mortgaged property be redeemed, but possession of it must be obtained in order that the section may be applicable. If this be the true meaning of the section, it follows that it can only be applicable to a limited number of cases, namely cases of usufructuary mortgage, in which the mortgagee holds possession of the mortgaged property, and upon redemption delivers over that possession to the mortgagor. Was this the meaning of the Legislature? If the Legislature had usufructuary mortgages only in view when the section was passed, it is difficult to understand why the section was not prefaced by some such words as "in the case of usufructuary mortgages." Nothing in the preceding sections indicates that the Legislature had in view merely usufructuary mortgages. On the contrary, the earlier sections deal with mortgages generally. Section 82 gives the right of contribution where several properties are mortgaged to secure one debt. Sections 83 and 84 enable a mortgagor or any person entitled to institute a suit for redemption to deposit in Court the amount of the mortgage debt and thereby redeem the property. Section 85 and the succeeding sections up to 94 deal with the foreclosure, sale or redemption of mortgaged property. All these sections are concerned with mortgages generally, and not with any particular class of mortgage. The language of section 93 is particularly noticeable. It provides that upon payment of the amount found to be due to the mortgagee in case of redemption "the plaintiff shall, if necessary, be put into possession of the mortgaged property." These latter words possibly explain the words which have created the difficulty in the interpretation of section 95, namely "and obtains possession thereof." The draftsman had no doubt in view the words in the earlier section. After these sections follows the sections under consideration. We are unable to discover any ground why the provisions of this section should be confined to usufructuary mortgages. The object of the Legislature apparently was to give to a co-mortgagor, independently of the nature of his mortgage, a charge on a share of a co-mortgagor for the proportion of the share of the mortgage debt paid by him to redeem the property. The strict grammatical construction of the section no doubt demands that a mortgagor

1903

BRAGWAN  
DAS  
v.  
HAR DIE.

who is to have the benefit of the section must not merely redeem the mortgaged property, but also obtain possession. This construction, however, appears to us to frustrate the apparent purpose of the enactment and to lead to a result which can never have been intended. Now, where the ordinary meaning of the language of a Statute leads to a manifest contradiction of the apparent purpose of it, or to some inconvenience or absurdity, a construction may be put which will bring the language into accord with the apparent intention, even though it be necessary to reject words altogether, or interpolate other words. It seems to us that in this case the section was intended to be and should be read as if after the words "and obtains possession thereof" some such words as "if the mortgagee be in possession" were interpolated. The section would then run thus :—"Where one of several mortgagors redeems the mortgaged property and obtains possession thereof, if the mortgagee be in possession, he has a charge, *et cetera*." This question came before the Madras High Court in the case of *Moidin v. Oothumanganni* (1). It was there held that "the true construction of section 95 is that the co-mortgagor redeeming the whole of the mortgaged property has as well a right of obtaining possession as of treating the co-mortgagor's share of the mortgage debt as a charge on the latter's interest in the property redeemed." We do not well understand how this meaning can be attributed to the section, and are not prepared to agree that it represents the true construction of it. The decision, however, supports the contention of the appellant. The question came before Mr. Scott, one of the learned Judicial Commissioners of Oudh, in the case of *Gulam Marlu Khan v. Musammal Banno Khanam* (2). He held that the words "obtains possession" may be interpreted to mean "obtains possession when the mortgagee had possession under his mortgagee," and that the appellant in that case, notwithstanding that he had not obtained possession, had a charge on the share of each of the respondents for the latter's proportion of what he had paid to redeem the mortgage. We think that this view is correct, and that it was not the intention of the Legislature to confine

(1) (1888) I L. R., 11 Mad., 416.

(2) (1901) Oudh Cases, Vol. IV, p. 273.

the operation of the section as is here sought to be done. If our view be correct the article of the Limitation Act applicable to the case is article 132. It may be argued that section 95 is not exhaustive, and that independently of it a co-mortgagor who pays off the entire mortgage debt has, by virtue of sections 82 and 100 of the Act, a charge upon the shares of his co-mortgagors for a rateable share of the debt so paid off. Having regard, however, to our interpretation of section 95, it is unnecessary to consider this question. We hold, therefore, that the plaintiff appellant has a charge upon the share in the mortgaged property of the defendant respondent in respect of a moiety of the sums paid by him, and that the claim is not Statute-barred.

Another question has been raised before us, but has not been, and could not seriously be, pressed. The learned Subordinate Judge found that the decrees of Sri Ram and Jauhari Mal were satisfied out of moneys which belonged to one Karori Mal, and not with the moneys of the plaintiff or Banwari Das. It is clear upon the evidence that Banwari Das paid the amount of the decrees. Munshi Bulaki Das, who was pleader for the plaintiff, in his evidence states that Rs. 4,040 were deposited by him *on behalf of Banwari Das* for the satisfaction of the decree, and the remaining amount was given to Banwari Das, and also that *Banwari Das deposited Rs. 2,770-4-9 for the satisfaction of the decree of Jauhari Mal.* The money paid for redemption was clearly paid by Banwari Das, and it is perfectly immaterial from what source he obtained that money. The learned Subordinate Judge has gone out of his way to ascertain from what source Banwari Das obtained the money, and has found that it came from Karori Mal. It is, as we have said, immaterial from what source the money came, provided that Banwari Das paid it and satisfied the decrees. We therefore allow the appeal, and remand the suit under the provisions of section 562 of the Code of Civil Procedure to the lower Court, and direct that it be replaced on the file of pending suits under its original number, and be determined on the merits. The plaintiff appellant will have the costs of this appeal in any event. The other costs will abide the result.

*Appeal decreed and cause remanded.*

1903

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 BHAGWAN  
 DAS  
 v.  
 HAR DEL.