

When we indicated our view that the want of proper sanction under section 539 was a defect fatal to the plaintiffs' case, application was made to us by the learned advocate for the appellants for permission to withdraw the suit with liberty to bring a fresh suit. This application was strongly opposed by the learned advocate for the respondents. Ordinarily if it is shown to us that a suit must fail by reason of a formal defect, we should have no hesitation in granting permission to withdraw, particularly if it were shown that the plaintiffs would be debarred from all further remedy if permission were refused. The circumstances of the present case are peculiar. The plaintiffs have delayed for upwards of eight years in bringing the suit after the sanction by the Legal Remembrancer. During this interval part of the property in dispute has been sold more than once in execution of decrees obtained against it, and it has been purchased by third parties. No proper explanation is offered to account for this long delay on the part of the appellants. We doubt, moreover, whether they are actuated by and are acting solely in the interest of the trust. In the third place our refusal will not prevent the Legal Remembrancer or other persons having a more direct interest than the plaintiffs in the proper administration of this trust from bringing a suit.

For the above reasons we dismiss this appeal with costs.

Appeal dismissed.

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 GOPAL DEB
 v.
 KANNO
 DEB.

Before Mr. Justice Blair and Mr. Justice Banerji.

ANWAR HUSAIN (PLAINTIFF) v. LALMIR KHAN AND ANOTHER

(DEFENDANTS).*

1903

 July 21.

Suit for redemption of a usufructuary mortgage—Limitation—Act No. XVI of 1877 (Indian Limitation Act), section 20; schedule II, article 148.

Held that section 20 of the Indian Limitation Act does not apply to a suit for redemption of a usufructuary mortgage in such a manner as to extend the period of limitation within which such a suit must be filed. *Kallu v. Halki* (1) and *Khilanda Ram v. Jinda* (2) followed. *Jamma Prasad v. Gokla* (3) dissented from.

*Second Appeal No. 861 of 1901 from a decree of Babu Nihal Chandra, Subordinate Judge of Shahjahanpur, dated the 17th of August 1901, reversing a decree of Babu Prem Behari, Munsif of Sahaswan, dated the 4th of October 1898.

(1) (1896) I. L. R., 18 All., 295.

(2) Punj. Rec., 1883, p. 115.

(3) Weekly Notes, 1894, p. 87.

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THIS was a suit for redemption of a usufructuary mortgage. The plaintiff alleged that the mortgage was for a sum of Rs. 95 and was executed in the year 1849. The defendants on the other hand alleged that the mortgage set up by the plaintiff did not exist; but admitted that there was a mortgage for Rs. 85, which they said was executed in 1826, and they pleaded that the suit was barred by limitation. The Court of first instance (Munsif of Sahaswan) found that the true date of the mortgage was 1826, and that limitation was saved by an entry in the khewat for 1272 Fasli, in which Bazmir Khan, one of the defendants, had acknowledged his liability as a mortgagee of the property. That Court therefore decreed the plaintiff's suit upon payment of Rs. 85. On appeal by the defendants the lower appellate Court (Subordinate Judge of Shahjahanpur) found that the admission in the khewat of 1272 Fasli (1865) relied upon by the plaintiff was not as a matter of fact attested by Bazmir Khan, and dismissed the suit as barred by limitation. The plaintiff appealed to the High Court, there raising the contention that "the mortgage in question being a usufructuary mortgage the last clause of section 20, Act XV of 1877 applies to the case, and the suit is therefore not barred by limitation." It was also pleaded that the acknowledgment relied upon in the Courts below was a good acknowledgment in law, and further that a provision in the mortgage deed by which the mortgage was redeemable at any time saved the suit from being time-barred.

Munshi *Haribans Sahai*, for the appellant.

Munshi *Gobind Prasad*, for the respondents.

BLAIR, J.—This case arises out of a suit for redemption of a mortgage. On the finding of fact the date of the mortgage is more than 60 years. The Court of first instance decreed the claim. The Court of first appeal dismissed it as barred by limitation. The special question before us is whether the mortgage being a usufructuary mortgage and the right of the mortgagees to sue for the debt having beyond all question been extended by the operation of section 20 of the Limitation Act No. XV of 1877, a correlative right of the mortgagor to redeem is extended by virtue of the same section. The argument addressed to us

was based upon two rulings of 1894 to which I was a party. In the case of *Jamna Prasad v. Gokla* (1), an opinion was expressed, unnecessarily for the decision of case, that the plaintiff under the terms of his mortgage was entitled to redeem at any time, and that art. 148 of the Limitation Act of 1877 did not bar his suit. In the unreported case, Second Appeal No. 38 of 1893, it was held expressly, and that holding was necessary to support the conclusion at which the court arrived, that the privilege conferred by section 20 of the Limitation Act was not conferred only upon one party to the contract. Mr. *Haribans Suhai* in support of this appeal has argued upon grounds which were no doubt present to our minds on the delivery of the unreported judgment quoted above that the mortgage contract is one which must either survive or be extinguished on both sides. He argued that if the right to redeem is gone, the mortgage contract of which it forms an essential part must be taken to have come to an end, and that inasmuch as by the provisions of section 20 of the Limitation Act certain payments enure to the extension of the rights of the mortgagee, they must necessarily operate to extend to the same extent the rights of the mortgagor. That seems to us the substantial proposition which we have to deal with. On the other hand, there is a decision of our brother Aikman sitting singly in *Kallu v. Halki* (2). He based his decision upon this reasoning: "Reading the section as a whole, that is, section 20, these words in my opinion indicate that the clause is meant to extend the time for suit by a mortgagee to recover a debt secured by a usufructuary mortgage and are not intended to override the general provision as regards limitation for suits for redemption which is to be found in art. 148 of the second schedule of the Act." The same point was raised in a case reported in the Punjab Record for 1883, page 115—*Khilanda Ram v. Jinda*. In that case Mr. Justice Rattigan enunciated the following proposition: "No doubt by the general law the right to redeem and the right to foreclose are co-extensive rights. In the present case we have to apply the provisions of the law of limitation, which is a special law, and we cannot enlarge exceptions of time allowed by that law beyond their legitimate limits.

(1) Weekly Notes, 1894, p. 87.

(2) (1896) I. L. R., 18 All., 295.

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The language of section 20 does not operate for any other purpose except to extend the period under certain circumstances within which a debt or legacy can be legally enforced against persons liable to pay the debt or legacy. We think it cannot be applied so as to extend the period of limitation in favour of a mortgagor." There are two cases also reported in the printed judgments of the Bombay High Court for 1883, one at page 318 and the other at page 346. In the case at page 318 the Court obviously intended to follow the ruling reported in the Punjab Record to which I have referred, and which is the authority upon the question. Turning myself to section 20 and considering it by the light of these judgments, I think the ruling in the Weekly Notes for 1894 cannot be maintained, and the ruling in the unreported case is also indefensible. I find that section 20 applies to cases in which interest on a debt or legacy is paid or part payment of principal is made, and the last clause of section 20 applies where receipt of profits by a mortgagee in possession operates as payment of interest. I have referred to the argument addressed to us and which influenced the mind of the Bench in the unreported case to which I have referred. It appears to me on further consideration that the scope of section 20 is limited by the opening words of that section and extends only to the remedies of persons entitled to a debt or legacy. It does not seem unreasonable that the Legislature should have provided for an extension of time for suits for the recovery of money by a mortgagee, who could in no way be said to be in default, and at the same time should decline to extend to the debtor, who was in continual default by non-payment of the debt which he has incurred, the same indulgence. I am therefore of opinion that the ruling in the Punjab and Bombay Courts and that of our brother Aikman are correct, and I would therefore dismiss this appeal with costs.

BANERJI, J.—I also am of opinion that this appeal should be dismissed. The suit was one for the redemption of a mortgage which has been found by the lower appellate Court to have been made in the year 1826. As the suit was brought after the expiry of 60 years, it was under the provisions of article 148, schedule II, of the Limitation Act barred by time. The

plaintiff, however, invoked in aid three circumstances: (1) an alleged acknowledgment by the mortgagee; (2) a provision in the mortgage-deed under which the mortgagor was competent to redeem the mortgage at will; and (3) the receipt of profits by the mortgagee, which, according to the contention of the appellant, had the effect of extending the period of limitation under the provisions of section 20 of the Limitation Act.

As regards acknowledgment, the plaintiff's contention is concluded by the finding of the Court below to the effect that the acknowledgment relied upon was not signed by the person making it. Consequently it could not extend the period of limitation under the provisions of section 19 of the Act. As regards the provisions of the mortgage-deed the learned vakil for the appellant contends that as the mortgagor is competent to redeem the mortgage at will, article 148 cannot bar his suit, because he could bring his suit at any time he liked. In support of this contention he refers to certain observations made in the case of *Jamna Prasad v. Gokla* (1) which seem to bear out his contention. With all deference I am unable to agree with those observations. As the mortgage was redeemable at the will of the mortgagor, his right to redeem accrued on the date of the mortgage, and consequently he was bound to bring his suit for redemption within 60 years of that date. As regards the third point, I cannot accede to the appellant's contention. For the reasons which my brother Blair has stated, it seems to me that the scope of section 20 is to extend the period of limitation prescribed for a suit to enforce payment of a debt or legacy. A creditor whose debt is secured by a mortgage may take the benefit of the section, and avail himself of the receipt of profits of the mortgaged property for enlarging the period of limitation for the recovery of his debt. But in my opinion the mortgagor cannot under the provisions of that section obtain an extension of time for the redemption of a mortgage. A usufructuary mortgagee as such cannot, it is true, sue to recover his debt. Such a mortgagee is not entitled to avail himself of the section. But in the case of some usufructuary mortgages the mortgagee in possession has by the terms

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of the mortgage the right to sue for his money. It is also easy to conceive of other mortgages in which the mortgagee is allowed to take possession of the property and appropriate the usufruct and has at the same time the right to sue for the recovery of the mortgage-money. Such a mortgagee may take the benefit of the section. It seems to me that it is only under section 19 of the Limitation Act, where an acknowledgment of the right of the mortgagor to redeem has been made in the manner required by the section, that the mortgagor can obtain an extension of the period of limitation. The effect of any other view of section 20 would be practically to exclude suits for redemption of usufructuary mortgages from the operation of the Limitation Act. Part payment of principal or payment of interest avoids the operation of limitation on the principle that such payment is "an acknowledgment of the existence of the debt and from it the law raises an implication of a promise to pay the residue or the principal, as the case may be, just as it does from a simple acknowledgment." (Darby and Bosanquet on Limitation, 2nd edition, p. 107.) This principle cannot apply to the case of a mortgagor seeking to redeem a mortgage, and must of necessity apply to the person to whom the money is due. I am therefore unable to agree with the ruling in the unreported case which has been relied upon on behalf of the appellant, and to which reference is made in the judgment of my brother Blair. As he has pointed out, the Punjab Chief Court and the Bombay High Court have held the contrary view, and the same view has been held by my brother Aikman in the case of *Kallu v. Halke* (1). I agree with the remarks made by him and hold that a mortgagor plaintiff is not entitled to claim the benefit of section 20 of the Limitation Act. It is true that the right of the mortgagee to recover his debt and that of the mortgagor to redeem are reciprocal rights. But the Legislature may restrict the right of one of those persons and extend that of the other, and that seems to have been done by section 20. The reason is not far to seek. As my learned colleague observes, it is the mortgagor who is in default in not making payment, and the Legislature may consequently have been of opinion that no extension beyond the long

(1) (1896) I. L. R., 18 All., 295.

period of 60 years which is prescribed for a suit to redeem should be granted to the mortgagor. I agree in dismissing the appeal with costs.

BY THE COURT.—The order of the Court is that the appeal is dismissed with costs.

Appeal dismissed.

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REVISIONAL CIVIL.

1903
July 23.

Before Mr. Justice Blair and Mr. Justice Banerji.

NANNHU MAL (APPLICANT) v. GULABO (OPPOSITE PARTY).*

Act VII of 1889 (Succession Certificate Act), sections 9 and 19—Order granting certificate conditionally on the giving of security by the applicant—Appeal.

When, on an application for the grant of a certificate of succession under section 7 of Act No. VII of 1889 the Court passes an order conditioned on the previous filing of security, such an order is not an order "granting, refusing or revoking a certificate within the meaning of section 19 of the Act, and no appeal will lie therefrom. *Bhagwati v. Manni Lal (1) and Bai Deokore v. Lalchand Jivandas (2)* followed. *Venkatasami Naik v. Chhanna Narayana Naik (3)*, *Ariya Pillai v. Thangammal (4)* and *Radha Bani Dass v. Brindaban Chandra Basack (5)* referred to.

ONE Nannhu Mal applied in the Court of the Munsif of Bareilly for the grant of a certificate of succession under section 7 of Act No. VII of 1889. The Court in the exercise of its discretion under section 9 of the Act made an order in the following terms:—"That the certificate as prayed for be granted to the applicant, provided that he files a deed of agreement and furnishes security amounting to Rs. 362-14-0 within fifteen days from this date, to the effect that the applicant would deposit in Court all the money that might be realized by him in respect of those bonds. If the deed of agreement is not filed and security not furnished within this period, the application would be disallowed and the costs of the objector would be borne by the applicant." This order was appealed against by the resisting party, and the appeal was entertained by the District Judge and the order of the Munsif

* Civil Revision No. 5 of 1902.

- (1) (1891) I. L. R., 13 All., 214. (3) (1894) 5 Mad., L. J., 28.
(2) (1894) I. L. R., 19 Bom., 790. (4) (1896) I. L. R., 20 Mad., 442.
(5) (1897) I. L. R., 25 Calc., 320.