1903
May 13.

APPELLATE CIVIL.

Before Mr. Justice Knox and Mr. Justice Aikman.

KARIMDAD KHAN (PLAINTIFF) *v.* MUSTAQIM KHAN AND OTHERS (DEFENDANTS) *

Act No. XIV of 1859 *(Limitation), section* 1 (12)—*Act No. IX of* 1871, *(Indian Limitation Act) Schedule II, Articles* 135 *and* 144—*Limitation—Mortgage—Novation of contract—Adverse possession.*

A mortgage which purported to be a usufructuary mortgage was executed on the 14th of May, 1861, the ostensible consideration being a sum of Rs. 4,800; but, in fact, only Rs. 2,270 out of the nominal consideration were paid. The mortgagees on the other hand did not get possession of the whole of the property covered by the mortgage, but only of a portion of it. On the 11th of April, 1862, another deed was executed between the parties, by which the mortgagees surrendered to the mortgagor a portion of the mortgaged property. At the same time the mortgagor entered into a covenant, the effect of which was to alter the transaction into a mortgage by conditional sale. In 1882 the mortgagees attempted to get possession of the remaining portion of the mortgaged property, but their suit was dismissed as barred by limitation. In 1900 the mortgagees sued for foreclosure of the whole of the property comprised in the original mortgage deed as modified by the agreement of the 4th April 1862. *Held* that the suit was barred by limitation whether it was article 135 or article 144 of Act No. IX of 1871 or section 1 (12) of Act XIV of 1859 which prescribed the rule of limitation applicable. *Murlidhar* v. *Kanchan Singh* (1), *Denonath Gangooly* v. *Nursing Proshad Dass* (2), *Ram Chunder Ghosaul* v. *Juggutmonmohiney Dabee* (3) referred to. *Buldeen* v. *Golab Koonwer* (4) distinguished.

THE facts of this case are as follows:—

On the 14th of May 1861, Musammat Fajjo, the predecessor in title of the defendants respondents, executed a mortgage in favour of the predecessors in title of the plaintiff appellant whereby she mortgaged one and a half sihams of certain property as security for an advance of Rs. 4,800. The mortgage purported to be a usufructuary one. On the 11th of April 1862 another deed was executed between the parties to the previous deed whereby the mortgagees surrendered to the mortgagor a portion of the mortgaged property. At the same time the mortgagor entered into a covenant, the effect of which, according to

* First Appeal No. 49 of 1901 from a decree of Babu Achal Behari, Additional Subordinate Judge of Moradabad, dated the 18th of December 1900.

(1) (1888) I. L. R., 11 All., 144.
(2) (1874) 14 B. L. R., 87.
(3) (1878) I. L. R., 4 Calc., 283.
(4) (1867) N.-W. P., H. C. Rep., 1867, F. B., 102.

the case set up by the plaintiff, was to alter the transaction into a mortgage by way of conditional sale. Although the deed of the 14th of May 1861, recited that the mortgagor had received the whole of the mortgage money, and had put the mortgagees in possession of the whole of the mortgaged property, in fact, out of the Rs. 4,800 which the mortgagees agreed to advance, they paid to the mortgagor less than half, namely, Rs. 2,270. Neither did the mortgagees get possession of the whole of the mortgaged property, but only of a portion thereof, of which they remained, and are still, in possession. In 1882 the plaintiff made an attempt to get possession of the rest of the mortgaged property by a suit in Court, but his suit was dismissed as barred by twelve years' limitation, and this decision was on appeal affirmed by the High Court. On the 10th of September 1900 the plaintiff instituted the suit out of which this appeal has arisen praying for a decree for Rs. 31,785 on the basis of the mortgage deed of the 14th of May 1861, as modified by the agreement of the 11th of April 1862, or in default for a decree for foreclosure of the whole of the mortgaged property.

The Court of first instance (Subordinate Judge of Moradabad) dismissed the suit, holding on a construction of the deed of the 11th of April 1862, that it was merely an agreement to sell and gave the plaintiff no right to sue for foreclosure.

Against this decree the plaintiff appealed to the High Court.

Mr. *Karamat Husain* and Maulvi *Ghulam Mujtaba*, for the appellant.

Mr. *Abdul Majid* and Pandit *Sundar Lal*, for the respondents.

KNOX and AIKMAN, JJ. — On the 14th of May, 1861, Musammat Fajjo, the predecessor in title of the defendants respondents, executed a mortgage in favour of the predecessors in title of the plaintiff appellant whereby she mortgaged 1½ *sihams* of certain property as security for an advance of Rs. 4,800. The mortgage purports to be a usufructuary one. On the 11th of April, 1862, another deed was executed between the parties to the previous deed whereby the mortgagees surrendered to the mortgagor a portion of the mortgaged property. At the same

1903

KARIMDAD KHAN v. MUSTAQIM KHAN.

time the mortgagor entered into a covenant, the effect of which, according to the case set up for the plaintiff, was to alter the transaction into a mortgage by way of conditional sale. Although the deed recites that the mortgagor had received the whole of the mortgage money, and put the mortgagees in possession of the whole of the mortgaged property, it is proved and admitted that out of Rs. 4,800 which the mortgagees agreed to advance, they paid to the mortgagor less than half of this amount, namely, Rs. 2,270. It further appears that the mortgagees did not, as recited in the mortgage-deed, get possession over the whole of the mortgaged property, but only over a portion thereof, of which they remained, and are still, in possession. The plaintiff made an attempt, in 1882, to get possession of the rest of the mortgaged property by a suit in Court; but this suit was dismissed on the 10th of February, 1883, as barred by 12 years' limitation, and this decision was on an appeal affirmed by this Court. The plaintiff has now brought this suit for foreclosure of the whole of the property comprised in the original mortgage-deed as modified by the agreement of the 11th of April, 1862.

The amount advanced by the plaintiff's predecessor in title was Rs. 2,270. He admits having received Rs. 3,932, and claims to recover a balance of Rs. 31,785 by enforcement of the conditional sale over the whole of the property. In answer to the plaintiff's suit the defendants put forward a large number of pleas. One of the pleas was that the transaction of the 11th of April, 1862, was not a mortgage by conditional sale, but merely a contract to sell, and that the plaintiff ought to have sued for specific performance of the contract. It appears that in the previous suit between the parties to this agreement Nawab Rasul Khan, who was a mortgagee under the same deed along with the plaintiff's predecessor in title, brought a suit on the deed of 1862, treating it as a contract of sale, and suing for specific performance. Musammat Fajjo, the predecessor in title of the defendants, met that suit by pleading that the agreement of 1862 was a mortgage by conditional sale. This plea was sustained by the Subordinate Judge who held that the deed of 1862 was a mortgage by conditional sale. His decision was appealed to this Court, and

on the 27th of February, 1868, a Bench of this Court, consisting of Morgan, Chief Justice, and Ross, J., adhered to the Subordinate Judge's decision, holding, on a consideration of the terms of the document of 1862, that its effect "was to convert the original security into a conditional sale," which, however, still retained the character of a mortgage security. They went on to say:—"It must therefore be held to be subject to all the incidents of a mortgage by conditional sale." We entirely agree with this interpretation of the deed. We are surprised to find that the Additional Subordinate Judge not only allowed Fajjo's representatives to resile from the position taken up by her, but, ignoring the interpretation put by this Court on the deed, although he had the judgment of this Court before him, put upon it an interpretation of his own, holding it to be merely a contract to sell. On this ground, and on this ground alone, he dismissed the suit. We consider the action of the Subordinate Judge unbecoming and indicative of a want of respect to the judgments of the Court to which he is subordinate.

Against this decree the plaintiff comes here in appeal, contending that the transaction was a mortgage by conditional sale. As stated above, we are of opinion that this contention is sound. The learned counsel for the respondents, however, supports the decree of the lower Court on various pleas, two of which, we think, it will be sufficient to notice. The first is, that the plaintiff is not entitled to enforce a claim to foreclosure over the whole of the property when he has never paid the whole of the consideration money, the payment of which was a part of the original contract. In spite of our giving time to the counsel on both sides to ascertain whether precedents bearing upon this plea could be found, no such precedent was forthcoming, and we know of none. The learned counsel went on to maintain that the transaction between the parties in consequence of which the appellant is found in possession of a portion only of the property pointed to a novation of the original contract between the parties. Taking into consideration the term of years over which this change in the conditions of the original contract has lasted, we are of opinion that this contention is well-founded, and we find accordingly. The strong probability is that upon

1903

KARIMDAD KHAN v. MUSTAQIM KHAN.

its being found that the mortgagees were unable to advance the whole of the consideration money agreed upon, the parties agreed to substitute the present condition of circumstances, whereby the appellant is in possession of a part only of the property originally agreed upon as the mortgaged property, and a part which appears to bear such a proportion to the whole as the money advanced bears to what was to have been the consideration money. As we find there was a novation of contract, this is sufficient ground for supporting the decree of the Court below dismissing the plaintiff's suit.

But there remains another contention put forward by the respondents, which is equally fatal to the plaintiff's suit. From the very first the respondents had contended that the suit was barred by limitation. The law of limitation which the learned counsel would apply is that contained in Act No. XIV of 1859, section 1, clause 12, or, looking to the time when the period allowed by that Act expired, the provisions of either article 144 or article 135 of Act No. IX of 1871. It is true that when this suit was filed, namely, on the 10th of September, 1900, the Limitation Act in force was Act No. XV of 1877, which by article 147 of its second schedule allows a period of 60 years for a suit by a mortgagee for foreclosure, the time from which the period begins to run being the date when the money secured by the mortgage becomes due. But if the period of limitation for suits like the present under the previous law had expired before Act No. XV of 1877 came into force, it is clear that the plaintiff can derive no benefit from the new provision of law by which a period of 60 years is allowed. The provisions of section 2 of the present Act are clear on this point. Act No. XIV of 1859, contained no express provision for a suit for foreclosure; but this Court and the Calcutta High Court have applied to such suits clause 12 in section 1, which allows a period of 12 years from the time the cause of action arose. *Vide* the cases of *Murlidhar* v. *Kanchan Singh* (1), *Denonath Gangooly* v. *Nursing Proshad Dass* (2) and *Ram Chunder Ghosaul* v. *Juggutmonmohiney Dabee* (3). Nor is there to be

(1) (1888) I. L. R., 11 All., 144. (2) (1874) 14 B. L. R., 87.
(3) (1878) I. L. R., 4 Calc., 283.

found in Act No. IX of 1871, any express provision for a suit like the present. The only articles applicable to such suits in Courts not established by the Royal Charter, are articles 135 and 144. The first of these deals with a suit by a mortgagee for possession of immovable property when the plaintiff has become entitled by reason of any forfeiture or breach of condition. In the case of article 135 the time from which limitation begins to run is the date when the mortgagee is first entitled to possession, and the *terminus a quo* in article 144 is the time when forfeiture was incurred or the condition broken. The period of limitation both in article 135 and article 144 is 12 years.

In the judgment last cited, Markby, J., says:—"Moreover even under the Act of 1871, I do not at present see how the plaintiff can get more than 12 years from the date when the debt became due to bring his suit for foreclosure." With this expression of opinion we entirely agree. We are of opinion therefore that before Act No. XV of 1877 became law the plaintiff's right to claim foreclosure was dead, and was not revived by the enactment of the present Limitation Act. The learned counsel for the appellant strenuously argued that we ought not to follow the decision in I. L. R., 11 All., 144, inasmuch as according to his contention, that decision is at variance with a Full Bench Judgment of this Court, namely *Buldeen* v. *Golab Koonwer* (1). But we do not think that the Full Bench decision was overlooked by the learned Judges who decided the case in 11 Allahabad, 144, inasmuch as it was relied on in the decision of the lower Court. Moreover, the facts of the present case are not on all fours with those of the case the Full Bench had under consideration, while they are on all fours with the case in 11 Allahabad, 144. In the order of remand which was passed in the Full Bench case the learned Judges carefully invited the attention of the Court below to the question whether the mortgagors had repudiated the mortgagee's rights and had held adversely to them and without recognition of their title for 12 years. In the present case we find that the mortgagors did, as regards the greater portion of the property covered by the

(1) (1867) N.-W. P., H. C. Rep., 1867, F. B., 102.

1903

KARIMDAD KHAN v. MUSTAQIM KHAN.

mortgage repudiate the mortgagee's title, and they have held adversely to them for about 30 years. Both on the ground, therefore, that the contract upon which the plaintiff comes into Court had been departed from by mutual agreement, and a new contract substituted, and also on the ground that the plaintiff's suit is barred by limitation, we hold that the appeal fails. On the grounds set forth above we dismiss the appeal with costs. In arriving at this decision we have this satisfaction, that it defeats an exorbitant claim and is in accord with the equity of the case.

Appeal dismissed.

1903
May 20.

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

LACHMAN SINGH AND ANOTHER (PLAINTIFFS) *v.* RAM LAGAN SINGH AND OTHERS (DEFENDANTS).*

Pre-emption—Wajib-ul-arz—Construction of document—Letters Patent, sections 10 *and* 27*—Difference of opinion between members of Bench hearing an appeal from a single Judge of the Court—Civil Procedure Code, section* 575.

Where the words of the pre-emptive clause of a wajib-ul-arz ran in the form:—"If any co-sharer desires to sell or mortgage, &c., *let him* sell first to so and so, and then to so and so." It was *held* by STANLEY, C.J., that the use of the imperative mood did not indicate a fresh contract between the co-sharers, but was consistent with the clause being a record of pre-existing custom. Where there is nothing to show clearly that such a clause embodies a new contract as to pre-emption, the rule of construction is that it is a record of a custom. *Majidan Bibi* v. *Hayatan* (1) and *Ali Nasir Khan* v. *Manik Chand* (2), followed.

Per BURKITT, J. *contra.*—The language of the wajib-ul-arz indicates that what is recorded is a new contract between the co-sharers.

Held also that where an appeal under section 10 of the Letters Patent is heard by a Bench consisting of two Judges, and such Judges are divided in opinion as to the decision to be given on such appeal, the appeal will be decided according to the opinion of the senior Judge; that is, section 575 of the Code of Civil Procedure does not, in respect of appeals under section 10 of the Letters Patent, override section 27 of the Letters Patent.

THE suit out of which this appeal arose was brought by the plaintiffs to enforce a right of pre-emption, or rather pre-mortgage, based upon a custom recorded in the village wajib-ul-arz. The Court of first instance (Munsif of Deoria) found the

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* Appeal No. 35 of 1902 under section 10 of the Letters Patent.

(1) (1896) Weekly Notes, 1897, p. 3. (2) (1902) I. L. R., 25 All., 90.