

APPELLATE CIVIL.

1907
April 16

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice
Sir William Burkill.

HUSAINI KHANAM AND ANOTHER (PLAINTIFFS) v. HUSAIN KHAN
AND OTHERS (DEFENDANTS).*

*Act No. IV of 1882 (Transfer of Property Act), sections 62 and 63—
Mortgage—Redemption—Act No. XV of 1877 (Indian Limitation Act), sche-
dule II, article 134—Mortgage by mortgagor purporting to be of a proprietary
interest in the mortgaged property—Foreclosure.*

Under ordinary circumstances a mortgagor cannot, before the time limited for payment to the mortgagee expires, take proceedings to redeem the mortgage. *Brown v. Cole* (1), *Vadju v. Vadju* (2), *Raghubar Dayal v. Budhu Lal* (3) and *De Braam v. Ford* (4) referred to.

The widow of a usufructuary mortgagee in possession made a gift of the mortgaged property to *A. H.* The donee mortgaged part of the property, the subject of this gift, to *P. N.*, purporting to mortgage the full proprietary interest in the property. *P. N.* took proceedings for foreclosure against *A. H.* as absolute owner and obtained foreclosure and possession of the property. *Held*, on the finding that *P. N.* acted *bona fide* and had no reason to suppose that *A. H.* was not, as he represented himself to be, the full owner of the property mortgaged, that *P. N.* was entitled as against the representative of the original mortgagor to the protection afforded by article 134 of the second schedule to Act No. XV of 1877.

Ahamed Kutti v. Raman Nambudri (5) and *Ram Chandra Vithal v. Sheikh Mohidin* (6) distinguished. *Bhagwan Sahai v. Bhagwan Din* (7), *Radanath Dass v. Gisborne and Co.* (8), *Yesu Ramji Kalnath v. Balkrishna Lakshman* (9), *Behari Lal v. Muhammad Muttaki* (10), *Maluji v. Fakir Chand* (11), *Manavikraman Ettan Thamburan v. Ammu* (12) and *Narayan v. Shri Ram Chandra* (13) referred to.

THIS was a suit to redeem a mortgage of the 6th of January 1880, executed by Mirza Aman Ali and Agha Fateh Ali in favour of Muhammad Ata-ullah Khan to secure an advance of Rs. 19,500. The mortgage comprised twelve villages situated in the district of Cawnpore. The plaintiff claimed to be the daughter of Agha Fateh Ali, who survived Aman Ali, and as such became entitled to the equity of redemption in the mortgaged

* First Appeal No. 91 of 1904, from a decree of Babu Bipin Bihari Mukerji, Subordinate Judge of Cawnpore, dated the 4th of January 1904.

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| (1) (1844) 14 Sim., 427. | (7) (1886) I. L. R., 9 All., 97. |
| (2) (1880) I. L. R., 5 Bom., 22. | (8) (1869) 14 Moo., I. A. L. |
| (3) (1885) I. L. R., 8 All., 95. | (9) (1891) I. L. R., 15 Bom., 583. |
| (4) (1900) L. R., 1900, Ch., 142. | (10) (1898) I. L. R., 20 All., 482. |
| (5) (1901) I. L. R., 25 Mad., 99. | (11) (1896) I. L. R. 22 Bom., 225. |
| (6) (1899) I. L. R., 23 Bom., 614. | (12) (1900) I. L. R., 24 Mad., 471. |
| | (13) (1903) I. L. R., 27 Bom., 373. |

1907

HUSAIN
KHANAM
v.
HUSAIN
KHAN.

property. The plaintiff's case was that the mortgage was created by two contemporaneous documents of the 6th of January 1830, namely, a sale deed in favour of Ata-ullah Khan, and an ikrar-nama by which Ata-ullah Khan agreed to re-convey the properties to Aman Ali and Fateh Ali on payment of Rs. 19,500 and interest on the expiration of a term of nine years. Ata-ullah Khan was succeeded on his death, in 1843, by his widow Sahib Begam, who, on the 13th of March 1862, gave the property to the defendant Ali Husain Khan. The other defendants are transferees from him. On the 7th of January 1867 Ali Husain Khan mortgaged by conditional sale without possession to one Prag Narain five of the villages, and Prag Narain dedicated these five villages to the idol Sri Rukmini Kishen Das. On the 13th of February 1871, Prag Narain, as the manager of the temple of Sri Rukmini, took foreclosure proceedings, and on the 19th of June 1872 obtained an order for foreclosure, and followed this up by a suit for possession, and on the 2nd of August 1872 obtained possession of the five villages. In the plaint it was alleged that according to the terms of the mortgage whenever the mortgage money had been satisfied out of the usufruct of the property or by payment before or after the stipulated period the property would be redeemable, and that the principal and interest had in fact been satisfied in 1200 Fasli, that is, before the expiration of the 9 years term of the mortgage.

The defendants pleaded *inter alia* that the claim was barred by 60 years' limitation, and as regards the five villages which were dedicated to Sri Rukmini that it was barred by the rule of limitation prescribed by article 134 of schedule II to the Indian Limitation Act.

The Court of first instance held that the suit was barred by limitation and dismissed it. That Court also found that the plaintiff was not, as she professed to be, the daughter of Agha Fateh Ali.

The plaintiffs appealed to the High Court.

Messrs. *Karamat Husain, Abdul Majid* and *B. E. O'Connor*, for the appellants.

Messrs. *A. E. Ryves, W. Wallach* and *Pandit Moti Lal Nehru*, for the respondents.

1907

 HUSAINI
 KHANAM
 v.
 HUSAIN
 KHAN.

The High Court (STANLEY, C. J. and BURKITT, J.) found on the facts that the plaintiff Husaini Khanam was, as she alleged, the daughter of Fatch Ali. As to the issue whether the plaintiff's suit was barred by the sixty years' rule of limitation, and as to the other points of law raised by the appeal the judgment of the Court—after discussing the documentary evidence as to the original mortgage of 1830, and its bearing upon the question whether that mortgage was redeemable within nine years or only after the expiration of the period—continued as follows:—

Ordinarily a mortgagor cannot, before the time limited for payment to the mortgagee expires, take proceedings to redeem. The reason for this is that it was the agreement of the parties that the mortgage should, during the intervening time, remain as security for the money advanced, and therefore it is not competent for either party to disturb that relation—*Brown v. Cole* (1). Westropp, C. J., in his judgment in *Vadju v. Vadju* (2) says:—"The general principle as to redemption and foreclosure is that in the absence of any stipulation expressed or implied to the contrary the right to redeem and the right to foreclose must be regarded as co-extensive." In that case the stipulation in the mortgage deed was that the mortgagor would pay the debt within ten years and redeem the mortgaged property, and it was held that a suit for redemption instituted within the ten years was premature, the mere use of the word "within" not being a sufficient indication of an intention that the mortgagor might redeem in a less period than ten years. So in *Raghubar Dayal v. Budhu Lal* (3), in which the stipulation was that the principal and the interest should be paid at the promised time (that was in ten years), it was held that the advance by the mortgagee to the mortgagor was for a period of ten years certain, and that the mortgagor was not entitled before that period had expired to redeem the property. The principle acted upon in these cases is embodied in the Transfer of Property Act. Section 60 provides that "at any time after the principal money has become payable," the mortgagor may redeem. Section 62 prescribes in the case of a usufructuary mortgage, that the mortgagor has a right to recover possession of the property where the mortgagee is

(1) (1844) 14 Sim., 427. (2) (1880) I. L. R., 5 Bom., 22.

(3) (1885) I. L. R., 8 All., 95.

1907

HUSAINI
KHANAM
v.
HUSAIN
KHAN.

authorized to pay himself from the rents and profits the interest of the mortgage debt, "when the term (if any) prescribed for the payment of the mortgage-money has expired, and the mortgagor pays or tenders to the mortgagee the principal money, &c." Also in section 67, in which the right of foreclosure or sale is prescribed, the language is as follows:—"In the absence of a contract to the contrary the mortgagee has, at any time after the mortgage money has become payable to him, &c.," a right to obtain an order for foreclosure or sale. The principal money only becomes payable when the payment becomes obligatory upon the mortgagor. Lindley, M. R., in the case of *De Braam v. Ford* (1), commenting on the meaning of the words 'time of payment' contained in a bill of sale, observes:—"To my mind the expression is unambiguous: it means the time at which payment is to become obligatory, the time at which the borrower must pay and after which, if he does not pay, he can be sued for payment."

On the evidence afforded by the proceeding before the Collector we are of opinion that the agreement of the parties was that the advance made by Ata-ullah Khan was to be left outstanding for a period of nine years, and that within that period the mortgagee could not foreclose the mortgage nor could the mortgagors redeem it. The learned Subordinate Judge appears to have been of this opinion also, for he says in his judgement:—"The mortgage was, no doubt, for a term of nine years." But then he holds that by reason of the statement by the plaintiffs in the plaint that the debt was actually satisfied out of the usufruct within the period, the plaintiffs could not rely on this fact. He also seems to hold that it was optional with the mortgagor to redeem whenever he pleased, and that therefore the period of limitation ran from the date of the mortgage. After referring to some rulings he says:—"Having regard to the terms of the mortgage in this case and to the plaintiffs' allegations I am bound to hold, following the above rulings, that the period of limitation in this case will run from the date of the mortgage, viz., the 6th of January 1880, and the suit was beyond time on the 6th of January 1899, when it was instituted." We are unable

(1) L. R., 1900, 1 Ch., 142.

1907

HUSAIN
KHANAM
v.
HUSAIN
KHAN.

to agree with him as to this. The time began to run, we think, from the expiration of the term of nine years, and the mere fact that the plaintiffs alleged that the mortgage debt was satisfied within this period, does not affect the question.

The next point upon which Mr. *Ryves* on behalf of the principal respondents relied was as to the sufficiency of the stamp upon the plaint. The suit is one for redemption, but the plaintiffs in their plaint alleged that a large surplus was due to them and in the plaint they asked that this surplus should be paid to them. Appended to the plaint is given a statement showing the amount of receipts and disbursements according to the settlements of 1247 and 1282 Fasli and bringing out a large balance of over two lakhs, as due to the mortgagors. The *Munsarim* found that the court fee of Rs. 765 paid by the plaintiffs in respect of the claim for redemption was sufficient, but that no court fee had been paid in respect of the surplus of profits claimed by them. He held that a further court fee of Rs. 2,220 was payable, and an order was passed directing the plaintiff to make good the deficiency. On the 21st of January 1899 the plaintiffs applied for three weeks' time to make good the deficiency, but this application was rejected on the 23rd of January, and on the 25th of January 1899 an order was passed by the Subordinate Judge directing the plaint to be registered, subject to any objection the defendants might raise. The principal defendants raised the preliminary objection that the plaint should have been rejected owing to the fact that the deficiency in the court fee had not been made good by the plaintiffs within the period fixed by the Court, and also on the ground that as there was no sufficiently stamped plaint presented to the Court before the expiry of sixty years, the claim was beyond time. These objections were disallowed, and on the 25th of September 1899 the plaintiffs were allowed to withdraw their claim for mesne profits with liberty to sue again in respect of such profits. There are two answers to the contention of Mr. *Ryves*. The first is, that the suit is for redemption, and that the mere fact that the plaintiffs claimed in the suit payment of any sum which might be found to be due to them on the taking of the accounts, a relief to which they would be entitled under the ordinary

1907

HUSAINI
KHANAM
v.
HUSAIN
KHAN.

decree for redemption, did not alter the nature of the suit so as to necessitate the payment of an additional fee. Section 7, sub-section 9 of the Court Fees Act provides that in a suit for redemption the court fee shall be valued at the principal amount secured by the mortgage. As a suit for redemption only a proper court fee has been paid. Another answer is that section 373 of the Civil Procedure Code empowered the Court to allow the plaintiffs to abandon part of their claim with liberty to bring a fresh suit in respect of the part so abandoned, if it was satisfied that the suit must fail by reason of a formal defect or that there were sufficient grounds for permitting them to abandon part of their claim. This section was intended to meet, amongst other cases, a case in which there had been an improper valuation of the stamp. Sir J. W. Colville in *Watson v. The Collector of Rajshahye* (1) dealing with the powers conferred by this section observes, at page 170, "There is a proceeding in these Courts called a non-suit, which operates as a dismissal of the suit without barring the right of the party to litigate the matter in a fresh suit; but that seems to be limited to cases of misjoinder either of parties or of the matters in contest in the suit; to cases in which a material document has been rejected, because it has not borne the proper stamp, and to cases in which there has been an erroneous valuation of the subject of the suit." The Court was in our opinion authorized in permitting the withdrawal by the plaintiffs of that portion of their claim which was concerned with any surplus of profits which might be found to be due to them. We are unable therefore to accede to Mr. *Ryves'* contention.

We now come to the last question discussed in the appeal. As we have shown, the Court below held that in any case the plaintiffs' suit is barred by 12 years' limitation under article 134 of the Limitation Act as regards the five villages held by the defendant Sri Rukmini and the defendants who are transferees of portions of these five villages from Sri Rukmini. On the death of the mortgagee Ata-ullah Khan, his widow, Sahib Begam, became entitled to the mortgaged property. She, in the year 1862, made a gift of it to Ali Husain, and he on the 7th of January

(1) (1869) 13 Moo., I. A., 160.

1907

 HUSAINI
 KHANAM
 v.
 HUSAIN
 KHAN.

1867 mortgaged five of the twelve villages by way of conditional sale without possession to Prag Narain, who later on dedicated these five villages to Sri Rukmini. On the 13th of February 1871 Prag Narain took proceedings against Ali Husain for foreclosure of his mortgage, and in these proceedings treated Ali Husain as absolute proprietor. On the 19th of June 1872 a decree for foreclosure was passed, and on the 2nd of July 1872, according to the practice which then prevailed, a suit was brought for recovery of possession against Ali Husain and a decree was obtained therein, and on the 2nd of August 1872 Prag Narain obtained delivery of possession. These proceedings were taken behind the back of the original mortgagors, Ali Husain having been treated as sole and absolute proprietor. The Court below held that Prag Narain was a purchaser of the property within the meaning of that expression as used in article 134 of schedule II to the Limitation Act; and that the claim of Fateh Ali and his daughter was barred. On the part of the appellants Mr. O'Connor strenuously contended that article 134 did not apply to a case of an involuntary sale and that the foreclosure proceedings taken by Prag Narain did not constitute him a purchaser within the meaning of the article, and that if this be granted the defendants are forced to rely on the mortgage of 1867, and that inasmuch as that mortgage was a mortgage without possession the defendants do not come within the purview of the article. Mr. O'Connor quoted in support of his argument the case of *Ahamed Kutti v. Raman Nambudri* (1), in which it was held that a purchaser of immovable property at a sale in execution of a money decree in which the real interest of the judgment-debtor was that of a mortgagee only was not a purchaser from the mortgagee within the meaning of article 134, even though the property was sold as the property of the judgment-debtor without any limitation of his interest therein. He also relied on the decision in *Ram Chandra v. Sheikh Mohidin* (2), in which it was held that a person purchasing or taking a mortgage from a mortgagee believing that he is getting a good title, must have possession of the property for the statutory period in order to protect the transaction as against the original mortgagor under article 134.

(1) (1901) I. L. R., 25 Mad., 99. (2) (1899) I. L. R., 23 Bom., 614.

1907

HUSAINI
KHANAM
2.
HUSAIN
KHAN.

It is clear from the mortgage of 1867 that Ali Husain held himself out to the mortgagee as absolute owner of the property therein comprised. In it, it is recited that the property is owned and possessed by him and that he is in proprietary possession of it. He purported to convey to the mortgagee an absolute interest in the property subject to redemption. It may be taken, we think, to be well settled law that a mortgage as well as an out and out sale by a trustee or a mortgagee is a purchase within the meaning of article 134. In *Bhagwan Sahai v. Bhagwan Din*, (1), Edge, C. J., and Tyrrell, J., held that article 134 was intended to protect a person who happening to purchase from a mortgagee had reasonable grounds for believing and did believe that his vendor had the power to convey and was conveying to him an absolute interest and not merely the interest of a mortgagee. In their judgment the learned Judges refer to the case of *Radanath Dass v. Gisborne and Co.* (2) in which their Lordships of the Privy Council discussed the meaning of the word "purchaser" as used in section 5 of Act XIV of 1859, which closely corresponds with article 134 of schedule II to the Limitation Act of 1877, and point out that upon the true interpretation of their Lordships' language, a person who purchases from a mortgagee having reasonable grounds for believing and believing that his vendor had power to convey to him an absolute interest, and not merely the interest of a mortgagee, was a purchaser within the meaning of the article. In the case of *Yesu Ramji Kalnath v. Balkrishna Lakshman* (3) it was held by Sargent, C. J., and Candy, J., that the expression "purchaser for valuable consideration" in article 134 includes a mortgagee as well as a purchaser properly so called. In the case of *Behari Lal v. Muhammad Muttaki* (4), Aikman, J., expressed the view that the term "purchased" as used in article 134 could not be taken as including "mortgaged," but Banerji, J., in the same case expressed a contrary opinion. In the case of *Maluji v. Fakir Chand* (5) the same question was discussed, and it was held by Farran, C. J., and Fulton, J., following the decision in *Yesu v. Balkrishna* that mortgagees are purchasers for value within the meaning of article 134.

(1) (1886) L. L. R., 9 All., 97.

(2) (1869) 14 Moo., I. A., 1.

(3) (1891) I. L. R., 15 Bom., 583.

(4) (1898) I. L. R., 20 All., 482.

(5) (1896) I. L. R., 22 Bom., 225.

In the case of *Manavikraman Ettan Thamburan v. Ammu* (1) it was held by White, C. J., and Shephard, J., Davies, J., dissenting, that a mortgagee whose mortgagor was merely a mortgagee of lands but who mortgaged as if he were complete owner, was a purchaser within the meaning of article 134, and having been in possession for 12 years, was entitled to the benefit of that article.

In the case of *Narayan Manjaya v. Shri Ramchandra Devasthan* (2) Jenkins, C. J., and Aston, J., held that a lease described as a "mulgeni lease" was a purchase *pro tanto* of the interest thereby assured within the meaning of article 134. Jenkins, C. J., who delivered the judgment of the Court, says:—"Here no doubt we have a mulgeni lease and not an absolute alienation, but in principle this involves no distinction, for even if article 134 be treated as the governing article, a mulgeni lease is a purchase *pro tanto* of the interest thereby assured."

We are supported by the foregoing authorities in the view which we take, namely, that a person who *bona fide* purchases from a mortgagee in possession what is represented to him and what he believes to be the absolute interest, is entitled to the protection afforded by article 134. In the case before us we find that Ali Husain held himself out as the absolute owner of the five villages which were mortgaged to Prag Narain and we have no reason to suspect that Prag Narain had any reason to doubt the representation which was made to him by his mortgagor. We find that Prag Narain obtained possession of the mortgaged property on the 2nd of August 1872, and that he and his successors in title have been in uninterrupted possession of it from that time to the present. The cases upon which Mr. O'Connor mainly relied do not bear out his argument. One of these, *Ramchandra v. Sheikh Mohidin* (3), which decided that a person purchasing or taking a mortgage from a mortgagee, believing that he is getting a good title, must have possession of the property for the statutory period, in order to validate the transaction as against the original mortgagor under article 134. This case decided that a purchaser from a mortgagee of what is represented to be the absolute estate,

1907

 HUSAINI
 KHANAM
 v.
 HUSAIN
 KHAN.

(1) (1900) I. L. R., 24 Mad., 471. (2) (1903) I. L. R., 27 Bom., 378.

(3) (1899) I. L. R., 23 Bom., 614.

1907

HUSAINI
KHANAM
v.
HUSAIN
KHAN.

must be a purchaser with possession so as to make the purchase valid as against the true owner, after 12 years' enjoyment.

This case is not applicable to the case before us, in view of the fact that Prag Narain, the mortgagee, obtained possession in the year 1872, and that he and his transferees have been in possession ever since that time. The other case on which he relied, namely *Ahamed Kutti v. Raman Nambudri* (1) also has no close application. In it, it was held that article 134 only applies to cases in which the mortgagee disposes of the property voluntarily and not to a purchase made at an auction sale in execution of a money decree, in which the interest of the judgment-debtor is only that of a mortgagee. The mortgage of 1867 made to Prag Narain was a voluntary transaction, under which no doubt possession was not directly obtained, but it was a voluntary sale *sub modo* by virtue of which the mortgagee by the aid of the Court afterwards obtained possession.

Possession is not referred to in article 134, but we are disposed to think that the article is applicable only to cases in which a purchaser, whether his purchase be absolute or merely *sub modo*, must obtain and hold possession for 12 years or upwards, in order that he may have the benefit of the article. If the purchaser is a purchaser from a trustee, the property cannot be followed into his hands, as it may be under section 10 of the Limitation Act, unless he have possession. So in the case of a purchase from a mortgagee, the mortgagor has no notice of the transaction unless it be with possession. Taking therefore the view of the article most favourable to the plaintiffs appellants, their contention fails, inasmuch as Prag Narain and his transferees have had possession since the year 1872.

For these reasons we hold as regards the five villages included in the mortgage of the 7th of January 1867, that the plaintiffs' claim to redeem them cannot be sustained.

In view of the conclusions at which we have arrived upon the several points raised before us in this appeal, we are prepared to give a decree to the plaintiffs for redemption of the seven villages included in the mortgage which did not pass to Prag Narain under his mortgage, upon payment of any sum which may be due, after

(1) (1900) I. L. R., 25 Mad., 99.

taking an account by them to the mortgagees on foot of the mortgage of 1830, and to dismiss the suit as regards the other five villages. As no account, however, has been taken in the Court below, we cannot finally deal with his appeal, but must remand issues to that Court under the provisions of section 566 of the Code of Civil Procedure. The mortgagees have put it out of their power to deliver over possession of the five villages to the mortgagors on redemption. These villages are, under section 82 of the Transfer of Property Act, liable to contribute rateably to the debt. We must therefore ascertain what part of the principal debt of Rs. 19,500 is properly attributable to the seven villages in respect of which we propose to pass a decree for redemption. We therefore remand to the lower Court the following issues under the provisions of section 566:—

(1) What portion of the mortgage debt is rateably attributable to the seven villages which we hold the plaintiff is entitled to redeem, regard being had to the amount of any incumbrances to which the villages respectively were subject at the date of the mortgage?

(2) How much of the mortgage debt, if any, attributable to the seven villages remains unpaid to the mortgagees, after making allowance for the usufruct of the property by the mortgagees from the date of the mortgage?

We direct the Court below to take such relevant evidence as the parties respectively may tender. On return of the findings the parties will have the usual ten days for filing objections. We reserve the question of costs.

Issues remitted.

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

LACHMAN SINGH AND OTHERS (PLAINTIFFS) v. MADSUDAN

(DEFENDANT.)*

Act No. IV of 1882 (Transfer of Property Act), sections 92, 93—Usufructuary mortgage—Redemption—Form of decree in a suit for redemption.

An order declaring that the plaintiff's right to redeem shall be extinguished upon non-payment within the time limited by a decree for redemption

*Second Appeal No. 527 of 1906, from a decree of H. J. Bell, Esq., District Judge of Aligarh, dated the 31st of March 1906, confirming a decree of Maulvi Muhammad Shafi, Subordinate Judge of Aligarh, dated the 10th of April 1905.

1907

MUSAINI
KHANAM
v.
HJESAIN
KHAN.

1907
April 17.