

1909

IN THE
MATTER OF
SHEIKH
MAQBUL
AHMAD.

on the section may in some instances be productive of hardship, but in my opinion the words of the Act admit of no interpretation other than what I place on them. If there is any hardship, the remedy is an amendment of the law. My reply to the reference is that the office report to the effect that the application must bear the court-fee leviable on the memorandum of appeal is correct. I omitted to say that the learned vakil based his argument on the use of the word 'leviable' instead of 'levied'. It appears to me that this word was used in order to provide for an application for review by a defendant or respondent in the case of a suit or appeal in *forma pauperis*.

APPELLATE CIVIL,

Before Mr. Justice Banerji and Mr. Justice Aikman.

KALKA PRASAD AND OTHERS (DEFENDANTS) *v.* BHUIYAN DIN AND ANOTHER (PLAINTIFFS).*

Mortgage by conditional sale—Stipulation for redemption within seven years—Suit for redemption—Limitation—Starting point.

The plaintiffs' ancestor executed a sale-deed of certain property in favour of the defendant's ancestor who simultaneously executed an agreement to reconvey. The latter deed provided that if within a period of seven years (*andar miad sat sal*) the vendors paid to the vendee Rs. 300, which was the consideration for the sale, the vendee would reconvey the property. *Held* that the transaction amounted to a mortgage by conditional sale, that the mortgagor had no right to redeem the mortgage before the expiry of seven years from the date of the mortgage, and that time did not begin to run until after seven years from the execution of the mortgage.

THE facts of this case are as follows :—

The plaintiffs' ancestors sold a 5 annas 4 pies share in mauza Madanpur to Mannilal, ancestor of defendants, for Rs. 300 on 13th May 1845, and there was a simultaneous agreement by Mannilal to reconvey the property to his vendors on receipt of Rs. 300 within seven years. The present suit was brought on 22nd January 1907, for redemption on the allegation that the mortgage had been paid off, but that the plaintiffs were ready to pay any money if found due. The defendants pleaded that there was no mortgage by conditional sale, that there was no sale or

*First Appeal No. 16 of 1908, from an order of Bipin Behari Mukerji, Judge of Small Cause Court, Cawnpore exercising powers of a Subordinate Judge, dated the 20th of December 1907.

simultaneous agreement in 1845, but that the property was purchased by their ancestor Mannilal in 1852 for Rs. 1,000 from the plaintiffs' ancestors. The Munsif held that there was an out and out sale by plaintiffs' ancestors to Mannilal in 1852 and that no suit for redemption lay. The lower appellate court held that the share in dispute was not sold in 1852 to Mannilal, that the transaction of 1845 was a mortgage by conditional sale and that the suit was not barred by limitation as time ran from the expiry of seven years after 1845 and not from the date of execution, 13th May 1845, and remanded the case. The material portion of the deed of 13th May 1845, dealing with the period within which redemption would be allowed, was as follows:—

“Therefore, I agree and give it in writing that whenever the vendor aforesaid, according to the time mentioned in the agreement (*andar miad sat baras*), will pay to the vendee, I the vendee shall get recorded, as heretofore, the name of the said vendor in the Government books.”

The defendants appealed to the High Court.

Dr. *Tej Bahadur Sapru*, for the appellants, submitted that the court had to see whether there was a contract not to repay within seven years. The words used were “*andar miad sat baras*,” which did not show that the mortgagor could not repay before seven years. They only fixed a maximum limit of seven years. If no restraint were placed on the choice of the mortgagor he might exercise his choice at any time before the seven years. The case of *Husaini Khanam v. Husain Khan* (1) relied on by the court below was in conflict with the earlier authorities. He relied on *Chatarbhuji v. Raghbar Dial* (2), *Rose Ammal v. Rajarathnam Ammal* (3), *Raghubar Dayal v. Budhu Lal* (4), *Bhagwat Das v. Parshad Singh* (5), *Setrucherla Ramabhadra v. Vairicherla Surianarayna* (6) and *Marana v. Pendyala* (7), *Bhawani v. Sheodihl*, (8) *De Braam v. Ford*, (9).

Dr. *Satish Chander Banerji*, for the respondents, submitted that the right to redeem accrued when the mortgage money

1909

 KALKA
 PRASAD
 .
 BHUIYAN
 DIN.

(1) (1907) I. L. R., 29 All., 471.

(2) Weekly Notes 1901, p. 56.

(3) (1898) I. L. R., 23 Mad., 33.

(4) (1885) I. L. R., 8 All., 95.

(5) (1888) I. L. R., 10 All., 602.

(6) (1880) I. L. R., 2 Mad., 314.

(7) (1881) I. L. R., 3 Mad., 230.

(8) (1904) I. L. R., 26 All., 479.

(9) (1900) L. R., 1 Ch., 142.

1909

KALKA
PRASAD
v.
BHUTYAN
DIN.

became payable. The rights of foreclosure and redemption were co-extensive unless there was a contract to the contrary. He cited Ghosh's *Law of Mortgage*, (3rd edition), p. 236 and submitted that cases decided before the Transfer of Property Act would throw no light upon the question. The mortgage money became payable when the mortgagor was bound to pay, and the obligation here would not be complete until seven years had elapsed. *Tirugnana v. Nallutambi* (1), *Vadju v. Vadju* (2).

BANERJI and AIKMAN, JJ.—This appeal arises out of a suit for redemption of a mortgage alleged to have been made on the 13th of May 1845. The plaintiffs' case was that on the date mentioned above a sale deed was executed in favour of the predecessor in title of the defendants by the predecessor in title of the plaintiffs and on the same date the predecessor in title of the defendants executed an agreement to reconvey the property on receipt of Rs. 300, the amount of consideration mentioned in the sale deed, within seven years, no account being taken of interest or profits, that the transaction was that of a mortgage by way of conditional sale and that they were entitled to redeem it. The defendants denied the transaction referred to by the plaintiffs and asserted that an absolute sale of the property for Rs. 1,000 had been made in favour of their predecessor in title in 1852. The lower appellate court has found that this allegation of the defendants is not made out and this finding is not impugned in this appeal. The court below was of opinion that the predecessor in title of the plaintiffs made a mortgage by way of conditional sale in favour of the defendants' predecessor in title and that the claim of the plaintiffs was not time barred. As the court of first instance had dismissed the suit upon the finding that the alleged sale of 1852 had been made out, the lower appellate court remanded the case under section 562 of the old Code of Civil Procedure (Act No. XIV of 1882) for decision of the other issues. From this order of remand the present appeal has been filed. The first plea taken in the memorandum of appeal is that upon a proper construction of the deed of 1845 the transaction was an out and out sale with a condition of repurchase. This plea has not been pressed. We may

(1) (1892) I. L. R., 16 Mad., 486. (2) (1880) I. L. R., 5 Bom., 22.

1909

KALKA
PRASAD
v.
BHUYAN
DIN.

say that we agree with the learned Subordinate Judge in his conclusion as to the nature of the transaction. The learned Advocate for the appellants has confined his argument to the second plea, namely, that the claim is barred by time. He contends that the mortgagor had a right to redeem at any time within seven years, that this right to redeem therefore accrued on the date of the mortgage and that as the suit was brought more than sixty years after the accrual of that right, the claim is time-barred. A number of rulings have been cited to us which are not all in harmony. The latest ruling, namely *Husaini Khanam v. Husain Khan* (1), on which the court below relies, supports the view of the learned Judge. In the view which we take of the case we do not deem it necessary to enter into a consideration of the various authorities which have been cited. We think that in each case we must look to the nature of the particular mortgage and the surrounding circumstances to ascertain what the intention of the parties was. Having regard to the nature of the mortgage in the present case we do not think that it would be reasonable to hold that the mortgagor had a right to redeem before the expiry of seven years from the date of the mortgage. The transaction was on the face of it one of absolute sale, but as an agreement was executed on the same date to reconvey the property, and from the terms of the agreement it is manifest that the intention was that a conditional sale should be effected and the mortgagee should enter into possession and enjoy the profits in lieu of interest, it is in the highest degree improbable that it was intended that the mortgagee should have possession for any term less than seven years. He clearly had not the right to foreclose the mortgage before the expiry of that term and we do not think that the intention was that the mortgagor should have the right to re-enter into possession at an earlier date. It is true that at one place it is said in the document executed by the mortgagee that the mortgagor should pay the money "within seven years," but further on, it speaks of payment being made "according to the period mentioned in it" (*hasb miyad mundarja ikrarnama*). Having regard to these circumstances the right to redeem did not, in our opinion, accrue until the expiry of the seven years.

(1) (1907) I. L. R., 29. All., 471.

1909

KALKA
PRASAD
v.
BHUIYAN
DIN.

1909,
February 10.

The suit is therefore within time. We dismiss the appeal with costs.

Appeal dismissed.

Before Mr. Justice Aikman, and Mr. Justice Richards.

DEVI PRASAD (DECREE-HOLDER) v. A. H. LEWIS (JUDGMENT-DEBTOR).
Code of Civil Procedure (Act No. XIV of 1882), section 266—Execution of decree—Attachment of future salary of private servant.

Where a decree-holder applied on the 18th November 1907, for attachment of the judgment-debtor's salary for November and the succeeding months, the judgment-debtor being a lawyer's clerk, *held* that the unearned salary of a private servant in whole or in part was not liable to attachment in advance. *Holmes v. Millage* (1), and *Ayyavayyar v. Virasami* (2), referred to and followed. *Harshankar v. Baijnath* (3), distinguished.

THE facts of this case are as follows:—

The appellant Debi Prasad obtained a decree against the respondent who was a private clerk in the employment of Pandit Pirthinath, a pleader of Cawnpore. On the 18th November 1907, the appellant applied for attachment of the salary of his judgment debtor for November and the succeeding months. The judgment-debtor objected to the attachment on the ground, among others, that on 25th November 1907, his salary for November was not due and that future salary could not be attached. Both the lower courts allowed the objection. The decree-holder appealed to the High Court.

Babu *Satyā Narain* (with him Pandit *Baldeo Ram Dave*), for the appellant, contended that the salary of a private servant was a debt and was therefore liable to attachment under section 266 of the Civil Procedure Code. It was clear that future debts could be attached, as the explanation to section 266 exempted from attachment certain properties, future salary not being among them. By section 268 the manner in which the future salary of a Public Officer could be attached was indicated. There was no difference in principle between the salary of a public servant

* Second Appeal No. 726 of 1908 from a decree of J. H. Cumming, District Judge of Cawnpore, dated the 30th of April 1908, confirming a decree of Girdhari Lal, Subordinate Judge of Cawnpore, dated the 1st of February 1908.

(1) (1893) 1 Q. B., 557. (2) (1897) 1 L. R., 21 Mad., 393.
(3) (1901) 1 L. R., 23 All., 164.