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DAI SINGH
v.
MUSAMMAT
DINI.

There is thus no authority for the contention that a widow who after her husband's death lives with another man commits an act of unchastity or vice.

The appeal fails and is dismissed with costs.

Appeal dismissed.

Before Mr. Justice Sir George Knox and Mr. Justice Richards.

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December 17.

SAID-UD-DIN KHAN AND OTHERS (DEFENDANTS) v. BAPAN LAL (PLAINTIFF).
Act No. XV of 1877 (Indian Limitation Act), schedule II, articles 132, 148—Mortgage—Redemption by one mortgagor—Nature of possession—Subsequent sale under another mortgage decree—Suit by another representative of mortgagor for redemption—Limitation.

G, in 1850, mortgaged certain property and died, leaving a son, a daughter, and a widow. The son obtained a decree for redemption of the whole, which was sold to M H, G M, and A, who redeemed the mortgage. After the passing of this decree G's son and widow mortgaged certain shares in the villages affected by the original mortgage, and in 1891 these shares were sold in execution of a decree for sale and purchased by M H and the representatives of G M and A.

Held, on suit by the representative of G's daughter to redeem her share, that article 148 and not article 134 of the second schedule to the Indian Limitation Act, 1908, applied and the suit was not time-barred.

THE facts of this case were as follows:—

One Ghulam Mustafa Khan executed a usufructuary mortgage-deed in respect of his share in certain villages in favour of one Mohan Lal, on the 5th of September, 1850. The heirs of Mohan Lal in their turn sub-mortgaged the property to certain other persons. Ghulam Mustafa died, leaving three heirs, Ghulam Nabi, a son, Shams-ul-nissa, a widow, and Ashraf Begam, a daughter. Ghulam Nabi brought a suit for redemption and obtained a decree against the mortgagees and the sub-mortgagees on the 26th of February, 1872. The decree, however, was subsequently put up for sale in execution of a simple money-decree obtained against Ghulam Nabi and was purchased by one Meghraj Singh on the 25th May, 1875. Meghraj Singh sold it to Muhammad Husain, Ghulam Muhi-ud-din Khan, and Azim-ullah Khan. These persons paid off the decretal amount under the decree and redeemed the entire mortgaged property. Prior to the redemption, however, Ghulam Nabi and Shams-ul-nissa had mortgaged the property to one Jauhari

* Appeal No. 52 of 1908 under section 10 of the Letters Patent.

Mal, who brought a suit for sale of the property against Ghulam Nabi, Shams-ul-nissa, and the aforesaid Muhammad Husain, Ghulam Muhi-ud-din, and Azim-ullah and obtained a decree against them on the basis of a compromise on the 22nd of September, 1886. In execution of this decree the property was sold and purchased by Said-ud-din, Khadim Husain, Ali Husain, and Muhammad Husain, the appellants, on the 20th of April, 1891. Among the auction purchasers, Said-ud-din was the heir of Ghulam Muhi-ud-din and Khadim Husain and Ali Husain were the sons of Azim-ullah Khan, Musammat Ashraf Begam, the daughter of the original mortgagor Ghulam Mustafa was a party to none of these transactions. Ashraf Begam died, leaving a son, Ghias-ud-din, who assigned his interest in the mortgaged property to the plaintiff, Ratan Lal. Ratan Lal accordingly instituted the suit for redemption of the share of Ashraf Begam on the 19th of August, 1905. One of the defences raised was that the suit was barred by limitation. Both the courts below held that it was not so barred. On second appeal BANERJI, J., delivered the following judgment:—

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“This appeal arises out of a suit for the redemption of a mortgage, and the only question raised is whether the claim is time-barred. The facts are these: One Ghulam Mustafa Khan owned a five-biswa share in the village Rasulpur Mustafa, a similar share in Rustampur, and a ten-biswa share in Nijabatpur. On the 5th of September, 1850, he made a usufructuary mortgage of the above shares in favour of one Mohan Lal, who sub-mortgaged the shares. Ghulam Mustafa Khan died, leaving a son, Ghulam Nabi Khan, a daughter, Musammat Ashraf, and a widow, Musammat Shams-ul-nissa. On the 26th of February, 1872, Ghulam Nabi Khan obtained a decree for redemption of the mortgage mentioned above, against Mohan Lal and his sub-mortgagees. That decree was sold by auction in 1875 and was purchased by one Meghraj Singh, who on the 9th of February, 1876, sold it to Muhammad Husain, Ghulam Muhi-ud-din Khan and Azim-ullah. These persons paid off the amount of the mortgage, so that by discharging that mortgage they became absolute owners of the share of Ghulam Nabi, and as regards the share of Musammat Ashraf they stepped into the shoes of the original mortgagee and held her share as the representatives of a co-mortgagor who had redeemed the mortgage. In 1873 Ghulam Nabi and Shams-ul-nissa mortgaged certain shares in the three villages mentioned above to one Jauhari Mal, who on the 22nd of September, 1886, obtained a decree for sale and in execution of that decree caused the property mortgaged to him to be sold on the 20th of April, 1891. At the sale, Muhammad Husain, Said-ud-din son of Muhammad Khan, and Ali Husain and Khadim Husain, the representatives in interest of Azim-ullah, became the purchasers and took possession and are still in possession. Ghias-ud-din, son of

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Ashraf, who inherited her share in the property, sold it to the plaintiff, Ratan Lal. The plaintiff accordingly instituted the present suit for redemption of the share of Ashraf.

"It is contended that the claim is barred by limitation. There can be no doubt that Musammat Ashraf had a share in the property mortgaged by her father. Upon redemption of that mortgage the person who redeemed the mortgage took and retained possession of her share by reason of his having stepped into the shoes of the mortgagee. So that his possession was equivalent to that of a mortgagee and Musammat Ashraf was entitled to redeem her share from his hands. The present suit having been brought within the statutory period of limitation, namely, 60 years from the original mortgage of 1850, it is on the face of it not barred by limitation. It is urged, however, that the purchasers at auction in execution of Jauhari Mal's decree took possession of Ashraf's share adversely to her. As the mortgage in favour of Jauhari Mal was made by Ghulam Nabi and Shams-ul-nissa, and not by Ashraf, that mortgage could not affect the interests of Ashraf, and the sale in execution of the decree obtained on that mortgage could not convey to the purchasers the interests of Ashraf.

"As I have said above, when Muhammad Husain and others redeemed the mortgage of 1850 in pursuance of the decree for redemption obtained by Ghulam Nabi in 1872 and took possession, their possession in respect of the shares of Ashraf was equivalent to that of the original mortgagees. Therefore, when they purchased the property in execution of Jauhari Mal's decree, the nature of their possession as regards Ashraf's share was not changed, unless they in distinct terms or by any positive act set up a title adverse to that lady. This they do not appear to have done. Therefore their possession in respect of Ashraf's share being that of mortgagees was not adverse. Their possession could be referred to a legal title and they must be deemed to have been in possession under that title. Consequently the claim is not time-barred and the courts below are in my judgment right in holding the plea of limitation to be untenable.

"The appeal fails and is dismissed with costs."

Against this judgment the defendants preferred an appeal under section 10 of the Letters Patent.

The Hon'ble Mr. *Abdul Majid* (with him *Maulvi Muhammad Ishaq*), for the appellants, contended that the suit was barred by time, inasmuch as the defendants' possession became adverse to the plaintiff from the date of their purchase in execution of Jauhari Mal's decree on the 20th of April, 1891. Article 134 and not Article 148 of the second schedule of the Limitation Act, 1877, was applicable to the case.

Babu Surendra Nath Sen, for the respondent, contended that the right of Ashraf Begam as mortgagor was never sold and was never purchased. If the appellants purchased anything, they

purchased only the interests of Ghulam Nabi and Shams-ul-nissa. Ashraf Begam's interest remained unaffected. She was a mortgagor and her representative could redeem the property within 60 years from the date of the execution of the mortgage bond. The plaintiff was within time. Article 148 of the second schedule of the Limitation Act, 1877, did apply. The possession of the appellants was merely that of mortgagees. They never set up title adverse to that of the plaintiff twelve years before the suit. The principle of law which would govern the case is one of venerable antiquity—'once a mortgage always a mortgage.' Moreover, the plaintiff could not claim possession so long as the usufructuary mortgage was not discharged; and in equity, as in law, time would not run against a person who was unable to act.

KNOX and RICHARDS, J.J.—The only question in this Letters Patent Appeal is the following: The predecessors in title of the defendants claimed through one Ghulam Nabi. Ghulam Nabi was one of the heirs of Ghulam Mustafa. Ghulam Mustafa had made a usufructuary mortgage in 1850. Ghulam Nabi without the other heirs redeemed the entire mortgage. For many years the predecessors in title of the defendants were in possession under the redemption of Ghulam Nabi. Some time about the year 1891 the predecessor in title of defendants purchased at auction sale the property now in dispute. The auction sale was had in pursuance of a mortgage decree under the Transfer of Property Act and the property put up for sale was the property now in dispute. The learned counsel for the appellants admits that but for this sale they would be in no better position than the mortgagee from Ghulam Mustafa and the suit would not have been barred by limitation. But it is contended that when the defendants or their predecessors in title purchased the property in 1891 and got formal possession their title from that time must be referred to the auction purchase and not to their original title through Ghulam Nabi. We think that the view taken by our learned brother was correct and the defendants' title must be referred to the original possession and not to the purchase in 1891. The appeal is dismissed with costs.

Appeal dismissed.

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