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which he sought to have a sale. He caused the property to be sold either free from the mortgages, or subject to the mortgages. If it was sold free from the mortgages he must be deemed to have abandoned his mortgages, and in that case he has no interest, in the property sold. If he caused the property to be sold subject to the mortgages, the sale only related to the interest of the mortgagor, that is, his right of redemption. In this right of redemption the mortgagee has no interest. Therefore, from either point of view, the decree-holder in this case has no interest in the property sold such as would entitle him to make an application under rule 89. We think the judgement of the court below to the contrary is erroneous. We accordingly allow the appeal, set aside the order of the court below and dismiss the application of the respondent, Ahmad Said Khan, to have the sale set aside, with costs in both courts.

Appeal allowed.

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

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February 17.

BIHARI AND ANOTHER (DEFENDANTS), *v.* RAM CHANDRA AND OTHERS (PLAINTIFFS).*

Evidence—Burden of proof—Usufructuary mortgage—Suit for possession of mortgaged property not brought for nearly twelve years—Presumption that no consideration passed.

Where the plaintiffs, who were usufructuary mortgagees, were never given possession of the mortgaged property and did not attempt to recover possession until the period of limitation had almost expired, it was *held*, on plea raised by the defendants that no consideration had passed, that the burden of proving that consideration had passed was rightly shifted to the plaintiffs. *Achobandil* v. *Mahabir* (1) followed. *Mahabir Prasad* v. *Bishan Dayal* (2) distinguished.

THIS was an appeal under section 10 of the Letters Patent from a judgement of KARAMAT HUSAIN, J.—The facts of the case are set forth in the judgement under appeal, which was as follows:—

"The facts are as follows:—Bihari, defendant No. 1, on the 15th of December, 1896, executed a mortgage with possession in favour of the plaintiffs. In that deed the recitals are that they received the entire mortgage money as detailed below, that they put the mortgagees in possession and that they from that date should continue in possession thereof and should sublet the said property. The plaintiffs on the basis of that mortgage instituted

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* Appeal No. 96 of 1910 under section 10 of the Letters Patent.

(1) (1886) I. L. R., 8 All., 641. (2) Weekly Notes, 1904, p. 163.

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a suit for recovery of possession on the 14th of December, 1908, which was the last day for instituting the suit. The first plea in defence was as follows:—'The defendant did not receive the amount of consideration of the mortgage deed, and consequently the plaintiff never demanded possession during the long period of 12 years, nor did he make an application for mutation of names. The mortgage deed is without consideration.'

"The court of first instance dismissed the claim. The court at the end of its judgement observes:—'I presume that the suit was not filed earlier as the bond in question was not executed for consideration.' On appeal the lower appellate court confirmed the decree. That court in its judgement says:—'The defendants admit execution of the deed in suit but deny receipt of consideration.' That court disbelieved the evidence adduced by the parties and was of opinion that the decision of the case turned on the question of burden of proof. In consequence of the delay in instituting the suit for possession that court was of opinion that the burden of proving the payment of consideration lay on the plaintiffs. For this proposition it relied on *Achobandil Kuari* v. *Mahabir Prasad* (1), in which the learned Judges observe:—'It is doubtless true that the party to a deed duly executed and registered, who alleges non-payment of consideration, is ordinarily bound to prove his allegation; but we think the Judge has overlooked the peculiar circumstances of this case. He had found that possession had never been transferred, and that the plaintiff and his predecessor had silently submitted to the withholding of possession for upwards of eight years. This state of things, combined with the continuous possession of the vendors, favoured their allegation that possession had been withheld because of the non-payment of consideration, and raised such a counter-presumption as to make it incumbent on the plaintiff vendee to give evidence that consideration had in fact passed.'

"The lower appellate court was further of opinion that the suit was for the specific performance of a contract of mortgage and was governed by article 113 of the Indian Limitation Act and not by article 144. The plaintiffs have preferred a second appeal to this Court and it is urged on their behalf that the suit is not barred by limitation under article 113, which has no application to the facts of the case, and that as the defendants admitted the execution and denied the receipt of consideration, they were bound to prove that they had not received the consideration of the mortgage. The view taken by the lower appellate court, that the suit is barred by limitation, is not correct. This action can in no way be regarded to be an action for the specific performance of the contract. The recitals in the mortgage deed are that the mortgagors received the mortgage money and put the mortgagees in possession of the property mortgaged. That being so, the suit is clearly a suit for possession by a mortgagee against the mortgagor of immovable property and is undoubtedly governed by article 135 of the Indian Limitation Act, vide *Gopal Rao* v. *Baji Lal* (2).

"Regarding the plea of burden of proof the question is simply this:—Does the institution of a suit for possession on the last day of limitation raise such a strong presumption of fact relating to the absence of consideration as to counteract

(1) (1886) I. L. R., 8 All., 641. (2) Weekly Notes, 1884, p. 125.

the presumption raised by the recital in the deed as to its payment. In support of the proposition that the long delay raises such a presumption, reliance is placed on section 159 of Volume I of Wigmore's Law of Evidence and on section 2517 of Volume IV of the same work; but in my opinion when the law of limitation fixes a time for the institution of a class of cases, the delay up to the last day of limitation is not sufficient to raise any presumption of the kind, because when the law of limitation sanctions such a delay no presumption of fact against that law can possibly arise. The ruling in I. L. R. 8 All., 641, is only an authority for the proposition that long delay raised a presumption of fact with reference to the circumstances of that case. That being so, that case is no authority for the proposition that a long delay in the institution of a suit for possession on the basis of a mortgage in which there is a recital that the mortgagors had received the consideration, will shift the burden of proof from them to the mortgagee in all cases.

"In *Mahabir Prasad* v. *Bishan Dayal* (1) it is laid down that 'where execution of a bond is admitted and the bond contains an admission that consideration has passed, it is for the executant to get rid of the admission which he has made in the bond. It is not enough for him to prove that prior to the institution of the suit on the bond he denied receipt of consideration, even if such denial was made before the registering officer.'

"Following the above ruling, I am of opinion that the mortgagors in the case before me were bound to prove that they had not received consideration and that the delay in the institution of the suit is not, in my opinion, enough to take this suit out of the general rule that a party who admits execution of a deed in which he recites receipt of consideration is bound to prove non-payment.

"For the above reasons, I allow the appeal, set aside the decrees of the courts below, and send down the case to the court of first instance through the lower appellate court for trying the remaining issues."

The defendants appealed.

Dr. *Tej Bahadur Sapru*, for the appellants.

The respondents were not represented.

STANLEY, C. J. and BANERJI, J.:—In this suit the plaintiffs seek a decree for possession of certain property usufructuarily mortgaged to them on the 15th December, 1896. It appears from the evidence, and it is not disputed, that from the 15th of December, 1896, until the 14th of December, 1908, the day on which this suit was instituted, the plaintiffs never applied for mutation of names in their favour, nor did they take any step whatever to obtain possession from the defendants, and it is admitted in the plaint that they never got possession. The defence set up was that no consideration for the mortgage passed. Both the lower courts dismissed the plaintiffs' suit holding that

(1) Weekly Notes, 1904, p. 163.

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no consideration for the mortgage was proved. The lower appellate court did not place any reliance upon the oral evidence adduced on either side, but finding that no steps were taken by the plaintiffs for recovery of possession for a period of 12 years all but one day, drew the inference from this that no consideration had passed. The fact that no step was taken by the plaintiffs for so long a period raises the presumption that the plaintiffs did not consider during this long period that they were entitled to possession. We think that such an inference is under the circumstances not unreasonable, and that the courts below were justified under the circumstances in throwing upon the plaintiffs the burden of proving as a fact that consideration did pass. The case is very similar to that of *Achobandil Kuari* v. *Mahabir Prasad* (1). The suit in that case was for possession of land alleged to have been purchased under a registered deed of sale. The defendant vendor admitted the execution and registration of the deed but denied receipt of consideration. The deed was dated January, 1886, and the suit was not instituted until the year 1894, that is, after the lapse of eight years. It was found that the vendor had been in possession during the whole of that period. The plaintiffs produced no evidence in proof of payment of consideration. It was held by OLDFIELD and TYRRELL, JJ., that, although under ordinary circumstances the party to a deed duly executed and registered, who alleges non-payment of consideration is bound to prove his allegation, the fact that the plaintiff and his predecessor had silently submitted to the withholding of possession for upwards of eight years, combined with the continuous possession of the vendor, favoured the allegation of the latter that possession had been withheld because of the non-payment of consideration, and raised such a counter-presumption as to make it incumbent on the plaintiff to give evidence that consideration had in fact passed. We are not aware that this decision has been the subject of adverse comment, and a number of years have passed since the ruling was made. We think that the view taken by the learned judges in that case is a reasonable one. The circumstances of this case are somewhat stronger, for here we have a mortgage executed so far back as

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the 15th of December, 1896, and no steps whatsoever have been taken for the obtaining of possession of the property by the mortgagees until the last day of limitation, namely, the 14th of December, 1908, a period of 12 years. The learned judge of this court relied upon the ruling in *Mahabir Prasad Rai* v. *Bishan Dayal* (1). The facts of that case are unlike those in the present case. There, there was no withholding of possession for a length of time as in this case. We cannot concur in the decision of our learned brother and must allow the appeal. We accordingly allow the appeal, set aside the decree of this court and restore the decree of the lower appellate court with costs in all courts.

Appeal allowed.

FULL BENCH.

Before Mr. Justice Richards, Mr Justice Griffin and Mr. Justice Tudball.

1911

February 21.

PARMANAND (APPLICANT) *v.* SAT PRASAD (OPPOSITE PARTY.)*

Act No. II of 1899 *(Indian Stamp Act), sections* 2 (21), *and* 60 ; *schedule* 1, *article* 48 *(g)—Stamp—Power of attorney—Document authorizing holder to appear and do all acts necessary for execution of decree.*

Held that a document purporting to authorize the person in whose favour it was executed, who was not a certificated mukhtar or pleader, to appear and do all acts necessary for the execution of a decree of a court, outside the United Provinces, which had been transferred to a court in those Provinces for execution, required to be stamped as a power of attorney with a one rupee stamp, and not as a vakalatnamah or muktar-namah.

THIS was a reference under section 61 of the Stamp Act, 1899, made by the District Judge of Cawnpore on the following facts:—

A decree of a Punjab Court was transferred to the court of the District Judge of Cawnpore for execution. A person who was not a legal practitioner filed, on behalf of the decree-holder, some papers in the Cawnpore Court. His authority for acting on behalf of the decree-holder was a 'mukhtar-namah' which was stamped only with a court fee label of 8 annas. The District Judge referred the following question to the High Court:—"When a private person acting on behalf of another in a matter

* Civil Miscellaneous No. 445 of 1910.

(1) Weekly Notes, 1904, p. 163.