Registrar only come into play when he is invoked by some person having a direct relation to the deed."

Their Lordships were here dealing with the initial presentation for registration and that presentation was made by a mere volunteer. For the purposes of the point we are now dealing with, it must be presumed that the bond was originally presented by a person duly authorized and that the error, if any, which was committed was the sending of the bond by the Judge to the Sub-Registrar instead of handing it back to the party to be presented. In our opinion the second point which has been argued in support of the decision of the learned Subordinate Judge also fails.

We, therefore, hold that the appeal should be allowed. We accordingly allow the appeal, set aside the decree of the learned Subordinate Judge and remand the case to his court under order XLI, rule 23 of the Code of Civil Procedure, to be heard and determined according to law. The appellant will have his costs in this Court. Other costs will abide the result.

Appeal allowed.

Before Mr. Justice Karamat Husain and Mr. Justice Chamier.

1912 *January* 11.

HABIB-ULLAH AND OTHERS (DEFENDANTS) *v.* ABDUL HAMID AND OTHERS (PLAINTIFFS) AND NABI BAKHSH AND OTHERS (DEFENDANTS).*

Bengal Regulation XV of 1793—*Mortgage—Redemption—Limitation—Act No. XIV of* 1859 *(Limitation Act), section I* (12)—*Accounts.*

A usufructuary mortgage was executed in the year 1852, in a place to which the provisions of Bengal Regulation XV of 1793 applied. It provided that the mortgagees should enter into possession and collect the rent and pay the Government revenue and defray collection charges &c. therefrom and retain the balance in lieu of interest. There was to be no accounting on either side and the mortgagor was to be entitled to redeem on payment of the principal sum of Rs. 252.

Held, on suit by the representative of the mortgagor to redeem, brought within 60 years from the date of the mortgage, that the suit was within time; that the mortgage could not be considered as redeemed in the strict sense of the term from the moment when the profits received by the mortgagees became equal to the amount due to them for principal and interest, and that the mortgagor was, notwithstanding anything contained in the deed, entitled to an account

* Second Appeal No. 607 of 1910, from a decree of Ram Autar Pande, District Judge of Azamgarh, dated the 2nd of February, 1910, confirming a decree of Ram Chandra Chaudhri, Subordinate Judge of Azamgarh, dated the 30th of June, 1909.

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of the profits received by the mortgagees. *Sudarshan Das Shastri* v. *Ram Prasad* (1) followed. *Shafi-un-nissa* v. *Fazl Rab* (2) and *Badri Prasad* v. *Murlidhar* (3) distinguished.

THE facts of this case were as follows:—

On the 12th of February 1852, one Muslima Bibi made a mortgage by way of a *zar-i-peshgi* lease of an eight anna share of a village Patua for the period of six years in consideration of Rs. 215 in favour of Akbar Ali and Yar Muhammad, the predecessors in title of defendants Nos. 1 to 50. The deed provided that Rs. 12 per annum would be paid as profits in lieu of interest. The plaintiffs, who had acquired the property from the successors of the mortgagor, brought the present suit for redemption on the 27th of June, 1908. They also claimed Rs 2,175-13-11 as mesne profits, as well as interest at the rate of 12 per cent. per annum, alleging that it could be awarded under Bengal Regulation XXXIV of 1803. Defendants contended that the suit was barred by limitation, and that they were not liable for any mesne profits or interest.

The court of first instance held that the suit was governed by article 148, schedule II, of the Limitation Act, and was within time. It also held that the plaintiffs were entitled to mesne profits and interest, and decreed the suit. The lower appellate court confirmed this judgement. The plaintiffs appealed.

Dr. *Tej Bahadur Sapru* (with him Maulvi *Muhammad Ishaq*), for the appellants:—

The mortgage, being made in 1852, was governed by Bengal Regulation XV of 1793. Section 10 of that Regulation provides as follows:—"All such mortgages are to be considered as virtually and in effect cancelled and redeemed, whenever the principal sum with simple interest due upon it shall have been realized from the usufruct of the mortgaged property, &c." The plaintiffs sue for redemption on the ground that the mortgage debt has long ago been satisfied by the usufruct, and they claim the surplus as mesne profits. If the mortgage was satisfied by the usufruct, it must be considered under section 10 of Regulation XV of 1793, to have been cancelled and redeemed at once. No period of limitation was necessary under the Regulation, as

(1) (1910) I. L. R., 33 All., 97. (2) (1910) 7 A. L. J., 787.
(3) (1879) I. L. R., 2 All., 593.

the relation of mortgagee and mortgagor ceased to exist, and the plaintiff's remedy was by an ordinary suit for recovery of possession for which an ordinary period of limitation was provided. The fact of redemption was under the Regulation completed by the satisfaction of the mortgage from the usufruct, and did not require a decree of court to establish it as it does now. The Regulation was repealed by section 1 of Act XXVIII of 1855, but section 10 was not affected. The Preamble of Act XXVIII refers only to the repeal of the Usury Laws, and section 7 of that Act also enacts a saving. He also cited *Samar Ali* v. *Karam-ullah* (1).

[Mr. *Abdul Raoof*, for the respondents, here referred to. *Sudarshan Das Shastri* v. *Ram Prasad* (2).]

With all due respect to the learned Judges responsible for that ruling it does not contain a correct interpretation of this Regulation. The word, 'redeemed' is used in section 10 in its fullest sense. From the very day the mortgage is *cancelled and redeemed*, the possession of the mortgagee become adverse to the mortgagor. His position becomes no better than that of a trespasser. It is true that this is not the law now, but it was so under the old Regulation. The interpretation in 7 A. L. J. R., 963, reads words into section 10 which are not there. The section clearly says *cancelled and redeemed*. As to *Pokhpal Singh* v. *Bishan Singh* (3), the case cited by the lower appellate court, the mortgage in that case was not governed by the provisions of Regulation XV of 1793. As to the fact that when a mortgage is satisfied out of the usufruct, it becomes extinct, and the parties are relegated to the position in which they were before the mortgage, see *Gobardhan* v. *Suraj* (4). Regulation XV was extended to Azamgarh by Regulation XVII of 1806. Section 10 of Regulation XV had not been modified till it was repealed by the Transfer of Property Act. He also cited *Fakir Baksh* v. *Sadat Ali* (5). The plaintiffs have no right to any account. Even if any surplus be held to be due, no interest should be awarded. He cited *Badri*

(1) (1886) I. L. R., 8 All., 402.
(2) (1910) I. L. R., 33 All., 97.
(3) (1897) I. L. R., 20 All., 115.
(4) (1894) I. L. R., 16 All., 254, at 255.
(5) (1885) I. L. R., 7 All., 376.

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Prasad v. *Murlidhar* (1), *Shafi-un-nissa* v. *Fazl Rab* (2) and *Bechoo Singh* v. *Rai Sheo Sahoy* (3).

Mr. *Abdul Raoof*, for the respondents, was heard only on the question of interest.

The mortgagee was awarded 12 per cent. under Regulation XXXIV of 1803. The mortgagor should also be awarded the same rate. As to an account and mesne profits, that is provided for by section 11 of Regulation XV of 1793.

KARAMAT HUSAIN and CHAMIER, JJ.—This appeal arises out of a suit by respondents 1, 2 and 3, for redemption of a mortgage made in the form of a *zar-i-peshgi* lease on February 12th, 1852, by one Muslima Bibi, in favour of the appellants and respondents 4 to 48 or their predecessors in title. The deed provided that the mortgagees should enter into possession and collect the rents and pay the Government revenue and defray collection charges &c., therefrom and retain the balance in lieu of interest. There was to be no accounting on either side and the mortgagors were to be entitled to redeem on payment of the principal sum Rs. 252. The case of the plaintiffs respondents was that the mortgage was subject to the provisions of Bengal Regulation XV of 1793; therefore, the mortgagees were not entitled to more than 12 per cent. per annum on the principal sum, notwithstanding the provisions of the deed, and that if an account were taken of profits received by the mortgagees, it would be found that the principal sum and interest had been satisfied many years ago, and that a large sum was due to the plaintiffs respondents. The Subordinate Judge gave them a decree for possession of the property and for Rs. 3,305-8-9 on account of surplus profits and interest thereon up to the date of the suit and directed an inquiry as to the profits during the suit and up to the delivery of possession. The decree was confirmed on appeal by the District Judge. In second appeal it is contended in the first place that the suit is barred by limitation. Dr. *Tej Bahadur* argues that if Regulation XV of 1793 applies, as the plaintiffs respondents say, the mortgagees were not entitled to more than 12 per cent. per annum on the principal sum notwithstanding the

(1) (1879) I. L. R., 2 All., 593. (2) (1910) 7 A. L. J., 787.
(3) (1869) N.-W. P., H. C. Rep., 111.

terms of the deed, and an account must be taken of what the mortgagees have received and the mortgage must be considered to have been in the words of section 10 of the Regulation "virtually and in effect cancelled and redeemed" as soon as the principal sum with simple interest at 12 per cent. per annum had been realized from the usufruct of the property, and thereafter the mortgagee's possession must be deemed to have been adverse; consequently the mortgagor's right to recover the property was barred under section I (12) of the Limitation Act XIV of 1859, on the expiry of 12 years from the date on which the principal and interest were satisfied out of the usufruct. There can be no doubt that the mortgage was originally subject to Regulation XV of 1793, which was made applicable to the Azamgarh district by Regulation XVIII of 1806, and that, as held in *Samar Ali* v. *Karimullah* (1), it remained subject to the former Regulation notwithstanding the passing of the Usury Laws Repeal Act XXVIII of 1855. Therefore the plaintiffs were entitled to an account of the profits received by the mortgagees. But we cannot accept the argument that the right of the mortgagors to recover the property became barred by limitation upon the lapse of twelve years from the date on which the principal and interest were satisfied out of the usufruct. Prior to the passing of Act XIV of 1859, there was no limitation for a suit for redemption of a mortgage. Section I (15) of that Act provided that the period of limitation applicable to a suit against a mortgagee for the recovery of immovable property mortgaged should be sixty years from the date of the mortgage, and there are similar provisions in the Limitation Acts of 1871, 1877 and 1908. The possession of a mortgagee does not become adverse to the mortgagor merely because the mortgagee remains in possession after the mortgage money has been satisfied out of the usufruct or has been otherwise paid off. Much more is required to set time running against the mortgagor. We agree with the *Sudarshan Das Shastri* v. *Ram Prasad* (2) that the provision in section 10 of the Regulation of 1793, that a mortgage shall be deemed to be cancelled and redeemed, does not mean redeemed in the full sense of the word. It appears to us that on the

(1) (1886) I. L. R., 8 All., 402. (2) (1910) I. L. R., 33 All., 97.

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passing of Act XIV of 1859 the mortgagor's right to redeem became subject to section 1 (15) of that Act and a suit for redemption could be brought at any time within sixty years of the mortgage. In our opinion the suit is not barred by limitation.

The next point taken is that the plaintiffs respondents are not entitled to an account of the profits received by the mortgagees. As already stated, we are of opinion that the mortgage has all along been subject to the provisions of Regulation XV of 1793, therefore the plaintiffs respondents are entitled to an account of the profits. Dr. *Tej Bahadur* relied upon the decision in *Shafi-un-nissa* v. *Fazal Rab* (1), but the mortgage in that case was made in January, 1866, and therefore was never subject to the Regulation of 1793. He relied also on the case of *Badri Prasad* v. *Murlidhar* (2), but that case is clearly distinguishable from the present case. The sum to be received by the mortgagee was a fixed sum, not as here a fluctuating amount, and their Lordships were careful to point out that they did not decide that, if the amounts received by the mortgagee had been fluctuating, it would not have been necessary to take an account against him.

The third and last point taken is, that the courts below were wrong in allowing the plaintiffs respondents interest at 12 per cent. per annum on the annual surplus profits. In allowing interest at the above rate the courts below relied upon the judgement of this Court in *Bechoo Singh* v. *Rai Sheo Sahoy* (3), in which it was said that it was an established practice in cases of this kind to allow the mortgagor, interest on the surplus profits at the rate allowed to the mortgagee on the mortgage-debt. It is not contended that no interest should have been allowed and in the circumstances, we think that 12 per cent. is a fair rate.

The appeal fails and is dismissed with costs.

Appeal dismissed.

(1) (1910) 7 A. L. J., 787. (2) (1873) I. L. R., 2 All., 593 : L. R., 7 I. A., 5.
(3) N.-W. P., H. C. Rep., 1869, p. 111.