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Act of 1877 that no right which had become barred under the Act of 1871, was thereby revived. No doubt for some time this High Court considered that a suit might be instituted in respect of mortgages, which were governed by the Act of 1877, at any time within sixty years, but their Lordships of the Privy Council have considered this view erroneous—see *Vasudeva Mudaliar* v. *Srinivasa Pillai* (1). This last mentioned decision, and the hardship which was supposed to follow in consequence, led to the introduction of section 31 of the present Act, which provides that, notwithstanding anything contained in it, or in the Limitation Act of 1877, a suit for sale may be instituted within two years from the date of its passing or within sixty years from the date when the money secured by the mortgage becomes due, whichever period expires first. The appellant relies upon this section, and contends that it is clear from the mention of sixty years that it was intended to apply to cases like the present, even though they were already barred by the provisions of the Act of 1871. We cannot agree with this contention. It is impossible to hold that by the introduction of this section the Legislature intended to revive rights which had already become long since barred under the Act of 1871. The section expressly refers only to the provisions of Act XV of 1877 and not to any earlier Act. It is quite clear that if the plaintiff had instituted the suit whilst Act XV of 1877 was still in force it would have been time-barred. The enactment of section 31 certainly can give him no higher title. We dismiss the appeal with costs.

Appeal dismissed.

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January, 23.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Banerji.

DURGA KUNWAR AND OTHERS (DEFENDANTS) *v.* KALI CHARAN (PLAINTIFF).*

Sale—Covenant for title—Claim made against purchaser compromised before suit brought—Right of purchaser to claim indemnity from covenantor.

The purchaser of immovable property concerning which the seller has covenanted to indemnify the purchaser in the event of the title proving defective is not bound to wait until a suit is brought and he is deprived of the property by reason of a decree passed therein, but, if a claim which the purchaser has

* First Appeal No. 343 of 1911 from a decree of Baijnath Das, Officiating Subordinate Judge of Bareilly, dated the 19th of August, 1911.

(1) (1907) I. L. R., 30 Mad., 426.

substantial reason to believe to be valid is brought against him, he may, after notice to the covenantor, compromise such claim and sue the covenantor on his covenant to recover the amount paid by him to effect the compromise. *Smith* v. *Compton* (1) referred to.

THE facts of this case are fully stated in the judgement of the Court.

Babu *Jogindro Nath Chaudhri* and Babu *Sital Prasad Ghosh*, for the appellants

The Hon'ble Dr. *Sundar Lal* and Dr. *Satish Chandra Banerji*, for the respondent.

RICHARDS, C. J. and BANERJI, J. :—This appeal arises out of a suit in which the plaintiff claims damages for breach of covenants for title contained in a sale deed, dated the 12th of October, 1889. The court below has given the plaintiff a decree for Rs. 2,900, being considerably less than the amount claimed. At the time of the alleged sale the property mentioned in the plaint, together with other property was in the hands of the Court of Wards, and the sale deed was executed by the Court of Wards. It has not been contended, and in our opinion could not be contended, that the persons entitled to the property sold were not liable upon foot of the covenants given by the Court of Wards, assuming that there was a breach. The sale deed contained the ordinary covenants for title, including a covenant that the vendors took upon themselves "the responsibility that the property should be free from all debts, claims and liabilities".

In the present suit we are concerned with a village called Mirpur Harriapur, which was one of the items of property comprised in the deed already mentioned. The title to this village briefly is as follows:—One Jaswant Singh and others were the owners of it. Jaswant Singh mortgaged it to Brij Kishore, who brought a suit for sale and obtained a decree. Brij Kishore then died and his widow Durga Dei continued the proceedings, had the property sold, and purchased it herself. On the 9th of December, 1879, Durga Dei sold it to Durga Kunwar. Durga Kunwar was the widow of Lakhan Singh, who had a brother, Har Singh, and it is admitted that the two brothers were joint. Some time after the sale by the Court of Wards claims were made to the property, the subject matter of the sale. The claimants

(1) (1832) 3 B. and A., 407.

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alleged that they were the reversioners to the estate of Brij Kishore; that Durga Dei as his widow, in the absence of legal necessity, had no power or authority to sell property to Durga Kunwar, and that upon Durga Dei's death, which took place on the 8th of June, 1905, they became entitled to the property.

It is an admitted fact that a considerable amount of litigation took place with respect to the claim so made, with the result that in respect of one of the villages sold by Durga Dei, the claim of one Kishan Chand, one of the claimants, was decreed. We mention this to show that there was a serious claim made against the vendees under the sale deed of the Court of Wards. In due course a claim was made against Kali Charan, the purchaser from the Court of Wards, in respect of the village Mirpur Harriapur. The plaintiff at once sent notice to Durga Kunwar, setting forth clearly and distinctly the nature of the claim that had been made, called attention to the success of Kishan Chand in the other litigation, and required Durga Kunwar to give such information as would enable Kali Charan to defend the suit which he anticipated would be brought against him. No attention of any kind was paid to this notice. Subsequently Kali Charan compromised with the claimants and paid to Kishan Chand a sum of Rs. 4,750. He gave notice of this compromise to Durga Kunwar, but again no notice was taken and then the present suit was instituted.

We are quite satisfied that the compromise was a genuine compromise. We are also quite satisfied that the two notices, although addressed to Durga Kunwar alone, reached all the defendants, who constituted a joint Hindu family. In the written statement, which was put in by Gajraj Singh, Mahtab Singh and Musammat Dharam Kunwar, it is not disputed that the notice was sent.

Two main points have been argued in the present appeal. It was first contended that, inasmuch as Kali Charan was never actually dispossessed, the plaintiff cannot recover, and that he had no right to enter into the compromise, and that he ought in any event to have waited until a suit was actually instituted. The second point was that the property really belonged to Durga Kunwar and did not belong to the other defendants, and that accordingly the suit should be dismissed, at least, as against them.

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We shall deal with the second point first. The property was purchased in the name of Durga Kunwar, but it was during the life-time of her husband, who, admittedly, was joint with his brother, the father of the other defendants. The sale deed in favour of Kali Charan purports to be made on behalf of the other defendants as well as Durga Kunwar. In the written statement filed on behalf of the defendants other than Durga Kunwar, it is admitted that the property was sold by them, but it is alleged that they were only selling such title as had been got from Durga Dei. They also admitted in paragraph 4 that they were the purchasers from Durga Dei, and it was never expressly alleged in the written statement that Mirpur Harriapur belonged exclusively to Durga Kunwar. We therefore can pay no attention whatever to the statement of the pleader in the *rubkar* of the 6th of June, 1911, that the property was exclusively hers. In any event we think that, inasmuch as the property was sold as belonging to the joint family, the joint family are liable at the suit of the purchaser assuming that there was a breach of the covenant.

We now deal with the question as to whether or not Kali Charan was bound to wait until a suit was brought or whether he was entitled, after giving due notice, to enter into such compromise as he thought fit and was reasonable. A very similar question arose in the case of *Smith* v. *Compton* (1). In that case a suit was brought against the vendee, who compromised the suit before judgement, paying £.550. He then brought a suit against the covenantors for breach of their covenant for title. It was contended that the plaintiff could not recover the money which he had paid by way of compromise, because he had not given notice to the defendants, and consequently that he was not entitled to recover the costs which he paid to his own attorney for defending the action up to the time of the compromise. Lord TENTERDEN, C. J., says :

"I am of opinion that there should be no rule. The only effect of want of notice in such a case as this, is to let in the party who is called upon for an indemnity to show that the plaintiff has no claim in respect of the alleged loss or not to the amount alleged, that he made an improvident bargain, and that the defendant might have obtained better terms, if the opportunity had been given

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him. That was not proved here, and we cannot assume it. As to the costs, the plaintiff here had a right to claim an indemnity, and he is not indemnified unless he receives the amount of the costs paid by him to his own attorney."

It will thus appear that the learned Chief Justice considered that the plaintiff was entitled to compromise the action and to claim the amount for which he compromised, together with the costs of defending the suit. PARKE, J., says:—

"I am of the same opinion. The effect of notice to an indemnifying party is stated by BULLER, J., in *Duffield* v. *Scott*, 3 T.R., 374:—'The purpose of giving notice is not in order to give a ground of action, but if a demand be made, which the person indemnifying is bound to pay, and notice be given to him, and he refuse to defend the action, in consequence of which the person to be indemnified is obliged to pay the demand, that is equivalent to a judgement and estops the other party from saying that the defendant in the first action was not bound to pay the money.'"

The only distinction that can be drawn between the case cited and the present, is that the plaintiff in the present case settled what he considered to be a claim which he could not resist without waiting until a suit was actually brought. We can see no reason or principle why if a person entitled to an indemnity is competent to compromise a suit which is brought, he is not equally competent to settle the dispute before suit. If he has given due notice to the indemnifying party, the indemnifying party, on the authority of the case to which we have referred, is not entitled to come forward and say that the compromise was not a fair and reasonable one.

In any event the court below has in our judgement given very good reasons for holding that the compromise in the present case was a reasonable and fit one. Furthermore, it was never alleged by the defendants that they were in a position to show that Durga Dei had authority to sell the property in question absolutely, or that there was any other claimant who could come forward, and it has been admitted by the learned advocate for the plaintiff that he has no further claim against the defendants upon foot of the covenants contained in the sale deed from the Court of Wards, so far as the village of Mirpur Harriapur is concerned.

We accordingly dismiss the appeal with costs.

Appeal dismissed