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GULAB CHAND

v.

SHANKAR
LAL.

record it was unnecessary to take any further step. The suit was decided *ex parte* against Gulab Chand. His application was rejected by the court below on the ground that a vakalatnama, dated the 27th of July, 1911, had been filed and showed that a vakil was appointed to defend the action filed and therefore service of summons was unnecessary after that. It is quite clear that on the 27th of July, 1911, the only matter pending was the miscellaneous matter relating to the appointment of a guardian. The suit was not registered and the pleader was appointed for that miscellaneous matter. It was the duty of the court to serve the summons after the suit had been registered. It is true that Gulab Chand knew that a suit had been instituted, but he was entitled to receive a copy of the plaint and be informed of the date fixed in order that he might be able to protect his rights. Therefore the order of the court below is wrong. We allow the appeal; set aside the *ex parte* decree as against the present appellant, and direct the court below to restore the suit to its original number and proceed to hear and determine it according to law. The costs of this appeal will abide the event.

Appeal allowed and cause remanded.

FULL BENCH.

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January, 21.

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

COLLECTOR OF MIRZAPUR (PLAINTIFF) v. BHAGWAN PRASAD
AND OTHERS (DEFENDANTS).*

Act No. IV of 1892 (Transfer of Property Act), sections 59, 100—Mortgage—
Charge—Attestation—Document attested by one witness only.

Held that a document which purported to be a mortgage, but which was attested by only one witness could not operate either as a mortgage or as creating a charge on immovable property within the meaning of section 100 of the Transfer of Property Act, 1892. *Shamu Patter v. Abdul Kadir Bawathan* (1) referred to.

THE plaintiff in this case brought a suit for sale of immovable property on the basis of a document, alleged to be a mortgage, dated the 11th of July, 1900. The document purported to have

* First Appeal No. 52 of 1911 from a decree of Keshab Deb, Subordinate Judge of Jaunpur, dated the 26th of September, 1910.

(1) (1912) I. L. R., 185 Mad., 607.

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been executed by a number of persons who were stated to be the adult members of a joint Hindu family. It was in the form of a mortgage, but was attested by only one witness, instead of the two witnesses required by section 59 of the Transfer of Property Act, 1882. It was argued that nevertheless the document might be construed as creating a charge within the meaning of section 100 of the Act. The court of first instance held against the plaintiff on both these points and dismissed the suit. The plaintiff thereupon appealed to the High Court.

Mr. *A. E. Ryves*, for the appellant.

The Hon'ble Dr. *Sundar Lal* and Munshi *Haribans Sahai*, for the respondents.

RICHARDS, C.J., and BANERJI and TUDBALL, J.J.:—This appeal arises out of a suit for sale on foot of an alleged mortgage. The document is dated the 11th of July, 1900. It purports to have been executed by a number of persons who are stated to have been the adult members of a joint Hindu family. The present suit is brought against all the members of the family. The court below dismissed the plaintiff's suit. Hence the present appeal.

The appellant has to admit that owing to the fact that the document was attested by one witness only, the deed cannot operate as a mortgage, having regard to the provisions of section 59 of the Transfer of Property Act, which requires that a mortgage must be attested by at least two witnesses. It is, however, contended that the document, assuming it to have been executed by the persons who purported to do so, amounts to a charge under section 100 of the Transfer of Property Act and ought to be given effect to as such. It was further contended that in any event the plaintiff ought to have a personal decree against such persons as in fact executed the document.

The question as to how a mortgage must be attested was recently before their Lordships of the Privy Council in the case of *Shamu Patter v. Abdul Kadir Rowathan* (1). In that case there were several witnesses to the document, but it appears that these witnesses had signed their names as such merely upon the admission of the executants and had not actually witnessed the signatures of the executants. It was held by the High Court of Madras that

(1) (1912) I.L.R., 35 Mad., 607.

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such "attestation" did not fulfil the requirements of section 59. On appeal their Lordships of the Privy Council took the same view and confirmed the decision of the Madras High Court. It is contended that their Lordships did not decide the question raised in the present appeal, namely that the document might be good as a charge although it fell short of fulfilling the necessary conditions of a mortgage. We cannot accept this view. The suit in that case was a suit for sale on an alleged mortgage, just as the present; and the present argument could not well have escaped the attention of their Lordships or of the Madras High Court. As a matter of fact we find from the report, at page 610, that it was contended before their Lordships of the Privy Council that the document must operate as a charge. We must take it that their Lordships considered and repelled the contention that a charge was created. We deem ourselves bound by the ruling of their Lordships in the case to which we have referred.

As to the other point we must point out in the first instance that the suit was not a suit for a personal decree. It was a suit to enforce payment of moneys alleged to be secured by mortgage by sale of the mortgaged property. Furthermore we find in the document itself the following clauses:—"In case of breach of the condition laid down in this document the said Babu Sahib shall have power to realize the entire amount mentioned in this document together with interest at the said rate from the hypothecated properties. The said Babu Sahib shall have no power to realize it from the persons and pay, et cetera, of us, the executants."

It is true that in the earlier part of the deed there are provisions that upon failure to pay certain instalments the mortgagee shall have power to realize the entire amount from the property hypothecated and also from "*other movable and immovable properties.*" These are ordinary clauses which find their way into a great number of mortgages in these provinces. But, reading the document as a whole, we think that it was the intention of the parties that the mortgagee should rely upon his remedy against the mortgaged property and not against the person of the mortgagors. There is certainly no provision that a personal decree should be obtained. Under these

circumstances we consider that the decision of the court below was correct and ought to be confirmed.

We accordingly dismiss the appeal with one set of costs.

Appeal dismissed.

APPELLATE CIVIL.

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January, 22

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

JAI SINGH PRASAD (PLAINTIFF) v. SURJA SINGH AND OTHERS

(DEFENDANTS).*

Act No. IX of 1908 (Indian Limitation Act), section 31—Limitation—Mortgage—Suit on mortgage barred under Limitation Act of 1871—Mortgagee's rights not revived by present Act.

Held that section 31 of the Indian Limitation Act, 1908, cannot be construed as reviving rights already time-barred under the Limitation Act of 1871.

THIS was a suit for sale on a mortgage, dated the 19th of July, 1863. The money secured by the mortgage became payable on the 19th of June, 1864, and the suit was instituted on the 6th of August, 1910. The court of first instance dismissed the suit as being time-barred under the Indian Limitation Act of 1871. The plaintiff appealed to the High Court, relying on section 31 of the Limitation Act of 1908.

Munshi Jang Bahadur Lal, for the appellant.

Mr. A. H. C. Hamilton, for the respondents.

RICHARDS, C. J. and BANERJI, J. :—This appeal arises out of a suit on a mortgage, dated the 19th of July, 1863. The money secured by it became payable on the 19th of June, 1864. The present suit was instituted on the 6th of August, 1910. The court below has dismissed the suit as being barred by time. In our opinion this view was correct. Under the Limitation Act of 1871, which governed the present mortgage, a suit could only be brought within twelve years of the time the money became due, that is to say, within twelve years from the 19th of June, 1864. That Act contained no provision similar to article 147 of Act XV of 1877. It is, therefore, quite clear that before the passing of the last mentioned Act the claim under the bond in suit was barred by limitation. It is manifest from the provisions of section 2 of the

* First Appeal No. 422 of 1911 from a decree of Rama Das, Additional Subordinate Judge of Azamgarh, dated the 3rd of July, 1911.