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apply to the transfer, which had been made long before they came into operation.

The defence fails, so far as it is based on the allegation of undue influence, on the finding of fact by the court below.

In our opinion, there was no failure of consideration. This being so the appeal must be allowed. We, accordingly, set aside decree of the court below and restore the decree of the court of first instance with costs.

Appeal allowed.

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April, 9.

Before Mr. Justice Muhammad Rafiq and Mr. Justice Piggott.

BALKARAN UPADHYA AND OTHERS (DEFENDANTS) *v.* GAYA DIN KALWAR AND OTHERS (PLAINTIFFS) AND AISHA BIBI AND OTHERS (DEFENDANTS). *

Amendment of plaint—Limitation—Power of court to allow amendment—Fresh relief claimed in respect of which a suit would have been time-barred.

A deed of mortgage purported in the first place to mortgage with possession certain specified plots of *sir* and *khudkasht* land. There was, however, a stipulation in the mortgage-deed that, if the mortgagees failed to obtain possession under the deed or were disturbed in their possession, they would be entitled to recover their money from the mortgagors, and this either by sale of the mortgaged plots, or by sale of the *zamindari* share to which these plots appertained or from the persons and the property of the judgement-debtors. A suit was filed just within the extended period of limitation allowed by section 31 of Act No. IX of 1908 for sale of the specified plots. After the period of limitation, however, had expired the plaintiffs applied for leave to amend the plaint and asked for sale of the *zamindari* share. The court below allowed the amendment.

Held that the court had no power to allow amendment of the plaint by introducing a new cause of action after the period of limitation in respect of such cause had expired. *Muhammad Sadiq* v. *Abdul Majid* (1) distinguished.

THIS was a suit for sale under a mortgage, dated the 24th of May, 1893. The suit was brought on the 23rd of May, 1910, and the plaintiffs therefore had to take advantage of the special limitation granted by section 31 of Act No. IX of 1908. The mortgage on the face of it was a mortgage with possession of certain specific plots of *sir* and *khudkasht* land; but it further contained a stipulation to the effect that, if the mortgagees failed to obtain possession under the deed, or were disturbed in their possession, they were to be entitled to sue the mortgagors for the recovery of the

* Second Appeal No. 403 of 1913, from a decree of L. Marshall, District Judge of Jaunpur, dated the 9th of January, 1913, confirming a decree of Gopal Das Mukerji, Munsif of Jaunpur, dated the 29th of February, 1912.

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mortgage money, and in such a suit might ask for sale either of the specific plots mortgaged, or of the zamindari shares to which these plots appertained, or might recover the money from the persons and other property of the mortgagors. The suit as brought was for sale of the specific plots; but it was subsequently found that for various reasons a decree could not be obtained against these, and the plaintiffs accordingly asked for and obtained leave to amend their plaint by adding a prayer for sale of the zamindari share. The court of first instance gave the plaintiffs a decree against some of the defendants, and dismissed the suit as against the others, and on appeal this decree was affirmed. The defendants appealed to the High Court.

Dr. *S. M. Sulaiman*, for the appellants.

Pandit *Baldeo Ram Dave*, for the respondents.

MUHAMMAD RAFIQ and PIGGOTT, JJ.—This is a second appeal by certain defendants in a suit for sale upon a mortgage. The mortgage was one dated the 24th of May, 1893, and it was somewhat peculiar in its provisions. The mortgagors, Bhole Khan and Faulad Khan, were said to be the proprietors of a certain share in a *mahal* known as that of Bhole Khan in mauza Chak English Zorawar Khan. There was a further recital to the effect that the *sir* and *khudkasht* lands in this *mahal* were divided by private arrangement amongst the co-sharers and that certain specified plots had been assigned under this arrangement to the mortgagors. The deed purported in the first place simply to mortgage specified plots of *sir* and *khudkasht* land with possession in return for the money advanced as consideration for the deed. There was, however, a stipulation to the effect that, if the mortgagees failed to obtain possession under the deed, or were disturbed in their possession, they were to be entitled to sue the mortgagors for the recovery of their money and that in respect of the suit for recovery of money, they might exercise any one of three alternative reliefs: they might enforce their claim for their money against the specified plots of lands mortgaged with possession under the deed, or they might recover the money from the persons or other property of the mortgagors, or they might recover it from the *zamindari* share of one anna to which the specified *sir* and *khudkasht* lands were alleged to appertain. This suit was brought on

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the 23rd of May, 1910, that is to say, just about seventeen years after the date of the deed, and the plaintiffs claimed to be within limitation by virtue of the special provisions of section 31 of the Indian Limitation Act No. IX of 1908. In the suit as brought the relief claimed was to recover the principal and interest by bringing to sale the specified plots of land set forth in the mortgage. A large number of defendants were impleaded besides the original mortgagors, there having been in the interval both a number of transfers and a partition of the *mahal* in question. We are concerned with the defence set up by four of the defendants who are now the appellants before us. The case for these defendants in their written statement as originally filed was that they were not in possession of, and had no interest in, any of the plots of land sought to be sold under the plaintiff's claim, and that consequently they had been unnecessarily impleaded as parties to the suit. At a considerably later stage it became clear to the plaintiffs that the suit as brought could not succeed without some sort of amendment of the plaint. This much, at any rate, was certain, that there had been a partition in the year 1312 Fasli by which the private distribution of *sir* and *khudkasht* lands amongst the co-sharers of the *mahal*, as it had existed in 1893, was completely set aside and the particular plots specified in the mortgage deed had been assigned to co-sharers other than the original mortgagors. Indeed some of them had been assigned to the plaintiffs themselves, who were also co-sharers in the *mahal*. Accordingly the plaintiffs, on the 4th of January, 1912, applied for permission to amend the plaint in various ways. They referred to this partition of 1312 Fasli, and stated that the original mortgagors had received certain specified plots of land in exchange for those set forth in the mortgage-deed. They also explained that, in consequence of the partition, the original share of one anna referred to in the mortgage-deed had become a share of one anna, seven pie, four krant. They now asked the court to give them a decree for the principal and interest of their mortgage-debt, recoverable by sale, both of the above mentioned share of one anna, seven pie, four krant, and of certain specified plots of land which they alleged the mortgagors had received in exchange for those set forth in the mortgage-deed. After the

plaint had been amended, the defendants who are now the appellants before us filed a fresh written statement in the course of which they challenged the plaintiffs to prove that the mortgage-deed in suit had been executed for valid consideration. It also became clear at some later stage of the proceedings that the plaintiffs could not, under the terms of the deed itself, ask for a decree both against the specified plots of land and the *zamindari* share. The court accordingly asked the plaintiffs to make a definite election between the two. The plaintiffs replied that, if the court was of opinion that they were not entitled to a decree against both, then they would prefer to have a decree against the zamindari share only. This was done by an application, dated the 29th of February, 1912, being the very date on which the suit was decided by the court of first instance. The learned Munsif gave the plaintiffs a decree for principal and interest recoverable by sale of a one anna, seven pie, four krant zamindari share, which is in the possession of these defendants who are now the appellants before us. An appeal against this decree was filed in the court of the District Judge and a large number of pleas were entered in the memorandum of appeal, including certain pleas impeaching the order of the first court by which the amendment of the plaint had been permitted. It appears, however, from the order of the learned District Judge on appeal that the only points pressed before him were whether the consideration for the deed in suit had been paid to the original mortgagors, and whether the plaintiffs had or had not obtained possession of certain plots of *sir* and *khudkasht* lands in accordance with the terms of mortgage-deed. These points were decided by the lower appellate court in favour of the plaintiffs, and it was noted in the judgement that the other points raised in the memorandum of appeal "had been dropped." In the second appeal now before this Court the defendants appellants again challenge the order of the first court permitting the amendment of the plaint, and they contend further that the finding with regard to the passing of consideration is vitiated by the fact that the burden of proof had been wrongly laid on the defendant. With regard to this latter point reference is made to a ruling of this Court in *Bihari* v. *Ram Chandra* (1), which has been

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discussed by the learned District Judge also. There can be no doubt that there is something peculiar and open to suspicion in the conduct of the plaintiffs in having refrained from bringing any suit on this mortgage-deed for so long a period as seventeen years. The court might have been entitled to infer from this delay, with reference to the terms of the deed and the circumstances of the case generally, either that there had been failure of payment of the consideration, or that the plaintiffs must in some way or other have enjoyed their interest, for part at any rate of the period in question, by separate possession over some of the plots of *sir* or *khudkasht* land. Moreover, the inference to this effect would be strengthened by consideration of the fact that the plaintiffs during the partition proceedings of 1312 Fasli never raised any question about their rights under the mortgage-deed in suit, even though some of the plots specified in this deed were actually assigned to them as part of their share on partition. The learned District Judge might in our opinion have assigned greater weight to these considerations and put the plaintiffs to strict proof, both of the passing of consideration and as to their having failed to obtain possession under the terms of the mortgage-deed. We notice that on this latter point the District Judge has remarked that the the defendants failed to prove that the plaintiffs had not obtained possession under the deed. The burden of proof in our opinion lay clearly on the plaintiffs, inasmuch as their failure to obtain possession was a condition precedent to their title to bring a suit for sale at all. However, the case being now before us in second appeal and the finding as to the plaintiff's failure to obtain possession not being challenged in the memorandum of appeal before us, we should be reluctant to interfere with the decision of the lower appellate court on these grounds, if they stood alone. We mention them chiefly in order to show that the equities of the case are at least doubtful. There remains for consideration the question of the amendment of the plaint; and here it appears to us that both the courts below have entirely overlooked the question of limitation, when they permitted the plaint to be amended in the way in which they did. We have been referred to a ruling of this Court in *Muhammad Sadiq* v. *Abdul Majid* (1). It was there

(1) (1911) I.L.R., 33 All., 616.

laid down that in view of the wide discretion allowed by the Code of Civil Procedure in the matter of the amendment of pleadings, the High Court will be slow to interfere in appeal with the exercise of this discretion, but that no court has power to allow a new cause of action to be introduced into a plaint after that cause of action has become barred by limitation. On the particular facts of this reported case the learned Judge of this Court held that there had not been anything like the introduction of a new cause of action, but only an amendment in the description of the property in suit. Now the essential question seems to us to be whether the same could be said of the suit before us. It must be remembered that the mortgage-deed in suit is a very peculiar one. Stipulations giving the mortgagees alternative remedies such as we find in the deed before us are certainly unusual. The plaintiffs have, whatever may have been their reasons, delayed the institution of this suit until the period of limitation was running out. They brought this suit on a deed which allowed them two or three alternative reliefs, and on the suit as framed they expressly claimed to enforce one of those reliefs only, namely, the recovery of their money by sale of the specified plots mentioned in the instrument of mortgage. They were allowed in effect to amend their plaint so as to change the relief by asking for a decree against the zamindari share, and this was done after the period of limitation to enforce a simple mortgage on that zamindari share had expired. This, in our opinion, the plaintiffs should not have been permitted to do; and even though the point was not pressed in the lower appellate court, it seems to us that we are bound to take notice of it in second appeal, inasmuch as a question of limitation is involved. In our opinion the amendment of the plaint should not have been allowed and the decree passed for the sale of the zamindari share cannot be sustained. We, therefore, accept this appeal, and, setting aside the decrees of both the courts below, we dismiss the plaintiff's suit with costs throughout.

Appeal allowed.