

of proper accounts on the basis of the above-recited covenant within a time to be specified by the High Court.

And their Lordships will humbly advise His Majesty accordingly.

Considering the result, they think the ends of justice will be served by making the parties bear their respective costs in the appeals to the High Court and to this Board.

Solicitors for the appellant: *Barrow, Rogers & Nevill.*

Solicitor for the first respondent: *Edward Dalgado.*

J. V. W.

BAKHTAWAR BEGAM (DEFENDANT) v. HUSAINI KHANUM AND ANOTHER
(PLAINTIFFS) And cross-appeal: two appeals consolidated.

[On appeal from the High Court of Judicature for the N.-W. Provinces, at Allahabad.]

Limitation—Suit for redemption—Mortgage by conditional sale—Specified period for redemption—Payment of mortgage debt within specified time—Accrual of cause of action—Act No. XV of 1877 (Indian Limitation Act), schedule II, article 148.

Ordinarily, and in the absence of a special condition entitling the mortgagor to redeem during the term for which the mortgage is created, the right of redemption can only arise on the expiration of the specified period. But there is nothing in law to prevent the parties from making a provision that the mortgagor may discharge the debt within the specified period, and take back the property. Such a provision is usually to the advantage of the mortgagor.

The father of the plaintiff executed a mortgage by way of conditional sale on the 6th of January, 1880, in respect of 12 villages in favour of the predecessor in title of the principal defendant; and there was at the time of execution a contemporaneous agreement "that the sale would be cancelled on payment of the amount of consideration in nine years." In a suit brought on the 6th of January, 1899, for redemption the High Court held on the construction of the contract that the suit was not barred, as the right to redeem only arose on the expiry of the nine years.

Held, by the Judicial Committee, that the case must be decided, not on the construction of the contract, but on the case made by the plaintiff on the pleadings, which was that she was entitled under the agreement to redeem the property within the period of nine years, and by the statement of account produced with the plaint which showed that the mortgage debt was actually satisfied under the contract on the 4th of September, 1888; and that being so the right to redeem then accrued, and the whole suit was therefore barred, not having been brought within 60 years from that date [article 148 of schedule II of the Limitation Act, XV of 1877].

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TWO consolidated appeals (26 and 27 of 1911) from a judgement and decree (16th April and 11th November, 1907) of the High Court at Allahabad, which reversed a judgement and decree (4th January, 1904) of the Court of the Subordinate Judge of Cawnpore.

The facts of the case are sufficiently stated in the report of the appeal to the High Court (Sir JOHN STANLEY, C. J. and Sir WILLIAM BURKITT, J.) which will be found in I. L. R., 29 All., 271.

The main question for decision in these appeals was whether the plaintiffs were entitled to redeem a mortgage alleged to have been executed in the year 1830.

De Gruyther, K. C. and *B. Dube*, for Bakhtawar Begam, the appellant in appeal 26, and first respondent in appeal 27, contended that the suit was wholly barred by the limitation of 60 years, which began to run from the date of the mortgage, the 6th of January, 1830, or at any rate before the expiry of the nine years, within which period the plaintiffs admitted there was a provision allowing the redemption of the mortgage. The plaintiffs came into court on the allegation that the mortgage debt was satisfied on the 4th of September, 1838; and as the suit was not instituted until the 6th of January, 1899, it was barred under article 148, schedule II, of the Limitation Act, 1877. Section 62 of the Transfer of Property Act was also referred to.

Sir Erle Richards, K. C. and *Ross K. C.*, for Husaini Khanum, and Yusuf Husain Khan, the respondents in appeal 26 and appellants in appeal 27, contended that on the contract between the parties the plaintiffs could not sue for redemption before the expiry of the nine years: the parties intended that the mortgage debt should remain outstanding for that period, and a suit to redeem the mortgage before that period would have been premature: see *Vadju v. Vadju* (1), where it was held that the use of the word "within" was not a sufficient indication of an intention that the mortgagor might redeem in a less period than ten years. The High Court therefore wrongly held that the suit was in any way affected by limitation.

G. C. O'Gorman for Jamna Narain, representing the second respondent in appeal 27, whose contentions were the same as those for Bakhtawar Begam.

De. Gruyther, K. C., replied.

1914, February 6th :—The judgement of their Lordships was delivered by Mr. AMEER ALLI.

The suit which has given rise to these consolidated appeals from a decree and judgement of the High Court at Allahabad was instituted by the plaintiff respondent in the Court of the Subordinate Judge of Cawnpore for the redemption of a mortgage executed so long ago as the 6th of January, 1830. The suit was brought on the 6th of January, 1899, and the only and vital question presented at the Bar for determination in this case is whether the claim is barred by the Statute of Limitation (Indian Act XV of 1877).

The plaintiff Husaini Khanum alleges that on the 6th of January, 1830, her father, Aga Fateh Ali, in conjunction with another relative named Aman Ali, executed a mortgage by way of conditional sale in respect of 12 villages lying within the district of Cawnpore in favour of one Ata-ullah Khan, since deceased. The other plaintiffs are persons who have acquired title from Husaini Khanum. The principal defendant in the action was one Ali Husain Khan, who was the representative of Ata-ullah. He died since the decision by the High Court in the appeal from the decree of the Subordinate Judge, and he is now represented by his widow, Bakhtawar Begam, the appellant. The remaining defendants are assignees of interests created by the original mortgagee or his representatives in the mortgaged premises.

The mortgage deed is not forthcoming, but both the Courts in India have found that the contract between the parties to the transaction is, for all material purposes, substantially set forth in the proceeding of the Collector's Court, dated the 18th of September, 1830, on an application for mutation of names in the Revenue Register.

The contract of mortgage by conditional sale is a form of security recognized throughout India, and its incidents have been embodied in section 58 of Act IV of 1882 (the Transfer of Property Act). The form it usually takes is for the mortgagor to execute a deed of sale in respect of the mortgaged property in favour of the mortgagee, who on his side executes an agreement covenanting that on the liquidation of the debt, according to the terms of the

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contract, the sale would be cancelled, and he would re-convey the property to the mortgagor. On the breach of the condition relating to repayment the contract executes itself, and the transaction becomes one of absolute sale.

The proceeding which contains the contract in this case is set out in full in the judgement of the High Court. The only material part to which their Lordships need refer is the clause relating to repayment, which runs as follows :—

“On being asked, Sital Prasad, attorney of Ata-ullah Khan, stated that his client had executed and made over to Mirza Aman Ali and Fateh Ali an agreement to the effect that the sale would be cancelled on payment of the amount of consideration in nine years, and that, therefore, the sale was not an absolute but a conditional sale.”

The period of limitation under the Indian Statute for suits for redemption or for recovery of possession of mortgaged property is sixty years from the date of the accrual of the right to redeem or to recover possession (Art. 148, Sched. II, Act XV of 1877). The Subordinate Judge was of opinion that limitation began to run from the date of the contract, and accordingly held that the suit was barred. The High Court of Allahabad on appeal have taken a different view. The learned Judges considered *inter alia* that the right to redeem in respect of the seven villages which were in the possession of the mortgagee's representatives accrued only on the expiration of the period of nine years for which the contract was made, but that as regards the five villages which had been transferred by the mortgagee to third parties the claim was barred. They accordingly decreed the plaintiff's claim in respect of seven villages and dismissed it with regard to the rest.

The defendants have appealed from the first part of the High Court decree, against which there is a cross-appeal on the part of the plaintiffs.

The first question to determine is whether the plaintiffs' right to redeem is affected by 60 years' limitation, for in that case her claim must fail *in toto*. The learned Judges dealing with this point give expression to their opinion in the following passage in their judgement :—

“If the meaning of this contemporaneous agreement was that the mortgagors might redeem at any time within the period of nine years, the plaintiffs' claim is barred by limitation. If, on the other hand, the intention of the parties was

that the debt should remain outstanding for a period of nine years certain, then the right to redeem only accrued at the expiration of that period. Ordinarily, a mortgagor cannot, before the time limited for payment to the mortgagee expires, take proceedings to redeem. The reason for this is, that it was the agreement of the parties that the mortgage should, during the intervening time, remain as security for the money advanced, and therefore it is not competent for either party to disturb that relation."

And they refer to a number of cases in support of their conclusion. Ordinarily, and in the absence of a special condition entitling the mortgagor to redeem during the term for which the mortgage is created, the right of redemption can only arise on the expiration of the specified period. But there is nothing in law to prevent the parties from making a provision that the mortgagor may discharge the debt within the specified period and take back the property. Such a provision is usually to the advantage of the mortgagor. In the present case, had the matter depended only on the construction of the contract as given in the proceeding of the Collector, much might be said in support of the High Court's conclusions. The expression that "the sale would be cancelled on payment of the consideration in nine years" is certainly ambiguous.

But here the plaintiffs' case is that the mortgagors were entitled to recover the property within the period of nine years on the liquidation of the debt with the usufruct of the property. In the second paragraph of the plaint the plaintiffs state as follows :—

"The terms of the mortgage as agreed were that the mortgagee should remain in possession of the said mortgaged villages . . . that the amount of profits, if any, which shall remain after paying the Government revenue, interest, and pay of the persons making the collections, would be owned by the mortgagors and applied in the payment of the principal, and that whenever the mortgage money would be satisfied (out of the usufruct) or paid (by the mortgagors) before or after the stipulated time the mortgaged property should be redeemed."

And the fact is emphasized in paragraph 8, which is in these terms :—

"The whole amount of the principal mortgage money with interest mentioned in the mortgage-deed was paid up at the end of the year 1245 Fasil according to the account which is annexed to this plaint and forms part of it. No portion of the mortgage money, interest or any other demand is now due: on the other hand, there is a surplus amount due to the plaintiffs."

In their Lordships' judgement this is not a case of a wrong construction of a clause or condition in the contract. It is a

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distinct allegation of fact on which the right to recover possession is founded. But the matter does not rest there. The plaintiffs produced with the plaint a statement of accounts in respect of the 12 villages based on the settlement records to show the amounts realized by the mortgagee from 1830 to 1897. In this document it is clearly stated that the whole debt was satisfied in 1215 Fasli (4th September, 1837—4th September, 1838). From that time the balance of the realizations by the mortgagee after deduction of the legitimate outgoings is treated by the plaintiffs as sums retained by him without any right.

If the fact be, as the plaintiffs allege, that the mortgage debt became satisfied under the contract in 1838, the right to recover possession accrued then, and the suit is clearly barred.

Their Lordships are, therefore, of opinion that the decree of the High Court partly decreeing the plaintiffs' claim should be set aside, and the suit dismissed, which will involve the dismissal also of the cross-appeal.

With regard to the costs, their Lordships think that Jamna Narain, who represents the original assignee of the five villages in respect of which the plaintiffs' suit has been dismissed by both the Courts in India, is entitled to the costs decreed in the Court of the Subordinate Judge and in the High Court, and to the costs of these appeals to His Majesty in Council. As regards the other parties, their Lordships think that the plaintiffs should bear the costs decreed against them in the First Court, but that each of the parties should bear their respective costs of these appeals and of the appeals to the High Court, including the costs incurred in the proceedings on remand.

And their Lordships will humbly advise His Majesty accordingly.

Appeal allowed.

Solicitors for Bakhtawar Begam :—*T. L. Wilson & Co.*

Solicitors for Husaini Khanum and Yusuf Husain Khan :—*T. C. Summerhays & Son.*

Solicitors for the respondent Jamna Narain :—*Rancken Ford, Ford & Chester.*

J. V. W.