

Their Lordships were referring to article 135 of Act XV of 1877. That article provides that a suit by a mortgagee for possession of immovable property must be brought within twelve years from the time when the mortgagor's right to possession determines. The plaintiffs in the suit had been contending that article 147 of the same Act was applicable to the case. That article provides that a suit for foreclosure by a mortgagee might be brought within sixty years from the time when the money became due. It is quite clear that their Lordships held that article 135 was the article applicable. We think that the present appeal is concluded by this authority.

We may also refer to the cases of *Shyam Chander Singh v. Baldeo* (1) and *Ram Dawar Rai v. Bhirgu Rai* (2), where numerous rulings are referred to. We think that the cause of action accrued to the plaintiff in July, 1867, and consequently the present claim was barred within twelve years from the expiration of that date. We dismiss the appeal with costs.

*Appeal dismissed.*

*Before Justice Sir Pramada Charan Banerji and Mr. Justice Walsh.*

MAHABIR PRASAD AND ANOTHER (DEFENDANTS) v. MASIAT-ULLAH  
(PLAINTIFF).\*

*Act No. I of 1872 (Indian Evidence Act), section 94—Mortgage—Construction of document—Misdescription of property mortgaged—Evidence admissible to show to what property the mortgage was intended to apply.*

On the 27th of March, 1864, one H. B. mortgaged 9½ biswas of the villages Anuda, Hasan Mahdud and Paniyala. On the 6th of February, 1873, the mortgagee executed a second mortgage of the villages comprised in the mortgage of the 27th of March, 1864, but by mistake the name of the third village was entered in the schedule of property mortgaged as Halla Nagla instead of Paniyala.

*Held* that section 94 of the Indian Evidence Act, 1872, did not debar the mortgagees from giving evidence to show that the village of Paniyala was intended to be charged by the mortgage of the 6th of February, 1873: the language of the later mortgage could not be regarded as clear and unambiguous.

THE principal question arising in this case was one of the construction of a deed of mortgage, dated the 6th of February, 1873. One Haidar Bakhsh executed three mortgages, dated

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\* Second Appeal No. 1224 of 1914, from a decree of C. E. Guiterman, Additional Judge of Moradabad, dated the 30th of April, 1914, modifying a decree of Mohsin Ali Khan, Munsif of Bijnor, dated the 29th of January, 1914.

(1) (1912) 10 A. L. J., 523.

(2) (1912) 10 A. L. J., 538.

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respectively the 27th of March, 1864, the 3rd of April, 1864, and the 6th of February, 1873. The first was of  $9\frac{1}{2}$  biswas of three villages Anuda, Hasau Mahdud and Paniyala; by the second another 5 biswas of Paniyala was mortgaged; and by the third, which was for Rs. 15,000, it was declared that Rs. 3,500 were to be a charge on the villages mortgaged by the bond of the 27th of March, 1864. In this third bond, however, the name of the third village was entered as Halla Nagla instead of Paniyala. The mortgaged property was sold in various portions to various purchasers in execution of money decrees against the mortgagor, and the purchasers of Paniyala then sued to redeem the mortgages of the 27th of March, 1864, and the 3rd of April, 1864, by payment of the proportionate amount to which that village was liable. The lower appellate court held that under section 94 of the Indian Evidence Act, 1872, evidence could not be admitted to show that in the mortgage of February, 1873, the entry of Halla Nagla was a mistake for Paniyala, and accordingly was of opinion that Paniyala was only chargeable under the two earlier bonds. The defendants mortgagees appealed to the High Court.

Mr. M. L. Agarwala and The Hon'ble Pandit Moti-Lal Nehru, for the appellants.

Mr. B. E. O'Connor and The Hon'ble Dr. Tej Bahadur Sapru, for the respondent.

BANERJI and WALSH, JJ.:—This appeal arises out of a suit for redemption of a mortgage. The property sought to be redeemed is a share in the village Paniyala, which, along with other property, was mortgaged by one Haidar Bakhsh, who was the owner of it. He executed three mortgages, in one of which, dated the 27th of March, 1864, a  $9\frac{1}{2}$  biswa share in Paniyala was mortgaged along with shares in two other villages. On the 3rd of April, 1864, he mortgaged five more biswas of the same village along with other property. On the 6th of February, 1873, he executed a mortgage for Rs. 15,000, and out of the consideration for that mortgage he declared that Rs. 3,500 was to be a further charge on the property comprised in the mortgage of the 27th of March, 1864. In the description of the property on which a further charge was thus placed, were mentioned a  $9\frac{1}{2}$  biswa

share in each of the villages of Anuda, Hasan Mahdud and Halla Nagla; so that, instead of mentioning Paniyala under the mortgage of the 27th of March, 1864, which, together with the other two villages, was mortgaged, mention was made of Halla Nagla. The rights of the mortgagor in Paniyala have been sold by auction in execution of money decrees, and have been purchased by the plaintiff to the suit out of which this appeal arises, and by the plaintiff to the suit in the connected appeal No. 1225 of 1914. Portions of the mortgaged property have also been purchased by the defendants Nos. 1 and 2, who now represent the mortgagees. The integrity of the mortgages has thus been severed and the plaintiffs are entitled to redeem on payment of the proportionate liability of the property purchased by them for the mortgages which exist on it. The plaintiff's contention was that the village Paniyala was only liable under the two mortgages of the 27th of March, 1864, and the 3rd of April, 1864. The defendants mortgagees, however, urged that there was a further charge of Rs. 3,500 on that village under the mortgage of the 6th of February, 1873. The lower appellate court, in view of the provisions of section 94 of the Evidence Act, was of opinion that the defendants were not entitled to show that Paniyala was one of the villages on which a further charge of Rs. 3,500 was created, inasmuch as in the mortgage deed of the 6th of February, 1873, mention was made of Halla Nagla and not of Paniyala. It is clear from the terms of that document that the intention undoubtedly was to create a further charge on the property comprised in what was called the second mortgage, namely, that of the 27th of March, 1864. In that mortgage Paniyala was clearly included and not Halla Nagla. It also appears from the mortgage deed of the 6th of February, 1873, that where the mortgagor included in that mortgage property not included in the earlier mortgages, he distinctly said so. There is, therefore, no room for doubt that the intention was to create a further charge on Paniyala and not on Halla Nagla. Section 94 of the Evidence Act provides that "when language used in a document is plain in itself, and when it applies accurately to existing facts, evidence may not be given to show that it was not meant to apply to such facts." We are of opinion that the language used in the

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mortgage of the 6th of February, 1873, is not plain and unambiguous, as we have already pointed out. In the opening part of that document mention was made of the mortgage of the 27th of March, 1864, which created a charge on Paniyala. The document of 1873 clearly purports to place a further burden of Rs. 3,500 on the property comprised in the earlier mortgage of 1864, but apparently the scribe of the document made a mistake in mentioning Halla Nagla as one of the properties included in the earlier mortgage of 1864, instead of Paniyala. This was clearly a misdescription, and the case is, in our opinion, one of misdescription and mutual mistake. This being so, section 94 of the Evidence Act does not preclude the appellant from showing what was intended to be included in the mortgage of 1873. In our judgement the plaintiff can redeem Paniyala by payment of the proportionate liability of that village, not only under the mortgages of the 27th of March, 1864, and the 3rd of April, 1864, but also under the mortgage of the 6th of February, 1873, for Rs. 3,500 out of the amount secured by that mortgage. As the amount for which Paniyala is rateably liable under these mortgages has not been ascertained by the court below, we must refer an issue to that court to determine what is the amount of the proportionate liability of Paniyala. We accordingly refer the following issue to the court below under order XLI, rule 25, of the Code of Civil Procedure :—

“ What is the amount of the rateable liability of  $14\frac{1}{2}$  biswas of the village Paniyala under the mortgages of the 27th of March, 1874, 3rd of April, 1864, and the 6th of February, 1873.”

The court may take additional evidence, if necessary, and in arriving at its conclusion will bear in mind the observations made above. On receipt of the findings, the usual ten days will be allowed for filing objections.

*Issue remitted.*