

So far from saying that, he dwelt upon the strength of the argument in favour of necessity, and he went on to say, "it does not seem that there is any ground for assuming that the money was not taken for necessity, though it cannot be said that plaintiff has clearly proved this." Under these circumstances it is impossible for me to come to the conclusion that the District Judge intended to find that there was no necessity.

Issue referred.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Muhammad Rafiq.

BANSGOPAL AND OTHERS (PLAINTIFFS) v. SHEO RAM SINGH AND OTHERS (DEFENDANTS).*

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November, 30.

Mortgage—Construction of document—Anomalous mortgage—Suit for foreclosure—Limitation—Act No. IX of 1908 (Indian Limitation Act), schedule I, article 135—Regulation No. XVII of 1806.

A mortgage was made on the 25th of February, 1866, for a period of six years. It was provided that, if after six years anything remained due to the mortgagees, they might forthwith enter into possession of the mortgaged property and realize the principal and interest. It was further provided that the property would not be transferred so long as any principal or interest remained due; and that if it was transferred, or if the money due to the mortgagee was not paid, the mortgagee, without waiting for the expiry of the six years, might bring a suit for recovery of the principal and interest, and might also get possession "by completion of sale." Nothing at all was paid by the mortgagor in the way of either principal or interest and in 1867 part of the mortgaged property was transferred. Proceedings under section 8 of Regulation XVII of 1806 were not taken by the mortgagee. In the year 1910 the representative of the mortgagee instituted a suit for foreclosure.

Held, on a construction of the mortgage bond in suit, that the cause of action accrued in 1867, and the suit was barred by limitation.

Kishori Mohun Roy v. Ganga Bahu Debi (1) distinguished. *Srinath Das v. Khettler Mohun Singh* (2) followed. *Shyam Chander Singh v. Baldeo* (3) and *Ram Dawar Rai v. Bhirgu Rai* (4) referred to.

THIS was a suit for recovery of money and in default of payment by the defendants, for foreclosure of the mortgaged property.

The property in dispute, a village called Razipur, was mortgaged by the predecessors in title of the defendants on the 25th of February, 1866, for a period of six years. It was provided by the

* First Appeal No. 449 of 1913, from a decree of Murari Lal, Subordinate Judge of Cawnpore, dated the 2nd of October, 1913.

(1) (1895) L. L. R., 23 Cal., 223. (3) (1912) 10 A. L. J., 522.

(2) (1889) I. L. R., 16 Cal., 693. (4) (1912) 10 A. L. J., 538.

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deed that the mortgagors were to remain in possession and pay the interest half-yearly. It was further provided that if the money was not paid within the stipulated period the mortgagee will be entitled to recover possession of the mortgaged property; and if the property was transferred by the mortgagor without payment of the mortgage money, the mortgagee would be entitled to foreclose the property. The property passed to the defendants after the mortgage. The present suit was brought by the mortgagees for foreclosure on the 2nd of July, 1913. The plaintiffs alleged that the cause of action arose in their favour in 1867, when a part of the property was sold in execution of a decree and also in 1904 and 1905 when the mortgagors transferred the rest of it to the defendants. The defendants, among other pleas, raised the defence of limitation. The court below dismissed the suit as barred by limitation. The plaintiffs appealed to the High Court.

The Hon'ble Dr. *Syndar Lal* (with him the Hon'ble Pandit *Moti Lal Nehru*), for the appellants :—

In 1866 when the mortgage in suit was executed Regulation XVII of 1806 was in force. Under that Regulation no suit for foreclosure could be instituted. A person wishing to foreclose had to apply to the District Judge to issue a notice to the mortgagor to pay and the latter could pay within one year of the notice. If no payment was made, a suit for possession could be instituted. If proceedings under the Regulation were not taken the mortgage kept alive. The object of the Regulation was to keep the mortgage in force and to prevent the property from being foreclosed until proceedings were taken under it. (He referred to section 7 of the Regulation.) It is thus clear that the present suit is not barred by limitation under the Regulation. In those days the tendency was not to cut short the period of limitation. No proceedings could be brought before the expiry of six years provided by the deed. The suit was not barred even under the Limitation Act of 1859. Assuming that twelve years limitation applied, the suit would not be barred up to 1878 when the Limitation Act XV of 1877 had come into force. The Act of 1877 gave 60 years limitation to a suit for redemption or foreclosure of a mortgage and that period began to run from the date the cause of action arose. In this case the cause of action arose in 1872 and

60 years have not yet expired. The suit was brought within the two years allowed by section 31 of the present Limitation Act. The cases relied upon by the court below do not apply. There the time had expired before the Act of 1877 came into force. He discussed the following cases:—*Imdad Husain v. Mannu Lal* (1), *Kubra Bibi v. Wajid Khan* (2), *Kishori Mohun Roy v. Ganga Bahu Debi* (3) and *Srimati Sarasibala v. Nandul* (4). This is an anomalous mortgage. Two or more conditions could be combined as they have been in this case. Reference was also made to *Thumbusawmy Mudelly v. Mahomed Hossain Rowthen* (5).

Mr. B. E. O'Connor (with him the Hon'ble Dr. Tej Bahadur Sapru), for the respondents:—

The real question is whether the mortgage is one by conditional sale (*bai bilwafa*). In the deed there is no suggestion of sale. The essence of conditional sale is that it is a sale out-and-out of property, subject to a reconveyance. There must be an out-and-out transfer of title in a sale. The cause of action in this suit arose when the mortgage was executed; *Shvam Chander Singh v. Baldeo* (6), *Ram Dawar Rai v. Bhirgu Rai* (7). Notice under the Regulation should have been given by the mortgagee within twelve years of the arising of the cause of action. It was not given. The question, therefore, arises whether not giving of notice would save limitation. It is submitted that once the cause of action arises limitation would go on running. The suit is, therefore, barred by limitation. *Srinath Das v. Khetter Mohun Singh* (8), *Karimdad Khan v. Mustaqim Khan* (9), *Brojonath Koondoo Chowdry v. Khebut Chunder Ghose* (10).

The Hon'ble Dr. *Sundar Lal*, in reply, cited *Aman Ali v. Asgar Ali Mia* (11).

RICHARDS, C. J., and MUHAMMAD RAFIQ, J.:—This appeal arises out of suit for foreclosure of a mortgage said to have been made on the 25th of February, 1866. The principal sum alleged

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| (1) (1881) I. L. R., 3 All. 509. | (6) (1912) 10 A. L. J., 522. |
| (2) (1893) I. L. R., 16 All., 59. | (7) (1912) 10 A. L. J., 538. |
| (3) (1895) I. L. R., 23 Calc., 228. | (8) (1889) I. L. R., 16 Calc., 693. |
| (4) (1870) 5 B. L. R., 389. | (9) (1903) I. L. R., 26 All. 4. |
| (5) (1875) L. R., 2 I. A., 241. | (10) (1871) 14 Moo. I. A., 144. |
| (11) (1899) I. L. R., 27 Calc., 185. | |

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to have been secured was Rs. 3,000. The interest claimed is Rs. 16,000, in all Rs. 19,000. The suit was instituted in August, 1910, a few days before the expiration of the special period of grace allowed by section 31 of the Indian Limitation Act, 1908. This provision was passed to meet the supposed hardship occasioned by the decision of their Lordships of the Privy Council in the case of *Vasudeva Mudaliar v. Srinivasa Pillai* (1). There can be very little doubt that this enactment led to the institution of many doubtful mortgage suits. It is not alleged that from the date of the mortgage to the institution of the suit any payment had ever been made upon foot of the principal or interest secured by the mortgage. The plaintiffs were unable even to produce the original mortgage deed, but no question on this point is before us in the present appeal. The claim is at best an exceedingly stale one. The court below has held the suit barred by limitation. The copy of the mortgage which has been allowed to be given in evidence, will be found at page 7 of the appellant's book in First Appeal No. 382 of 1911. The translation is not particularly accurate. It begins by a statement that the mortgagor has borrowed Rs. 3,000, and has mortgaged the property for six years under conditions specified therein. The first clause provides that interest on the Rs. 3,000, at the rate of one per cent. per mensem should be paid every year in the month of Baisakh for six years. It goes on to provide that the mortgagor is to remain in possession and to pay the Government revenue. Clause 3 deals with redemption. Clause 4 provides that the mortgagor may make payments on account of principal in the manner specified therein. Clause 5 provides that if after the expiry of the six years anything remains due to the mortgagees, the mortgagees may forthwith enter into possession of the mortgaged property and realize the principal and interest. Clause 6 provides that the property shall not be transferred so long as any part of the principal or interest remains unpaid, and that if it is transferred, or if the money due to the mortgagees is not paid, the latter, without waiting for the expiry of the six years, may bring a suit to recover principal and interest and may also get possession by "completion of

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

sale." The translation "possession by foreclosure" is not strictly accurate. The more literal translation is that the mortgagee will get possession as that of a purchaser. It will be seen from the terms of this mortgage that the purchasers were to remain in possession until some one or more of the events mentioned in the deed occurred. This mortgage seems more like a "simple mortgage" within the definition of such a mortgage in section 58 of the Transfer of Property Act than a mortgage by conditional sale. Save for the words in clause 6, the mortgagor does not appear "ostensibly to sell" the mortgaged property, words which occur in the definition of a mortgage by conditional sale as defined in the same section. The appellants contend that they were never entitled to get possession as "owners" of the property until they had taken proceedings under clause 8 of Regulation XVII of 1806; that they could not take any such proceedings until the expiration of six years from the date of the mortgage; that consequently time could not possibly begin to run against the mortgagee until the year 1872; that as the law stood at that time (in the year 1872) they had twelve years within which they might institute a suit for possession or take proceedings for foreclosure; that Act XV of 1877, article 147, gave them a right to sue for foreclosure within sixty years of the time of the money becoming due; that on the passing of Act IV of 1882 (the Transfer of Property Act) proceedings under that Act for the realization of the mortgage debts were substituted for the provisions of clause 8 of Regulation XVII of 1806, and that consequently, their suit having been brought within the period prescribed in section 31 of Act IX of 1908, the suit was within time.

We must mention here that both the events mentioned in the mortgage, which would give the mortgagee a right to "possession as a purchaser," happened in the year 1867. Part of the mortgaged property was transferred in July, 1867, and, as already mentioned, there has never been any payment on foot of principal or interest. The appellants contend that this can make no difference, and rely upon the decision of their Lordships of the Privy Council in *Kishori Mohun Roy v. Ganga Bahu Debi* (1). It is true in that case their Lordships held that "the stipulated

(1) (1895) I. L. R., 23 Cal., 228.

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period " mentioned in section 8 of the Regulation XVII of 1806 was the particular period mentioned in the deed, and that proceedings under that section could not be brought before the expiration of that period, even where there was a contract in the deed of mortgage making *without reference to redemption* the whole principal lent become due upon failure to pay interest at a certain time. We need hardly mention that the terms of the mortgage in the present suit are wholly different. Under clause 6 the mortgagees were in the events which have happened entitled at once to bring a suit or get possession without waiting for the expiry of the stipulated period. Furthermore, the condition that the property shall not be transferred was very different from a mere stipulation that the money should become due if default was made in the payment of interest. The transfer of part of the property prejudiced the security for the loan. We think that under the circumstances of this case we must hold that time began to run in July, 1867. Proceedings might then have been taken for possession in the Civil Court or for foreclosure under the Regulation within twelve years.

In principle the circumstances of the present case seem to be undistinguishable from the case of *Srinath Das v. Khetter Mohun Singh* (1). In that case there was a mortgage, dated the 17th of November, 1865. Proceedings had been taken under the Regulation in the year 1873, but only the mortgagor was served with the prescribed notices. The contending defendants, who were purchasers from the mortgagor, had not been served. Their Lordships state at pages 700 and 701 of the report:—

"The inferences of fact which the court is bound to draw from the evidence, or omission of evidence, in the case, appear to their Lordships as follows: the foreclosure was as against Hari Narain perfect on or before the 31st of March, 1874; the purchasers from him were not served with notice as required by the Regulation; they, therefore, remained unaffected by the proceedings and the relationship of mortgagee and person entitled to redeem continued to subsist between Shama Sundari and them; the purchasers have continued in undisturbed possession since the time of their respective purchases; no interest has ever been paid on account of the mortgage debt, if any part of the principal has been paid in respect of any of the plots, the latest payment was made in August, 1886; therefore, if article 135 is the one applicable to the case, the twelve years there allowed ran out in the month of August, 1878, at the latest."

(1) (1882) I. L. R., 16 Cal., 693.

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.