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Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Piggott.
KESAR KUNWAR (DEFENDANT) v. KASHI RAM (PLAINTIFF) AND KEWAL
SINGH AND OTHERS (DEFENDANTS)*.

Mortgage—Usufructuary mortgage—Simple mortgage—Covenant to pay money due on simple mortgage before redemption of the usufructuary mortgage—Suit on second mortgage barred by limitation—Redemption of usufructuary mortgage.

Plaintiff executed a usufructuary mortgage and later executed a simple mortgage in favour of the defendant. In the latter bond he covenanted not to redeem the usufructuary mortgage till he had paid the money due on the second bond. The present suit was brought to redeem the usufructuary mortgage at a time when if the defendant had to sue on the simple mortgage it would have been barred by limitation. *Held* that the plaintiff was entitled to redeem the first mortgage without paying the money due on the second bond.

THE facts are as follows:—

The plaintiff was the purchaser of the interests of one Bhim Singh who on the 13th of February, 1880, executed a usufructuary mortgage to secure a sum of Rs. 900 for a term of four years in favour of Kripa Ram, the deceased husband of the defendant, Musammat Kesar Kunwar. In that bond it was stipulated that the mortgagor was not to get any profits nor the mortgagee any interest, and that at the end of the specified period the mortgagor would be entitled to redeem the property if he paid the mortgage-money only at the end of *Jeth*. The plaintiff deposited Rs. 900 on the 28th of May, 1912, in court, but the defendant Musammat Kesar Kunwar declined to accept it. Thereupon the plaintiff brought this suit to redeem the mortgage. Musammat Kesar Kunwar, contended, *inter alia*, that the mortgagor Bhim Singh, in continuation of his first mortgage, executed another mortgage-deed for Rs. 95 in favour of Kripa Ram on the 22nd of July, 1882, and that unless the plaintiff paid the amount of the bond tacked on to the first mortgage, he could not redeem that mortgage alone. The stipulation in the second bond was as follows:—“I will pay the money with interest at Rs. 2 per cent. per mensem. I hypothecate and mortgage in this bond the two biswazamindari share in mauza Parsari, . . . which is mortgaged with possession to the creditor, till the payment of this money. It

* Second Appeal No. 931 of 1914, from a decree of Banke Behari Lal, Subordinate Judge of Aligarh, dated the 21st of April, 1914, reversing a decree of Jogendro Nath Chaudhri, Munsif of Etah, dated the 26th of September, 1912.

is further stipulated that I should first pay the money due under this bond, and after that I should pay the mortgage-money." The Munsif held that the intention of the parties was to consolidate the amounts of the two mortgages and that, consequently the plaintiff was not entitled to redeem the usufructuary mortgage alone. He dismissed the suit as the plaintiff did not seek to redeem the second mortgage nor deposited the additional court fee. The Subordinate Judge on appeal held that there was no covenant in the bond that the "moneys due under both the mortgages were to be paid simultaneously," and therefore, "the amounts of the two mortgages were not consolidated, but under the terms of the second mortgage, the plaintiff could not ask for redemption of the earlier mortgage so long as the second mortgage subsisted." He further held that no term being fixed in the second bond for payment, it was payable on demand, and time ran from the date of the bond, twelve years expired in 1894 and the bond did not subsist. Accordingly he allowed the claim. Defendant, Musamat Kesar Kunwar, appealed.

Babu Sarat Chandra Choudhri, for the appellant.—

The bond of 1882 is a tacking bond, and reading the bond as a whole the intention clearly was that the amounts due under the two mortgages were to be consolidated. There is all the greater reason to hold that a consolidation was intended because the second bond was payable before the first. The suit is for redemption of the first mortgage, and it will be inequitable to allow the plaintiff to redeem it alone without paying the money due under the second bond. The same property is mortgaged in both the bonds, and unless the parties contemplated that the money was to be paid simultaneously the covenant would be meaningless. Without an express covenant to that effect, the mortgagor would be entitled to redeem the second mortgage at any time and the mortgagee could sue on foot of it whenever he liked within 12 years from the date of the bond. Unless the parties intended that the two mortgages were to be simultaneously redeemed, there was no conceivable motive for having a clause like the one now under consideration inserted in the bond. Whenever a tacking bond like this is executed the intention is that the mortgage to which it is tacked and that bond itself should be redeemed simultaneously.

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The case of *Birjial Singh v. Bhawani Singh*, (1) is on all fours with the present case and on interpretation of a covenant very much similar to the covenant in this deed, the Judges came to the conclusion that the two mortgages must be redeemed simultaneously; *Ranjit Khan v. Ramdhan Singh* (2); *Dorasami v. Venkataseshayyar* (3); *Coote's Mortgage*, 8th Ed., Vol. II, pp. 1174—1175. As for the further point that the bond does not subsist because a suit on it would be barred now it is submitted that limitation does not affect the defence based on the bond; *Rangnath Sakharam v. Govind Narasim* (4); *Lakshmi Doss v. Roop Lal* (5). Moreover, the mortgagee being entitled to consolidate no question of limitation arises.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the respondent was not heard.

RICHARDS, C. J., and PIGGOTT, J.:—This appeal arises out of a suit brought to redeem certain property which was made the subject of a usufructuary mortgage, dated the 13th of February, 1880. The principal sum secured was Rs. 900, and the mortgage deed expressly provided that the usufruct was to go against the interest and that the mortgagor should not be entitled to an account from the mortgagee of the profits. The defence to the suit was that there had been a subsequent mortgage, dated the 7th of July, 1882, and that under the terms of this mortgage plaintiff could not succeed in the present suit without first paying off the amount due for principal and interest under the last mentioned mortgage. The first court gave effect to the defence and dismissed the suit. The lower appellate court allowed the appeal.

The second mortgage was for a sum of Rs. 95, repayable with interest at the rate of thirty per cent. per annum. The deed, after reciting the facts that the property had been previously mortgaged, contains the following provisions:—"It is further stipulated that I should first pay the money due under this bond, and after that I should pay the mortgage money." It is clear from the terms of this mortgage taken in conjunction with the fact that the whole usufruct was to be applied to the keeping

(1) (1910) I. L. R., 32 ALL, 651.

(3) (1901) I. L. R., 25 Mad., 108.

(2) (1909) I. L. R., 31 ALL., 482, 485, 488. (4) (1904) I. L. R., 28 Bom., 689.

(5) (1906) I. L. R., 30 Mad., 169.

down of interest upon the first mortgage, that the second mortgage was in fact a simple mortgage. So long as it remained unpaid the interest would accumulate at the rate of thirty per cent. per annum, and according to the covenant the money due thereunder for principal and interest must be paid before the mortgagor redeemed the first mortgage. No principal or interest had ever been paid upon foot of this second mortgage. At the date of institution of the present suit, a suit to enforce payment of the second mortgage would be barred by limitation, unless it can be said that on the true construction of the deed it was not open either to the mortgagor to pay off the amount due, or to the mortgagee to bring a suit until such time as the mortgagor was ready to redeem the earlier mortgage. It seems to us absolutely clear that if the mortgagor, a year after the execution of the second mortgage, had tendered the sum of Rs. 95, *plus* a year's interest thereon, the mortgagee would have been legally bound to accept the same. He certainly could not have refused the tender by reason of the stipulation in the second bond that the mortgagor should pay the money due thereunder before he paid the mortgage on the earlier bond. Just in the same way we consider that if the mortgagee had brought a suit to enforce the second bond, the mortgagor could not have successfully pleaded that such suit was premature. The result is that we must take it that had a suit been brought on the 8th of August, 1912, (that is the day on which the written statement was filed), on the second mortgage the same would have been barred by limitation. We will assume that had the plaintiff brought the present suit before the second mortgage was barred by limitation, and had the defendant pleaded that the first mortgage could not be redeemed until after the second had been paid off the plea would have been a good one. The question remains whether such a plea is still good notwithstanding that the defendant is barred from maintaining any suit to enforce the second mortgage. In effect the defendant is asking the court to enforce against this property a claim which is barred by time. We think that this cannot be done and that the plaintiff is now entitled to recover possession of the property

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upon payment of the amount secured by the original mortgage.
We dismiss the appeal with costs.

Appeal dismissed.

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Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Piggott.
PREM NATH TIWARI AND ANOTHER (DECREE-HOLDERS), v. CHATARPAL
MAN TIWARI AND ANOTHER (JUDGEMENT-DEBTORS) *

Civil Procedure Code (1908), section 48—Decree in favour of minors—Application for execution 12 years after date of decree—Limitation—Act No. IX of 1908 (Indian Limitation Act), section 6.

Section 6 of the Indian Limitation Act, 1908, only refers to periods of limitation prescribed by the Act itself and has no application to a case where the decree is barred by the provisions of section 48 of the Code of Civil Procedure, 1908. Minority, therefore, is not a ground of exemption from the operation of limitation provided for by section 48 of the Code of Civil Procedure. *Moro Sadashiv v. Visaji Raghunath* (1) dissented from. *Jhandu v. Mohan Lal* (2) and *Ramana Reddi v. Babu Reddi* (3) followed.

THE facts of this case were as follows :—

A decree was obtained by the appellants on the 22nd of May, 1901. They were minors at that time as well as at the time of this application. There were several applications for execution leading up to one on the 6th of February, 1912, which was dismissed on the 3rd of December, 1912. The present application for execution was made on the 27th of May, 1913. The present application was thus a few days beyond twelve years from the date of the decree. The application was contested on the ground that it was barred by limitation. The first court gave effect to the plea, but the lower appellate court allowed the execution. The minor decree-holders appealed to the High Court.

Babu Sarat Chandra Chaudhri and Munshi Iswar Saran for the appellants.

Babu Girdhari Lal Agarwala, for the respondents.

RICHARDS, C.J., and PIGGOTT, J. :—This is an execution appeal. It appears that a decree was obtained by minors on the 22nd of May, 1901. There were several applications for execution leading up to one on the 6th of February, 1912, which was dismissed on the 3rd of December, 1912. The present application for execution was made on the 27th of May, 1913. It thus appears that the last

* Appeal No. 87 of 1915, under section 10 of the Letters Patent.

(1) (1891) I. L. R., 16 Bom., 536. (2) Punj. Rec., 1894, C.J., 489.

(3) (1912) I. L. R., 37 Mad., 186.