

1921

BASHIR-UN-
NISSA BIBI
v.
ABDUR
RAHMAN.

that case. The same point was taken there. It was said that the claim for partition of movables was barred because the claim fell within article 49. The Privy Council did not agree with that contention but held that the claim really fell within article 120 inasmuch as there was to be found in this first schedule to the Limitation Act no specific provision for a claim of this kind. As our view in this respect is the same as held by the learned Subordinate Judge, we are of opinion that on both grounds this appeal must be dismissed with costs. We accordingly dismiss this appeal with costs.

Appeal dismissed.

1921

December, 9.

Before Mr. Justice Lindsay and Mr. Justice Gokul Prasad.
ABDUL HAKIM KHAN (DEFENDANT) v. RAM GOPAL AND OTHERS
(PLAINTIFFS.)*

Act No. I of 1872 (Indian Evidence Act), section 92, proviso (1)—Mortgage deed—Misdescription of property mortgaged—Admissibility of evidence to show what really was the property which the parties intended to be mortgaged.

By a deed executed in 1892 certain items of property were mortgaged, including a share in khata No. 3 in mahal Ismail Beg. The mortgage was renewed in 1897 and in the second deed the words "mahal Ismail Beg" were omitted in the schedule of the properties mortgaged. The mortgage was again renewed in 1907, when in the corresponding part of the schedule there was entered an item "khata No. 3 in mahal Jafar Beg."

Held that it was open to the mortgagee to offer evidence to show that what was intended to be mortgaged was a share in mahal Ismail Beg, khata No. 3, and in so doing to refer to the two previous deeds.

THE facts of this case sufficiently appear from the judgment of the Court.

Dr. S. M. Sulaiman and Munshi Bhagwati Shankar, for the appellant.

Dr. Surendra Nath Sen, for the respondents.

LINDSAY and GOKUL PRASAD, JJ. :—After hearing the learned counsel in this case we think the appeal must fail and the judgment of the court below must be affirmed.

The question now before us is a question of fact and there is a definite finding by the lower appellate court.

* Second Appeal No. 1246 of 1919, from a decree of Ganga Sahai, Additional Judge of Meerut, dated the 14th of August, 1919, modifying a decree of Kashi Prasad, Additional Subordinate Judge of Meerut, dated the 27th of May, 1919.

The plaintiffs brought a suit on a mortgage and asked for sale of certain properties specified in the deed. With regard to one item of property the plaintiffs' plea was that the description of it in the mortgage-deed was wrong.

The mortgage deed purports to show that one of the items of the mortgaged property was khawat No. 3 in mahal Jafar Beg. The plaintiffs' case was that this description was a mistake and that what was mortgaged and what was intended to be mortgaged was khata No. 3 in mahal Ismail Beg.

It was alleged, and the fact is admitted, that the mortgagor Abdul Hakim Khan, who is the appellant here, has no interest in khata No. 3 in mahal Jafar Beg; on the other hand, it is proved that he had an interest in khata No. 3 in mahal Ismail Beg and that this interest is now, by reason of partition, included in the mahal called mahal Abdul Hakim.

The first court held that there was no proof of mistake. The lower appellate court has held that there was a mistake and it has found in favour of the plaintiffs.

It has been argued before us here that this finding of fact arrived at by the learned Additional Judge is not binding inasmuch as the learned Judge referred to evidence which was not admissible. We cannot agree with this contention. The learned Judge of the lower court traced the history of the mortgage in suit up to the first mortgage between the parties made in the month of June, 1892, which showed that in the mortgage of that date the mortgagor had mortgaged a share in khata No. 3 of mahal Ismail Beg along with other properties. That deed of 1892 was renewed by a later deed executed in 1897. Comparing the two deeds it appeared to the learned Judge of the court below that in copying out the list of items of property mortgaged a mistake was made in the deed of 1897. According to the judgment of the court below the mistake was that after the words "khata or khawat No. 3" the words "mahal Ismail Beg" were left out. It is an admitted fact that the mortgagor owned property in khata No. 4 of mahal Jafar Beg and so it seems to have been assumed that the entry regarding khata No. 3 from which the words had been omitted as we have said above, referred also to mahal Jafar Beg.

1921

ABDUL
HAKIM KHAN
v.
RAM GOPAL.

1921

ABDUL
HAKIM KHAN
v.
RAM GOPAL.

The bond now in suit was executed in the year 1907 and the finding of the court below is that the mistake which was made in drawing up the deed of 1897 was again repeated in the document of 1907 now in suit. The learned Judge felt no doubt that there had been a clerical error and accordingly he allowed the plaintiffs' claim in respect of the property in mahal Ismail Beg.

We cannot allow the argument that the learned Judge of the court below was not entitled to look at the earlier documents of 1892 and 1897. In proviso (1) to section 42 of the Evidence Act it is laid down that any fact may be proved such as . . . mistake in fact or law which would entitle any person to any decree or order relating to a document. It cannot, therefore, be doubted that it was open to the plaintiffs to prove this mistake and the evidence which they produced to prove that fact was certainly admissible. The result, therefore, is that we affirm the decree of the court below and order that this appeal be dismissed with costs.

Appeal dismissed.

1921

December, 14.

REVISIONAL CIVIL.

Before Mr. Justice Figgott and Mr. Justice Walsh.

MAHADEO SAHAI (APPLICANT) v. THE SECRETARY OF STATE
FOR INDIA IN COUNCIL AND OTHERS (OPPOSITE PARTIES).*

*Civil Procedure Code (1908), section 115—Application for leave to sue in
formá pauperis—Order rejecting such application—Revision.*

Held by Walsh, J., that no application in revision under section 115 of the Code of Civil Procedure will lie from an order rejecting an application for leave to sue in formá pauperis. Buddhu Lal v. Mewa Ram (1) followed.

THE applicant in this case applied to the Subordinate Judge of Jaunpur for leave to sue *in formá pauperis*. The suit which he proposed to file was against the Secretary of State for India in Council and other -defendants. The Subordinate Judge, having regard to the particulars of the suit which were filed along with the application, came to the conclusion that they disclosed no cause of action against the Secretary of State, and upon that ground dismissed the application.

* Civil Revision No. 119 of 1920.

(1) (1921) I. L. R., 43 All., 564.