begun in a competent Revenue Court regarding the property in suit, it was not open to the plaintiffs to come to the Civil Court and raise there a question of proprietary title which it was open to them to raise before the court dealing with the partition. The fact that the partition proceedings are carried to a completion before the appellate court is able to deliver its judgment does not seem to us to affect the case. The question whether a suit is maintainable or not is a matter to be considered in connection with the circumstances which exist at the time when the suit is brought into the court. For these reasons, therefore, we hold that the view of the law taken in *Ganesh Tewari* v. *Salik Pande* (1) is correct and that the present suit was not maintainable and was liable to dismissal. The appeal, therefore, fails and is dismissed with costs to the respondents.

Appeal dismissed.

Before Sir Grimwood Mears, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

MUHAMMAD HANIF AND OTHERS (DEFENDANTS) *v.* ISHRI PRASAD (PLAINTIFF).*

1921 *June*, 30.

Mortgage—Suit for recovery of the mortgage money—Dispossession of mortgagee from part of the mortgaged property—Acquiescence of mortgagee—Ultimate dispossession from the remainder—Limitation—Terminus a quo.

Plaintiff in 1894, took a usufructuary mortgage of eleven villages, knowing at the time that nine of the villages were subject to a prior mortgage. He either never obtained possession of these nine villages or he lost possession in 1897, when they were sold in execution of a decree on the prior mortgage. He, however, acquiesced in the situation and apparently remained content with the possession of the remaining two villages as security for the money advanced by him. In 1916 plaintiff was dispossessed of the two remaining villages, and thereafter instituted a suit for the recovery of the mortgage money.

Held that in the circumstances the suit was not barred by limitation, the plaintiff's cause of action having arisen only on his dispossession from the last two villages.

THE facts of this case are fully stated in the judgment of the Court,

Maulvi *Iqbal Ahmad*, for the appellants.

Babu *Lalit Mohan Banerji*, for the respondents.

---

* First Appeal No. 58 of 1919, from a decree of Raj Bihari Lal, Subordinate Judge of Azamgarh, dated the 20th of November, 1918.

(1) (1914) 12 A. L. J., 949.

1921

MUHAMMAD HANIF v. ISHRI PRASAD.

MEARS, C. J., and BANERJI, J. :—This and the connected appeal No. 70 of 1919 arise out of a suit brought by the plaintiff respondent to recover money alleged to be due upon a *zar-i-peshgi* lease executed by the defendants in favour of Baldeo Prasad, father of the plaintiff, on the 12th of December, 1894. The property comprised in the *zar-i-peshgi* lease, which is in reality a usufructuary mortgage, consisted of 11 villages, 9 of which were subject to a prior mortgage, on which a decree had been obtained in 1893. According to the terms of the usufructuary mortgage, the mortgagee was to remain in possession of the 11 villages and the mortgage could be redeemed upon payment in the month of *Jeth* of any year of the principal amount borrowed. The principal amount secured by the mortgage was Rs. 9,000 and the plaintiff claims that amount together with interest, on the allegation that he was dispossessed in May, 1916, from two of the villages included in the mortgage, of which he was in possession. Various pleas were raised by the defendants, but we need not refer to all of them, as we propose to deal with such of the pleas as have been put forward before us in the two appeals. The court below has made a decree in favour of the plaintiff for Rs. 4,000 and interest, it being of opinion that out of the Rs. 9,000 mentioned in the mortgage-deed, the payment of Rs. 4,000 only had been proved.

The first contention raised before us in this appeal, which has been preferred by three of the defendants only, is that the payment of consideration for the document in suit has not been proved. It must be borne in mind that the execution of the document has been fully established by the evidence, and on this point there is no dispute. In the document itself the receipt of the consideration was acknowledged and at the time of registration it was admitted that consideration had been paid. Therefore, on the face of the document and on the face of the admission made before the Sub-Registrar there was sufficient evidence of payment of consideration. However, it appears that Badleo Prasad, father of the plaintiff, who was the original mortgagee, stated in a deposition made by him in 1898 in the Revenue Court, that the amount which he had paid was entered in his account books and the inference from the whole of his

1921

MUHAMMAD HANIF v. ISHRI PRASAD.

statement is that the full amount of consideration was not paid. In the present suit one of the witnesses for the defendants, Bakhshi Khan, stated that in his presence Rs. 4,000 was paid. He also stated that other sums had been paid, but not in his presence. Therefore, so far as the amount of actual payment is concerned, there is only the evidence of Bakhshi Khan as to the payment of Rs 4,000. The court below has believed the statement of Bakhshi Khan, and we see no reason to disbelieve it. If he had been a false witness and if he had been inclined to give false evidence on behalf of the plaintiff, he would in all probability have stated that the whole of the Rs. 9,000 had been paid in his presence. So far, therefore, as his evidence is concerned, it is reliable and proves the payment of Rs. 4,000. This payment is also supported by the admissions to which we have already referred. The respondent has not preferred any objection as regards the balance of the consideration and has submitted to the finding of the court below as to the payment of Rs. 4,000 only. So far, therefore, as the question of consideration is concerned, we are in full agreement with the decision of the court below and must repel the plea advanced on behalf of the appellants.

The next contention on behalf of the appellants in this case is that Jasodanand, who purported to have signed the mortgage-deed for them as their general attorney, had no authority to execute a document like the present on their behalf under the power of attorney which he held from the defendants. The court below was of opinion that that power of attorney authorized Jasodanand to execute documents of this nature on behalf of the appellants. We have considered the terms of the power of attorney and we find that the authority given by that document to the attorney appointed by the appellants was an authority to produce for registration and obtain registration of ordinary leases, *zar-i-peshgi* leases, leases granted to tenants and similar documents executed by the principals. There is no authority in the document as we read it, empowering the attorney to execute a lease or a *zar-i-peshgi* lease on behalf of the appellants. We have, therefore, to consider whether the act of Jasodanand in signing the mortgage-deed on behalf of the appellants was ratified by the

1921

MUHAMMAD HANIF v. SHRI PRASAD.

appellants. The mortgage, as we have said above, was executed in 1894. It has been proved that until 1916 the mortgagee was in possession of two of the mortgaged villages. It is thus manifest that for this long period extending from 1894 to the date of the institution of the present suit, the mortgage was never repudiated by the appellants. It was acquiesced in, and at no time did the appellants dispute its validity. It was contended on behalf of the appellants that the mortgage-deed was *ab initio* void inasmuch as it had not been signed by the appellants themselves as required by section 59 of the Transfer of Property Act. On the face of it, however, the document was signed by a person who professed to be the general agent of the appellants. If in fact he had been the general attorney of the appellants empowered to execute a *zar-i-peshgi* lease on their behalf, the signature of the appellants on the *zar-i-peshgi* lease which is the mortgage-deed in the present case, would have been a sufficient signature so as to bind the appellants. Therefore, when the document was executed it was not on the face of it a void or invalid document. In the subsequent contest which has arisen in the present suit, the question has been raised that Jasodanand had no authority to execute the document. As we have already stated, upon a true construction of the power of attorney executed in his favour he was not authorized to grant a *zar-i-peshgi* lease, but we have the fact that ever since the date of the lease, of which the appellants had perfect knowledge, the lease has been allowed to be acted upon, and this, in our opinion, amounts to a ratification of the act of Jasodanand. This being so, it is not open to the appellants now to contend that they are not bound by the document which Jasodanand signed for them.

The third question raised, which was argued at some length before us, was the question of limitation. The document on which the claim is based provides, amongst other things, that if the mortgagee is dispossessed or does not obtain possession, he would be entitled to sue for his money with interest. On the strength of this provision it is contended that if the mortgagee did not obtain possession of a part of the mortgaged property in 1894 or was dispossessed in 1897, when nine of the villages comprised in the mortgage were sold by auction in execution of the decree obtained

1921

MUHAMMAD HANIF v. ISHRI PRASAD.

on a prior mortgage in 1893 by Mahadeo, the brother of Baldeo Prasad, the right of Baldeo Prasad the mortgagee to sue for his money arose either in 1894 or in 1897, and that as the present suit was instituted after the expiry of twelve years from those years, it is time-barred. On the other hand, it is urged that possession of the nine villages had never been obtained by the mortgagee; that he had obtained possession of the two villages which had not been sold, namely, the villages of Lado and Bijarwa; that he remained in possession till 1916, and that therefore there was a waiver of the right of the mortgagee to claim his money, and that it was only when he was subsequently dispossessed that his right to recover the money accrued. We think that the latter contention is well founded. The evidence proves that the mortgagee obtained possession of the two villages mentioned above from the time of the execution of the mortgage in 1894. A number of revenue receipts have been produced to show that he paid Government revenue for these two villages even before the auction sale in 1897. He has also given evidence to prove that he was in actual possession until 1916 and that it was only in that year that he was dispossessed. On this point we agree with the finding of the court below. What happened then is this. The mortgagee obtained a mortgage of eleven villages. At the time he took the mortgage he was aware of the fact that there was a prior mortgage on nine of the eleven villages, for the sale of which a decree had been passed. When these nine villages were sold, the mortgagee was content to take as security for the money advanced by him the remaining two villages which had remained unsold and he continued in possession of those two villages. He acquiesced in the fact of the nine villages going out of his possession, and the result of this was that the mortgage affected only two of the mortgaged villages and that he was content to regard those two villages as the property which was security for the money advanced by him. This being the case, it was only when he was dispossessed from these two villages that his right to sue for his money accrued. Considerable reliance was placed upon the decision of the majority of the Full Bench in the case of *Gaya Din* v. *Jhumman Lal* (1),

(1) (1915) I. L. R., 37 All., 400.

1921

MUHAMMAD HANIF v. ISHRI PRASAD.

We think that the circumstances of that case may be differentiated from those of the present case. That was a case of a simple mortgage in which there was a clause authorizing the creditor to sue for his money in case of default of payment. The present case is a case of a usufructuary mortgage under which the mortgagee was to remain in possession. It was only if he was dispossessed that his right to recover the money arose. He was content to relinquish his right to a portion of the security afforded by the mortgage, and he accepted the remainder of the mortgaged property as his security and he remained in possession of that portion. The mortgagee in this case, as we have said above, acquiesced in the sale of nine of the villages which were mortgaged and upon which there was a prior charge. He, therefore, substituted for the mortgage of eleven villages a mortgage of two villages only, and, so long as he remained in possession of those two villages, he could not have sued for the recovery of his money. It may be that in 1894 or 1897 he might have brought a suit for his money if he had so chosen, but, as he did not repudiate the entire mortgage at that time but remained content with the security of two villages only and remained in possession of those two villages, he could not, unless he was dispossessed from those two villages, put forward a claim for his money. It was only when he was dispossessed from those two villages that his right to recover the money accrued. In this view the suit was within time, having been brought within twelve years of the date of his dispossession in 1916. The court below, we think, came to a right conclusion on this point. No other question is argued before us. The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.