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Before Mr. Justice Lindsay and Mr. Justice Stuart.

SHEO SARAN CHAUDHRI AND OTHERS (DEFENDANTS) v. RAM LAGAN DAS (PLAINTIFF) AND AUTAR CHANDAR AND OTHERS (DEFENDANTS). *
Act No. IV of 1882 (Transfer of Property Act), sections 83 and 103—Mortgage—Tender—Mortgage executed in the name of a minor member of a joint Hindu family, though in reality a family transaction, the mortgage money being supplied from the joint family funds.

A mortgage was executed in favour of a minor member of a joint Hindu family. The mortgagor paid the mortgage money into court and asked for service of notice on "Ram Lagan, minor, under the guardianship of his father Mahadeo Das," and notice was issued accordingly: but all that was done was that the notice was affixed to the door of the house and the serving officer reported that he was not able to effect personal service on either the minor or his father. No application was made by the mortgagor for the appointment of a guardian *ad litem*.

Held that no valid payment had been made within the meaning of section 83 of the Transfer of Property Act, 1882, so as to stop the running of interest. *Pandurang Babu Parab v. Mahalaji Moreshwar Gokhale* (1) referred to.

Where, however, a mortgage, though executed in the name of a minor member, is in reality a mortgage taken by the head of a joint Hindu family, the mortgage money being supplied from the joint family funds, it may well be held that an offer to pay the money due on such a mortgage to the managing member is a good and valid tender in the eye of the law.

THE facts of this case sufficiently appear from the following order of the Court.

Dr. M. L. Agarwala, for the appellants.

Dr. Surendra Nath Sen and Munshi Haribans Sahai, for the respondent.

LINDSAY and STUART, J.J.:—This case had already been before us and was adjourned for the production of the record of certain proceedings which were taken under section 83 of the Transfer of Property Act.

We sent for that record in order to enable us to decide a plea which was raised in both the courts below. It was whether a deposit which undoubtedly was made by the mortgagors in this case was a valid deposit so as to stop the running of interest.

It has been found as a matter of fact that the mortgagee in this case, that is to say, the person in whose favour the mortgage

* Second Appeal No. 613 of 1919, from a decree of I. B. Mundle, Officiating District Judge of Gorakhpur, dated the 4th of March, 1919, confirming a decree of Shams-ul-Hasan, officiating Subordinate Judge of Gorakhpur, dated the 26th of August, 1918.

(1) (1902) I. L. R., 27 Bom., 23.

purports to have been executed, was one Ram Lagan, who was at the time of the mortgage a minor. So far as can be ascertained, he was at that time about five years of age, and according to the evidence on the record the court below has found that he was a member of a joint Hindu family along with his father, one Mahadeo Das.

The record of the section 84 proceedings has been brought before us and from this it appears that on the 19th of August, 1909, an application was made to the court asking for service of notice on the mortgagee who was described as "Ram Lagan minor, under the guardianship of his father Mahadeo Das." It was also proved from the record that on the date this application was presented the mortgagors deposited into the court a sum of Rs. 1,446-6-0 which represented the sum then due on account of the mortgage.

It is further clear, however, that no application was ever made to the court for the purpose of having Mahadeo Das constituted the guardian *ad litem* of his minor son Ram Lagan for the purpose of receiving service of notice under section 83 of the Transfer of Property Act. A notice did issue addressed to Ram Lagan under the guardianship of his father Mahadeo Das. All that appears is that this notice was stuck up on the door-post of the house and that the serving officer reported that he was not able to effect personal service either on the minor or the father. When this notice was returned the court directed the proceedings to be shelved.

It would, in our opinion, be impossible to hold that the courts below were wrong in deciding that the minor was not bound by these proceedings under section 83. The law on the subject, which is contained in section 103 of the Transfer of Property Act, has, we think, been rightly interpreted by the court below, and in support of the interpretation there is a ruling of the Bombay High Court—*Pandurang Babu Parab v. Mahadaji Moreswar Gokhale* (1).

The matter, however, does not appear to us to end here. Mr. *Agarwala* for the appellants has contended that, apart from the deposit proceedings taken under section 83 of the

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Transfer of Property Act there was, in fact, a valid tender of the mortgage money before the money was put into court. This plea was raised in the lower appellate court, but the learned District Judge refused to entertain it on the ground that no such case had been set up in the written statement.

It is quite true that no such plea of tender, as distinct from the deposit in court, was raised in the written statement which has been filed. We have, however, certain statements made by the pleaders of the parties which are set down on page 10 of the paper book. Those statements perhaps do not indicate that a direct tender of the money was made to Mahadeo Das, the father of Ram Lagan, but it may at any rate be said that they suggest that something of the kind was done. We notice, moreover, that evidence was allowed to be adduced in the first court for the purpose of showing that a definite offer of the mortgage money was made to the father of Ram Lagan. The Subordinate Judge had dealt with this matter at length in his judgment and we need not at the present stage refer to it further.

There can be no doubt that at the time this mortgage was made the present plaintiff Ram Lagan was according to the findings of the court below a lad of about five years of age. It is apparent that he and his father Mahadeo Das constituted a joint Hindu family and that Mahadeo Das was the managing member of that family. If we are to take into account the fact that this transaction of mortgage was really entered into by the joint family consisting of Mahadeo Das and his son and if we believe that at the time of these deposit proceedings, that is to say, in the year 1909, Ram Lagan was still a minor, then we think it might well be held that an offer to pay the mortgage money to the managing member of the joint family was a good and valid tender in the eye of the law.

It has, however, been objected that this case was not definitely set up in the court below, and that perhaps is correct. At the same time there is evidence on the record to indicate that the money which was advanced was the property of a joint Hindu family and we think for the purpose of doing justice between the parties, this is a question which requires further investigation. It is to be observed that on the 29th of August, 1909, when

the deposit was made in court, the mortgage amounted to Rs. 1,446-6-0. At the present time the claim has swelled to Rs. 3,896-12-0, the difference representing the interest which has accrued between the year 1909 and the year in which this suit has been brought. The matter is one of great importance to the representatives of the mortgagors and we think, as we have said, that complete justice cannot be done without a further investigation into the matter. We have, therefore, decided to remit two issues to the lower appellate court for disposal. They are as follows :—

(1) Was the mortgage debt due under the deed of the 15th of December, 1900, for the purpose of securing which the bond in suit was executed, a debt due to the joint Hindu family consisting of Mahadeo Das and his son Ram Lagan, or was the money due to Ram Lagan alone ?

(2) Was an unconditional tender of the mortgage money made to Mahadeo Das by the appellant ?

The parties will be at liberty to adduce any evidence they choose on these issues and the court below should return its findings within two months from the date of the receipt of this order. Ten days will be allowed after the findings have been received in this Court to file objections.

Issues remitted.

Before Justice Sir Pramada (Charan Banerji and Mr. Justice Gokul Prasad, SHIB LAL (PLAINTIFF) v. MUNNI LAL AND OTHERS (DEPENDANTS) Act No. IV of 1882 (Transfer of Property Act), sections 74 and 95—Act No. IX of 1872 (Indian Contract Act), section 63—Mortgage—Effect of satisfaction of prior mortgagee's decree by puisne mortgagee—Charge—Suit by prior mortgagee to recover money so paid—Limitation—Act No. IX of 1908 (Indian Limitation Act), schedule I, articles 61 and 132.*

Where a second mortgagee discharges a decree obtained by the first mortgagee, he acquires a charge on the mortgaged property as from the date upon which he made payment in satisfaction of the decree, as well as a right to be re-imbursed by the mortgagor personally ; but he is in no sense an assignee of either the mortgage or the decree. *Gopi Narain Khauna v. Bansidhar* (1) referred to. *Nathuram v. Shao Lal* (2) dissented from.

* Second Appeal No. 972 of 1918, from a decree of A. G. P. Pullan, District Judge of Mainpuri, dated the 27th of April, 1918, confirming a decree of Piri Lal Kutara, Subordinate Judge of Mainpuri, dated the 31st of January, 1918.

(1) (1905) I. L. R., 27 All., 325. (2) (1917) 42 Indian Cases, 796.

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

Dr. *M. L. Agarwala* and Mr. *A. Sanyal*, for the appellant.
Pandit *Baldeo Ram Dave* and *Munshi Girdhari Lal Agarwala*, for the respondents.

BANERJI and GOKUL PRASAD, JJ.:—The facts of this case are these. In 1886 certain persons mortgaged their property to one Shadi Lal. In 1906 they mortgaged the same property to the present plaintiff Shib Lal. Shadi Lal brought a suit upon his mortgage and obtained a decree for sale against the mortgagors and the second mortgagee, the present plaintiff, on the 17th of January, 1912. The decree was not discharged by the mortgagors, and therefore, on the 24th of January, 1914, that is, before the decree had become time-barred, the present plaintiff paid on account of the aforesaid decree, and in discharge of it, a sum of Rs. 2,297. After the discharge of the decree by the abovementioned payment the mortgagors sold a part of their property to one Mohan Lal. The defendant Panna Lal brought a suit for pre-emption in respect of this sale and obtained a decree. He deposited in court an amount which discharged the second mortgage held by the plaintiff. This amount had not been paid by the transferees of the property, and consequently the pre-emptor had to pay it and the second mortgage was thus satisfied. After this the present suit was brought by the plaintiff to recover Rs. 2,297 principal and Rs. 811-8-0 interest from the mortgagors and from the property against which the mortgage decree had been passed and a part of which is admittedly in the possession of Panna Lal, defendant. Various defences were raised in the courts below, but both those courts have dismissed the suit on the ground of limitation. The learned Subordinate Judge who tried the suit was of opinion that the plaintiff stepped into the shoes of the first mortgagee Shadi Lal and that, as Shadi Lal's mortgage could be enforced only after 1888, the plaintiff could not recover his money after the lapse of twelve years from that year. This view also found favour with the lower appellate court. The learned Judge of that court says in his judgment that the right of the plaintiff to recover the money

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arose at the time when the first mortgagee's right to recover it accrued. We do not agree with this view. In our opinion the right of the plaintiff to recover the amount claimed by him accrued to him only on the date on which he made the payment. He was a second mortgagee of the property comprised in the first mortgage and was therefore interested in paying off the amount of that mortgage and the decree obtained on the basis of it. There was a liability for the amount of the decree on the mortgagors personally and also on the property mortgaged. Of this liability the plaintiff relieved the mortgagors and their property by payment on the 24th of January, 1914, when the decree was still enforceable. By such payment and by relieving the defendants mortgagors and their property of the liability which existed on them, he, by virtue of the provisions of section 69 of the Contract Act, acquired a right to be re-imbursed the money which he had paid for the benefit of the mortgagors and for the protection of their property. As he was the second mortgagee, he was interested in seeing that the property was not sold in execution of the decree on the first mortgage, as otherwise he would not have been entitled to enforce his own mortgage on the property. As there was a charge on the mortgagors' property in favour of the first mortgagee, and the second mortgagee, the present plaintiff, discharged that charge, he acquired a charge on the property. On the principle of section 95 of the Transfer of Property Act which has been held not to be exhaustive, a co-mortgagor who discharges a mortgage is entitled to a charge on the property of the other mortgagor. On the same principle a second mortgagee who discharges a prior mortgage acquires a charge on the property which he relieves of liability for that mortgage. This is also manifest from the provisions of section 74. This charge he acquires, not when the prior mortgage was made nor when that prior mortgage could be enforced, but on the date on which he pays off the amount of the prior mortgage. The right also to be re-imbursed accrues to him on the date on which he pays off the amount of the decree and relieves the mortgagors of the obligation which under the decree exists on them. It is clear, as already remarked, that this right could

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not have accrued when the original mortgage became payable. The second mortgagee who discharges the prior mortgage and the decree obtained on that mortgage is not an assignee of the decree and he is not entitled to execute the decree. This was held by their Lordships of the Privy Council in the case of *Gopi Narain Khauna v. Bansidhar* (1). In view of this ruling of their Lordships of the Privy Council the court of first instance was right when, on the 1st of August, 1914, it refused the application of the present plaintiff for the making of a final decree in his favour in respect of the decree obtained by the first mortgagee. The lower court has relied upon the decision of the Judicial Commissioner of the Central Provinces in the case of *Nathu Ram v. Shoo Lal* (2). That ruling, no doubt, to a great extent supports the view of the learned Judge, but, with great deference, we are unable to follow it. It is impossible to hold that the right of the plaintiff accrued before he made any payment at all. In that ruling the learned Judge seems to have assumed that the plaintiff was the assignee of the decree. Under section 74 of the Transfer of Property Act he no doubt acquired the rights and powers of the mortgagee whom he redeemed, but the fact of his redeeming the prior mortgage does not make him an assignee of the mortgage. His rights may be akin to those of an assignee, but he is not the actual assignee. If he had been the assignee of the mortgage and no suit had been brought on the basis of the mortgage by the prior mortgagee, he would have been bound to bring his suit to enforce that prior mortgage within the period of limitation which was available to the prior mortgagee. But a suit like the present is not a suit to enforce the prior mortgage nor is it an application for the execution of the decree obtained on the basis of the prior mortgage. This is conceded by the learned vakil for the respondents. But he urges that the plaintiff is seeking to extend the period of limitation. We fail to see how the present plaintiff can be said to be seeking to extend the period of limitation, which is not the period of limitation available to the first mortgagee. He is entitled to bring his suit within the period of limitation

(1) (1905) I. L. R., 27 All., 325

(2) (1917) 42 Indian Cases, 796.

which would govern the claim to recover money paid by him for the defendants or to enforce a charge which he has acquired on the property of the defendants. So far as the suit is a suit of this nature the claim is admittedly within time. If the suit were treated as a suit personally against the mortgagors the limitation would be three years from the date of payment. See article 61, schedule I, of the Limitation Act. If it is a suit to enforce a charge, as it obviously is, or for a declaration that he has a charge on the property, it is still within time. In this view no question of acknowledgment arises. There are several other questions involved in the case which the court of first instance did not try in consequence of its decision on the question of limitation. We accordingly allow the appeal, set aside the decrees of the courts below and remand the case to the court of first instance with instructions to restore it to its original number in the register and to try and dispose of the other questions which arise in the case. Costs here and hitherto will be costs in the cause.

Appeal allowed and cause remanded.

Before Mr. Justice Walsh and Mr. Justice Wallach.

SHIKRI PRASAD (APPLICANT) v. AZIZ ALI AND OTHERS (OPPOSITE PARTIES)*

Act No. V of 1920 (Provincial Insolvency Act) sections 4, 5 and 75 (2)—Insolvency—Procedure—Appeal—Question of title—Act No. IV of 1882 (Transfer of Property Act), section 53.

A court exercising insolvency jurisdiction under Act No. V of 1920 has to administer the law under its own procedure and to decide questions arising in insolvency which are covered by special provisions of the Insolvency Act. But it also has to decide all questions of general law, including such questions as are raised by section 53 of the Transfer of Property Act, 1882.

Where a decision on a question of title whether certain property was still the property of the insolvent or had been the subject of a valid alienation was pronounced after the coming into operation of Act No. V of 1920, although the action of the receiver which gave rise to the question was taken before, it was held that an appeal lay under the new Act as a matter of right at the instance of a creditor adversely affected by the decision.

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

* First Appeal No. 18 of 1921, from an order of H. J. Collister, District Judge of Saharanpur, dated the 14th of May, 1920.

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