APPELLATE CIVIL.

1925 December, 1.

Before Mr. Justice Walsh and Mr. Justice Kanhaiya Lal.

SHEORAM SINGH AND OTHERS (PLAINTIFFS) *v.* BABU SINGH AND OTHERS (DEFENDANTS).*

Act No. IX of 1908 (*Limitation Act*), *schedule I, article* 132—*Mortgage—Construction of document—Mortgage by conditional sale—English mortgage.*

By the terms of a mortgage executed in 1903 it was provided that " if default is made in payment of interest, at the time of such default the mortgage deed shall be treated as a sale deed and the mortgage money as sale consideration." In 1922 the mortgagee sued to recover the mortgage money, no payment of interest ever having been made since the execution of the deed.

Held (1) that the mortgage must be construed as a mortgage by conditional sale to which article 132 of the first schedule to the Indian Limitation Act, 1908, applied, and (2) that time began to run against the mortgagee from the date when the first instalment of interest became due and was not paid. *Vasudeva Mudaliar* v. *Srinivasa Pillai* (1), *Girwar Singh* v. *Thakur Narain Singh* (2) and *Shib Dayal* v. *Meharban* (3), referred to.

THIS was a suit to recover money on a mortgage. The main defence was limitation, and the decision of the point of limitation turned upon the precise category of mortgage to which the document in suit belonged. The parties themselves described it as a mortgage by conditional sale, and it was drawn up in the form usually employed in this part of the country for such deeds. Moreover it contained a covenant to the effect that " if default is made in payment of interest, at the time of such default the mortgage deed shall be treated as a sale deed and the mortgage money as sale consideration." The trial court treated the deed as a mortgage by conditional

* First Appeal No. 280 of 1922, from a decree of Raja Ram, Second Subordinate Judge of Cawnpore, dated the 10th of April, 1922.

(1) (1907) I.L.R., 30 Mad., 426. (2) (1887) I.L.R., 14 Calc,. 730.
(3) (1922) I. L. R., 45 All., 27.

sale, and, applying article 132 of the first schedule to the Indian Limitation Act, 1908, dismissed the suit.

The plaintiffs appealed.

Dr. *Kailas Nath Katju*, for the appellants.

Maulvi *Iqbal Ahmad*, for the respondents.

WALSH, J.—The main question in this appeal is which article of the Limitation Act applies to this mortgage. The learned Judge in the court below has applied article 132. If this is a mortgage by conditional sale, that would be right. We are of opinion that it is a mortgage by conditional sale. In the first place the parties so described it. That would not be conclusive, but the vernacular word employed is always used as meaning mortgage by conditional sale, and the general form of the document corresponds to such mortgages as drawn in these Provinces. In the second place, there is a provision that if default is made in payment of interest, at the time of such default the mortgage-deed shall be treated as a sale-deed. In other words, it is ostensibly a bargain and sale to be defeated by a condition subsequent, namely, the payment of interest. But if default is made in the payment of interest, then it becomes a real sale, and the definition in section 58 of the Transfer of Property Act provides that such a transaction is a mortgage by conditional sale. Thirdly, the plaintiffs by their plaint did not ask for foreclosure or sale, or for a sale at all, but sued for the money or for foreclosure, clearly treating their rights as governed by the law applicable to a mortgage by conditional sale, in respect of which a decree for sale is prohibited by section 67. We are asked, on the other hand, to hold that article 147 applies on the ground that this was not really a mortgage by conditional sale, but (although not an English mortgage), a mortgage in respect of which the mortgagee

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might sue for foreclosure or sale, and we are asked to apply article 147 to such a document in spite of the judgement of the Privy Council in the case of *Vasudeva Mudaliar* v. *Srinivasa Pillai* (1). We are unable to do so. We regard the judgement of the Privy Council in that matter as peremptory and binding upon us. Whether or not their Lordships' observations were necessary for the disposal of the case, they were considered observations delivered for the express purpose of setting at rest a question which was much controverted at the time in India, and they held that article 147 was applicable only to the class of mortgage generally known and defined by the Transfer of Property Act as an English mortgage. They gave preponderating reasons for adopting this view. The second was that there was a presumption that the legislature, when it repeated in a later Act an expression which had obtained a settled meaning by judicial construction, intended the words to mean what they meant before. That reason applies with even greater force to their Lordships' view at the present day than it did then. The judgement was delivered in 1907. The provisions of the Transfer of Property Act were re-enacted, so far as they apply to remedies in respect of mortgages, in the first schedule to the Civil Procedure Code of 1908, and article 147 of the Limitation Act has been re-enacted in the Limitation Act of 1908 without change, and therefore bearing the narrower interpretation given to it by the judgement of the Privy Council to which we have referred. We hold, therefore, that article 132 applies to this case. It follows that the claim is barred unless the plaintiffs establish payment of interest sufficient to take the case out of the mischief of the statute. The law has been settled

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

until it is reversed elsewhere, that in a mortgage in this form the statute begins to run from the time when default is made in payment of an instalment of interest, where the mortgagee is given the right on such default to sue for the whole amount. The question of the payment of interest is a question of fact which the learned Judge has disposed of in an emphatic judgement.

[His Lordship here discussed the evidence and continued.]

Nothing has been shown which would justify us in differing from the learned Judge upon these findings of fact. The result is that the appeal fails and is dismissed with costs.

KANHAIYA LAL, J.—I wish to add a few observations as to the questions which have been argued before us in the course of the hearing. The plaintiffs sought to recover money due on a mortgage effected by Darshan Singh, the predecessor of the defendants, in favour of Prag Singh, the predecessor of the plaintiffs, on the 7th of August, 1903. The mortgage-deed provided for the payment of the mortgage money with interest thereon at eleven annas per cent. per mensem within seven years, and further contained a stipulation that the interest accruing due for the half year shall, if not paid up, be added to the principal amount, and that if interest for any six months remained unpaid, the mortgagee shall have power either to bring a suit in respect of the entire mortgage money and interest without waiting for the expiry of the stipulated period or to wait for the payment of the principal and interest and compound interest till the expiry of the term fixed It is further stated that both the conditions

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were left entirely to the choice or option of the mortgagee, that the mortgagee had liberty to act in accordance with either of those conditions, that is to say, either to bring a suit in respect of the entire mortgage money and interest without waiting for the expiry of the stipulated period, or to waive the default and wait for the payment of the principal and interest and compound interest agreed till the expiry of the term fixed. In fact the mortgagor covenanted that in no circumstances he shall have power to raise any objection or make any refusal, and he further agreed that if at the stipulated time the money remained unpaid, the mortgage deed shall be treated as a sale-deed, and the mortgage money as the sale consideration.

The allegation of the plaintiffs was that they had received Rs. 600 on account of interest at different times from one of the defendants, and they sued for the foreclosure of the mortgage in case the mortgage money was not paid within such time as might be fixed by the court for the purpose.

The defendants pleaded *inter alia* that they had made no payments towards the mortgage money, and that the claim was barred by limitation. There were other pleas raised in defence with which this appeal is not concerned.

The court below dismissed the suit, holding that the plaintiffs had failed to establish that the defendants had made any payments towards interest as such within the meaning of section 20 of the Limitation Act (IX of 1908). On the other points raised in the suit it gave its findings in favour of the plaintiffs. The sole question for determination in this appeal therefore is whether the claim of the plaintiffs is within time, either by reason of the covenants entered

in the mortgage-deed, or of the payments alleged to have been made by the defendants. The court below applied article 132 of the Indian Limitation Act which provides a limitation of 12 years for a suit to enforce payment of money charged upon immovable property, and that period is to be computed from the time when the money becomes due. Under one covenant that money was to have fallen due on the expiry of seven years unless repaid at any time within that period. By another covenant it could have been claimed on the non-payment of interest for any 6 months unless the default was waived by the mortgagee, who was given the right or an option by the contract of mortgage to disregard it and wait till the expiry of the longer term. The argument addressed to us here is that the contract gave the mortgagee authority, option or liberty to act in either one of the two ways mentioned in the deed on the happening of a certain event, and it was open to him to waive the one and adhere to the other. In other words, it is suggested that the effect of the waiver by the mortgagee authorized by the contract would be not to stop the running of limitation, but to postpone the cause of action or starting of it, till the other default provided for by the deed had taken place. Whatever might be said in favour of the view contended before us, the Full Bench decision in the case of *Shib Dayal* v. *Meharban* (1), is conclusive on the matter, and we are constrained to hold that despite the authority given by the contract, the operation of the clause which gave an option to the mortgagee for his own benefit could not be waived so as to prevent or postpone the starting of limitation against him.

(1) (1922) I. L. R., 45 All., 27.

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It is argued, however, that the mortgage deed in question is in terms not a mortgage by conditional sale, and that under order XXXIV rule 4, clause (2), the plaintiffs could be given either a decree for foreclosure or for sale within the meaning of article 147 of the Indian Limitation Act, which was introduced for the first time by Act XV of 1877. As observed by their Lordships of the Privy Council in the case of *Vasudeva Mudaliar* v. *Srinavasa Pillai* (1), suits of the present class were governed, before Act XV of 1877 was passed, by article 132 of Act IX of 1871, which referred to suits for money charged upon immovable property. The language of article 132 has since then been slightly altered. The Limitation Act of 1871 provided a limitation of 60 years for a suit to recover possession of the immovable property mortgaged from the mortgagee, from the date when the right to recover possession accrued. There was no provision in that Act for suits " to redeem " a mortgage other than a mortgage accompanied by possession. By Act XV of 1877 suits against the mortgagee to redeem a mortgage were also provided for, and it is suggested that in order to make the remedies of the mortgagor and the mortgagee co-extensive, a departure was deliberately made, when article 147 was introduced for the first time. Whether this was so or not, the decision of their Lordships in the case of *Vasudeva Mudaliar* v. *Srinivasa Pillai* (1), and the earlier decision of WILSON and PORTER, JJ., in the case of *Girwar Singh* v. *Thakur Narain Singh* (2), which they followed, does not leave it any longer open to us to determine how far article 147 of the Limitation Act of 1877 was intended to apply to suits for foreclosure like the present.

(1) (1907) I.L.R., 30 Mad., 426 (2) (1887) I.L.R., 14 Calc., 730.

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The learned counsel for the plaintiffs appellants has argued that the mortgage in question is an anomalous mortgage within the meaning of section 98 and not a mortgage by conditional sale, and reading section 67 of the Transfer of Property Act with order XXXIV, rule 4, clause (2), of the Civil Procedure Code, a decree for either foreclosure or sale can be passed in the present case. The mortgage-deed does not purport to provide for the immediate sale of the property conditionally or otherwise. It only provides for the enforcement of the deed by foreclosure at the expiry of the stipulated period, but as observed by their Lordships of the Privy Council in the case of *Thumbuswamy Moodelly* v. *Hossain Rowthen* (1), the essential characteristic of a mortgage by conditional sale is that on the breach of the condition of repayment, the contract executes itself and the transaction is closed and becomes one of absolute sale to be enforced in a particular manner. Section 58 of the Transfer of Property Act defines a mortgage by conditional sale as a transaction by which the mortgagor ostensibly sells the mortgaged property on condition that on default of payment of the mortgage money on a certain date the sale shall become absolute. The deed in the present case is not exactly worded in that form; but in substance it adopts that form, and, as pointed out in the case of *Ali Ahmad* v. *Rahmatullah* (2), such defaults in deeds which are generally executed are intended to operate as deeds of mortgage by conditional sale. Article 147 of the Limitation Act, IX of 1908, cannot, therefore, be applied to the case. The only other question is that of the alleged payments said to have been made towards interest, but the account books produced only go to show that there was a general account between the mortgagor

(1) (1878) I.L.R., 1 Mad., 1. (2) (1892) I.L.R., 14 All., 195.

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and the mortgagee in connection with this deed, and certain other advances independently made by the mortgagee, about which an arrangement appears to have been made by the mortgagor to pay the moneys due by instalments of Rs. 400 per year. The account books contain certain entries showing payments made towards these instalments, but they do not show that these payments were made towards interest *as such* due on the deed in suit, and the oral evidence produced on the point to supplement what is not entered in the books cannot be believed. The court below was, therefore, justified in holding that these payments, if made, did not save limitation.

I agree in the order proposed.

Appeal dismissed.

REVISIONAL CIVIL.

Before Mr. Justice Mukerji.

1925 December 2.

GOKUL DAS (PLAINTIFF) *v.* NATHU (DEFENDANT).*

Civil Procedure Code, section 20—Debtor and creditor—No place fixed for payment—Presumption of law—Duty of debtor to seek creditor.

If there is no special covenant for payment of a debt elsewhere, the presumption of law is that the borrower ought to seek out the lender for payment. *Sri Narain* v. *Jagannath* (1), referred to. Also *Bangali Mal* v. *Ganga Ram, Asharfi Lal* (2), cited in argument.

THIS was an application to revise a decision of the Court of Small Causes at Moradabad. The facts of the case, so far as they are necessary for the purposes of this report, appear from the judgement of the Court.

Dr. *Kailas Nath Katju*, for the applicant.

* Civil Revision No. 118 of 1925.

(1) (1917) 15 A.L.J., 653. (2) (1922) 71 Indian Cases, 431.