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taking at the time of the re-conveyance. The amount had, therefore, to be kept intact and a convenient way for doing that was to pay back the balance to Jagdeo Singh himself rather than enter into a complicated calculation of the actual proportionate profits.

Having regard to these circumstances I have no doubt in my mind that the sale was subject to the condition of re-conveyance on payment of the entire consideration and that it fell within the definition of mortgage by conditional sale as given in section 58 (c) of the Transfer of Property Act.

. BY THE COURT.—The order of the Court is that the appeal be dismissed with costs.

Appeal dismissed.

Before Mr. Justice Dalal and Mr. Justice Pullan.

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ANPURNA KUNWAR (DEFENDANT) v. RAM PADARATH AND OTHERS (PLAINTIFFS) AND BALRAJ KUNWAR AND OTHERS (DEFENDANTS).*

Mortgage—Prior and subsequent' incumbrances—Mortgage executed to satisfy prior mortgage—Question whether prior mortgage was kept alive beyond the period of limitation natural to it.

On the 15th of March, 1898, eight villages were mortgaged to B by way of simple mortgage for a period of three years. On the 1st of November, 1898, the same villages were mortgaged to A. On the 4th of May, 1900, two of the eight villages (R and K) were again mortgaged to B, this time by way of usufructuary mortgage. Under this mortgage the mortgagee was entitled to sue for the amount due to him on dispossession and in that case he was entitled also to recover from the property hypothecated by the first mortgage. B was dispossessed of the village K on the 24th of February, 1911. Meanwhile he had purchased in 1904 the village R, but, as the result of a suit brought by the second mortgagee A, in 1909, that village was again sold and was purchased by A.

* First Appeal No. 469 of 1923, from a decree of Ali Ausat, Subordinate Judge of Jaunpur, dated the 14th of August, 1923.

Held, on suit by B to enforce the first mortgage by sale of certain villages, that the suit was barred by limitation. If that mortgage was kept alive by the mortgage of May, 1900, it was not given a second birth, and if the plaintiffs retained a right to sue on the simple mortgage of March, 1898, at all, they could do so only in accordance with the rule of limitation applicable to that bond.

Mahomed Ibrahim Hossain Khan v. Ambika Pershad (1) and *Deputy Commissioner of Lucknow v. Pandit Sukhmandan* (2), referred to.

THIS was a suit brought to enforce a simple mortgage of the 15th of March, 1898, by the sale of certain villages. The mortgage was for Rs. 13,200 bearing interest at $1\frac{1}{4}$ per cent. per mensem, for a period of three years, and eight villages were hypothecated. The mortgage was executed to pay off earlier mortgages. On the 1st of November, 1898, the mortgagor executed a second mortgage of the same villages to Babu Indar Sen Singh, who subsequently died leaving a widow, Musammat Anpurna Kunwar. On the 4th of May, 1900, the mortgagor executed a usufructuary mortgage in favour of the plaintiffs for a sum of Rs. 17,712 due on the mortgage of the 15th of March, 1898, and other items, amounting in all to Rs. 22,500, giving possession of the two villages of Rajdharpur and Konda. Under this mortgage the mortgagee was entitled to sue for the amount due to him on dispossession, and he would in that case be entitled to recover also from the property hypothecated under the bond of the 15th of March, 1898. The plaintiffs were dispossessed of the village of Konda on the 24th of February, 1911. Meantime the plaintiffs had, in 1904, purchased the village of Rajdharpur, but as the result of a suit brought by the second mortgagee Musammat Anpurna in 1909, the

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village of Rajdharpur was again sold and purchased by Musammat Anpurna.

The plaintiffs filed this suit on the 9th of December, 1922, and obtained a decree against three villages, namely, Rajdharpur and Pura Sarwan, in the possession of Musammat Anpurna, and Khalispur which had been purchased in 1919 by Durbali Tiwari (defendant 4). An appeal was filed by Musammat Anpurna, who claimed that the suit was barred by limitation as against the villages of Rajdharpur and Pura Sarwan.

Dr. *Kailas Nath Katju* and *Munshi Kamla Kant Varma*, for the appellant.

Munshi Haribans Sahai, *Maulvi Muhammad Abdul Aziz*, *Pandit S. S. Sastry* and *Munshi Gaddhar Prasad*, for the respondents.

THE judgement of the Court (DALAL and PULLAN, JJ.), after stating the facts as above, thus continued :—

The suit has been decreed on two grounds: first, because the mortgage of 1898 has been held to have become merged in the mortgage of 1900, and thereby acquired the period of limitation applicable to that deed, and, secondly, because the order of the District Judge of Azamgarh passed in 1912 in Anpurna's own suit, to the effect that her claim was subject to the prior charge of the plaintiff's mortgage, operates as "practically" *res judicata*. We do not agree with either of those findings. The deed of May, 1900, although executed to satisfy the mortgage of March, 1898, is of an entirely different nature. Under the simple mortgage the mortgagee had a right to sue for the principal after three years, under the usufructuary mortgage he could sue at once if he failed to get possession. or a claim was brought for expropriatory

rights, but otherwise he could only sue on being dis-
 possessed. This was an entirely new burden on the
 property of which the puisne mortgagee had no notice
 and we are not prepared to find that she should be
 bound by an agreement altering the period of limita-
 tion allowed for a suit on the prior mortgage. In
*Mahomed Ibrahim Hossain Khan v. Ambika Pershad
 Singh* (1), their Lordships of the Privy Council held
 that when a suit was brought on a simple mortgage of
 1888, seeking to make certain property covered by
 that mortgage and by a *zarpeshgi* deed of 1877 liable
 for the decretal amount, the right of priority set up
 by the plaintiffs on the *zarpeshgi* deed was barred by
 limitation, as the suit should have been brought
 within twelve years of the date when the money due
 on that deed became repayable. The principle in
 that case is the same as in the appeal before us. The
 same view was taken by LINDSAY, J., when Judicial
 Commissioner of Oudh, in *Deputy Commissioner of
 Lucknow v. Pandit Sukhnandan* (2). It may be that
 the simple mortgage of March, 1898, was kept alive
 by the mortgage of May, 1900, but it was not given a
 second birth, and if the plaintiffs retained a
 right to sue on the simple mortgage of March, 1898,
 at all, they did so only in accordance with the rule
 of limitation applicable to that bond, and their suit
 became time-barred in March, 1913.

In order to meet this position the plaintiffs argue
 that the usufruct of the two villages enjoyed by them
 in accordance with the mortgage of May, 1900,
 should be regarded as a payment of interest on the
 simple mortgage of March, 1898. This objection is
 easily answered by a reference to the terms of the
 mortgage of May, 1900. This mortgage was for a

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sum of Rs. 22,500 and the usufruct of the two villages was given to satisfy the interest on that sum, and not the interest due on the prior mortgage for Rs. 13,200. In our opinion there has been no payment or acknowledgement which would bring the suit within time under section 20 or 19 of the Limitation Act.

As to the second finding of the learned Judge of the court below that the decree of 1912 has practically the effect of *res judicata*, we are of opinion that this view is mistaken. In 1912 the mortgage of March, 1898, was still within time, and still had priority to the mortgage of November, 1898, on which the plaintiff in that suit based her claim. The fact that the plaintiff's charge was then declared to have priority in no way prevents the claim from subsequently becoming barred by time.

Nor can the plaintiff base his suit on the deed of May, 1906, and obtain a decree for sale subject to the appellant's mortgage rights, because when an opportunity was given to the plaintiff in 1912 to redeem the intermediate mortgage, he refrained from doing so, and allowed the sale to be executed in favour of Musammat Anpurna.

In our opinion the plaintiff's suit as against the villages of Rajdharpur and Pura Sarwan was barred by limitation. We allow the appeal with costs against the contesting respondents and order that these two villages shall be exempted from the decree.

Appeal allowed.