

FULL BENCH.

Before Mr. Justice Wazir Hasan, Mr. Justice Muhammad Raza and Mr. Justice Kendall.

SHRI RAM (PLAINTIFF-APPELLANT) v. NAJIBULLAH AND OTHERS (DEFENDANTS-RESPONDENTS).*

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August, 9.

Limitation Act (IX of 1908), articles 134 and 148, applicability of—Suit for recovery of possession by redemption against transferee of mortgagee in possession—Word “transferred” in article 134 of the Limitation Act, meaning of.

The mortgagee with possession of certain immovable property instituted foreclosure proceeding under the terms of the mortgage in 1876 and subsequently sold the property to the defendants in 1881 who continued in possession ever since. The plaintiffs then brought the present suit for recovery of possession of the property by means of a decree for redemption.

Held, that the suit was governed by article 134 and not by article 148 of the Indian Limitation Act. The consequential relief in every suit for redemption is the recovery of possession where the mortgagor is not in possession of the mortgaged property and the substantial relief involved in the present suit is “to recover possession of immovable property.” The mere fact that a suit may be treated as a suit for redemption would not necessarily place it under article 148 or take it out of article 134 of the Limitation Act.

Held further, that the word “transferred” in article 134 cannot mean the transfer of mortgagee rights, because that would be merely equivalent to an assignment of a mortgage; it would be the case of a person taking a mortgage with a clear and distinct understanding that it was nothing more than a mortgage. It must, therefore, mean a transfer of an absolute title.

Held also, that the language of article 134 renders the question of notice wholly irrelevant. Under that article as it

* Second Civil Appeal No. 449 of 1925, against the decree of Gokul Prasad, Subordinate Judge of Partabgarh, dated the 18th of August, 1925, upholding the decree of H. K. Ghoshal, Munsif of Partabgarh, dated the 31st of March, 1925.

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stand at present, the transferee without notice and the transferee with notice are on the same footing.

Held also, that the *sine qua non* for the application of article 148 of the Limitation Act is that the suit must be against the mortgagee. That article, therefore, cannot be applicable where possession is claimed not against the mortgagee but against his transferee who obtained absolute title under the conveyance and retained possession ever since as an owner. [14 M.I.A., 1; I.L.R., 47 Calc., 866 and I.L.R., 46 Bom., 903, relied upon. I.L.R., 44 Bom., 614, referred to.]

Mr. *Radha Krishna*, for the appellant.

No one for the respondent.

HASAN, RAZA, and KENDALL, JJ.:—This is a reference under section 14, sub-section (1) of the Oudh Courts Act (IV of 1925) by one of us for decision of the following question: Is the suit, out of which this appeal arises, governed by article 134 of the Indian Limitation Act? The necessary facts with reference to which the question must be answered are stated in the order of reference, dated the 31st of March, 1926. They may briefly be recapitulated here.

The property in suit is immovable property and was mortgaged by the predecessors-in-interest of the plaintiff to the predecessors-in-interest of the defendants in the years 1871 and 1872. The mortgage was possessory and in virtue of its terms the original mortgagee entered into the possession of the mortgaged property. The deed of mortgage contained a covenant as to foreclosure. It appears that in the year 1876 advantage was taken of that covenant and foreclosure proceedings were initiated under Regulation 17 of 1806. It is contended in the appeal that those proceedings were infructuous and had not the effect of foreclosing the mortgage, but that is a matter with which we are not concerned in deciding the question

before us. In the year 1881 the mortgagee sold the mortgaged property to the defendants. The deed of sale professes to convey absolute title in the property and it also describes the process by means of which the title had become absolute, that is the foreclosure proceedings of the year 1876.

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The plaintiff-appellant claims to recover possession of the property in suit by means of a decree for redemption of the mortgages of 1871 and 1872. One of the defences to the suit was that it was barred by article 134 of the Indian Limitation Act. This defence has been upheld by both the lower courts and, as the question referred to the Full Bench indicates, we have to decide whether that article applies, or not, to the present suit.

The question is not free from difficulty. The difficulty has arisen by reason of case-law under which article 134, it seems to us, is buried. It appears to us that the only way of solving the difficulty is to concentrate our attention on the language of the article itself. The article is as follows:—

Description of suit.	Period of limitation.	Time from which period begins to run.
To recover possession of immovable property mortgaged and afterwards transferred by the mortgagee for a valuable consideration.	Twelve years	The date of the transfer.

It was argued, on behalf of the appellant, that this is a suit for redemption and, therefore, it does not fall within the first term of article 134. As a corollary it was argued that the case falls under

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article 148 of the Indian Limitation Act. In support of this argument reliance was placed upon a decision of a Bench of the High Court at Bombay in the case of *Tairamiya v. Pirasaheb Patayit* (1). We are of opinion that the argument is unsound. The consequential relief in every suit for redemption is the recovery of possession where the mortgagor is not in possession of the mortgaged property. Indeed there is a specific relief to that effect in the plaint to the suit out of which this appeal arises. We have no doubt in our mind that the substantive relief involved in the present suit is "to recover possession of immovable property."

The argument is unsound on another ground also. It is apparent from the language of column 1 of article 148 that the article contemplates also a suit "to recover possession of immovable property mortgaged." So the mere fact that the present suit may be treated as a suit for redemption would not necessarily place it under article 148 or take it out of article 134 of the Indian Limitation Act.

The ground for applying one article or the other must, therefore, be founded on some other basis. That the property was originally "mortgaged" and, therefore, the suit satisfies also the second element of the description given in article 134 is unquestionable. It is admitted that the transfer of 1881 was for a valuable consideration. The decision of the question would, therefore, appear to turn upon the interpretation which may be placed on the word "transferred." What then is the meaning of the word "transferred" in the article. It cannot be the transfer of mortgagee rights, because, to use the language of the Right Honourable

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Lord CAIRNS in the case of *Radanath Dass v. Gisborne* (1) "that would be merely equivalent to an assignment of a mortgage; it would be the case of a person taking a mortgage with a clear and distinct understanding that it was nothing more than a mortgage." It must, therefore, mean a transfer of an absolute title. That there was the transfer of such a title under the conveyance of the year 1881 in favour of the defendants' predecessors-in-interest is not disputed. We are, therefore, of opinion that every term of article 134 is satisfied in the present case.

Arguments were addressed to us on the question as to whether notice, actual or constructive, on the part of the transferee that the transferor held only mortgagee rights in the property transferred is, or is not, sufficient to exclude the applicability of article 134. We are of opinion that the language of the article renders the question of notice wholly irrelevant. We entirely agree with the observation of RICHARDSON, J., in *Narain Das Arora v. Haji Abdur Rahim* (2) that under article 134, as it stands at present, the transferee without notice and the transferee with notice are on the same footing. This is also the view which was taken by Sir NORMAN MACLEOD, C. J. and COYAJEE, J., in *Keshav Raghunath Goshi v. Ghafurkhan Daimkhan* (3).

Finally, we may add that, in our opinion, article 148 of the Indian Limitation Act is not applicable to the present suit. The *sine qua non* for the application of that article is that the suit must be "against the mortgagee." In the present case the substantial relief of possession is not claimed nor can it, in the very nature of the thing, be claimed against the mortgagee but is claimed as it should have been against the holder of the property who obtained absolute title

(1) (1871) 14 M.L.A., 1.

(2) (1920) I.L.R., 47 Cal., 866.

(3) (1922) I.L.R., 46 Bom., 903.

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under the conveyance of 1881 and has retained possession ever since in the character of an owner.

On these grounds our answer to the question referred to us for decision is in the affirmative.

Appeal allowed.

APPELLATE CIVIL.

Before Sir Louis Stuart, Knight, Chief Judge and Mr. Justice Muhammad Raza.

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October, 4.

RAJA SHRI PRAKASH SINGH (JUDGMENT-DEBTOR-APPELLANT) v. ALIAHABAD BANK, LIMITED, LUCKNOW BRANCH (DECREE-HOLDER-RESPONDENT).*

Civil Procedure Code, order XXI, rule 2—Limitation Act (IX of 1908), article 181—Certification of payment by decree-holder under order XXI, rule 2(1) of the Code of Civil Procedure, limitation for—Application, whether necessary with a certificate for payment—Certification by decree-holder under order XXI, rule 2(1), whether an application under article 181 of the Limitation Act.

Held, that neither under the Code of Civil Procedure nor under the Limitation Act (IX of 1908) is there any limitation which compels a decree-holder to certify a payment of adjustment under the provisions of order XXI, rule 2(1) of the Code of Civil Procedure, within any particular time.

Held, that under order XXI, rule 2 of the Code of Civil Procedure the position of a decree-holder differs essentially from the position of a judgment-debtor. Under that rule the decree-holder has the right himself to certify the payment or adjustment and the court is obliged to record his certificate and is not permitted to question that certificate and so in recording the certificate the court cannot be said to perform a judicial act. The judgment-debtor on the other hand is directed under the rule to apply to the court to issue a notice to the decree-holder to show cause why the payment or adjust-

* Execution of Decree Appeal No. 31 of 1926, against the order of Mahmud Hasan Khan, Subordinate Judge of Sitapur, dated the 15th of May, 1926.