

Before Sir Louis Stuart, Knight, Chief Judge, and Mr. Justice  
Gokaran Nath Misra.

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December, 9.

MUSAMMAT RAISUNNISA (PLAINTIFF-APPELLANT) v.  
ZORAWAR SAH (DEFENDANT-RESPONDENT).\*

*Mortgage—Limitation cannot be pleaded against a claim set up by way of defence—Deed of further charge, what constitutes—Heirs and representatives of mortgagor, liability of, to satisfy a deed of further charge.*

A usufructuary mortgage was followed by a simple deed providing that the money borrowed under it was to be paid in instalments and that in case the instalments provided were not paid on due dates specified therein the mortgagor was to pay the sum due under the deed with interest at the time of the redemption of the original mortgage.

*Held*, that it is a settled rule of law that limitation cannot be pleaded against a claim made by way of defence.

It is, therefore, clear that the mortgagee was entitled to wait for the money due under the subsequent deed and is competent to demand it now when redemption is sought for against him and it is not competent to the appellant to plead limitation in regard to a claim put forward by the defendant respondent.

*Held further*, that the plaintiff appellant being one of the heirs and representatives of the original mortgagor cannot escape the liability of the payment under the deed in dispute.

The view that because in the body of a subsequent deed there is nothing to show that any interest in immovable property was transferred it could not be considered as other than a simple bond for the payment of the money received and that the fact that the executant of the deed covenanted that he should not be allowed to redeem the mortgage until he had satisfied the deed, did not render the deed a deed of

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\* Second Civil Appeal No. 275 of 1925, against the judgement and decree of Sheo Narain Tewari, Subordinate Judge of Bara Banki, dated the 10th of February, 1925.

mortgage or a deed of further charge, must be accepted, with caution. [17 O.C., 303, correctness doubted. 5 O.L.J., 768, followed. I.L.R., 44 All., 37; I.L.R., 4 All., 85; I.L.R., 9 Bom., 233; 9 O.L.J., 484; and 25 O.C., 134, referred to.]

Mr. *Ghulam Hasan* holding brief of Mr. *A. Rauf*, for the appellant.

Mr. *Bisheshwar Nath Srivastava*, for the respondent.

MISRA, J. :—This is a second appeal arising out of a suit for redemption brought by the plaintiff-appellant against the defendant-respondent and certain other persons. The facts so far as they are material for purposes of this appeal are as follows :—

One Jam Ali executed, on the 17th of June, 1865, a usufructuary mortgage for Rs. 50 in respect of certain lands, situate in village Karamullahpur, district Bara Banki, in favour of one Lodhe, the father of defendants Nos. 2 and 3. It was stipulated in the deed that the profits of the property mortgaged were to be appropriated by the mortgagee in lieu of interest. Subsequently, under a deed executed on the 17th of January, 1870, the said Jam Ali borrowed a sum of Rs. 150 from the same Lodhey agreeing to pay the said amount by instalments and in case the money was not paid at the stipulated time it was to be paid with interest at 2 per cent. per mensem at the time of redemption. It was also stipulated in this deed that without the payment of the money borrowed thereunder the mortgagor would not be entitled to redeem the property mortgaged under the deed of 1865. The plaintiff-appellant, Musammat Raisunnisa, who seeks redemption, is one of the heirs of Jam Ali, the original mortgagor, being one of his grand-daughters and who

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is admitted for the purposes of this litigation, by the parties to be the sole heir and representative of Jam Ali, the mortgagor. The defendant-respondent, Zorawar Sah, is also admitted to be the sole representative of the mortgagee.

*Misra, J.*

The contest mainly centered round the deed of the 17th of January, 1870. Its genuineness was denied by the appellant; it was urged on her behalf that the deed, even if genuine, did not create any charge on the property in suit and she was not liable to pay the money due under it. It was also contended that the deed being unregistered, could not operate as a charge on the property mortgaged and that, in any case, she was not bound to pay the amount of money due under it since the claim regarding that amount was barred by limitation. The last plea was not raised in either of the courts below but has been urged for the first time here.

The trial court, the Munsif of Fatehpur, by his decree dated the 1st of September, 1924, decided that the deed of 1870 was genuine and that the plaintiff was bound to pay the money due under it. He accordingly decreed the plaintiff's claim for redemption directing her to pay the principal sum of Rs. 50 due under the deed of 1865 and Rs. 1,878 due under the deed of 1870.

The plaintiff appealed against this decree to the Court of the Subordinate Judge of Bara Banki and the learned Subordinate Judge by his decree dated the 10th of February, 1925, has confirmed the decree of the trial court and dismissed the plaintiff's appeal.

The plaintiff has again appealed to this Court and the contentions raised on her behalf are three-fold :

*First*, that the deed of the 17th of January, 1870, cannot be construed as a deed of further charge;

*Secondly*, that even if it be construed as a deed of further charge it cannot be operative as such, being unregistered, and

*Thirdly*, that the claim under the said deed is barred by limitation.

In respect of the first contention reliance is placed on behalf of the appellant mainly on a ruling of the late Court of the Judicial Commissioner of Oudh reported in *Ramadhin Misra v. Sitla Bakhsh Singh* (1) in which it was held that because in the body of the deed in dispute in that case there was nothing to show that any interest in immovable property was transferred it could not be considered as other than a simple bond for the payment of the money received and that the fact that the executant of the deed covenanted that he should not be allowed to redeem the mortgage until he had satisfied the deed, did not render the deed a deed of mortgage or a deed of further charge, and the fact that the deed was described as a deed of further charge had not the effect of making it such a deed. This was the view promulgated by my learned brother, Mr. Justice STUART, who decided that case. The view held in that case has now to be accepted with caution in view of a later Full Bench decision of the Allahabad High Court in *Har Prasad v. Ram Chander* (2). My learned brother was also a member of the Bench which decided that case and it appears that he has very much modified the view that was taken by him

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(1) 17 O.C., 303.

(2) I.L.R., 44 All., p. 37.

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in the above Oudh case. It is, however, not necessary for me to come to a definite decision on this matter in this case, since the learned Counsel for the respondent did not press the contention that the deed was a deed of further charge.

Misra, J.

It is also unnecessary to decide whether the deed can be considered to be a valid deed in spite of its not having been registered, but I may point out that in the year 1870 no registration Act was in force in the province of Oudh, the first registration Act introduced in this province being Act VIII of 1871. Till the introduction of the said Act registration in this province was governed by the registration rules promulgated by the Judicial Commissioner of Oudh and under those rules it was not compulsory to register deeds like the one before us.

The main point which has been argued on both sides in this Court is whether the deed, considering it to be a simple deed, can be enforced against the appellant. I have no doubt in my mind that the plaintiff-appellant being one of the heirs and representatives of the original mortgagor, Jam Ali, cannot escape the liability of the payment under the deed in dispute; I am supported in this view by decisions of the various High Courts as well as by those of the late Court of the Judicial Commissioner of Oudh, vide *Allu Khan v. Roshan Khan* (1), *Hari Mahadaji Savarkar v. Balambhat Raghunath Khare* (2), *Gaya Prasad v. Rachpal* (3), and *Naunidh Lal v. Mahadeo Singh* (4) and also the Oudh case first quoted in the earlier part of this judgement.

It also appears to me that there is no force in the plea of limitation raised by the learned Counsel for

(1) I.L.R., 4 All., p. 85.

(2) I.L.R., 9 Bom., p. 233.

(3) I.L.R., 9 O.L.J., p. 484.

(4) 25 O.C., p. 134.

the appellant. Turning to the deed in question I find that it provided that the money borrowed under it was to be paid in instalments and that in case the instalments provided for, were not paid on due dates specified therein, the mortgagor was to pay the sum due under the deed with interest at the time of redemption. It is, therefore, clear that the mortgagee was clearly entitled to wait for the money due under this deed and is competent to demand it now when redemption is being sought for against him. It is not competent to the appellant to plead limitation in regard to a claim put forward by the defendant-respondent under this deed, because it is a settled rule of law that limitation cannot be pleaded against a claim made by way of defence. If any authority were needed in support of the point I would quote a case decided by a Bench of the late Court of the Judicial Commissioner of Oudh of which my learned brother, Mr. Justice STUART, was a member. It is reported in *Meharban Singh v. Raghunath Singh* (1).

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I am of opinion that there is no force in this appeal. I, therefore, dismiss the appeal with costs.

STUART, C. J.—I agree with my learned brother as to the order passed in this appeal, and add that my views as to the interpretation and effect of deeds of this nature will be found in my decision reported in I.L.R., 44 All., 37 (2).

*Appeal dismissed.*

(1) 5 O.L.J., p. 768.

(2) I.L.R., 44 All., 37.