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SANT
BAKHSI
SINGH
v.
BHAGWAN
BAKHSI
SINGH.

Srivastava
and
Pullan, JJ.

was that the learned District Judge had wrongly thrown the onus on the plaintiffs to show that the deed had not been understood by Musammât Lachhman and had not been properly explained to her. We think the contention has no force. The learned District Judge after an examination of the entire evidence came to the conclusion that the defendant had sufficiently brought home the document to the lady and had established the genuineness of the deed. We must therefore overrule this contention.

The result of our findings on the first two points is that the appeal must succeed. We therefore set aside the decision of the learned District Judge and restore that of the trial court. The plaintiffs will get their costs in all the courts.

Appeal allowed.

APPELLATE CIVIL.

Before Mr. Justice Bisheshwar Nath Srivastava.

LALTA SINGH (DEFENDANT-APPELLANT) v. MUTHUR
UPADHIA (PLAINTIFF-RESPONDENT).*

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September,
17.

Limitation Act (IX of 1908), section 18 and articles 116 and 120—Mortgage with possession—Possession not delivered—Suit by mortgagee for personal decree, limitation applicable to—Transfer of Property Act (IV of 1882), section 68—Fraud—Specific allegations of fraud necessary in a case of fraud—Mere omission to inform another party of his title not enough to constitute actual fraud.

Where a mortgagor mortgaged with possession certain plots of land and stipulated that the mortgagee was to remain in possession and in case there was any disturbance in the mortgagee's possession he was entitled to recover the mortgage money with interest and possession was not delivered, held, that the mortgagee had a right to sue the mortgagor for the mortgage money and to claim a personal decree against him un-

*Second Civil Appeal No. 222 of 1930, against the decree of M. Zia-uddin Ahmad, Subordinate Judge of Sultanpur, dated the 16th of April, 1930, reversing the decree of Pandit Shiam Manohar Tewari, Munsif of Musafir-khana at Sultanpur, dated the 18th of January, 1930.

der section 68, clause (b) of the Transfer of Property Act. Such a suit must be governed either by article 116 or by article 120 of the Limitation Act and the period of limitation for such a suit can be only six years from the time when the cause of action arises.

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Section 18 of the Limitation Act is directed against cases of active and designed fraud.

Where, therefore, there were no specific allegations of active fraud in the plaint and the defendant did not do anything to keep the plaintiff from the knowledge of the true facts as regards his title in respect of certain plots but only concealed from the plaintiff his want of title and omitted to inform him of the title of others, such mere omission would not be enough to constitute active fraud so as to attract the application of section 18 of the Limitation Act.

Mr. *Moti Lal Saksena*, for the appellant.

Mr. *E. R. Kidwai*, for the respondent.

SRIVASTAVA, J. :—This is a second appeal against the decision dated the 6th of April, 1930, passed by the Subordinate Judge of Sultanpur modifying the decree dated the 13th of January, 1930, passed by the Munsif of Musafirkhana at Sultanpur. It arises out of a suit brought by the plaintiff mortgagee on foot of a mortgage deed, dated the 30th of April, 1923, asking for a simple money decree or in the alternative a decree for possession and for substituted security. The plaintiff's case was that the defendant mortgaged to him three plots nos. 1399, 1032 and 1033 situate in village Jajjour, pargana Barausa, with possession and stipulated, that the plaintiff was to remain in possession as mortgagee and in case there was any disturbance in the mortgagee's possession he was entitled to recover the mortgage money with interest at 2 per cent., per mensem. The plaintiff further alleged that possession was never delivered to him and that when the plaintiff wanted to institute the present suit he discovered that two of the mortgaged plots, namely, 1399 and 1033 did not belong to the defendant. He therefore claimed a money decree for the principal and interest at 2 per cent., per mensem and in the alternative

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a decree for possession of plot no. 1032 and for substituted security in lieu of plot nos. 1399 and 1033. The defendant admitted the execution of the mortgage deed but denied the other allegations and pleaded that the claim for a money decree was barred by time.

Srivastava,
J.

The learned Munsif held that the plaintiff was entitled neither to a money decree nor to any substituted security. But he gave the plaintiff a decree for the amount claimed recoverable by sale of plot no. 1032. On appeal by the plaintiff to the lower appellate court, the learned Subordinate Judge held that the plaintiff's claim for a money decree was within time and he has accordingly given the plaintiff a personal decree for the amount claimed against the defendant.

The only contention urged by the learned counsel for the defendant appellant before me is that the claim for a personal decree was barred by time. I think this contention is correct and must succeed. I agree with the learned Subordinate Judge that on the facts alleged, the case fell within the provisions of section 68 clause (b) of the Transfer of Property Act and that the plaintiff mortgagee had therefore a right to sue the mortgagor for the mortgage money and to claim a personal decree against him. But such a suit under the provisions of section 68 of the Transfer of Property Act must be governed either by article 116 or by article 120 of the Limitation Act and the period of limitation for such a suit can be only six years from the time when the cause of action arises. It is now the common case of both parties that plots nos. 1399 and 1033 never belonged to the mortgagor and that the mortgagee never got possession and has therefore been deprived of his security to the extent of these two plots from the very inception of the mortgage. The claim for a money decree under section 68 of the Transfer of Property Act was therefore *ex facie* barred by time when the suit was instituted on the 23rd of October, 1929. The lower appellate court however has held the claim to be within limitation on the ground that the plaintiff

learnt about the want of title of the defendant only in September, 1929, when he obtained copies of certain documents with a view to institute the present suit. The learned Subordinate Judge has not referred to any provision of law in support of his view but presumably he intended to apply the provisions of section 18 of the Limitation Act to the case. The learned counsel for the plaintiff respondent has also referred me only to the provisions of that section in support of the view of the lower appellate court. In my opinion section 18 has no application to the case. This section is directed against cases of active and designed fraud. In the present case I fail to find any specific allegations of actual fraud in the plaint. It has been repeatedly held that mere general allegations are quite insufficient to constitute an averment of fraud of which a court can take notice. Order VI, rule 4 of the Code of Civil Procedure also definitely provides that in all cases in which a party sets up a case of fraud, the full particulars with dates and items, if necessary, shall be stated in the pleadings. There is no suggestion that the defendant did anything to keep the plaintiff from the knowledge of the true facts as regards the title in respect of plots nos. 1399 and 1033. All that is suggested is that the defendant concealed from the plaintiff his want of title and omitted to inform him of the title of others. Such mere omission would not be enough to constitute active fraud so as to attract the application of section 18 of the Limitation Act to the case. I am therefore of opinion that the plaintiff cannot claim the benefit of section 18 and the claim for a money decree was therefore barred by time.

As stated before, the plaintiff made an alternative prayer for a decree for possession and for substituted security. This alternative claim has not been considered by the lower appellate court. I must therefore remand the case to the learned Subordinate Judge for a decision in respect of the claim for possession and substituted security.

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The result therefore is that I allow the appeal with costs, set aside the decision of the lower appellate court and remand the case to the learned Subordinate Judge with directions to re-admit the appeal under its original number and to determine it according to law.

Appeal allowed.

APPELLATE CIVIL

Before Mr. Justice A. G. P. Pullan.

LALTA PRASAD (APPELLANT) v. MISRI LAL
(RESPONDENT).*

1930
September,
17.

Civil Procedure Code (Act V of 1908), section 35—Costs—Trial court's discretion in the matter of allowing costs of a suit to parties—Second appeal—Appellate court's power to interfere with the discretion of lower court in the matter of allowing costs.

Section 35 of the Code of Civil Procedure gives the court the full power to determine the amount of costs and the party or parties who shall pay them subject to such conditions and limitations as may be prescribed by the provisions of any law for the time being in force, and the same section enacts that where the court directs that any costs shall not follow the event the court shall state its reasons in writing.

Where a plaintiff comes to enforce a legal right and there has been no misconduct on his part, and no omission or neglect which would induce the court to deprive him of his costs, the court has no discretion and cannot take away the plaintiff's right to costs.

Where the trial court decreed a suit with costs and in appeal the lower appellate court disallowed costs without stating any reasons except that it considered it to be a very hard case for the appellant, *held*, that the lower appellate court acted in an arbitrary manner in interfering with the proper decision of the court of first instance on the question of costs and the High Court was justified in interfering with the order of the lower appellate court in second appeal. *Eshahuq Molla v. Abdul Bari Halidar* (1), distinguished.

*Second Civil Appeal No. 182 of 1930, against the decree of S. Ali Hamid, 1st Subordinate Judge of Kheri, dated the 16th of April, 1930, modifying the decree of Pandit Data Ram Misra, Additional Munsif of Kheri, dated the 19th of February, 1930.

(1) (1908) I.L.R., 31 Cal., 189.