shall not vest in nor be exercised by nor be subject to the nomination of the Government or any public officer. It is also clear that both groups of sections above referred to, relate to religious establishments to which the Regulations were applicable. Section 14 comes in the wake of these two groups of sections. It does not make specific reference to the Regulations, yet there can be little doubt that the mosque, temple or religious establishment mentioned therein must refer to the mosque, temple or religious establishment dealt with in the preceding sections. This is also the interpretation most consistent with the preamble. The scope of Act XX of 1863 cannot, in my opinion, be wider than that of the Regulations which it has replaced. The application of the Act must, therefore, be confined to religious establishments which were governed by the Regulations mentioned in the preamble or at most to institutions which could fall within the scope of the said Regulations. It is not disputed that the Bengal Regulation XIX of 1810 contemplates endowment of land only and the Madras Regulation VII of 1817 contemplates endowments of money, land and produce of land.

My answer therefore to the question referred for opinion is that section 14 of the Religious Endowments Act is inapplicable to temples for the maintenance of which no endowment has been made.

APPELLATE CIVIL.

Before Mr. Justice Muhammad Raza and Mr. Justice Bisheshwar Nath Srivastava.

1932 *March*, 2.

KANHAIYA LAL AND ANOTHER (PLAINTIFFS-APPELLANTS) *v.* GULAB SINGH AND OTHERS (DEFENDANTS-RESPONDENTS).*

Transfer of Property Act (IV of 1882), section 92—Subrogation—Mortgagee getting his mortgage renewed—Priority

*Second Civil Appeal No. 139 of 1931, against the decree of Pandit Bishambhar Nath Misra, District Judge of Unao, dated the 26th of January, 1931, confirming the decree of Pandit Krishna Nand Pande, Additional Subordinance Judge of Unao, dated the 26th of August, 1930.

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Raza and Srivastava, JJ.

the mortgages (exhibits 3 and 4). In order to repay the mortgage debt due under these two deeds Gulab Singh, defendant No. 1 on the 27th of October, 1902, executed the mortgage deed in suit (exhibit 1) for Rs.3,000 bearing interest at 4 annas per cent per mensem, in favour of Mahadin and Ram Prasad. The mortgage consideration was made up of Rs.2,497, the principal sum secured under the two deeds (exhibits 3 and 4) in favour of Musammat Bitto and Rs.503, the interest due in respect of both the aforesaid deeds. It is a mortgage by conditional sale in respect of an eight pies share in village Bichauli. The term fixed in the deed is 15 years. The plaintiffs, as representatives of Mahadin and Ram Prasad, claimed a decree for Rs.4,292-12-0 on account of principal and interest by foreclosure of the eight pies share on the allegation that the time fixed for payment had expired. As the controversy in the appeal before us is only between the plaintiffs and two of the defendants, namely Baijnath, defendant No. 4, and Hira Lal, defendant No. 5, it would be enough for us to state such of the pleas raised in defence by these defendants as are relevant to the appeal. The plaintiffs have impleaded Baijnath and Hira Lal as subsequent transferees of the mortgaged property. Baijnath pleaded that Gulab Singh, defendant No. 1, and Musammat Rukmin, widow of Kalka Singh, had on the 19th of October, 1899, executed a mortgage deed (exhibit F2) for Rs.7,344 bearing interest at 10 annas per cent. per mensem in favour of his brother Thakur Prasad in respect of a three annas six pies share in village Bichauli. It was a possessory mortgage but possession was not given. The term fixed in the mortgage was 10 years. Thakur Prasad died and since his death Baijnath became entitled to the mortgagee rights of his deceased brother. On the 16th of October, 1911, Gulab Singh and Musammat Rukmin, in order to repay the debt due under the mortgage deed (exhibit F2), executed another mortgage deed (exhibit F1) for Rs. 12,000 in favour of Baijnath. The term fixed for

payment in this deed is 10 years. It relates to a three annas share in village Bichauli. Under the terms of this deed the mortgagee was given possession over specific plots of land aggregating 144 bighas, 2 biswas in area in lieu of interest which was fixed at seven annas per cent. per mensem. Baijnath obtained a decree for sale on foot of the mortgage deed (exhibit F1) and on the 9th of August, 1927, purchased a two annans six pies share in village Bichauli in execution of the said decree. On the basis of these transactions Baijnath claimed priority in respect of the mortgage (exhibit F2), dated the 19th of October, 1899, and pleaded that the plaintiffs were bound to pay up the charge under that deed before they could claim foreclosure. He also pleaded that he was a purchaser for value and in good faith and was, therefore, protected against the claim of the plaintiffs.

Hira Lal, defendant No. 5, set up a mortgage deed (exhibit G2), dated the 17th of June, 1899, executed by Gulab Singh and Chandika Singh in favour of his father Lachhman Prasad in respect of a one anna share of village Bichauli. It was a mortgage by conditional sale and carried interest at Re. 1-2-0 per cent. per mensem. Lachhman Prasad on the 6th of December, 1907, obtained a foreclosure decree (exhibit G4) on the basis of his mortgage deed, dated the 17th of June, 1899. On these facts Hira Lal denied his being a subsequent transferee and relied on his title acquired by foreclosure.

The plaintiffs in order to meet the claim set up by Baijnath and Hira Lal on the basis of the mortgages of 1899 (exhibits F2 and G2), claimed priority against them on the basis of Musammat Bitto's mortgages of 1888, on the ground that the deed in suit was executed *in lieu of those mortgages*. It was further averred that the claim under the mortgages of 1888, (exhibits 3 and 4) had been kept alive by means of acknowledgments made and interest paid by the mortgagor. Another ground set up against Baijnath's claim for priority was that the mortgage deed, dated the 19th of October,

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1899 (exhibit F2), had been merged in the mortgage dated the 16th of October, 1911 (exhibit F1), and that the latter mortgage had been extinguished as a result of the decree for sale passed on the basis of it.

Raza and Srivastava, JJ.

Both the lower courts have held that Baijnath and Hira Lal were not subsequent transferees and that they were entitled to priority as against the claim of the plaintiffs. As a result of this and other findings arrived at by them it has been held that the plaintiffs are entitled to a decree for foreclosure only in respect of a one-third pie share of Gulab Singh. The plaintiffs have accordingly been given a decree for Rs.4,292-12-0 with interest and it has been ordered that if the amount is not paid in six months, a one-third pie share of Gulab Singh would be foreclosed. The shares in the possession of Baijnath and Hira Lal not being liable, the plaintiffs' claim against them has been dismissed.

The trial court had held that the plaintiffs could claim priority on the basis of the two earlier mortgages of 1888 in favour of Musammat Bitto (exhibits 3 and 4), but the learned District Judge disagreed with this finding.

The learned counsel for the plaintiffs-appellants has strenuously challenged this finding of the lower appellate court. He has contended that the plaintiffs should be presumed to have intended what was to their benefit, and that they ought to be deemed to have intended to keep alive the earlier mortgages to be used as a shield against the intermediate mortgages of 1899 set up by Baijnath and Hira Lal. It has, therefore, been argued that the plaintiffs are entitled to claim priority as against the defendants in respect of the eight pies share covered by the mortgage in suit. The learned counsel for the defendants-respondents admitted the correctness of this contention of the appellants and made no attempt to support the finding of the lower appellate court on this point. We think the appellants' contention is correct and must be accepted. It is supported

by the decisions in *Alangaran Chetti* v. *Lakshmanan Chetti* (1), *Gopal Chunder Sreemany* v. *Herembo Chunder Holdar* (2) and *Ram Kumar* v. *Dwarka Prasad* (3) relied on by the appellants.

Raza and Srivastava, JJ.

The next question is whether the plaintiffs' claim based on the earlier mortgages of 1888 is within time. Both the lower courts have held that claim under the mortgages (exhibits 3 and 4) was time-barred at the date of the suit. It is admitted by the plaintiffs-appellants that in order to entitle them to priority on the basis of the earlier mortgages they must show that the claim based on these mortgages is within time. They have relied on the mortgage deed in suit (exhibit 1) and two other mortgages (exhibits 7 and 8) as affording evidence of acknowledgment and of payment of interest as such which have the effect of keeping the mortgages of 1888 alive. The deed in suit does contain an acknowledgment of the mortgages of 1888. This acknowledgment is also within 12 years of the date fixed for payment in those mortgages. Exhibits 7 and 8 are two simple mortgages executed in 1914 by Gulab Singh. The first of them is in favour of Kanhaiya Lal, plaintiff No. 1, and the second in favour of Debi Dayal, plaintiff No. 2. A part of the consideration of these deeds was appropriated in payment of interest due in respect of the deed in suit (exhibit 1). There is not one word in either of these deeds containing any reference to the mortgages of 1888 in favour of Musammat Bitto. We have, therefore, no hesitation in holding that the plaintiffs are not entitled to claim any extension of limitation in respect of the deeds of 1888 on the basis of exhibits 7 and 8. Thus there being nothing to save limitation in respect of the mortgages of 1888 after the execution of the deed in suit in 1902, the claim under exhibits 3 and 4 was long barred by limitation at the time of the institution of the present suit in 1929.

(1) (1896) I.L.R., 20 Mad., 274. (2) (1889) I.L.R., 16 Calc., 523.
(3) (1912) 15 O.C., 211.

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The result, therefore, is that the plaintiffs though entitled to claim priority on the basis of the mortgages of 1888 cannot derive any benefit from them in the present suit.

Raza and Srivastava JJ.

The next line of attack adopted by the plaintiffs-appellants was that Baijnath could not claim priority on the basis of the mortgage deed (exhibit F2), as it had merged in the subsequent mortgage (exhibit F1). It was also said that as the decree for sale had been obtained on the basis of exhibit F1 the latter deed was also extinguished. The learned counsel for the plaintiffs-appellants had to admit that the case of Baijnath as regards the priority claimed by him was parallel to the plaintiffs' own claim for priority based on the mortgages of 1888, and he frankly admitted that the argument urged by him against Baijnath was contradictory to his own argument dealt with earlier. It was however, contended by him that where a mortgagee takes another mortgage in lieu of his prior mortgage the case does not fall within the terms of any of the provisions of the Transfer of Property Act relating to subrogation or priority. It was argued that section 92 of the Transfer of Property Act which enacts a general statement of the doctrine of subrogation can apply only to cases in which any of the persons referred to in section 91 or a co-mortgagor redeems a mortgage. The argument was that a mortgagee paying up his own earlier mortgage is not one of such persons. Similarly, it was contended that the provisions of section 101 of the Transfer of Property Act have no application, as it was not a case of a mortgagee purchasing or otherwise acquiring the rights of the property of the mortgagor or owner. In answer to the contention of the learned counsel for the defendants-respondents that the present case was governed by the old section 74 of the Transfer of Property Act, it was pointed out that this section also refers only to a subsequent mortgagee redeeming a prior mortgage, and does not cover a case

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in which a mortgagee has obtained a renewal of his own mortgage. It is true that a case like the present is not covered strictly by the terms of any of these sections but we can see no ground for excluding the present case from the benefit of the principle underlying these provisions. It seems to us that on principle it makes no difference whether the money raised under a latter mortgage is applied in satisfaction of an earlier mortgage of a third person or in satisfaction of an earlier mortgage of the subsequent mortgagee himself. The doctrine of subrogation is an equitable doctrine founded on principles of natural justice. When a particular liability or a burden which a person is liable to satisfy or discharge is satisfied out of the money belonging to another person, it would be contrary to equity and good conscience to hold that such last named person is not entitled to the benefit of the equities existing in favour of the person whose debt has been so discharged. In *Malireddi Ayyareddi* v. *Gopalakrishnayya* (1) their Lordships of the Judicial Committee went to the length of holding that payments made by the mortgagor to the second mortgagee were to be regarded as purchases *pro tanto* of the second mortgage and that there is nothing in law or good sense to eliminate the owner of the property from the list of the possible purchasers. Section 92 of the Transfer of Property Act as enacted by the Amending Act XX of 1929 expressly excludes the mortgagor from the benefit of subrogation, but to use the words of their Lordships we can see "nothing in law or good sense to eliminate a mortgagee" situated like the defendant Baijnath from the benefit of priority. In *Gokaldas Gopaldas* v. *Puranmal Premsukhdas* (2) their Lordships observed that "the ordinary rule is that a man having a right to act in either of two ways shall be assumed to have acted according to his interest". In this case it was to the obvious interest of Baijnath to keep alive his mortgage of 1899 in order to use it as

Raza and Srivastava, JJ.

(1) (1923) L.R., 51 I.A., 140. (2) (1884) I.L.R., 10 Calc., 1035.

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a shield against the plaintiffs. He must, therefore, be presumed to have intended to keep it alive.

Raza and Srivastava, JJ.

This view is also supported by the decisions mentioned above which had been relied on by the learned counsel for the plaintiffs himself. In *Alangaran Chetti* v. *Lakshmanan Chetti* (1) it was held that where a mortgagee subsequently to the execution of the mortgage deed takes another mortgage in renewal of the former deed, he has priority over incumbrances subsequent to the first deed. In *Gopal Chunder Sreemany* v. *Herembo Chunder Holdar* (2) *H* mortgaged to the plaintiff his one-third share in a house in 1882 to secure Rs.1,000 with interest at 12 per cent. On the 3rd of January, 1884, he mortgaged his one-third share in the same house to a third person to secure Rs.1,000 with interest at 18 per cent. On the 14th of May, 1884, *H* and his brothers mortgaged to the plaintiff the entirety of the said house to secure Rs.3,400 with interest at 18 per cent. A part of the consideration of the last mortgage was applied in liquidating the debt due under the mortgage of 1882. It was held that the transaction of the 14th of May, 1884, did not amount to payment of the original debt, but was in reality a further advance and a fresh security for both the old debt and the fresh advance, on different terms as to interest, the old debt remaining untouched, but that even had the original debt been satisfied thereby, that fact would not have necessarily destroyed the security, the presumption being, unless an intention to the contrary were shown, that the plaintiff intended to keep the security alive for his own benefit. In *Ram Kumar* v. *Dwarka Prasâd* (3) it was held that where a mortgagor being unable to repay a loan an account is taken of the money due to the mortgagee and a fresh bond is executed, the priority of the original mortgage is not affected although any fresh advance made under the subsequent

(1) (1896) I.L.R., 20 Mad., 274. (2) (1889) I.L.R., 16 Calc., 523.
(3) (1912) 15 O.C., 211.

deed need not have any effect as against an intermediate incumbrancer.

The only case cited on behalf of the plaintiffs in support of the contrary view was the decision in *Jagannath Prasad* v. *Naurang Singh* (1) to which one of us was a party. In that case also there was a renewal of a previous mortgage but the right to recover money on the basis of the earlier mortgage had been lost by lapse of time. It was, therefore, held that the mortgagee was not entitled to claim priority on the basis of those earlier mortgages. Reliance has been placed upon the following remarks made in that judgment: "This is a case in which the mortgagee himself has taken a renewal of previous liabilities in full satisfaction. As we understand it there can be no question of subrogation in the particular circumstances." These remarks cannot be intended to mean anything more than that the case did not fall within the terms of section 92 relating to subrogation. It was not necessary in that case to consider the matter further as the claim on the basis of the earlier mortgages was clearly barred by limitation. We are also of opinion that the fact of the decree having been obtained by Baijnath cannot stand in the way of his claiming priority against the mortgage in suit. As observed by their Lordships of the Judicial Committee in *Sukhi* v. *Ghulam Safdar Khan* (2), order XXXIV, rules 3 and 5 of the Code of Civil Procedure which now govern final decrees for foreclosure and sale do not provide that after a decree thereunder the mortgage security is extinguished, as was provided by section 89 of the Transfer of Property Act (IV of 1882) in the case of a sale decree made under that section. If, therefore, there is nothing to prevent the renewed mortgage being used as a shield we can see no reason why an earlier mortgage which was not extinguished cannot also be used as a shield. We are, therefore, in agreement with the courts below that Baijnath

Raza and Srivastava, JJ.

(1) (1929) 6 O.W.N., 718. (2) (1921) L.R., 48 I.A., 465.

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is, under the circumstances, entitled to claim priority against the plaintiffs on the basis of his mortgage (exhibit F2).

It was also contended by the plaintiffs that the claim on the basis of the mortgage (exhibit F2), was barred by limitation. This contention, in our opinion, has no substance. Baijnath is a defendant in the case and is setting up the mortgage in question not as a weapon of attack but only as a shield in defence of his possession of the property. There is no limitation against a defence. *Gaya Prasad* v. *Gur Dayal* (1).

Raza and Srivastava, JJ.

Lastly, as regards the claim of Hira Lal, it follows from what we have stated above with regard to the claim of Baijnath that Hira Lal is also entitled to claim priority on the basis of his mortgage (exhibit G2), in spite of his having obtained the foreclosure decree (exhibit G4).

The result, therefore, is that the appeal fails and is dismissed with costs.

Appeal dismissed.

FULL BENCH.

Before Sir Syed Wazir Hasan, Knight, Chief Judge, Mr. Justice Muhammad Raza and Mr. Justice Bisheshwar Nath Srivastava.

1932 *March,* 30.

KUNWAR BAHADUR (DEFENDANT-APPELLANT) *v.* SURAJ BAKHSH (PLAINTIFF-RESPONDENT).*

Evidence Act (I of 1872), section 91—Promissory note, insufficiently stamped—Advance of money on terms recorded in an insufficiently stamped promissory note—Oral evidence, admissibility of—Creditor, if entitled to recover money by proving advance of loan orally.

In spite of the provisions of section 91 of the Indian Evidence Act, it is open to the party who has lent money on

*Second Civil Appeal No. 117 of 1931, against the decree of Pandit Bishunath Hukku, Additional Subordinate Judge of Hardoi, dated the 28th of February, 1931, reversing the decree of Pandit Piarey Lal Bhargava, Munsif, Hardoi (South), dated the 6th of August, 1930.

(1) (1919) 6 O.L.J., 270.