

APPELLATE CIVIL.

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

1931
February.
16.

RAM SAHAI AND OTHERS (PLAINTIFFS-APPELLANTS) v.
KUNWAR SAH AND OTHERS (DEFENDANTS-RESPONDENTS).*

Limitation Act (IX of 1908), section 19 and article 132—Acknowledgment of liability—Recital in mortgage that money was due under a previous mortgage, if constitutes acknowledgment of liability—Transfer of Property Act (IV of 1882), section 101—Mortgagee paying off earlier charge—Right to use earlier mortgage as shield against intermediate encumbrancer.

Held, that for an acknowledgment under section 19 of the Limitation Act it is enough that it is made by the party against whom the right is claimed or by some person through whom he derives title or liability. If the operation of that section, in the case of acknowledgments made by some persons through whom a party derives title or liability, is to be confined to acknowledgments made before such title or liability was derived, it would be necessary to introduce words in the section which are not there and the function of courts is only to interpret the language of the section as it stands. *Syed Mahomed Ibrahim Hossein Khan v. Ambika Prasad Singh* (1), *Nigah Ali Khan v. Aquillah Khan* (2), *Krishna Chandra Saha v. Bhairab Chandra Saha* (3), *Domi Lal Sahu v. Roshan Dobay* (4), *Roshan Lal v. Kanhaiya Lal* (5) and *Hem Chandra Chaudhri v. Purna Chandra Chaudhri* (6), relied on.

Held further, that a mortgagee who pays an earlier charge should be assumed to have acted in the way most beneficial to themselves and to have kept the mortgage alive, to be used as a shield against an intermediate encumbrancer. Payments made to the prior mortgagee are to be regarded as purchases *pro tanto* of the prior mortgage and there is nothing in law or good sense to eliminate the subsequent mortgagees from

*First Civil-Appeal No. 183 of 1930, against the decree of S. Asghar Hasan, District Judge, Hardoi, dated the 18th of February, 1930, modifying the decree of Thakur Surendra Vikram Singh, Munsif, North Hardoi, dated the 22nd of August, 1929.

(1) (1912) L.R., 39, I.A., 68.

(2) (1929) 6 O.W.N., 1068.

(3) (1905) I.L.R., 32 Calc., 1077.

(4) (1906) I.J.R., 33 Calc., 1278.

(5) (1918) I.L.R., 41 All., 111.

(6) (1914) 22 I.C., 510.

the list of possible purchasers. *Malireddi Ayyareddi v. Gopala Krishnayya* (1), relied on.

A suit by a mortgagee who pays off an earlier charge and claims priority over an intermediate encumbrancer is governed by article 132 of the Indian Limitation Act. *Syed Mahomed Ibrahim Hossein Khan v. Ambika Persand Singh* (2) relied on.

Mr. *Hyder Husain*, for the appellants.

Messrs. *A. P. Sen, S. C. Dass* and *R. B. Mr. Mohan Lal*, for the respondents.

RAZA and SRIVASTAVA, JJ. :—This is a second appeal by the plaintiffs against the decision, dated the 18th of February, 1930, passed by the District Judge of Hardoi reversing the decision, dated the 22nd of August, 1929 passed by the Munsif, North Hardoi. It arises out of a suit for sale on foot of a mortgage deed, dated the 8th of August, 1923, executed by Dharam Singh defendant No. 1 in favour of Ram Sahai, plaintiff No. 1 and his brothers Rameshwar and Sheo Bakhsh who are represented by plaintiffs Nos. 2 to 7. Defendants Nos. 2 to 5 are members of the joint Hindu family of which defendant No. 1 is the manager. Kunwar Sah, defendant No. 6, was impleaded as a puisne mortgagee of the property in suit.

The suit was contested by Kunwar Sah alone on the ground that he was a prior mortgagee. This contention was repelled by the trial court but has found favour with the lower appellate court.

The only question which arises for decision in this appeal is whether Kunwar Sah is the prior or the subsequent mortgagee.

The facts relevant to the determination of this question are not in dispute. Sadho Singh on the 10th of August, 1909, executed a mortgage deed in favour of Khushal Sah for Rs. 700. The term fixed in this mortgage was two years (exhibit 2). On the 16th of

1931

 RAM
SAHAI
v.
KUNWAR
SAH.

(1) (1923) L.R., 51 I.A., 140.

(2) (1912) L.R., 39 I.A., 68.

1931

RAM
SAHAI
v.
KUNWAR
SAH.

Raza and
Srivastava
JJ.

May, 1911, Musammat Gayani, widow of Khushal Sah, made a sub-mortgage of her rights under the deed, exhibit 2, in favour of the plaintiff No. 1, Ram Sahai and his brothers Rameshwar and Sheo Bakhsh (exhibit 3). The deed in suit (exhibit 1) was executed on the 8th of August, 1923, by Dharam Singh, son of Sahdo Singh for Rs. 975, the whole of the consideration being appropriated in payment of the earlier mortgage of the 10th of August, 1909 (exhibit 2). The suit which has given rise to this appeal was instituted on the 15th of January, 1929 on the basis of the mortgage deed, dated the 8th of August, 1923.

Kunwar Sah, defendant No. 6, bases his title on two mortgages. The first of these, exhibit F1, is dated the 15th of January, 1910, and was executed by Sadho Singh in favour of Kunwar Sah for Rs. 3,000. The second mortgage (exhibit F2) is dated the 20th of September, 1913, and was executed between the same parties for Rs. 2,000, the balance due on that date in respect of exhibit F1. It may be mentioned that Kunwar Sah had obtained a decree for sale on the basis of this latter mortgage on the 16th of March, 1925.

The plaintiffs' case was that they had been subrogated to the rights possessed by Khushal Sah under the mortgage deed, dated the 10th of August, 1909, by reason of the consideration of the mortgage deed in suit having been applied in payment of that mortgage and that the said rights had been kept alive till the date of the institution of the present suit by reason of an acknowledgment contained in the mortgage deed exhibit 1. The learned District Judge has held that the statement contained in the mortgage deed in suit cannot be treated as acknowledgment of liability under the deed of 1909 so as to keep it alive and that the plaintiffs' claim for priority against Kunwar Sah based on the mortgage deed, dated the 10th of August,

1909, was therefore barred by time. He has further found that as the plaintiffs at the date of the mortgage deed were also the sub-mortgagees in respect of the mortgage deed, dated the 10th of August, 1909, therefore they could not claim priority in respect of their own previous mortgage debt which had been paid off by the mortgage in suit.

We are of opinion that the view taken by the learned District Judge on both these points is unsound and erroneous. His attention does not seem to have been drawn to a ruling of a Bench of this Court which fully covers the first point and to a ruling of their Lordships of the Judicial Committee which is conclusive, on the second point.

There can be no doubt that the plaintiffs' claim to enforce priority under the deed exhibit 2 in this suit is governed by article 132 of the Indian Limitation Act—*Syed Mahomed Ibrahim Hossein Khan v. Ambika Persand Singh* (1). The term fixed in this mortgage deed as stated before was two years. The period prescribed by article 132 of the Limitation Act therefore expired on the 10th of August, 1923. The present suit which was instituted on the 15th of January, 1929, would therefore be barred by time unless the plaintiffs can claim extension of limitation by reason of any acknowledgment. The acknowledgment relied on is contained in the deed in suit, exhibit 1. In this deed there is a recital by Dharam Singh mortgagor that a sum of Rs. 975 were due from him under the mortgage deed, dated the 10th of August, 1909 in favour of Khushal Sah, the mortgagee rights in respect of which had been mortgaged by Musammat Gayani widow of Khushal Sah under the sub-mortgage dated the 16th of May, 1911. We are of opinion that this statement in exhibit 1 constitutes a clear acknowledgment of liability in respect of the mortgage deed dated the 10th of August, 1909. In fact this point

1931

 RAM
SAHAI
v.
KUNWAR
SAH.

*Raza and
Srivastava.*
J.J.

(1) (1912) L.R., 39 I.A., 68.

1931

RAM
SAHA
v.
KUNWAR
SAH.

Raza and
Srivastava,
JJ.

has not been disputed by the learned counsel for the defendant respondent. The only contention seriously pressed in this behalf by the learned counsel for the respondent is that the acknowledgment in question was made after the mortgage in favour of Kunwar Sah. It is contended that an acknowledgment made by Dharam Singh subsequent to the mortgage by his father Sadho Singh in favour of Kunwar Sah should not be regarded as an acknowledgment by a person through whom the defendant derives title or liability within the meaning of these words as used in section 19 of the Limitation Act. The question is not altogether free from difficulty. A similar question arose in *Nigah Ali Khan v. Aqiuallah Khan* (1), a case decided by a Bench of this Court to which one of us was a party. It was held that for an acknowledgment under section 19 of the Limitation Act it was enough that it was made by the party against whom the right is claimed or by some person through whom he derives title or liability, and therefore the acknowledgment relied upon in that case was held effective against the defendants appellants even though it was made after they had derived their title from the persons making the acknowledgment. This decision is supported by a decision of Sir FRANCIS MACLEAN, C. J. and MITRA, J. of the Calcutta High Court in *Krishna Chandra Saha v. Bhairab Chandra Saha* (2), which was referred to and followed. In two later cases of the Calcutta High Court though they are cases arising under section 20 of the Limitation Act, namely, in *Domi Lal Sahu v. Roshan Dobay* (3), and *Hem Chandra Chaudhri v. Purna Chandra Chaudhri* (4), the view taken in *Krishna Chandra Saha v. Bhairab Chandra Saha* (2); was approved and followed. The same view has been adopted by a Bench of the Allahabad High Court in *Roshan Lal v. Kanhaiya Lal* (5).

(1) (1929) 6 O.W.N., 1068.

(2) (1905) I.L.R., 32 Calc., 1077.

(3) (1906) I.L.R., 33 Calc., 1278.

(4) (1914) 22 I.C., 510.

(5) (1918) I.L.R., 41 All., 111.

Therefore the view taken in *Nigah Ali Khan v. Aqiullah Khan* (1), is supported, by authority and is also in consonance with the precise language of section 19 of the Limitation Act. If the operation of this section, in the case of acknowledgments made by some persons through whom a party derives title or liability, is to be confined to acknowledgments made before such title or liability was derived, it would be necessary to introduce words in the section which are not there. Our function is only to interpret the language of the section as it stands. We think therefore that unless the Legislature intervenes, we must follow the interpretation put upon the section in *Nigah Ali Khan v. Aqiullah Khan* (1). Under the circumstances we can see no sufficient grounds to refer the matter to a full Bench as requested by the respondents, for reconsideration of the decision in (1). We accordingly hold that the acknowledgment contained in the mortgage deed, exhibit 1, is valid and extends the limitation in respect of the plaintiffs' claim to enforce priority under the deed of the 10th of August, 1909.

As regards the second point, the matter is concluded by the decision of their Lordships of the Judicial Committee in *Mahireddi Ayyareddi v. Gopala Krishnayya* (2). Assuming that the plaintiffs' position as sub-mortgagees is identical with the position of the mortgagee Khushal Sah, there is no reason why they should not be assumed to have intended to act in the way most beneficial to themselves and to have kept the mortgage alive, to be used as a shield against an intermediate incumbrancer like the defendant respondent. In the words of their Lordships of the Judicial Committee payments made to the prior mortgagee are to be regarded as purchases *pro tanto* of the prior mortgage and there is nothing in law or good sense to eliminate the plaintiffs' from the list of possible purchasers.

1931

 RAM
SAHAI
P.
KUNWAR
SAH.

*Raza and
Ericastava,
JJ.*

(1) (1929) 6 O.W.N., 1068.

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1931

RAM
SAHAI
v.
KUNWAR
SAH.

For the above reasons we allow the appeal with costs, set aside the decision of the lower appellate court and restore that of the first court. The plaintiffs-appellants will recover their costs in all the courts as part of the decretal amount of the mortgage.

Appeal allowed.

APPELLATE CIVIL.

*Before Syed Wazir Hasan, Chief Judge and Mr. Justice
B. S. Kisch.*

1931
March, 3.

TRILOKI NATH AND ANOTHER (DEFENDANTS-APPELLANTS)
v. RAM MANORATH AND OTHERS (PLAINTIFFS-RESPONDENTS).*

Registration Act (XVI of 1908), section 17, sub-section (2), clause (vi)—Mutation case—Petition of compromise filed in mutation court and court's order in terms of it incorporating its terms in the order—Proceedings and order of mutation court, if sufficient proof of settlement and whether exempt from registration—Officer seized of mutation proceedings, if to be regarded a "court"—Registration of mutation proceedings and order, if compulsory.

Where a petition of compromise relating to the entire subject-matter of the dispute pending in the mutation court is presented to the court and in proceedings separately recorded it is verified by the parties and finally, the court accepts it and orders mutation of names in accordance with its terms and the terms are incorporated in the order by means of a reference to the contents of the petition of compromise, *held*, that the proceedings and the order of the court are sufficient proof of the terms of the settlement and they clearly do not require registration for their admissibility in evidence, for an order of a court is exempted from registration under clause (vi) of sub-section (2) of section 17 of the Indian Registration Act, 1908. *Bindesri Naik v. Gangasaran Sahu* (1). *Pranal Annee v. Lakshmi Annee* (2), and *Rani Hemanta Kumari v. Midnapur Zamindari Co.* (3), relied on.

*Second Civil Appeal No. 240 of 1930, against the decree of M. Mahmud Hasan Khan, Subordinate Judge of Gonda, dated the 2nd of June, 1930, reversing the decree of Pandit Girja Shankar, Munsif, Tarabganj, Gonda, dated the 21st of August, 1929.

(1) (1897) L.R., 25 I.A., 9.

(2) (1899) L.R., 26 I.A., 101.

(3) (1919) L.R., 46 I.A., 240.