

mutation of names was also effected in his favour, and he was shown as owner of 333 bighas 8 biswas and 9 biswansis with a revenue of Rs.513-9-0 and this was subsequently shown as nine annas out of the sixteen annas of the combined mahal Ibn-e-Hasan Kashif Husain, and Mir Kashif Husain was shown as owner of the remaining seven annas out of the sixteen annas of the combined mahal Ibn-e-Hasan Kashif Husain.

We have now discussed all the arguments advanced before us by the learned Counsel for the plaintiff-appellant. Far from finding any considerable force in the arguments advanced by him, we are of opinion that his contentions are purely technical and have no substance in them for the simple reason that the property sold under the sale certificate was identical with the property, which formed the subject-matter of the mortgage and the decree for sale passed on the basis of it, and was moreover clearly identifiable and had not lost its identity by reason of the union of the two mahals into one.

Our answer to the question referred to us is that the sale of the land included in the original mahal Ibn-e-Hasan is not rendered invalid by reason of the order of the Settlement Court amalgamating the said mahal with mahal Kashif Husain.

APPELLATE CIVIL

*Before Mr. Justice Bisheshwar Nath Srivastava, and
Mr. Justice E. M. Nanavutty*

RAM ADHAR AND OTHERS (PLAINTIFFS-APPELLANTS) *v.* SHANKER BAKHSH SINGH AND OTHERS (DEFENDANTS-RESPONDENTS)*

Limitation Act (IX of 1908), section 28 and Articles 132 and 148—Mortgage—Redemption—Suit for redemption by puisne

*Second Civil Appeal No. 86 of 1932, against the decree of Pandit Krishna Nand Pandey, Additional Subordinate Judge of Unao, dated the 9th of January, 1932, confirming the decree of Pandit Brij Nath Zutshi, Munsif, of Safipur at Unao, dated the 17th of February, 1930.

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mortgagee against prior mortgagee—Article 148 and not Article 132, Limitation Act, governs the suit—Mortgagee's suit for recovery of his mortgage money—Section 28, Limitation Act, applicability of, to such a suit—Transfer of Property Act (IV of 1882), section 92(a)—Who may sue for redemption under section 91(a)—Person entitled to sue for redemption under section 91(a) must have subsisting interest in or charge upon property.

A suit by the representative of the puisne mortgagee to redeem the mortgaged property from the hands of the representatives of a prior mortgagee is governed by Article 148 and not Article 132 of the Limitation Act whatever the ulterior purpose of the plaintiff might be. *Nidhiram Bandopadhyaya v. Sarbessur Biswas* (1), dissented from. *Sayamali Molla v. Anisuddin Molla* (2), *Sunder Das v. Beli Ram* (3), *Ramjhari Koer v. Kashi Nath Sahai* (4), and *Priya Lal v. Bohra Champa Ram* (5), relied on.

The application of section 28 of the Limitation Act is confined to suits for possession. It does not apply to a suit by a mortgagee for the recovery of the money due to him either by sale or foreclosure of the mortgaged property. Even if the mortgagees remedy for recovery of the mortgage money has become barred by reason of his omission to bring a suit for sale or foreclosure within the statutory period, his right as a mortgagee cannot be extinguished under section 28 of the Indian Limitation Act. *Jokhu Bhunja v. Silla Baksh Singh* (6), relied on.

The words "interest in or charge upon" in section 91(a) of the Transfer of Property Act mean a subsisting interest or charge. Where, therefore, a puisne mortgagee becomes unsuccessful in his suit for mortgagee possession and fails to enforce his mortgage by foreclosure within the period prescribed by law, he has no subsisting interest in or charge upon the property and although his right as a mortgagee cannot be said to have become extinguished under the terms of section 28 of the Indian Limitation Act, yet he cannot be regarded as a person entitled to sue for redemption of the prior mortgage within the terms of section 91 of the Transfer of Property Act.

Mr. *Ali Zaheer*, for the appellants.

Mr. *Raj Kumar Srivastava*, for the respondents

SRIVASTAVA and NANAVUTTY, JJ.:—This is a second appeal arising out of a suit for redemption of a prior

(1) (1909) 14 C.W.N., 499.

(3) (1933) I.L.R., 14 Lah., 596.

(5) (1922) I.L.R., 45 All., 268.

(2) (1929) LL.R., 57 Cal., 704.

(4) (1926) I.L.R., 5 Pat., 513.

(6) (1929) 28 A.L.J., 750.

mortgage brought by a puisne mortgagee. On the 17th of July, 1868, four persons executed a mortgage-deed with possession in favour of Jawahir Singh and two others, the predecessors-in-interest of defendants 1 to 12. The term fixed in the mortgage was two years. On the 19th June, 1879 another mortgage in respect of the same property was executed in favour of Puran, the predecessor-in-title of the plaintiffs. Under this mortgage Puran was authorized to take possession of the mortgaged property. So he brought a suit for recovery of possession of the mortgaged property against the representatives of the prior mortgagees and his mortgagors alleging that the prior mortgage was fictitious and without consideration. Puran was unsuccessful, and his suit was dismissed in 1882.

The plaintiffs as the legal representatives of Puran instituted the suit which has given rise to the present appeal to redeem the prior mortgage of 1868. The suit was resisted on several grounds. The learned Munsif of Safipur dismissed it on the ground that the mortgagee rights of Puran had been extinguished under section 28 of the Indian Limitation Act and that the suit for redemption was barred by article 132 of that Act. The decision of the trial Court has been affirmed on appeal by the learned Additional Subordinate Judge. The plaintiffs having lost in both the lower courts have come here in second appeal.

Article 132 of the Indian Limitation Act relates to suits "to enforce payment of money charged upon immoveable property" and prescribes twelve years from the date when the money sued for becomes due as the period of limitation for such suits. The present suit, as stated above, is one by the representatives of the puisne mortgagee to redeem the mortgaged property from the hands of the representatives of the prior mortgagee. Such a suit according to the plain wording of the statute clearly falls within the terms of article 148 which provides for a suit "against a mortgagee to redeem

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or to recover possession of immovable property mortgaged". Whatever the ulterior purpose of the plaintiffs might be, it is hardly possible to treat the suit as one to enforce payment of money charged upon immovable property. We have therefore no hesitation in holding that the proper article governing the case is article 148, and not article 132.

Reliance has been placed by the Courts below on the decision of the Calcutta High Court in *Nidhiram Bandyopadhyaya v. Sarbessur Biswas and another* (1). In this case a prior mortgagee sued on his mortgage without making the second mortgagee a party, and in execution of the decree obtained by him, purchased the property himself. Subsequently, the second mortgagee also sued on his mortgage without making the prior mortgagee a party and purchased the property in execution of his decree. It was held that the omission of the prior mortgagee to implead the second mortgagee in his suit did not deprive the latter of his right to redeem the prior mortgage but that he could do so only within the period of twelve years from the due date of his own mortgage as provided in article 132 of the Limitation Act. With very great respect to the learned Judges who decided the case we are unable to accept the soundness of the view about the application of article 132 to the case. We should also point out that this case was considered and explained by a Full Bench of the same Court in *Sayamali Molla v. Anisuddin Molla* (2). The Full Bench held that whenever a suit for redemption is brought by a person entitled to redeem against a mortgagee, article 148 of the Limitation Act, and no other article applies to it. The Lahore High Court in *Sunder Das v. Beli Ram and others* (3) and the Patna High Court in *Musammat Ramjhari Koer v. Lala Kashi Nath Sahai* (4) have also differed from the view taken

(1) (1909) 14 C.W.N., 439.

(3) (1933) I.L.R., 14 Lah., 595.

(2) (1929) I. L.R., 57 Cal., 704.

(4) (1926) I.L.R., 5 Pat., 513.

in *Nidhiram Bandopadhyaya v. Sarbessur Biswas* (1). The view adopted by us about the application of article 148 to suits for redemption like the present against the prior mortgagee is further supported by the decision of the Allahabad High Court in *Priya Lal v. Bohra Champa Ram and another* (2). We are therefore of opinion that the present suit was not barred by limitation.

Next as regards the application of section 28 of the Indian Limitation Act. It runs as follows:

“At the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished.”

It is urged on behalf of the respondents that the suit for mortgage possession brought by Puran was dismissed as far back as 1882, and Puran and his successors took no steps to enforce their mortgage by means of a decree for foreclosure, which was the remedy allowed to them under the mortgage of 1879 within the period of twelve years prescribed by law. It has been argued that all the remedies available to Puran under his mortgage having been lost by efflux of time, his rights as a mortgagee must be deemed to be extinguished under section 28 of the Indian Limitation Act. We regret we find ourselves unable to apply section 28 to the case. The application of the section according to the plain wording of it is confined to suits for possession. It is difficult to apply it to a suit by a mortgagee for the recovery of the money due to him either by sale or foreclosure of the mortgaged property. Even if the mortgagee's remedy for recovery of the mortgage money has become barred by reason of his omission to bring a suit for sale or foreclosure within the statutory period, his right as a mortgagee cannot be extinguished under section 28 of the Indian Limitation Act. We are supported in the view which we are disposed to take as regards

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the scope of section 28 by the decision of a Bench of the Allahabad High Court in *Jokhu Bhunja v. Sitla Baksh Singh and another* (1).

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We are, however, of opinion that the decisions of the Courts below should be upheld on a different ground. Section 91 of the Transfer of Property Act specifies persons, who, besides the mortgagor, are entitled to redeem a mortgage. The case of a puisne mortgagee falls within clause (a), which is as follows:

“(a) Any person (other than the mortgagee of the interest sought to be redeemed) having any interest in or charge upon the property”;

The words “interest in or charge upon” must obviously mean a subsisting interest or charge. The puisne mortgagee in the present case, having been unsuccessful in his suit for mortgage possession and having failed to enforce his mortgage by foreclosure within the period prescribed by law, had no subsisting interest in or charge upon the property. We think therefore that, although his right as a mortgagee cannot be said to have become extinguished under the terms of section 28 of the Indian Limitation Act, yet he cannot be regarded as a person entitled to sue for redemption of the prior mortgage within the terms of section 91. In Fisher’s Law of Mortgage, sixth edition, page 741, para. 1448 the learned author observes as follows:

“The right of the puisne mortgagee to redeem is not, however, like that of the mortgagor or his representatives, an absolute right, but is only ancillary to his right to work out his remedy against the mortgaged estate by foreclosure; which remedy being out of the power of the puisne mortgagee in the first instance, by reason that the prior incumbrance stands in his way, he is allowed to remove it by redemption”.

It is true that these observations relate to the English law as regards the rights of a puisne mortgagee, yet we

think that they are not uninstrucive for us in applying the law as embodied in the Indian Statute. Whereas a mortgagor has an absolute right to redeem the mortgage this right has been conceded to other persons, like a puisne mortgagee, for the protection of the rights possessed by them. If the puisne mortgagee has lost all remedies available to him in respect of his own mortgage, he is left with nothing which might need protection. We must therefore hold that the plaintiffs' right to enforce their mortgage having long since become barred by time they had no subsisting interest in or charge upon the mortgaged property within the meaning of section 91 of the Transfer of Property Act at the time of the institution of the present suit. The suit has therefore been rightly dismissed.

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

Appeal dismissed.

REVISIONAL CRIMINAL.

*Before Mr. Justice E. M. Nanavutty and Mr. Justice
G. H. Thomas*

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KING-EMPEROR (COMPLAINANT) v. SADANAND (ACCUSED)*
Criminal Procedure Code (Act V of 1898), sections 337(2), 339 and 532—Pardon—Commitment of person to whom pardon has been tendered—Certificate of Public Prosecutor necessary before trial commences in Court of Session—Certificate not necessary in Magistrate's Court before commitment—Accomplice retracting confession after accepting pardon—Withdrawal of pardon before trial begins in Court of Session—Examination of the accomplice, if still necessary.

The certificate of the public prosecutor, which is required as a pre-requisite for the trial of a person to whom a pardon has been tendered, has to be filed before the trial of the accused commences, and the trial of the accused for an offence under section 396 of the Indian Penal Code really begins in the Court of Session. The preliminary enquiry before the Committing

*Criminal Reference No. 44 of 1934, made by S. M. Ahmad Karim, Additional Sessions Judge of Bahraich.

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