

raised by Ram Narain in his fifth point before the Collector, who declined to entertain it. Probably he was right and could not adjudicate upon it. The question which he had to determine was whether, assuming the claim to be legally founded, the liability under it existed. That being so, the period during which plaintiff was *bonâ fide* seeking to have redress in Courts which had no jurisdiction to deal with the question now before us must be struck out, and if that period is struck out, the suit is not barred by any period of limitation.

For these reasons we hold that the appeal must be dismissed with costs.

*Appeal dismissed.*

A. F. M. A. R.

*Before Mr. Justice Pigot and Mr. Justice Banerjee.*

NILCOMAL PRAMANICK AND OTHERS (PLAINTIFFS) *v.* KAMINI  
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*Limitation Act (XV of 1877), Schedule II, Arts. 132, 135, 147—Limitation Act (IX of 1871), Art. 132—Suit on a mortgage bond—Conditional sale—Foreclosure—Bengal Regulation XVII of 1806, ss. 7, 8—Transfer of Property Act (Act IV of 1882), s. 67, cl. (a).*

In a suit for possession of land on the allegation that it was mortgaged by the defendant's father in July 1849 to the plaintiffs' predecessors, by way of conditional sale, by a deed which fixed no time for payment, and made no provision as to the mortgagee taking possession; that the mortgagor made various payments down to 1875, and that subsequently foreclosure proceedings were instituted under Regulation XVII of 1806, and the mortgage foreclosed in 1877, the lower Appellate Court found that the deed was duly executed, but that the foreclosure proceedings were irregular and invalid. *Held*, that inasmuch as the deed fixed no time of payment, and the suit was brought more than twelve years after the date of the mortgage deed, and also more than twelve years after the date of the alleged last payment to the mortgagee, which was in 1875, the suit was barred by Art. 132, Schedule II of the Limitation Act. Having regard to the provisions of section 67, cl. (a) of the Transfer of Property Act, the mortgage

\* Appeal from Appellate Decree No. 657 of 1890, against the decree of Baboo Ananda Kumar Surbadhicary, Subordinate Judge of Dacca, dated the 14th March 1890, reversing the decree of Baboo Krishna Chunder Dass, Munsiff of Munshigunge, dated the 5th of January 1889.

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being by conditional sale, the mortgagee was not entitled to the remedy by sale, and therefore Art. 147 did not apply to the case.

*Girwar Singh v. Thakur Narain Singh* (1) referred to.

Held also, that inasmuch as the mortgagee did not become entitled to possession after foreclosure proceedings under Regulation XVII of 1806, the proceedings having been found to have been invalid, and as the mortgage deed did not contain any provision as to the mortgagee taking possession, Art. 135 was not applicable.

THE plaintiffs in this case sued, on the 15th May 1888, to obtain possession of certain plots of land, on the allegation that their ancestor Gouri Keshore Pramanick, on the 20th Assar 1256, corresponding with the 2nd July 1849, lent and advanced the sum of Rs. 100 to one Tara Nath Bose, the father of the defendant; that Tara Nath Bose executed a deed of conditional sale in the nature of an out-and-out sale in respect of the land in question; that subsequently Tara Nath Bose made various payments, amounting to the sum of Rs. 33 annas 8, on account of interest down to the year 1282, corresponding with 1875; that on the death of Gouri Kishore Paramanick, his sons, the plaintiff No. 1, and Kali Churn Pramanick, father of the plaintiff No. 2, on the 3rd of Joist 1283, corresponding with the 15th May 1876, instituted foreclosure proceedings under Regulation XVII of 1806 against Tara Nath Bose; that the mortgage was foreclosed on the 3rd Joist 1284, corresponding with the 13th May 1877; and that the mortgage debt still remained due. The mortgage deed did not fix any time of payment, nor did it contain any provision as to the mortgagee taking possession of the land in question.

The defendant alleged that his father Tara Nath Bose never mortgaged or sold the land in question to the plaintiffs' predecessor; that there was no due service of notice of the foreclosure proceedings; and that the suit was barred by the law of limitation.

The Munsiff found that the document relied on by the plaintiffs was executed by Tara Nath Bose; that the plaintiffs had satisfactorily proved that the transaction was intended to operate as a mortgage, and that the service of notice of the foreclosure proceedings was duly made in May 1876. He accordingly made a

decree for possession of the land in question, in default of the defendant to pay off the principal and interest at 12 per cent. per annum within six months from the date of the decree.

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On appeal the Subordinate Judge held that the deed in question was intended to operate as a mortgage, but on the question of the service of notice of the foreclosure proceedings upon Tara Nath Bose, he held that the service was not properly made as provided by Regulation XVII of 1806. The appeal was therefore allowed and the plaintiffs suit dismissed.

The plaintiffs appealed to the High Court.

Baboo *Lat Mohan Das* appeared for the appellants.

Baboo *Tara Kishore Chowdhury* appeared for the respondent.

The judgment of the Court (PIGOT and BANERJEE, JJ.) was as follows:—

This was a suit brought by the plaintiffs for possession of some land on the allegation that the same was mortgaged by the defendant's father on the 20th Assar 1256 (corresponding with some time in July 1849) to the predecessor of the plaintiffs by way of conditional sale by a deed which was drawn up as a deed of out-and-out sale, that the mortgagor made payments on various dates down to 1282 or 1875, that foreclosure proceedings were thereafter instituted and the mortgage foreclosed in Joist 1284 or May 1877, and that the plaintiffs were consequently entitled to possession. The defendant pleaded limitation, denied the mortgage, and the regularity of the foreclosure proceedings, and raised other objections not necessary to be considered now.

The first Court found for the plaintiffs and gave them a decree for possession in default of the defendant to pay off the mortgage debt with interest within six months from the date of the decree.

On appeal by the defendant the lower Appellate Court has reversed that decree and dismissed the suit on the ground that the foreclosure proceedings under Regulation XVII of 1806 were irregular and invalid.

In second appeal it is contended for the plaintiffs that the lower Appellate Court was wrong in dismissing the suit altogether, and that if the foreclosure proceedings under Regulation XVII of

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1806 were bad, the plaintiffs were still entitled to a decree for foreclosure under the provisions of the Transfer of Property Act.

It is unnecessary to consider that question, as the objection urged on behalf of the respondent, that the suit is barred by limitation, seems to be a fatal one.

It has been held by a Full Bench of this Court, in the case of *Girwar Singh v. Thakur Narain Singh* (1), that article 147 of the second schedule of the Limitation Act (XV of 1877) applies only to those cases in which the mortgagee is entitled to the alternative remedies of foreclosure and sale. Now the mortgage in this case being by conditional sale, the mortgagee is not entitled to the remedy by sale [*see* Transfer of Property Act, section 67, clause (a)]. That being so, article 147 of the Limitation Act does not apply to this case. The only other provisions of the Limitation Act that can possibly be referred to as applying to a case like this are articles 132 and 135. Now article 135 cannot apply to this case, as the mortgagee did not become entitled to possession after foreclosure proceedings under Regulation XVII of 1806, it being found by the lower Appellate Court that the proceedings did not properly take place, and as the mortgage deed contains no provisions as to the mortgagee taking possession, the only provision applicable to this case is, we think, article 132. A comparison of the language of article 132 of the present Act, which speaks of suits to *enforce payment* of money, &c., with that of the corresponding article of the Limitation Act of 1871, and the fact that the first decree in a foreclosure suit under the Transfer of Property Act is one that in the first place directs the mortgagor to pay off the mortgage money, go to support this view, and if article 132 applies, the suit is clearly barred, as the deed fixes no time of payment and the suit was brought more than twelve years after the date of the mortgage deed, and also more than twelve years after the date of the alleged last payment to the mortgagee, which was in 1875.

We must therefore hold that the suit has been rightly dismissed, and this appeal must be dismissed with costs.

A. F. M. A. R.

*Appeal dismissed.*