

also grant the plaintiff a decree for interest from the date of the suit to the date of realization on the total amount of the two figures just now mentioned at the rate of 1 per cent. per mensem. As neither party has placed the true facts of the case in the pleadings we think that the proper order as to costs would be that they shall bear their own costs all through.

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Appeal allowed.

FULL BENCH.

Before Sir Louis Stuart, Knight, Chief Judge, Mr. Justice Wazir Hasan and Mr. Justice Gokaran Nath Misra.

MUSAMMAT RAM KUER (DEFENDANT-APPELLANT) v.
MUSAMMAT PATRAJ KUER (PLAINTIFF-RESPONDENT.)*

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March, 1,

Limitation Act (IX of 1908), Article 132—Simple mortgage for a fixed period—Mortgagees' option to recover even before the expiry of the term fixed—Construction of documents—Claim for money before the expiry of the fixed period, whether could be enforced against the property—Suit to enforce the mortgage charge, limitation applicable to.

The general purport of a transaction evidenced by a deed was one of a simple mortgage as a security for the repayment of the mortgage money, principal and interest both, and the mortgage was to last for nine years certain so that neither the mortgagor had the right to redeem within the said period nor the mortgagee had any right to recall the mortgage money within that period but there was a clause in the deed giving a right to the mortgagee within the said period to recover his money both principal and interest from the mortgagor either by mutual settlement or through court.

*First Civil Appeal No. 83 of 1927 against the decree of Bhudhar Chandra Ghose. Subordinate Judge of Bahraich, dated the 15th of February, 1927, decreeing the plaintiff's suit.

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Held, that on a proper construction of the deed the intention of the parties appeared to be that if the mortgagee was to claim his money by sale of the property mortgaged he could only do so after the expiry of the stipulated period. If he, however, wanted to claim his money before the expiry of the said period he could do so, but in that case he would not be able to enforce his claim against the property. A suit to enforce the charge must be considered to be amply within limitation under Article 132 of the Limitation Act if it is brought within twelve years from the date of the expiry of the stipulated period when under the terms of the deed, the money charged was to fall due. *Sib Dayal v. Meharban* (1), and *Musammat Gaura v. Ram Charan* (2), relied upon.

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

Messrs. *Niamat Ullah* and *Naim Ullah*, for the respondent.

STUART, C.J. :—This is a reference made under section 14 of Act IV of 1925 (The Oudh Courts Act) by a Bench of Judges of the Chief Court to a Full Bench for decision on a specific question, the question being as to whether a certain suit was or was not barred by limitation. The circumstances are as follows. Thakur Sukhraj Singh executed on the 19th of June, 1911, a registered deed which, in certain aspects, is undoubtedly a deed of simple mortgage, in favour of Thakur Bisheshar Bakhsh Singh. The suit based upon this deed was not filed until the 19th of May, 1926. It has been decreed in favour of the mortgagee and it is against this decision that the appeal was filed in which the main argument taken (in fact the only argument taken) was that the suit was barred by limitation. I wish first to examine closely the terms of this deed. I understand that in the plaint, relief was sought also in respect of a deed of further charge. But I need not discuss the terms of the latter deed as, if it be decided affirmatively that the suit is not barred by limitation in respect of the relief claimed

(1) (1923) I. L. R., 45, All., 27. (2) (1927) 4 O. W. N., 207.

on the deed of 19th of June, 1911, no question will arise as to the deed of further charge. Under the deed of the 19th of June, 1911, Thakur Sukhraj Singh received Rs. 12,000 in cash on which he agreed to pay 10½ per cent. simple interest per annum. The deed commences by saying that he has charged certain immoveable property for the repayment of the amount due from him. It continues with an undertaking of Sukhraj Singh to pay the interest regularly every six months, with the condition that, if he does not do so, the interest shall accumulate as compound interest and that interest shall be added to interest. The deed continues that this payment of interest is to take place until June, 1920, and that then and only then shall it be open to Thakur Sukhraj Singh to satisfy his full liability by payment of the principal. It is distinctly laid down that it is not until June, 1920, that Thakur Sukhraj Singh is to be given an opportunity of redeeming the mortgage. To this limitation of the ordinary power of redemption is added a condition in favour of the mortgagor, to the effect that the mortgagee is not to bring the property to sale on account of a default until June, 1920. So far the terms of the deed present no difficulty. It is clear that the mortgagor is ordinarily not permitted to exercise his power of redemption until June, 1920, and that the mortgagee is not entitled to proceed against the property until June, 1920. But then comes a peculiar condition in the fourth paragraph which is to the effect that, although the mortgagor is not in any circumstances entitled to pay up the principal and redeem the mortgage before June, 1920, the mortgagee may recover, at his wish, either by mutual settlement or through a suit in court, the entire principal with interest, compound interest and interest on interest in accordance with the condition of this deed even before June, 1920. To this is superadded in the fifth paragraph a reiteration of the previous statement that it is

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not until after June, 1920, that the mortgagagee is to be entitled to sell up the property. In order to decide whether the suit was or was not within limitation it appears to me only necessary to consider under the provisions of Article 132 of the First Schedule of Act IX of 1908, when the money sued for in the present suit became due. I do not wish here to go at length into the general question. I note generally that I am in accord with the views taken by a Full Bench of the Allahabad High Court in *Sib Dayal v. Meharban* (1). What I am mainly concerned with here is the construction to be placed upon the terms of the deed. The construction which I place upon the terms is this. Sukhraj Singh agreed to pay Rs. 630 as interest every six months. Bisheshar Bakhsh Singh had no right to bring the property to sale until June, 1920; but he was not debarred from making a private arrangement with Sukhraj Singh whereby Sukhraj Singh should repay him the principal and interest within that period. Sukhraj Singh could not compel Bisheshar Bakhsh to make such an arrangement, but Bisheshar Bakhsh could compel Sukhraj Singh to make arrangement by instituting a suit against him to recover the principal and interest before June, 1920. Only if he took this course he had to refrain from enforcing the charge created by the mortgage upon the property and to proceed for the recovery of a money relief alone. According to my view a suit to enforce payment of money charged upon immoveable property in this suit could not thus have been instituted until June, 1920, for the money the payment of which was charged upon immoveable property did not become due till June, 1920; and in these circumstances the suit is within time. I answer the reference accordingly.

HASAN, J. :—My answer to the question referred for decision to the Full Bench is the same as that which

has just been given by the Hon'ble the CHIEF JUDGE. On the general question of law presented before us at the hearing of the appeal in arguments by the learned Counsel for both sides I adhere to the view taken in *Musammatt Gaura v. Ram Charan* (1)—a decision to which I was a party. In the present case the right answer to the question under consideration depends on the proper interpretation of paragraph 4 of the deed of mortgage, dated the 19th of June, 1911. The general purport of the transaction evidenced by this deed is one of a simple mortgage as a security for the repayment of the mortgage money, principal and interest both, from the inception of the transaction till the realization of the mortgage money. The charge on the immoveable property, according to my judgment, subsists all along. The mortgage is to last for nine years certain. In other words the mortgagor has no right to redeem within the said period, and the corresponding liability of the mortgagee is that he has no right to recall the mortgage money, within the said period. This is the general intention conveyed by the words employed in paragraphs 3, 4 and 5 of the deed of mortgage now being interpreted. The intention, which I have just now stated, is not to be gathered by any implication. To my mind these paragraphs expressly say so. Now within this ambit of the rights and liabilities of the mortgagor and the mortgagee *inter se*, we have a provision in paragraph 4 of the deed of mortgage. It will be desirable to reproduce the whole of this paragraph:—

“Paragraph 4.—That within the stipulated period, i.e., 1327 *fasli* I, the executant, cannot be entitled to pay the principal money, under any circumstances. Of course, Thakur Saheb, the said mortgagee is entitled to recover if he likes either by mu-

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tual settlement or through court, the entire money, principal with interest, compound interest and interest on interest, etc., in accordance with the conditions of his deed even within the stipulated period; if he chooses to recover only the interest, etc., he can also do so within the stipulated period."

This paragraph debars the mortgagor from repayment of the principal money within the stipulated period. Why reference is made to the principal money alone is clear from the fact that in the preceding paragraph provision was made that the interest shall have been paid six monthly as it fell due by the mortgagor to the mortgagee, and paragraph 4 contemplates that the liability had been satisfied from time to time as it arose. Paragraph 4, therefore, begins by excluding the mortgagor's right to redeem within the period of nine years; and yet it proceeds to give a right to the mortgagee within the said period to recover his money both principal and interest from the mortgagor. Parenthetically it may be mentioned that in my opinion the personal liability of the mortgagor expressed by the words employed in paragraph 4 carry with it contractual liability of a charge on immovable property as is expressed in the preamble of the deed of mortgage, and further it would follow as a matter of law, but that is not the matter with which I am concerned at present. Now this right of the mortgagee to recover his money within the period of nine years is clearly made dependent upon arising of a contingency expressly stated in the paragraph itself, and that contingency is: "either by mutual settlement or through Court." The contingency contemplated by the words just now quoted is alternative in its character. The first alternative is that the repayment of the loan shall be made by

the mortgagor by means of mutual settlement. Obviously no mutual settlement can be reached unless the parties to it have expressed to each other the intention of reaching at such a settlement. The second alternative is by an action in court. This alternative may be interpreted to mean either an action in which the court will grant a decree for the recovery of the mortgage money, only in the event of a precedent failure of a mutual settlement, or it may mean that the mortgagee may express his intention to recover the mortgage money by means of an action in court. If the last interpretation is correct, and I am inclined to think that it is, if I may say so, then the suit out of which this appeal has arisen is the first expression of the mortgagee's intention to claim his money; as it is agreed that there has been none before. In this view of the case there can be no question of limitation whatsoever.

MISRA, J. :—I would also answer the reference in the way as answered by the Hon'ble the CHIEF JUDGE. I agree with him in his interpretation of the deed. In my opinion, reading paragraphs 3, 4 and 5 of the deed, the intention of the parties to this deed of mortgage appears to be that if the mortgagee was to claim his money by sale of the property mortgaged he could only do so after the expiry of the stipulated period. If he, however, wanted to claim his money before the expiry of the said period he could do so, but in that case he would not be able to enforce his claim against the property. In that view of the case it appears to me that the present suit being a suit for the enforcement of the charge must be considered to be one amply within limitation. Under Article 132 of the Limitation Act the period for a suit to enforce the payment of money charged upon an immoveable property is a period of twelve years reckoned from the date when the money so charged becomes due. Under the terms of the mortgage deed the

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money charged was only to fall due in 1920, that is the end of *Jeth 1327 fasli*. The present suit was brought in 1926 and I am, therefore, of opinion that it was well within limitation.

BY THE COURT :—The reference is answered accordingly.

Appeal dismissed.

APPELLATE CIVIL.

*Before Sir Louis Stuart, Knight, Chief Judge and
Mr. Justice Muhammad Raza.*

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January, 18.

DEPUTY COMMISSIONER, MANAGER, COURT OF
WARDS OF THE KATESAR ESTATE, DISTRICT
SITAPUR (DEFENDANT-APPELLANT) v. MUSAMMAT
MUNNI AND ANOTHER (PLAINTIFFS-RESPONDENTS).*

Grant—Grant from generation to generation of a fixed monthly allowance for household expenses of the grantee, his descendants and dependants—Arrears of monthly allowance, whether a charge on immoveable property—Construction of documents—Lord Canning's Proclamation—Confiscation—Restoration of full proprietary rights, effect of, on subordinate rights—Charge-holder, whether a subordinate proprietor.

Where a grant was made of a certain village and of a fixed monthly allowance to the grantee for his household expenses, including those of his descendants and dependents, and it was said that the grant was to be from generation to generation and that all the village expenses, land revenue and cesses of the village were to be borne by the estate and when the necessity arose the grantee was to continue to take other expenses from the estate, held, that the grant could only be construed as a grant of a monthly maintenance of the amount mentioned therein to be paid out of the

*First Civil Appeal No. 63 of 1927, against the decree of Mahmud Hasan Khan, Subordinate Judge of Sitapur, dated the 16th of March, 1927, decreeing the plaintiff's claim.