

the ground that even though he had jurisdiction he would not have been prepared to exercise his discretion in favour of enlarging the time. It is well possible, as contended by the applicant, that the learned Munsif laboured under the impression that no extension could be granted. The learned counsel for the decree-holder opposite-party has also contended that no question of extension did arise, as no application for enlargement of time was made by Musammat Moona on the 13th of November, 1935, when she appeared in court with the money. Taking all the circumstances of the case into consideration we think that in the interests of justice it would be proper for the matter to be decided afresh by the learned Munsif.

We accordingly set aside the order of the lower court and send the case back to that court for being decided afresh in the light of the remarks made by us above. Costs here and hitherto will abide the result.

Application allowed.

APPELLATE CIVIL

Before Mr. Justice Bisheshwar Nath Srivastava, Chief Judge

GAURI SHANKAR (DEFENDANT-APPELLANT) *v.* LALA AND ANOTHER, PLAINTIFFS AND ANOTHER, DEFENDANTS
(RESPONDENTS)*

1937
September,
20

Mortgage—Redemption—Suit on specific mortgage—Plaintiff's failure to prove that mortgage—Different mortgage proved—Plaintiff cannot get decree on the new mortgage established.

Where the plaintiff brings a suit on the basis of a specific mortgage it is his duty to establish the existence of that mortgage and he cannot on his failure to prove the specific mortgage set up by him be allowed to make out a new case by claiming a decree on the basis of the defendant being admitted or proved to be a mortgagee—whether under some unknown mortgage or

*Second Civil Appeal No. 166 of 1935, against the decree of K. N. Wanchoo, Esq., I.C.S., District Judge of Rae Bareilly, dated the 25th of March, 1935, upholding the decree of Saiyid Abbas Raza, Munsif of Rae Bareilly, dated the 3rd of August, 1934.

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PRASAD
v.
AJODHIA
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C. J. and
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under a different mortgage. *Salik Ram v. Ramanand* (1), *Jaggiwan Singh v. Gajraj Singh* (2), and *Mahadeo Lal v. Prithipal Singh* (3), relied on.

Messrs. *Ram Bharose Lal* and *Murli Manohar*. for the appellant.

Mr. *Radha Krishna Srivastava*, for the respondents.

SRIVASTAVA, C. J.:—This is a second appeal by one of the defendants against an appellate decree of the learned District Judge of Rae Bareilly upholding the decree of the learned Munsif of that place. It arises out of a suit for redemption of a mortgage.

The plaintiffs' case was that they were the legal representatives of one Binda who in 1876 had made a mortgage with possession of the three groves in suit in favour of one Ram Ghulam, the predecessor-in-title of the defendants, for Rs.50. The defendants denied the pedigree set up by the plaintiffs and denied the alleged mortgage. The learned Munsif held the alleged mortgage to be proved and also found that the plaintiffs were the legal representatives of the mortgagor Binda. He accordingly decreed the plaintiffs' claim. On appeal the learned District Judge upheld the trial court's finding about the plaintiffs being the legal representatives of Binda. He further held that the mortgage in dispute did not come into existence in 1876 but came into existence in 1868. As the plaintiffs' claim, treated as one based on a mortgage of 1868 was at the face of it barred by limitation at the date of institution of the suit, the learned District Judge further went into the question of limitation and found that limitation was saved under section 19 of the Evidence Act by reason of an acknowledgment made in 1893. In result he upheld the decree of the Munsif and dismissed the appeal.

(1) (1899) 3 O.C., 173.

(2) (1924) 1 O.W.N., 130.

(3) (1926) A.I.R., Oudh, 546.

The only contention urged on behalf of the appellant is that the plaintiffs having failed to prove the specific mortgage of 1876 on which they had based their claim for redemption the learned District Judge was in error in giving the plaintiffs a decree for redemption in respect of a different mortgage namely one alleged to have been made in 1868. It is also complained that the learned District Judge was wrong in raising up for the first time in appeal the question of acknowledgment for the purpose of saving limitation when no such acknowledgment was set up in the pleadings as required by order VII, rule 6 of the Code of Civil Procedure. I am of opinion that the appeal must succeed. There is a long course of decisions in this Court in which it has been held that in such suits for redemption the plaintiff must establish the specific mortgage set up by him in his plaint and must also show the mortgage in suit to be subsisting. *Salik Ram v. Ramanand and others* (1); *Jagjiwan Singh v. Gajraj Singh and others* (2); and *Mahadeo Lal v. Pirthipal Singh* (3). The learned counsel for the plaintiffs-respondents has contended in reply that all these cases were distinguishable because in none of them the particular mortgage under which the defendants were in possession was proved, all that was proved being that they were in possession as mortgagee. Assuming this to be so, I do not think that the distinction pointed out would make any difference in the application of the principle underlying them. When the plaintiff brings a suit on the basis of a specific mortgage it is his duty to establish the existence of that mortgage and he cannot on his failure to prove the specific mortgage set up by him be allowed to make out a new case by claiming a decree on the basis of the defendant being admitted or proved to be a mortgagee—whether under some unknown mortgage or under a different mortgage. In the circumstances I am

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(1) (1899) 3 O.C., 173.

(2) (1924) 1 O.W.N., 130.

(3) (1926) A.I.R., Oudh, 546.

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of opinion that the learned District Judge was wrong in making out an entirely new case which the defendant had no opportunity of meeting by giving the plaintiffs a decree on the basis of an alleged mortgage of 1868.

Srivastava,
C. J.

A request was also made to me on behalf of the plaintiffs that they may be allowed to amend their plaint so as to convert the suit into a suit for redemption of the mortgage of 1868. It is admitted that if the plaintiffs have to institute a fresh suit it would be as much within limitation as the present suit. In the circumstances I think it would be proper that the plaintiffs institute a fresh suit in respect of the mortgage of 1868 so that all the pleadings with regard to it may be gone into afresh. There would be no advantage in ordering a fresh trial after allowing amendment of the plaint in this very suit.

I accordingly allow the appeal, set aside the decrees of the lower courts and dismiss the plaintiffs' suit with costs throughout.

Appeal allowed.

APPELLATE CIVIL

*Before Mr. Justice Bisheshwar Nath Srivastava, Chief Judge
and Mr. Justice H. G. Smith*

1937

October, 27

BAIJNATH AND OTHERS (PLAINTIFFS-APPELLANTS) v. PANDIT MAHABIR PRASAD AND ANOTHER (DEFENDANTS-RESPONDENTS)*

Oudh Laws Act (XVIII of 1876), Chapter II—Pre-emption—Sale-deed conveying different kinds of properties—Tenancy groves also included in sale-deed which are not pre-emptible—Suit for pre-emption of other properties only—Pre-emption suit for only part of property sold, if maintainable.

Under the Oudh Laws Act it is not possible to enforce pre-emption in respect of only a part of the property sold on payment of only a proportionate share of the price. Where,

*Second Civil Appeal No. 310 of 1935, against the decree of S. Abid Raza, Civil Judge of Partabgarh, dated the 10th of July, 1935, upholding the decree of Munir Uddin Ahmad Kirmani, Munsif of Partabgarh, dated the 28th of February, 1935.