

reliefs sought within the purview of section 92(1) of the Code of Civil Procedure, and that the proper remedy of the applicants in both these present applications lies in a suit propely instituted under that section."

For reasons given above, we are of opinion that the applications of the opposite-parties were not maintainable and that the learned Judge of the court below had no jurisdiction to entertain them. The present application is therefore allowed with costs and the orders of the court below set aside.

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Application allowed.

APPELLATE CIVIL

*Before Mr. Justice G. H. Thomas and Mr. Justice
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B. RAJA MOHAN MANUCHA AND OTHERS (PLAINTIFFS-
APPELLANTS) v. B. MANZOOR AHMAD KHAN AND OTHERS
(DEFENDANTS-RESPONDENTS)*

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Civil Procedure Code (Act V of 1908), schedule III and section 68—Execution of decree—Decree transferred to Collector under section 68, Civil Procedure Code—Decree satisfied by sale of some villages only—Remaining villages exempted from sale by Collector—Judgment-debtor, if can validly transfer exempted villages before confirmation of sale—Limitation Act (IX of 1908), as amended in 1927—Acknowledgment of payment of interest under section 20, requirements of—Contract Act (IX of 1872), section 65—Section 65, Contract Act, if applies to transfers—Relief under section 65 not claimed in suit or memorandum of appeal, if can be allowed in appeal.

So long as a property is under the management of the Collector under section 68 of the Code of Civil Procedure any transfer of it by the judgment-debtor is wholly void. Where a decree is transferred to the Collector for execution under section 68, Civil Procedure Code, and while the property is under his management the decretal amount is satisfied by the sale of only a few of the villages and the remaining villages are exempted from sale by his order, it cannot be said that the Collector's powers under Schedule III of the Code of

*First Civil Appeal no. 119 of 1935 against the decree of Saiyed Yaqoob Ali Rizvi, Additional Civil Judge of Sultanpur, dated the 2nd of August, 1935.

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Civil Procedure came to an end and that the judgment-debtor could after that make a valid transfer of the exempted property. Until the sale by the Collector is confirmed his powers and duties under Schedule III, paragraph 11 of the Code of Civil Procedure do not cease and until then the property is under his management. *Ballabhdas v. Sobha Singh* (1), and *Mahadeo v. Krishnaji* (2), relied on.

Under the proviso added to section 20 of the Indian Limitation Act in 1927, it is necessary that, except in the case of payment of interest made before the 1st of January, 1928, an acknowledgment of the payment appears in the handwriting of or in a writing signed by a person making the payment.

Section 65 of the Contract applies to transfers also.

Where the plaintiffs fail to claim any relief under section 65 of the Contract Act in the court below and do not also raise the point in their memorandum of appeal, they are not entitled to relief under that section. In such case they should seek their remedy under section 65 by a separate suit.

Dr. K. N. Katju and Mr. M. H. Qidwai, for the appellants.

Messrs. Akhlaque Husain, Bhagwati Nath Srivastava and Abrar Husain, for the respondents.

THOMAS and ZIAUL HASAN, JJ.:—This first appeal against a decree of the learned Civil Judge of Sultanpur has been brought by the plaintiffs to a suit for recovery of money on foot of a mortgage.

The mortgage-deed in suit was executed on the 12th of August, 1919, by Iltifat Ahmad Khan, father of the defendants-respondents, in favour of Babu Moti Lal, father of the appellants, for a consideration of Rs.10,000. The mortgaged property consisted of a village called Mahona Poorab and the claim was for recovery of Rs.17,168-10.

The defendants raised various pleas, some of which were found in their favour and others against them. The main defence to the suit, on which the appellants' claim has been dismissed, was based on the fact that at the time of the mortgage the village of Mahona Poorab was under the control of the Collector to whom execution of a decree obtained by the Allahabad Bank, Ltd.,

(1) (1923) 78 I.C., 270.

(2) (1919) 60 I.C., 310.

against the father and brothers of Iltifat Ahmad Khan had been transferred under section 68 of the Code of Civil Procedure.

In order to fully appreciate this defence and the plaintiffs' rejoinder, it is necessary to go briefly into the history of Iltifat Ahmad Khan's family property

Iltifat Ahmad Khan was one of the six sons of Ewaz Ali Khan, late taluqdar of Mahona. On the 8th of July, 1908, Ewaz Ali Khan mortgaged the entire taluqa consisting of twenty-six villages to the Allahabad Bank. In 1909, he executed several deeds of gift in favour of his wife Musammat Saifuran Bibi and his younger sons. Out of the twenty-six villages comprising the taluqa, the villages of Mahona Poorab, Gadarya Dih and Deokali were gifted respectively to Iltifat Ahmad Khan, Musammat Saifuran Bibi and Bashir Ahmad Khan (another son of the taluqdar). In 1915 the Allahabad Bank obtained a decree on the mortgage in its favour and the decree was made absolute on the 17th of June, 1916. Before the decree was made final, however, Ewaz Ali Khan died and Yar Muhammad Khan's name was brought on record as his successor. The Bank put its decree in execution and by his order (exhibit A-17), dated the 3rd of February, 1917, the learned Subordinate Judge of Sultanpur holding that the property sought to be sold was ancestral property of the judgment-debtors, transferred the decree for execution to the Collector.

It may be mentioned that the suit of the Allahabad Bank was originally against Ewaz Ali Khan, his wife and all his sons with the exception of Yar Muhammad Khan who was made a party before the passing of the final decree. On the 4th of January, 1919, Yar Muhammad Khan applied to the Collector (exhibit A-9) for permission to mortgage his twenty villages to pay off the decree of the Allahabad Bank and this permission having been granted (exhibit A-27). Yar Muhammad Khan raised a sum of Rs.1,05,000 by

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mortgaging his taluqa to the grandfather of the present applicants on the 18th of January, 1919 (*vide* exhibit A-3). The amount so raised satisfied only a portion of the Bank's decree and there remained a balance of about Rs.77,000. On the 15th of February, 1919, the Collector ordered the sale of the remaining six villages which had been transferred by gift to his wife and other sons by Ewaz Ali (*vide* exhibit 4). On the 14th of June, 1919, Iltafat Ahmad Khan also applied to the Collector for permission to mortgage his village of Mahona Poorab to pay off his share of the balance remaining due under the decree (*vide* exhibit 17) and a similar application was made by Musammat Saifuran Bibi in respect of her village Gadaryadih. Both these applications were dismissed and the Collector ordered sale of the remaining six villages with this direction that first of all village Gadaryadih be sold and then Mahona Poorab and that if the full demand be not satisfied by sale of these two villages, the other villages were to be sold each by a separate lot. It was also ordered that as soon as by the last bid the full amount of demand is secured the auction will be closed (*vide* exhibit A-20). The sale was fixed for the 21st of July, 1919. On that date the sale officer for some reason or other proceeded with the sale of villages Deokali and Gadaryadih and as both these villages fetched a total price of Rs.1,05,000 which was more than the balance remaining due on the Allahabad Bank's decree, the sale was stopped (*vide* exhibit 5). It was after this that Iltifat Ahmad Khan made the mortgage in question in favour of Babu Moti Lal.

The main question argued before us was whether having regard to the provisions of paragraph 11 of Schedule III of the Code of Civil Procedure, the mortgage of village Mahona Poorab to Babu Moti Lal was valid. It is not disputed by the learned counsel for the appellants that so long as a property is under the management of the Collector under section 68 of the

Code of Civil Procedure any transfer of it by the judgment-debtor is wholly void. It is contended however that the Allahabad Bank's decree having been satisfied by the sale of villages Gadaryadih and Deokali and the remaining four villages having been released by the sale officer on the 21st of July, 1919, the mortgage of Mahona Poorab made by Iltifat Ahmad Khan on the 12th of August, 1919, was quite valid. The learned counsel relies on the order of the sale officer dated the 21st of July, 1919, which says—

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"Baqia char mowaziat nilam se bari kiye gae."

These words have been translated by the official translator as—

"The remaining four villages were discharged from sale."

The more correct translation in our opinion would be—

"The remaining four villages are exempted from sale,"

and we do not think that the order of the sale officer connotes any release of the villages from the Collector's management. Besides, paragraph 11(1) of the third schedule of the Code lays down that—

"So long as the Collector can exercise or perform in respect of the judgment-debtor's immovable property, or any part thereof, any of the powers or duties conferred or imposed on him by paragraphs 1 to 10, the judgment-debtor . . . shall be incompetent to mortgage, charge, lease or alienate such property . . . except with the written permission of the Collector . . ."

Now, can it be said that because the remaining four villages including Mahona Poorab were exempted from sale for the time being, the Collector's powers under paragraphs 1 to 10 came to an end? We think not. The proceedings in execution before the Collector did not cease up to the date of the mortgage in question and there was a possibility of the sale of

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Gadaryadih and Deokali being set aside for some reason or other and the sale of Mahona Poorab ordered. In *Mahadeo v. Krishnaji* (1) it was held that until the sale by the Collector is confirmed his powers and duties under Schedule III, paragraph 11 of the Code of Civil Procedure do not cease and until then the property is under his management. Similarly in *D. B. Seth Ballabhdas v. Sobha Singh* (2) it was held that the proceedings for the execution of decree by a Collector should be regarded for the purposes of transfers of the property in his hands as continuing till their final disposal on appeal and that so long as such proceedings are liable to revision or appeal it is open to the Collector to set aside the sale or to order the property to be sold or take such other action as he is empowered to do by the third schedule of the Code of Civil Procedure. We are in perfect agreement with the view taken in these cases and hold that the village of Mahona Poorab was under the control of the Collector within the meaning of paragraph 11(1) of the third schedule when the mortgage in question was made by Iltifat Ahmad Khan. We therefore uphold the finding of the learned Judge of the court below that the mortgage in question was invalid.

Next it was urged on behalf of the appellants that even if the mortgage was invalid the court below ought to have decreed the plaintiffs' suit on the personal covenant made by Iltifat Ahmad Khan. The court below held that the claim for simple money decree was barred by time. Ordinarily a claim to enforce the personal covenant in the present case would be within time up to the 12th of August, 1928, as the loan was repayable after three years and the bond was a registered bond but the learned counsel for the appellants contends that limitation was extended by payments, made by the defendants, of interest from time to time. No doubt the plaintiffs alleged and the defendants

(1) (1919) 60 I.C., 310.

(2) (1923) 78 I.C., 270.

admitted that the total sum of Rs.8,158-5 was paid by Iitifat Ahmad Khan and the defendants on account of interest due on the mortgage-deed in suit but under the proviso added to section 20 of the Indian Limitation Act in 1927, it is necessary that except in the case of a payment of interest made before the 1st day of January, 1928, an acknowledgment of the payment appears in the handwriting of or in a writing signed by a person making the payment. In this connection the learned counsel for the applicants relies on a letter (exhibit 9) said to have been sent by Maqsud Ahmad Khan, defendant-respondent no. 2, to the plaintiff's father on the 6th of May, 1932. That letter runs as follows:

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"MY DEAR BABU SAHEB—

Compliments. About three weeks back I had received a letter from you in demand of interest, after which I sent my agent Shams-ud-din Khan to your place but he could only see Raja Mohan Saheb and his younger brother as you were too busy to have an interview with him. When he again made a call on you in the morning he was told that you had gone to Allahabad or Lucknow. Having no alternative he came back. This year, Sarkar has remitted nearly 50 per cent. of the rent to others in my *ilaga*; the Congress influence is strong enough to create a lot of obstacles in collections. I request you to kindly grant me extension of time and allowing me to defer payment of interest in this instalment. I shall without fail pay the sum of interest along with the next instalment. In these days I have another calamity to face with because Raja Saheb of Mahona has filed a case against me and so I am short of expenses. You are an old friend of my father and I consider you to be my patron, hope that you shall always prove yourself benevolent to me.

I hope to see you personally on the 12th or 13th May.

“(Sd.) MAQSOOD AHMAD,”

We are unable to accept the learned counsel's contention with regard to this document and are of opinion that it cannot be taken as an acknowledgment either under section 19 or under section 20 of the Indian

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Limitation Act. Apart from the question how far one of the debtors can bind the others by acknowledgment, there is absolutely nothing to show that this letter refers to the debt in suit. Indeed from the facts that this letter was not put to Maqsud Ahmad Khan while he was in the witness-box, that Maqsud Ahmad Khan is not the eldest son of Iltifat Ahmad Khan and that the letter appears to have been written by Maqsud Ahmad Khan in his personal capacity, we are inclined to think that it does *not* refer to the debt in suit. It was said that there is no suggestion that any debt was due to the plaintiffs' father by Maqsud Ahmad Khan alone but it was for the plaintiffs who rely on this document to show that it related to the debt in suit and not for the defendants to show that it did not. We may also note that no reliance appears to have been placed on this letter before the learned Civil Judge.

As, therefore, there is no acknowledgment of the payment of interest after the 1st of January, 1928, in the handwriting of or any writing signed by the defendants and as neither is there any acknowledgment under section 19 of the Indian Limitation Act within six years after the 12th of August, 1928, we agree with the court below that the plaintiffs' claim for a money decree was barred by time.

Lastly the learned counsel for the appellants took his stand on section 65 of the Indian Contract Act and argued that though the mortgage made by Iltifat Ahmad Khan be held to be invalid, the plaintiffs were entitled to recover their money under that provision of law. To this the reply of the learned counsel for the respondents was that section 65 of the Contract Act applied to agreements and contracts and not to transfers of property and that as in the present case there was a transfer in favour of the plaintiffs' father and not only a mere contract or agreement, the plaintiffs could not avail themselves of section 65. With this we do not agree as section 65 of the Contract Act was applied to

transfers not only by this Court but also by their Lordships of the Judicial Committee in several cases—*vide Bhola Nath v. Maharani Kuar* (1), *Raja Mohan Manucha v. Nisar Ahmad Khan* (2) and *Harnath Kunwar v. Indar Bahadur Singh* (3).

Another objection taken on behalf of the respondents to the plaintiffs' claim for a relief under section 65 of the Indian Contract Act was based on the ground that no such relief was asked for by the plaintiffs in their suit. This objection is in our opinion well-founded and in the circumstances of the case we think that the plaintiffs should seek remedy under section 65 of the Indian Contract Act by a separate suit. In *Barkat Ram v. Anant Ram* (4) the Court refused to grant relief under section 65 of the Contract Act on the ground that no such relief was claimed in the suit which was one for dissolution of partnership and rendition of accounts and the Court thought that a relief under section 65 of the Indian Contract Act could not be granted without amending the plaint and directing the trial of the suit *de novo*. The plaintiff in that suit did not claim any such relief in the court below and even the memorandum of appeal did not contain a prayer to that effect. The same is the case here inasmuch as not only did the plaintiffs fail to claim any relief under section 65 of the Contract Act in the court below but did not also raise the point in their memorandum of appeal.

Another point raised on behalf of the respondents was that the claim under section 65 of the Indian Contract Act is barred by limitation. We do not consider it advisable to express any opinion on this point as we have held that the plaintiffs are not entitled to relief under section 65 in this case but should seek their remedy by a separate suit.

In the end the learned counsel for the appellants argued, though in a half-hearted manner, that the

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(1) (1936) I. L. R., 12 Luck., 185.

(2) (1936) I. L. R. 12 Luck., 435.

(3) (1922) I.L.R., 45 All., 179.

(4) (1915) 31 I.C., 632.

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village of Mahona Poorab was not ancestral in the hands of Iltifat Ahmad Khan within the meaning of the rules framed by the Government under section 70 of the Code of Civil Procedure. As to this it is sufficient to say that the plaintiffs having raised no such plea in the trial court they cannot be allowed to raise it at this stage. In paragraphs 15 and 16 of the written statement of defendants 1 to 5 it was clearly pleaded on the 30th of November, 1934, that the property to which the mortgage in suit related was under the control of the Collector under Schedule III of the Code of Civil Procedure and that therefore the mortgage was null and void. On the 8th of December, 1934, the statement of the plaintiffs' pleader was recorded by the Court in respect to the plea raised by the defendants and all that the pleader for the plaintiffs stated with regard to the pleas contained in paragraphs 15 and 16 of the written statement was that—

“The property in dispute in the present suit was not under the control of the said Collector at the time the mortgage deed in suit was executed. It had been released by him before the said deed was executed.”

Nothing was said as to the property not being ancestral. Moreover, the question that the property was ancestral was decided by the court between the plaintiffs' predecessor-in-interest and the present defendants by its order, exhibit A-17, dated the 3rd of February, 1917, and no objection to that order was ever taken by the plaintiffs or their predecessor.

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

Appeal dismissed.