1926.

MUSSAMMAT RAZIA BEGUM v. SHAIKH MUHAMMAD DAUD.

was, therefore, not necessary for the vesting of the interest in the lessee in the present case and I can see no reason why we should apply a doctrine applicable to certain kinds of English leases to those governed in this country, not by the English common law, but by the Transfer of Property Act. In my opinion this appeal fails and should be dismissed with costs.

FOSTER, J.—I agree.

Appeal dismissed.

APPELLATE CIVIL.

Before Ross and Macpherson, JJ.

DINANATH RAI

v.

RAMA RAI.*

1926.

June, 29.

Evidence Act, 1872 (*Act I of* 1872), *section* 66—*notice under, whether necessary where existence of document denied by opposite side—tender of mortgage money, whether a condition precedent to a suit for redemption—Transfer of Property Act*, 1882 (*Act IV of* 1882), *section* 60—*mortgagee whether can acquire title by adverse possession.*

Where the trial court dispensed with a notice under section 66, Evidence Act, and admitted in evidence a certified copy of a mortgage bond, the existence of which was denied by the other side, *held*, that the court rightly dispensed with the notice as on the pleadings it was unnecessary.

Maung Po Ni v. *Ma Shwe Kyi*(1), not followed.

Bhubaneshwari Debi v. *Harisaran Sarma Moitra*(2), and *Krishna Kishori Chaowdhrani* v. *Kishorilal Roy* (3), distinguished.

*Appeal from Appellate Decree no. 12 of 1924, from a decision of Babu Akhauri Nityanand Singh, Subordinate Judge of Saran, dated the 1st of October 1923, modifying a decision of Babu Raghunandan Prasad, Munsif of Chapra, dated the 12th of February 1923.

(1) (1924) 84 Ind. Cas. 373. (2) (1881) I. L. R. 6 Cal. 720, P. C.
(3) (1887) I. L. R. 14 Cal. 486, P. C.

Section 60, Transfer of Property Act, 1882, merely defines the right to redeem and does not lay down that tender of the mortgage money is a condition precedent to the institution of a suit for redemption.

Raghunandan Rai v. *Raghunandan Pandey*(1), followed.

Mahommad Ali v. *Baldeo Pande*(2), dissented from.

A mortgagee cannot acquire a title by adverse possession against his mortgagor.

Appeal by the defendant.

This was a suit for redemption of some land which had been mortgaged by the grandfather of the plaintiff to the grandfather of the defendant in 1891. The defence was that the land was the ancestral kasht land of the defendant and that he was not in possession as zarpeshgidar. He denied that there had been any peshgi money or that he had ever been in possession by virtue of any zarpeshgi deed. The suit was decreed by the Subordinate Judge on appeal.

Sambhu Saran, for the appellant

Hareshwar Prasad Sinha, for the respondent.

Ross, J.—Three points have been taken in second appeal. In the first place it is contended that the trial Court erred in admitting in evidence a certified copy of the mortgage bond, on the ground that no notice had been given to the defendant to produce the original, as required by section 66 of the Evidence Act. I doubt whether this point is open in second appeal as there is no reference to it in the judgment of the lower appellate Court. But in any case there is a proviso to section 66 that no notice shall be required in any case in which the Court thinks fit to dispense with it; and in the present case it must be taken that the Court dispensed with the notice for the sufficient reason that the defendant denied that there was or ever had been a mortgage deed at all. In view of the pleadings it was idle for the plaintiff to give

(1) (1921) I. L. R. 43 All. 638 F. B. (2) (1916) I. L. R. 38 All. 148.

1926.

DINANATH RAI v. RAMA RAI.

ROSS, J.

notice to the defendant to produce a document, the existence of which he denied. The learned Advocate for the appellant referred to the decision in *Maung Po Ni* v. *Ma Shwe Kyi*(1) which to some extent supports his contention. But that decision, so far as the present point is concerned, seems to be based on a decision of the Judicial Commissioner which is not an authority for this Court. Two decisions of the Judicial Committee were also quoted [*Bhubaneshwari Debi* v. *Harisaran Sarma Moitra*(2) and *Krishna Kishori Chowdhrani* v. *Kishorilal Roy* (3)] in which secondary evidence was rejected where the parties failed to account for the non-production of the original. But these decisions are not in point. The only question is, whether this was a proper case for the Court to dispense with notice. In my opinion, in view of the pleadings, notice was altogether unnecessary and was properly dispensed with.

The second contention was that as the mortgage was redeemable at the end of Jeth each year and, according to the plaintiff's case, tender was made in Baisakh, the tender was not valid and therefore, in the absence of valid tender, no suit for redemption would lie. The learned Advocate for the appellant relied on the decision in *Mahommed Ali* v. *Baldeo Pande*(4) which does support that proposition. But that decision has been clearly overruled by the Full Bench of the Allahabad High Court in *Raghunandan Rai* v. *Raghunandan Pande*(5) where that case among others is referred to and it is pointed out that section 60 of the Transfer of Property Act only defines the right to redeem and does not lay down that tender of the mortgage money is a condition precedent to the institution of a suit for redemption. I fail to see how tender can be necessary before a suit can be instituted which is itself necessary in order that the amount payable by the plaintiff for redemption may itself be ascertained.

(1) (1924) 84 Ind. Cas. 373.
(2) (1881) I. L. R. 6 Cal. 720, P. C.
(3) (1887) I. L. R. 14 Cal. 486.
(4) (1916) I. L. R. 38 All. 148.
(5) (1921) I. L. R. 43 All. 638, P. B.

1926.

DINANÁTH RAI v. RAMA RAI.

ROSS, J.

The third point taken was that as the defendant was recorded as kashtkar in the record-of-rights and in the batwara proceedings to the knowledge of the plaintiff's ancestor, he must be taken to have acquired title by adverse possession. This argument that a mortgagee can acquire a title by adverse possession against his mortgagor runs counter to the elementary principle governing mortgages.

The appeal must be dismissed with costs.

MACPHERSON, J.—I agree.

Appeal dismissed.

APPELLATE CIVIL.

Before Adami and Kulwant Sahay, JJ.

EAST INDIAN RAILWAY COMPANY, LTD.

v.

KEDARNATH SETH.*

1926.

June, 29.

Railways Act, 1890 (*Act IX of* 1890), *section* 80, *scope of—suit against two defendant companies—appeal against one only—competency of appeal.*

Plaintiff consigned a bale of cloth under contract with the Great Indian Peninsula Railway Company but the goods were never delivered to the consignee. Part of the route having laid over the East Indian Railway, plaintiff sued both the companies for non-delivery of the goods. The suit was dismissed and the plaintiff preferred an appeal but failed to join the Great Indian Peninsula Railway Company as a respondent.

Held, that the contract being with the Great Indian Peninsula Railway Company and there being no allegation or finding that the bale was in fact lost in course of transit on the East Indian Railway, the suit and the appeal should have been brought against the Great Indian Peninsula Railway Company.

*Appeal from Appellate Decree no. 525 of 1924, from a decision of Babu Phanindra Lal Sen, Subordinate Judge of Ranchi, dated the 2nd February 1924, reversing a decision of Babu Ramesh Chandra Sur, Munsif of Palamau, dated the 16th May 1923.