

party who disputed the widow's right to obtain a partition to prove that such right did not exist. That *onus* in the present case has not been discharged.

Moreover, *Mussammat Bholi's* right to a partition is clear from the *Riwaj-i-am* in which it is stated (page 51 of the paper book) that any one of the persons upon whom the estate devolves, irrespective of the sex of such person or of the relationship in which such person stood to the deceased, can claim a partition as a matter of right.

The suit has been rightly dismissed and we dismiss the appeal with costs.

C. H. O.

Appeal dismissed.

APPELLATE CIVIL.

Before Sir Shadi Lal, Chief Justice and Mr. Justice Lumsden.

RAM SARAN DAS (PLAINTIFF) Appellant

versus

MULA (DEFENDANT) Respondent.

Civil Appeal No. 2284 of 1920.

Redemption of Mortgages (Punjab) Act, II of 1913—Order of Revenue Officer that mortgagor can redeem on payment of Rs. 400—suit by mortgagee for declaration that Rs. 1,336 is the proper charge on the land—whether law of Limitation or Order II, rule 2 of the Code of Civil Procedure, Act V of 1908, applies to such a suit—Post diem interest.

B mortgaged certain lands to B. S. D. in 1897 for Rs. 400. According to the deed interest was to be paid for 6 years at the rate of Rs. 1-8-0 *per cent. per mensem*. After the expiry of 6 years the land, if not redeemed, was to be considered sold to the mortgagee. On the 18th January 1905, the conditional sale clause was expunged by the Deputy Commissioner under section 9 (2) of the Punjab Alienation of Land Act, XIII of 1900. On the 12th of January 1910, the mortgagee brought a suit for possession and obtained a decree on the 16th February 1910. On the 21st of August 1912, a deed of lease was executed under which the mortgagor became a tenant of the mortgagee on a

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yearly rent of Rs. 72. After B.'s death his son applied for redemption under the Redemption of Mortgages Act, II of 1913, and on 19th January 1918 the Revenue Officer passed an order in his favour for redemption on payment of a sum of Rs. 400. On 24th March 1919, R. S. D. instituted the present suit for a declaration that the charge on the land was Rs. 1,336, and that he was entitled to retain possession until that sum was paid.

Held, that the position of a mortgagee in such a suit is not that of an ordinary plaintiff, but is more analogous to that of a defendant, and therefore the question of limitation does not arise, and the provisions of Order II, rule 2 of the Code of Civil Procedure, are inapplicable.

Held further, that there was an implied covenant to pay interest up to the date of redemption.

Motan Mal v. Muhammad Bakhsh (1), referred to.

Second appeal from the decree of J. Coldstream, Esquire, District Judge, Delhi, dated the 14th August 1920, affirming that of Khwaja Abdus Samad, Subordinate Judge, 2nd Class, Delhi, dated the 28th January 1920, and dismissing the claim.

JAGAN NATH, for Appellant.

DEVI DAYAL and N. C. MEHRA for Respondent.

The judgment of the Court was delivered by—

LUMSDEN J.—On the 26th January 1897 one Bhola, a Jat, mortgaged certain lands to the present appellant for Rs. 400. According to the terms of the deed interest was to be paid for 6 years at the rate of Rs. 1-8-0 *per cent. per mensem*. After the expiry of this period the land, if not redeemed, was to be considered sold to the mortgagee, the latter having the right during the subsistence of the mortgage to assume possession should the interest not be paid. On the 18th January 1905, the conditional sale clause was expunged by the Deputy Commissioner acting under section 9 (2) of Act XIII of 1900. On the 12th January 1910, the mortgagee brought a suit for possession and obtained a decree on the 16th February 1910. On the 21st August 1912, a deed of lease was executed under which the mortgagor became a tenant of the land on a yearly rent of Rs. 72. In that deed the mortgagor admitted that the charge on the land was Rs. 1,336, that sum representing the

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principal sum advanced on the basis of the mortgage plus 13 years' interest. After Bhola's death, his son, the present respondent, applied for redemption under Act II of 1913, and the Revenue Officer on the 19th January 1918 passed an order in his favour on payment of a sum of Rs. 400. On the 24th March 1919, the mortgagee brought a suit under Act II of 1913 for a declaration that the charge on the land was Rs. 1,336, and that he was entitled to retain possession until that sum was paid. The trial Court dismissed the suit holding that the claim was time-barred, and that in any case Rs. 1,336 could not be due as there was no stipulation in the mortgage deed that any interest was payable after the expiry of the 6 years' term. On appeal the District Judge confirmed the decree of the trial Court, adding that the suit could not lie under the provisions of Order II, rule 2, Civil Procedure Code. Dissatisfied with both these decrees the mortgagee has come to this Court on second appeal.

It appears to us that both Courts have failed to appreciate the real position of a mortgagee in such suits. That position is not that of an ordinary plaintiff but is more analogous to that of a defendant. The mortgagee was in possession of the land and had the Revenue authorities not intervened, it would have been the business of the mortgagor to bring a suit for possession by redemption. The summary proceedings taken by the Revenue authorities cannot affect the rights of the parties and the present suit is thus virtually a defence against an order divesting the mortgagee of possession before payment of the full sum due. In such circumstances the question of limitation does not arise and the provisions of Order II, rule 2, are inapplicable.

It seems doubtful, whether in any case these latter provisions would have barred the suit. Under the terms of the deed the mortgagee in 1910 had the option of suing for possession or claiming the money due. He could not have asked for both remedies, and it was open to him to select the one he preferred. In this connection the principles laid down in the Full Bench ruling of this Court *Parneshari Das v. Fakiria* (1) are in point.

We are satisfied that the sum of Rs. 1,336 is a valid charge on the land. It is true that the mortgage deed

does not expressly provide for the payment of interest after the expiry of the six years' term. In the Full Bench ruling published in *Motan Mal v. Muhammad Bakhsh* (1) the principles applicable in such cases were clearly set forth. In that authority LeRossignol, J., expressed the opinion that in the case of mortgages comprising a stipulation of conditional sale, a covenant to pay *post-diem* interest up to the date of redemption must be implied unless there are very strong reasons to the contrary. In the present case not only are no reasons to the contrary apparent but there is the significant fact that, when the registered deed of lease was executed in 1912, the mortgagor admitted that the burden on the land amounted to Rs. 1,336. This admission affords strong proof that there was an implied agreement to pay interest after the expiry of six years' term, should the mortgagee decide not to enforce his rights of foreclosure.

It follows from these findings that the appeal must be accepted and the plaintiff granted a decree to the effect that he is entitled to retain possession of the land until he is paid a sum of Rs. 1,336 less any payments already made in accordance with the order of the Collector. The plaintiff-appellant is also entitled to *mesne* profits from the date of the Collector's order and these *mesne* profits will be fixed at Rs. 72 *per annum* the amount payable under the terms of the lease. The decree will carry costs throughout.

A. R.

Appeal accepted.

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(1) (1922) I. L. R. 3 Lah. 200 (F. B.).