

or tribunals, Courts of law never interfere in his choice, except in very special cases and for the most cogent reason. It stands to reason that they cannot lend countenance to legal subterfuges by which his opponent tries to interfere with that choice.

For these reasons I hold that the suit for the declaratory reliefs claimed does not lie, and that even if it did, the Court, in the exercise of its discretion, should refuse to grant such reliefs.

I, therefore, dismiss the plaintiff's suit with costs, advocate's fee five gold mohurs.

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MOHAMMED
ABDUL
KADER
v.
FINLAY,
FLEMING
& CO.
—
CHARI, J.

APPELLATE CIVIL.

Before Sir Guy Ruddle, Kt., K.C., Chief Justice, and Mr. Justice Brown.

T. C. BOSE

v.

OBEDUR RAHMAN CHOWDHURY.*

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Feb. 6

Limitation Act (IX of 1908), Sch. I, Arts. 59, 132.—On-demand loan secured by mortgage, time runs from date of loan—Purchaser from mortgagor not made a party by mortgagee in his suit, effect of—Rights of auction-purchaser no higher than mortgagee's—Conflict between auction-purchaser and purchaser from mortgagor—Remedy of auction-purchaser.

Respondent was the purchaser at a Court auction of property which was sold in execution of a mortgage decree on a simple mortgage, the money being repayable on demand. The mortgagee had made only the mortgagors parties in his suit and had omitted to join the appellant who had purchased the property from the mortgagors subject to the mortgage. The executing Court put the respondent as auction-purchaser in possession of the property. Appellant filed a suit against the respondent for recovery of his possession and succeeded in the trial Court as well as in the appeal to the High Court which held that as the mortgage decree was inoperative against the appellant, he could not be disturbed in his possession. He had a right to redeem the property if he chose, but this right was not a liability which he could be compelled to discharge. Some six years after the auction and more than 12 years from the date of the mortgage, respondent filed a suit against the appellant for redemption of the mortgage by the appellant or in default for

* Special Civil Second Appeal No. 293 of 1927.

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sale of the property. The trial Court dismissed the suit as time-barred, but the District Court ordered a remand. Appellant appealed.

Held, that the appellant was under no personal obligation to discharge the mortgage debts and the claim for sale was barred under the provisions of Art. 132 of the Limitation Act. Whether the loan is personal or secured by a mortgage, if it is payable on demand, time runs from the date of the loan and not from the date of demand. The auction-purchaser had no higher rights than an assignee of the mortgagee and no fresh period of limitation started by reason of the mortgage decree or sale. If the respondent now wished to alter his claim into one for possession, even if he could be allowed to do so, the matter was *res judicata* between the parties owing to the decision in the previous suit between them.

Perianna v. Mulhewra, 21 Mad. 139—referred to.

A. B. Banerji for the appellant.

N. N. Burjorjee for the respondent.

RUTLEDGE, C.J., and BROWN, J.—On the 16th of March 1914, two persons Abdul High and Kala Kasim mortgaged three pieces of land to one U Po Kyaw for Rs. 3,000 bearing interest at Rs. 1/8 per cent. per month. The mortgage was a simple one and the money lent was repayable on demand. On the 12th of September 1918, the present appellant, T. C. Bose, purchased two of the pieces of land mortgaged from Abdul High, the original owner. On the 9th of June 1919 the mortgagee filed a suit on his mortgage against the two mortgagors, but did not join the appellant as a party. A mortgage decree was obtained and the property was sold in execution of the decree and purchased by the respondent Chowdhury on the 14th of June 1920.

The suit out of which this appeal has arisen was filed on the 27th September 1926 and in his plaint the respondent claimed payment of the original mortgage amount or in default sale of the land in dispute. The suit was dismissed by the trial Court on the ground that it was barred by limitation. The trial Court's decree was set aside by the District Court on

appeal and the case was remanded to the trial Court for trial on its merits. It is against this decree of the appellate Court that the present appeal is filed.

The appellant is clearly under no personal obligation to pay the money due and that part of the plaintiff's claim which relates to personal payments must therefore fail. The question for decision is whether the claim to enforce the payment by sale of the property is barred by limitation or not. It is not disputed that the article of the Limitation Act applicable to the case is Article 132 and limitation for the purposes of that article runs from the time when the money sued for becomes due. The learned District Judge held that the respondent's suit was based on the mortgage decree and that limitation would not begin to run till the date of that decree. We do not however think it possible to uphold this contention. The respondent by his purchase at the auction sale acquired the right, title and interest in the property of the mortgagee and such right, title and interest as the mortgagor had on the date of the suit. On the date of suit, the mortgagor had no interest in the property left. The mortgagee had the right of sale and it is as assignee of this right that the respondent makes his present claim. The position in this respect is precisely the same as if he had purchased privately the right, title and interest of the mortgagee. He cannot claim a greater right than the mortgagee had in the matter and the mere fact that a particular right has changed hands by assignment does not operate to cause a fresh period of limitation to run. It seems to us therefore that limitation runs in the same way as though the original mortgagee had been the plaintiff. The time from which the period began to run is when the money sued for became due.

It has been suggested that as the money was payable on demand, it would not become due until a

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demand had been made, but on this point we are of opinion that the view taken in the case of *Perianna Goundan v. Muthuvira Goundan and another* (1), is correct. As pointed out in that case under Article 59 of the Limitation Act, limitation in the case of money lent under an agreement that it shall be payable on demand runs from the time when the loan is made and it would be anomalous if limitation ran from a different time in a case where the money was lent on an agreement that it should be payable on demand but is also secured by a mortgage deed. We agree that it is not necessary in cases like the present that an actual demand should be made for limitation to commence under Article 132. In this view of the case, limitation in this suit ran from the 16th of March 1914 and the suit was already barred on the 27th of September 1926, the date on which it was filed. We therefore are of opinion that the trial Court was right in holding that the suit as framed is barred by limitation.

The plaintiff now asks that, if we take this view, we should allow him to amend his plaint and alter his claim into one for possession of the land.

The appellant bought the land subject to the prior mortgage and the operation of the law of limitation works hardly on the respondent in this case. In spite therefore of the late stage at which this application to be allowed to amend has been made, we should be inclined to allow the application if we thought that the amendment of the plaint on the lines suggested would have any useful result. There are conflicting authorities on the general question whether in a case such as the present the respondent would have the right to claim possession unless the mortgage debt is first paid off; but so

(1) (1897) 21 Mad. 139.

far as this particular claim is concerned the matter seems to us to have already been decided. After purchasing the land at the Court auction, the respondent, Chowdhury, was put in possession of the land by the Court in execution. The appellant, T. C. Bose, then brought a suit against Chowdhury for recovery of possession. That suit was decreed in his favour and the matter eventually came on appeal to this Court which confirmed the decree of the trial Court.* In the course of the judgment in that case the following passage occurs:—

“The principal ground of appeal is that the plaintiff is not entitled to possession without redeeming the mortgage subject to which, at the best, he purchased. The principle involved in this contention sounds equitable and is also proper to avoid multiplicity of suits. But it remains to decide whether in law it is enforceable. It is settled law that the rights which Mr. Bose might have had at the time of his purchase were entirely unaffected either by U Po Kyaw’s suit to which he was not a party or by the sale thereunder. Mr. Bose had acquired a right of redemption and such right is a legal right which he may seek to enforce but not a liability which he may be compelled to discharge. It is open to him to choose his own time. The decree in the mortgage suit being inoperative as against him the auction-purchaser was not entitled to disturb his possession.”

Here there was clearly an adjudication on the question whether the respondent, Chowdhury, was entitled to claim possession against the appellant, T. C. Bose, and the principle of *res judicata* will operate to prevent any suit for possession now from

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* Civil First Appeal No. 192 of 1924 from the judgment of the District Court of Maubin in Civil Regular Suit No. 8 of 1922.

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being successful. That being so, we must refuse the application to amend.

We therefore set aside the decree of the District Court and restore that of the trial Court dismissing the plaintiff-respondent's suit; but in view of the fact that the appellant's rights were at the time of his purchase clearly subject to the mortgage and in all the circumstances of the case we do not think it necessary to allow the defendant-appellant his costs. The parties to this appeal will bear their own costs in all three Courts.

PRIVY COUNCIL.

J. N. SURTY (*Plaintiff*)

v.

T.S. CHETTYAR, A FIRM (*Defendant*).

(On Appeal from the High Court at Rangoon.)

J.C.*
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Feb. 14.

Indian Limitation Act (IX of 1908), s. 12, sub-sec. 2—Time for appealing from decree—Time requisite for obtaining copy of decree—Rule of High Court dispensing with filing of copy of decree with memorandum of appeal.

Section 12, sub-section 2 of the Indian Limitation Act, 1908, which excludes from the period of limitation for appealing from a decree the time requisite for obtaining a copy of it, applies even when by a rule of the High Court the memorandum of appeal need not be accompanied by a copy of the decree.

So held as being the preponderating opinion in conflicting decisions of different High Courts, and being in accordance with the language of the section.

The word "requisite" means "properly required" and throws upon the appellant's legal advisers the necessity of showing that no part of the delay beyond the prescribed period is due to their default.

Haji Hassam v. Nur Mahomed, (1904) 28 Bom. 643; *Kirpa Ram v. Rakhi*, (1907) P.R. No. 114, and *Kalipada v. Shekhar Basini*, (1916) 24 Cal. L.J. 235—*approved*.

Fazal Muhammad v. Phul Kuar, (1879) 2 All. 192 (F.B.)—*distinguished*.

Jadhoji Raghoji v. Rajoo Babaji, (1899) 1 Bom. L.R. 112, and *Kumara Akkappa Nayann v. Siltala Naidu*, (1897) 20 Mad. 476 and *Abu Backer Sahib v. Secretary of State for India*, (1907) 34 Mad. 505 (F.B.)—*disapproved*.

* PRESENT :—LORD PHILIMORE, LORD BLANESBURGH AND MR. AMEER ALI.