

APPELLATE CIVIL.

Before Sir Shadi Lal, Chief Justice and Mr. Justice Bhide.
 MUHAMMAD HUSSAIN (PLAINTIFF) Appellant

versus

KARAM ILAHI AND ANOTHER (DEFENDANTS)

Respondents.

Civil Appeal No. 13 of 1925.

Indian Registration Act, XVI of 1908, section 17 (2) (xi)—Receipt for money due under a mortgage—Registration—whether compulsory.

Held, that in view of clause (xi) of section 17 (2) of the Registration Act of 1908, a receipt for payment of money due under a mortgage does not require registration, unless it expressly purports to extinguish the mortgage.

Piari Lal v. Makhan (1), and *Neelamani Patnaik v. Sukadvu Beharu* (2), followed.

Imdad Husain v. Tasadduk Husain (3), *Nand Lal v. Gurditta Mal* (4), *Amir v. Diala Mal* (5), and *Dwarka Das v. Lachhman Singh* (6), distinguished.

First appeal from the decree of Mir Ghulam Yazdani, Subordinate Judge, 1st class, Lahore, dated the 28th November 1924, dismissing the plaintiff's suit.

ZAFRULLAH KHAN and BASHIR AHMAD, for Appellant.

BARKAT ALI and KIDAR NATH CHOPRA, for Respondents.

The Judgment of the Court was delivered by—

BHIDE J.—The material facts of this case are briefly as follows:—

On the 7th July, 1921, *Sardar Abdul Kadar Khan Effendi*, defendant No. 2, sold a house to *Sheikh Muhammad Hussain*, the plaintiff, for Rs. 31,000. Rs. 22,000 out of the consideration was paid, and for

(1) (1912) I. L. R. 34 All. 528.

(4) 99 P. R. 1902.

(2) (1920) I. L. R. 43 Mad. 803.

(5) 39 P. R. 1904.

(3) (1884) I. L. R. 6 All. 335.

(6) 103 P. L. R. 1905.

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the balance of Rs. 9,000 the house was mortgaged by the plaintiff in favour of the defendant-vendor without possession on the same day. On the 31st August, 1921, *Sardar* Abdul Kadar Khan sub-mortgaged his mortgagee rights in the house in favour of *Babu Karam Ilahi*, defendant No. 1, for a sum of Rs. 6,000; and the original deed of mortgage was made over to the sub-mortgagee. On the 17th May, 1923, defendant No. 1 sued defendant No. 2 for the recovery of his debt and obtained a decree for the same recoverable by the sale of the mortgagee rights which were sub-mortgaged in his favour. In execution proceedings the house was attached and advertised for sale. Thereupon the present plaintiff, the original mortgagor, raised an objection that the mortgage-money had been already paid by him to defendant No. 2 and the house redeemed. This objection was dismissed on 8th April, 1924, and thereupon the present suit was instituted on the 3rd May, 1924, for a declaration that the house in question was not liable to be attached and sold in execution of the decree obtained by defendant No. 1 against defendant No. 2. The suit was resisted only by defendant No. 1 who denied knowledge of the payments alleged to have been made by the plaintiff in redemption of the mortgage. He did not admit the genuineness of the receipts produced by the plaintiff in support of the payments and pleaded that the transaction was collusive and had, in any case, no effect on his rights.

The learned Subordinate Judge framed only one issue which runs as follows :--

“ Was the property in suit completely redeemed and hence not liable to attachment and sale in execution of the decree of defendant No. 1 against defendant No. 2? ”

Out of the receipts produced, the last receipt was for Rs. 96-8-0. Defendant No. 1 raised an objection that it was inadmissible for want of registration as it extinguished the mortgage. The material portion of the recital in this receipt was as follows :—

“ *Bais tahrir anke—mubligh 96-8-0 nisaf jinke 48-4-0 hote hain babat baqaya sud nisbat zar rehn rehnnama mutallaga ahata Mozang, Chiragh Din Road jiski nisbat asl zar rehn men se baqaya 1,400 aj hi wasul kiya gaya hai wasul pai lihaza rasid likh di hai ke sanad rahe.*”

The learned Subordinate Judge was of opinion that “ this document on the face of it is intended to prove the release of the house secured by the mortgage deed and manifestly extinguished the mortgage and certainly requires registration.” This view seems to be untenable, as the receipt makes no reference at all to the extinction of the mortgage. Being a receipt for the last payment it may have had the effect of extinguishing the mortgage, but, according to clause (xi) of sub-section 2 of section 17 of the Registration Act, a receipt for payment of money due under a mortgage does not require registration unless it purports to extinguish the mortgage. Now, in the present instance, it is clear from the wording of the receipt that it does not purport to extinguish the mortgage. The learned Subordinate Judge has relied upon *Imdad Hussain v. Tasudduk Husain* (1), *Nand Lal v Gurditta Mal* (2), *Amir v. Diala Mal* (3) and *Dwarka Das v. Lachhman Singh* (4). The Allahabad ruling deals with a case under the old Registration Act of 1871 which did not contain any clause corresponding to clause (xi) of sub-

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(1) (1884) I. L. R. 6 All. 335.

(3) 39 P. R. 1904.

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section 2 of section 17 of the Indian Registration Act, 1908. In *Nand Lal v. Gurditta Mal* (1) the wording of the receipt is not given and it is not clear whether it did or did not purport to extinguish the mortgage. In the other two Punjab rulings, the receipt apparently did purport to extinguish the mortgage. In the present instance, the receipt does not expressly purport to extinguish the mortgage and there is ample authority in support of the contention of the learned counsel for the appellant that registration was not necessary in the circumstances—*vide, inter alia, Neelamani Potnaik v. Sukaducu Beharu* (2), *Piari Lal v. Makhan* (3). The learned counsel for the respondent did not attempt to support the view taken by the learned Subordinate Judge and it seems clear to us that it cannot be sustained.

The learned Subordinate Judge has given no finding on any other point. He framed only one issue in general terms and hence, it appears, that the attention of the parties was not directed to the main points which really require decision in the case, *viz.*, (1) whether the alleged payments were in fact made in good faith by the plaintiff to defendant No. 2, (2) whether the plaintiff had or had not notice of the sub-mortgage when he made the payments and (3) what is the effect of the payments on the rights of the sub-mortgagee? There is no sufficient material on the record to enable us to decide these points, and as the suit has been dismissed solely on the preliminary point of registration we must accept this appeal, set aside the decree of the learned Subordinate Judge and remand the case under Order 41, rule 23, Civil Procedure Code, for

(1) 99 P. R. 1902. (2) (1912) I. L. R. 34 All. 528.

(3) (1920) I. L. R. 43 Mad. 803.

redecision on all the issues arising in the case, including those specified above. Stamp on appeal to be refunded and other costs to follow the final decision.

N. F. E.

Appeal accepted.

Case remanded.

APPELLATE CIVIL.

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

MUHAMMAD KHAN (PLAINTIFF) Appellant

versus

AHMAD KHAN AND OTHERS (DEFENDANTS)

Respondents.

Civil Appeal No 206 of 1925.

Indian Limitation Act, IX of 1908, section 6—Son en ventre sa mere—whether a minor within the meaning of the section—and whether competent to challenge an alienation by his father.

The plaintiff brought the present suit on 19th December, 1923, to impeach a sale of land made by his father on 31st March, 1905. The plaintiff was born on 13th June, 1905, and at the date of the sale there was no reversioner who was entitled to challenge it.

Held, that the plaintiff was competent to impugn the sale inasmuch as a child *en ventre sa mere* is, for certain purposes, to be considered as born, and that the right of the son to take objection to the alienation made by his father dates, not from the hour of his birth, but from that of his conception.

Held, however, that the suit was barred by limitation because the legal fiction, by which a son in his mother's womb is considered to be born for certain purposes, does not govern the rule laid down by the statute.

The plaintiff, therefore, not having been born at the date of the sale, from which the period of limitation has to be reckoned, was not a minor at that time and could not

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