APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Fawcett.

CHHOTALAL KARSANDAS AND ANOTHER (ORIGINAL DEFENDANTS NOS. 1 AND 2), APPELLANTS *v.* VISHNU GANESH GOKHALE AND OTHERS (ORIGINAL PLAINTIFFS AND DEFENDANT NO. 3), RESPONDENTS*.

1920.
August 12.

Indian Limitation Act (IX of 1908), Schedule I, Article 120—Mortgage—Subrogation—One of the mortgagees paying off the mortgage amount—Payment creating a charge in favour of the creditor—Creditor not entitled to sell the property until declaratory decree obtained—Limitation.

In 1887, a mortgage of the plaint property was executed in favour of four brothers. On the 22nd August 1901, the plaintiff one of the mortgagees advanced a sum of money to enable the mortgagor to pay what was required to make the last payment on account of the mortgage of 1887, on the understanding that a further mortgage would be executed by the mortgagor in favour of the plaintiff. The mortgage was executed but it proved ineffectual for want of proper attestation. The plaintiff, therefore, brought a suit in 1914 for sale of the mortgaged property on the ground that the payment made by him in 1901 created a charge on the property to the extent of the money advanced.

Held, that the payment made in 1901, enabled the plaintiff to establish his right to a charge on the property but mere payment would not give the plaintiff any right against the property either to go into possession or sell it; he was bound to ask for a declaratory decree that a charge was created before the Court could have jurisdiction over the property.

Held further, that the plaintiff's claim to get a declaratory decree was governed by Article 120 of the Limitation Act and was, therefore, barred as not having been brought within six years from the date of payment in 1901.

Butler v. *Rice*[1], referred to.

SECOND appeal against the decision of J. A. Saldana Assistant Judge of Thana, reversing the decree passed by B. N. Shah, Subordinate Judge at Bassein.

Suit to recover amount by sale of mortgaged property.

* Second Appeal No. 770 of 1919.

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In 1887, one Karsandas (father of defendants Nos. 1 and 2) mortgaged the property in suit with four brothers Moro, Mahadev, Hari and Chintaman.

In 1901, Mahadev filed a suit for partition in which the claim on the mortgage deed of 1887 was admitted to be for the benefit of the joint family and was settled at Rs. 9,200.

On 22nd August 1901, the mother of mortgagors, defendants Nos. 1 and 2, borrowed Rs. 4,000 from Ganesh, son of Moro, to pay off a portion of a mortgage debt and entered into an agreement with him to pass a mortgage deed of the property. The deed was executed on the 30th November 1902.

Ganesh died in 1908 and the present suit was filed by his heirs on 29th November 1914 to recover the sum of Rs. 3,553-4-0 by sale of the mortgaged property.

The defendant having contended, *inter alia*, that the suit was not maintainable on the mortgage deed of 1902 as the same was not attested as required by law, the plaintiffs were allowed to amend the plaint so as to enable them to ask the Court to declare that they were entitled to mortgage and fall back upon the previous deed of the 29th December 1887 and that the claim on that deed was not time-barred as it was acknowledged in the mortgage deed of 1902, the agreement of 22nd August 1901 and also the *vasul* mentioned in the plaint.

The Subordinate Judge held that the mortgage deed of 1902 was not attested as required by law and could not be relied upon; that the plaintiff was entitled to get an equitable lien or charge for the money lent on the 22nd August 1901 on the security of the property mentioned in the deed of 1887, but held that the plaintiffs' claim on the lien was barred by limitation as the

acknowledgment in the *Sate-khat* was not an acknowledgment of a subsisting liability as required by section 19 of the Limitation Act, 1908: *Balaram Budhaji Marwadi* v. *Govinda valad Khandu*[1]; *Maniram* v. *Seth Rupchand*[2]; *Venkata* v. *Partha-saradhi*[3]; *and Periavenkan Udaya Tevar* v. *Subramanian Chetti*[4].

On appeal, the Assistant Judge held that as a matter of equity and justice, even if the mortgage of 1902 be held void there would arise a charge, not with regard to the advance of Rs. 4,000 but with regard to the incumbrance of 1887 so far as it was discharged by that advance; *Mahomed Shumsool* v. *Shewukram*[5]; *Lomba Gomaji* v. *Vishvanath Amrit Tilvankar*[6]; *and Sambhu bin Hanmanta* v. *Nama bin Narayan*[7].

He further held that limitation was saved by acknowledgment in the *Sate-khat* on the 22nd August 1901. The decree of the Subordinate Judge was, therefore, reversed and the plaintiff was allowed to recover Rs. 4,000 minus the sums paid by the defendants.

The defendants appealed to the High Court.

Jaykar, with *W. B. Pradhan*, for the appellants:—The mortgage-deed in suit, not being properly attested, the plaintiff cannot claim to have his money out of the property and the personal remedy is time-barred. The learned Assistant Judge also holds that the mortgage executed in 1887 had not merged in the mortgage in suit or was kept alive in any way and that the doctrine of subrogation does not apply to this case. If so the plaintiff must fail. The suit has been instituted beyond the time of limitation, even if it be assumed that the plaintiff can fall back upon the earlier mortgage.

(1) P. J. 1896, p. 621.
(2) (1906) 8 Bom. L. R. 501.
(3) (1892) 16 Mad. 220.
(4) (1896) 20 Mad. 239.
(5) (1874) L. R. 2 I. A. 7 at p. 17.
(6) (1893) 18 Bom. 86.
(7) (1911) 35 Bom. 438.

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P. B. Shingne, for respondents Nos. 1 to 3 :—The lower appellate Court has no doubt remarked that the doctrine of subrogation does not apply to the facts of this case. I submit that this is a case wherein the doctrine of subrogation certainly applies : vide *Butler* v. *Rice*[1] and *Tangya Fala* v. *Trimbak Daga*[2]. If so, I can claim to step into the position of the mortgagee in the first mortgage.

The suit to obtain relief on this footing is in time as held by the lower appellate Court. At any rate, a decree should be passed against the defendant No. 1 having regard to the written statement filed by him.

MACLEOD, C. J. :—The plaintiff sued to recover the sum of Rs. 3,553-11-0 and costs with future interest by sale of the mortgaged property.

The mortgage is dated 30th of November 1902. It is common ground that the mortgage deed was not properly attested and therefore the suit on the mortgage must fail. The plaint was allowed to be amended so as to enable the plaintiffs to ask the Court to declare that they were entitled to subrogate and fall back upon the previous deed of the 29th December 1887 and that the claim on that deed was not time-barred as it was acknowledged in the deed of 1902, the *Sate-khat* of 22nd August 1901 and also the *Vasul* mentioned in the plaint.

The facts of the case are simple. In 1887, the mortgage of the plaint property was executed in favour of four brothers. In 1901, the four brothers partitioned and they were paid off on the day that the last payment was made on account of the mortgage. Ganesh, the son of one of the mortgagees, agreed to pay the mortgagor Rs. 4,000, and we may take it as admitted that Ganesh paid Rs. 4,000 to enable the mortgagor to pay what was

[1][1910] 2 Ch. 277. [2](1916) 40 Bom. 646.

required to make the last payment on account of the mortgage of 1887. No doubt it was intended that Ganesh should get a mortgage of the property to secure the repayment of the Rs. 4,000 and the parties thought that they had executed a deed of mortgage for that amount in November 1902. That mortgage not having been executed in accordance with law must be ruled out of consideration altogether.

Then the question arises, what is the position of the plaintiff who had, on the 22nd August 1901, advanced the sum of Rs. 4,000 to enable the mortgagor to pay off the mortgage on the understanding that a further mortgage would be executed by the mortgagor. I do not think that there will be the slightest doubt that though Ganesh had no legal title to the plaint property he had a right to get a mortgage or to be placed in the same position as the previous mortgagee, and that right would be recognized if he came to a Court of Equity.

It may be said that in India there is no distinction between law and equity, but that makes no difference on a question of this kind, except that it only necessitates a little change in phraseology, and it may be said that Ganesh had no right in law to be considered as having any interest in this property until he came to a Court of law which administers doctrines of equity to have his right established. That makes little difference where it can be said that Ganesh can ask the Court for a declaration that he is entitled to a charge on the property to the extent of the money advanced, or that he is entitled to be put in the same position as the mortgagees who have been paid off with his money. We have been referred to the case of *Butler* v. *Rice*[1] where Warrington J. at page 282 says:—"The statement of claim proceeds on the well-known equitable doctrine that if a stranger pays off a mortgage on an estate he

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presumably does not intend to discharge that mortgage, but to keep it alive for his own benefit. The statement of claim asks for a declaration that the plaintiff is entitled to a charge on the Manor Road property for £ 450 and interest...." And again at page 283 : "The plaintiff did not know that there was any other property ; he intended to keep alive the security on the Manor Road property, and that intention was not affected by the fact that the bank also held another security. He is entitled to a declaration that he has a right to a charge on the Manor Road property for £ 450 and interest at 5 per cent., that being the rate of interest charged by the bank, and to have his security enforced by the usual foreclosure judgment in the case of an equitable mortgage."

Now there is no doubt that the payment in 1901 created a set of circumstances which enabled the person who paid the money to establish his right to a charge. But with regard to the property sold, the mere payment would not give the person who paid it any right against the property either to go into possession or to sell it. It would only give him a right to ask the Court to come to his assistance, on the ground that the facts which he relied upon created a charge. I think, therefore, the question of limitation in this case is one of primary importance. This is not the case of a party coming into Court to enforce a charge by a suit which is provided for by Article 132 of the Indian Limitation Act, which only relates to a suit brought to enforce a charge in existence and recognised at the date of the suit.

I cannot agree with the learned pleader for the respondent when he says that in a suit of this kind it is not necessary that the plaintiff should ask for a declaration. That declaration has to be made before the Court can exercise its jurisdiction over the property in suit.

Otherwise the plaintiff can only be considered as a simple creditor who has made a payment to his debtor for a particular purpose.

An equitable mortgagee has a lien or interest in the property. He has possession, of the title deeds, but cannot go into possession, and he cannot assert the right to sell the property unless he comes to a Court and gets a declaratory decree that he is entitled to a charge on the property. It appears to me that the only Article in the Indian Limitation Act which can apply to a suit of this nature is Article 120. Therefore the plaintiff is barred unless he filed his suit within six years of the payment of the Rs. 4,000. Even if the period is twelve years, the plaintiff would be no better off, because the suit was filed in 1914. I think the trial Judge has taken the right view when he says at paragraph 29 of the judgment:—"The question thus arises whether the plaintiff's claim on the lien thus created by law is in time. The charge was created on the date of payment, 22nd or 23rd August 1901. The suit is filed on 19th November 1914 and thus the point is, if there are acknowledgments of such part payments or payments of interest as would extend the period of limitation. Payments are not relied upon."

Thus it is found that there was nothing after the 23rd August 1901 which would start a new period of limitation running. The plaintiffs' claim is, therefore, barred by limitation. The result is that the appeal is allowed and the suit dismissed. There will be no order as to costs.

Decree reversed.

J. G. R.