I therefore agree that the decree of the lower appellate Court should be affirmed and this appeal dismissed with costs.

*Decree confirmed*

J. G. R.

## APPELLATE CIVIL.

*Before Mr. Justice Pratt and Mr. Justice Fawcett.*

1922.

*February* 23.

BAI REWA, WIDOW OF AMBARAM GOPAL (ORIGINAL DEFENDANT), APPELLANT *v.* VALI MAHOMED MIYA MAHOMED AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS*.

*Transfer of Property Act (IV of 1882), section 101—Extinguishment of charges—Onus of proving contrary intention.*

Plaintiffs were the trustees of a Wakf. In 1915 they sued to recover possession of three lots of property alienated by former trustees. There were mortgages effected in the years 1891 and 1898 on lots Nos. 1 and 2 and on the 9th May 1903 these lots were sold by the then trustees to the defendants' predecessor-in-title. The defendants contended that even if their title under the sale could not be sustained, their rights under the mortgages of 1891 and 1898 were not extinguished by merger under section 101 of the Transfer of Property Act, inasmuch as the continuance of the mortgage security would be for their benefit:

*Held*, over-ruling the contention, that the question as to whether such continuance would be for their benefit must be decided in the light of the circumstances existing at the time of the transaction, and that the onus lay on them to prove circumstances from which it could be inferred that it was to their interest, and therefore their intention, at the time of the transaction to keep the charges alive.

APPEAL under the Letters Patent against the decision of Macleod C. J. varying the decree passed by R. S. Broomfield, District Judge of Ahmedabad, modifying the decree passed by P. M. Bhat, Subordinate Judge at Ahmedabad.

Suit to recover possession.

*Appeal under the Letters Patent No. 37 of 1921.

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There was a Roza known as Alamkhan's Roza within the Municipal limits of Ahmedabad. It was a wakf property. The management of the Roza was conducted by certain Fakirs named Pirusha and Ramjansha who were living in some portion of the Roza and they raised money on the security of the open sites.

In 1910 some Mahomedans of Ahmedabad instituted Suit No. 3 of 1910 for a declaration that the property was wakf property. The District Court declared the property to be wakf, removed the old Vahiwatdars and prepared a scheme appointing the present plaintiffs as trustees. The trustees found that portions of Roza property were alienated in favour of defendant No. 1's father on different dates as follows :—

On the 5th September 1891 lot No. 1 was mortgaged by Fakir Pirusha for Rs. 99.

In 1898 Pirusha effected another mortgage on lots Nos. 1 and 2 for Rs. 600.

In 1901 lot No. 3 was mortgaged.

On the 9th May 1903 heirs of Pirusha sold the property in lots Nos. 1 and 2 to defendants' father by a registered sale deed for Rs. 1,000.

On the 15th January 1915 the plaintiffs filed the present suit along with other companion suits to recover possession of the wakf property by setting aside the alienation.

The principal contention of the present defendants was that the suit was barred by limitation.

The Subordinate Judge held that the suit in respect of all the lots was barred under Article 134 of the Limitation Act, as the mortgages had taken place beyond twelve years and limitation ran from the date of the transfer.

On appeal the District Judge agreed with the Subordinate Judge's view regarding Article 134 of the Limitation Act in respect of lots Nos. 1 and 2; as to lot No. 3 he set aside the decree of the lower Court and directed the defendants to hand over possession of it to the plaintiffs on payment to them by the plaintiffs of the sum of Rs. 99.

On appeal to the High Court the learned Chief Justice varied the decree. His judgment was as follows :—

MACLEOD, C. J.:—In Suit No. 43 of 1915 there were three lots. With regard to the third lot which was mortgaged on the 9th September 1901, the plaintiffs have been allowed to redeem it on payment of Rs. 99. If the time taken up in fighting Suit No. 3 of 1910 be taken into account, plaintiffs have brought their suit within twelve years of the mortgage. Therefore they are entitled to recover possession without payment of the mortgage money.

With regard to the lots Nos. 1 and 2 they were mortgaged first in September 1891 and again August 1898 and were sold on the 9th May 1903. The remarks I have made in Second Appeal No. 343 of 1920[1] also apply to this case. The transfer sought to be set aside is dated 9th May 1903, less than twelve years before suit and it cannot be said that the mortgage rights have been kept alive. The plaintiffs are entitled to succeed and therefore the plaintiffs should recover all the three lots from the defendants with costs throughout.

[1] The pertinent remarks in the Second Appeal No. 343 of 1920, referred to by his Lordship, were as follows :—

MACLEOD, C. J.:—In *Gokaldas Gopaldas* v. *Puranmal Premsukhdas*[1] the mortgagee's right, title and interest in certain immoveable property subject to a first and second mortgage were sold in execution. The purchaser paid off

[1] (1884) 10 Cal. 1035.

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The defendants appealed under the Letters Patent.

*Pathardikar* with *D. G. Dalvi*, for the appellant.

*G. N. Thakor*, for the respondents.

PRATT, J. :—This is a Letters Patent appeal from the judgment of the Chief Justice in Second Appeal No. 102 of 1920. The suit was Original Suit No. 43 of 1915, and was filed by the plaintiffs who are trustees of a wakf, and they sue to recover possession of three lots, which had been alienated by former trustees, in breach of trust and in excess of their authority as trustees, to the defendant or defendant's predecessor-in-title. Lots Nos. 1 and 2 were sold by these former trustees on the 9th May 1903. Lot No. 3 had been mortgaged by them on the 9th September 1901. The District Judge in First Appeal dismissed the suit as regards lots Nos. 1 and 2 as time-barred under Article 134 of the Indian Limitation Act. But as to lot No. 3 the learned District Judge held that time was saved by time occupied in Suit No. 3 of 1910 which had been filed by the plaintiffs to secure a declaration that the property in suit was wakf property. He accordingly set aside the mortgage and decreed possession to the plaintiffs subject to their paying compensation of Rs. 93 to the defendant.

In Second Appeal No. 102 of 1920, the learned Chief Justice held that as regards lots Nos. 1 and 2 time was also saved because the period occupied in prosecuting

the first mortgage. It was held by the Privy Council that he had a right to extinguish the prior charge or to keep it alive, and the question was what intention was to be ascribed to him, and that in the absence of evidence to the contrary the presumption was that he intended to keep it alive for his own benefit. In India a formal transfer of a mortgage was never made *nor* was an intention to keep it alive ever formally expressed. The question was, in the interest of justice, equity and good conscience, what was the intention of the party paying off the charge. But section 101 of the Transfer of Property Act makes it clear that now no effect can be given to an intention to keep alive a charge or other incumbrances unless it is formally expressed...

Suit No. 3 of 1910 would be taken into account. He, therefore, held that the plaintiffs were entitled to a declaration that the sale of these two lots on the 9th May 1903 was invalid. But as regards the prayer for possession, the defendants pleaded mortgages, one of the 5th of September 1891, and the other in 1898, under which they were in possession at the time of the sale. As to these, the learned Chief Justice held that those mortgages were extinguished by merger, and accordingly decreed the plaintiffs' suit. As to lot No. 3, the learned Chief Justice erroneously referred to the decree passed by the District Judge as a decree for redemption on payment of the sum of Rs. 99, and he accordingly varied the decree and decreed the plaintiffs' claim for possession without payment of this sum which is really compensation but by mistake referred to as redemption money.

In this Letters Patent Appeal filed by the defendant, it is admitted that the defendant's title as regards lots Nos. 1 and 2 under the sale of the 9th May 1903 cannot be sustained; but Mr. Patwardhan urges that the mortgages of 1891 and 1898 were not extinguished by merger. The law on the subject is enacted in section 101 of the Transfer of Property Act under which on the acquisition of superior right the inferior right is extinguished unless the owner declares by express words or necessary implication that it shall continue to subsist or such continuance would be for his benefit.

Now, there has been here no such declaration as is contemplated by this section; but Mr. Patwardhan laid stress on the last words of the section and argues that the continuance of the mortgage would be for the benefit of his client, and, therefore, it must be held that there was no merger. The last clause of section 101 of

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the Transfer of Property Act, i. e., the words "continuance would be for his benefit" are merely a guide to the intention of the owner, and it seems to me clear that the question of benefit must be decided in view of the circumstances existing at the time of the transaction. Otherwise the nature of the title might be in suspense for an indefinite time. Where there is no mesne incumbrance outstanding at the time of the sale, the conclusion seems to be inevitable that the mortgage has been extinguished. I refer in this connection to the case of *Lomba Gomaji* v. *Vishvanath Amrit Tilvankar* [1] and the remarks of Jenkins C. J. in the case of *Fakiraya* v. *Gadigaya* [2]. In any case, the terms of the section throw the onus on the owner to prove circumstances from which it can be inferred that it was to his interest to keep the charge alive, so that at the time of the transaction that was his intention. No such evidence has been given on behalf of the defendants. I, therefore, think that the conclusion arrived at by the learned Chief Justice that these mortgages were extinguished on the plaintiffs' sale is correct.

It is also faintly urged that the defendant was entitled to tack his adverse possession as purchaser since 1903 to his prior adverse possession as mortgagee. But possession cannot be tacked unless it is identical in nature. Before 1903 the defendants were holding adversely only to the extent of their mortgage interest.

The appellant, therefore, has no case as regards lots Nos. 1 and 2.

As regards lot No. 3, it is true that the learned Chief Justice has treated Rs. 99 as redemption money, whereas the District Judge decreed payment of this sum not by way of enforcement of the mortgage but as

[1] (1893) 18 Bom. 86. [2] (1901) 26 Bom. 88.

compensation awardable to the defendant in return for setting aside the mortgage. However, no objection has been taken to this sum in appeal, and, as it is not shown that the trust estate received any benefit from the mortgage money, it is doubtful whether this is a case in which compensation could have been awarded.

I, therefore, confirm the decree of the learned Chief Justice and dismiss this appeal with costs.

FAWCETT, J. :—On the question of possession in regard to lots Nos. 1 and 2, I do not see how the fact of the defendants having possession from 1891 under their mortgage deed can affect the question of limitation that arises in the suit. Admittedly Article 134 of the Indian Limitation Act is the proper Article to apply, and under it limitation runs only from the date of the transfer by the trustee or mortgagee and not from the preliminary conveyance, bequest or mortgage. This is clear from the use of the word "transfer" in the third column, corresponding to the word "transferred" in the 1st column of the Article, and is supported by a comparison of the wording of the preceding Article 133, where the word "purchase" in column 3 clearly also refers to the subsequent transaction mentioned in the 1st column. Article 142 or Article 144 does not apply to this particular case, and, therefore, no question of adverse possession, in my opinion, arises.

In regard to the question of merger, I agree with my learned Brother that the time to be considered in determining whether the continuance of the incumbrance would be for the benefit of the owner of the incumbrance must be the time of the transaction under which he becomes absolutely entitled to the property. On this point I agree with the view taken in the case of *Jugal Kishore* v. *Ram Narain* [1].

[1] (1912) 34 All. 268.

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The second point is whether in this case we should draw a presumption that the defendant when he obtained the sale deed of 1903 intended the incumbrance to subsist because it was for his benefit to do so. No doubt, in the case of *Gokaldas Gopaldas* v. *Puranmal Premsukhdas* [1] it is said : "The ordinary rule is that a man having a right to act in either of two ways, shall be assumed to have acted according to his interest". But that was a case where a mortgagor's right, title and interest in certain immoveables were sold subject to a first and a second mortgage and the purchaser afterwards paid off the first mortgage. There was, therefore, another incumbrance subsisting, and it clearly was for the benefit of the purchaser of the mortgagor's right, title and interest that there should not be merger. Their Lordships' remark, I think, is intended to apply to cases of that description. Thus after referring to the familiar instance of a tenant for life paying off a charge upon the inheritance, they say : "In each case it may be for the advantage of the owner of a partial interest to keep on foot a charge upon the corpus which he has paid". But that is a very different case to one where the purchaser is the original mortgagee and there is no outstanding incumbrance. On this point I may refer to the remarks of Chief Justice Bellows in an American case cited in Ghose's Law of Mortgage in India, 4th Edition, Vol. I, page 488. He says : "The doctrine of merger springs from the fact that when the entire equitable and legal estates are united in the same person, there can be no occasion to keep them distinct, for ordinarily it could be of no use to the owner to keep up a charge upon an estate of which he was seised in fee simple". I think, therefore, the ordinary presumption in such a case is that the owner does not intend to keep up the charge upon the

[1] (1884) 10 Cal. 1035 at p. 1046.

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estate to which he has acquired a full title. This counteracts the rule laid down in *Gokaldas Gopaldas* v. *Puranmal Premsukhdas*,[1] and I think the learned Chief Justice was right in holding that in this case there had been a merger.

On the other points I agree with what my learned Brother has said and concur in the proposed order.

*Decree confirmed.*

J. G. R.

[1] (1884) 10 Cal. 1035 at p. 1046.

## APPELLATE CIVIL.

*Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Coyajee.*

1922.

*March 6.*

SHANKARBHAT BALAMBHAT KANITKAR (ORIGINAL PLAINTIFF), APPELLANT *v.* SAKHARAMBHAT HARBHAT KANITKAR AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS*.

*Civil Procedure Code (Act V of 1908), Order XXXIII, Rule 9—Pauper suit—Concealment of property—Dispaupering the plaintiff.*

In an *ex parte* proceeding, the plaintiff was permitted to file a suit *in forma pauperis* for a claim which required a Court-fee of over Rs. 500. It was then discovered that the plaintiff had failed to bring to the notice of the Court his life-policy valued at Rs. 245. The plaintiff was dispaupered and called upon to pay the Court-fees. For failure to pay the amount, the suit was dismissed. The plaintiff having appealed,

*Held*, reversing the order and restoring the suit, that the facts in the present case demanded a further scrutiny by the Court to ascertain whether the plaintiff had means so that he ought not to be allowed to continue the suit as a pauper.

FIRST appeal from the decision of E. F. Rego, First Class Subordinate Judge at Poona.

Suit for partition.

The plaintiff applied for leave to file the suit *in forma pauperis* ; the Court-fee payable on the claim was Rs. 535. At the inquiry into pauperism, the

* First Appeal No. 197 of 1921.