

APPELLATE CIVIL.

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

1922. BHAGWAN GANPATI MANKESHWAR (ORIGINAL PLAINTIFF), APPELLANT
 v. MADHAV SHANKAR AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

February 21.

Indian Limitation Act (IX of 1908), sections 19 and 20—Mortgage—Sub-mortgage—Acknowledgment of sub-mortgage—Suit for redemption by original mortgagor—Effect of acknowledgment—Receipt of rents and profits by mortgagee in possession.

In 1836 one S mortgaged the property in suit to R for a period of ten years. R sub-mortgaged the property to K in 1841. In 1878 sub-mortgagee K leased the property, in the rent-note of which the property was described as "the property mortgaged to you". The sub-mortgagee K presented the rent-note for registration and signed the registration particulars endorsed on it. In 1910 S's heirs sued to redeem the mortgage of 1836 from the sub-mortgagee K, R, the original mortgagee, having died meanwhile without leaving any heirs. The mortgagors, heirs of S, sought to bring their claim for redemption within time by treating the recital in the rent-note of 1878 as an acknowledgment of their mortgage under section 19 of the Limitation Act; and the receipt by the sub-mortgagee K of rent and profits as keeping alive their right under section 20 of the Act:—

Held, that the suit was barred as (1) although the recitals in the rent-note of 1878 might serve to operate as an acknowledgment of the sub-mortgage, they did not constitute an acknowledgment by the sub-mortgagee, under section 19 of the Limitation Act, of a liability to be redeemed by the original mortgagor, with whom he had no privity; (2) although the receipt of rents and profits by the sub-mortgagee extended the period of limitation allowed to him in which to sue for his mortgage debt, it did not confer a like indulgence on a mortgagor suing to redeem the mortgage.

SECOND appeal against the decision of N. S. Lokur, Assistant Judge, Sholapur, reversing the decree passed by K. A. Sapre, Subordinate Judge at Barsi.

Suit for redemption.

The property in suit belonged to one Shankar Janardan who mortgaged it with possession to Ramchandra Motiram in 1836. The mortgage was to be redeemed within ten years.

*Second Appeal No. 371 of 1921.

In 1841 Ramchandra sub-mortgaged the property to Rajaram Renukdas.

In 1878 Shankar Narhar being the heir of the sub-mortgagee Rajaram and being in possession of the suit property let it to one Pandu for a period of five years. Pandu executed a rent-note in favour of Shankar describing the property as "of your ownership by mortgage." Since then the property had remained in the possession of the sub-mortgagee's heirs who were represented on the record by defendants Nos. 1 and 2.

In 1919 the heirs of the original mortgagor Shankar Janardan sued to redeem the property from defendants Nos. 1 and 2.

The defendants contended *inter alia* that the heirs of the mortgagee Ramchandra were necessary parties and that the suit was time-barred under Articles 134 and 148 of the Limitation Act.

The Subordinate Judge held that Shankar Narhar by putting his signature on the rent-note of 1878 had acknowledged his liability to be redeemed and decreed the claim.

On appeal the Assistant Judge reversed the decree as in his opinion the acknowledgment in the rent-note could not be construed to allude to the original mortgage of 1836.

The plaintiff appealed to the High Court.

G. S. Rao, for the appellant:—I rely upon the rent-note, dated 11th February 1878 taken by Shankar, who presented it for registration and signed it. This amounts to an acknowledgment of liability to be redeemed by his mortgagor as also by the original mortgagor. When a mortgagor brings a redemption suit against his mortgagee who has sub-mortgaged, the sub-mortgagee is a necessary party and hence, if he admits

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his own mortgage he admits the mortgage to his mortgagor by way of implication. Moreover the mortgagee was in possession of the mortgaged property and received rents and profits thereof. So by section 20 of the Indian Limitation Act, the time for redemption was extended.

P. B. Shingne, for the respondent No. 1 :—This is a suit to redeem the original mortgage and unless there is an acknowledgment of liability to redeem the original mortgage, the suit would be clearly out of time. The rent-note is not signed by Shankar. Hence there is no acknowledgment of liability made by Shankar, as required by law. Moreover, the rent-note cannot be construed to contain an admission of liability in connection with the original mortgage. The provision in section 20 is intended for the benefit of the mortgagee and not for the benefit of the mortgagor. Vide *Chinto v. Ballerishna*⁽¹⁾.

MACLEOD, C. J. :—The plaintiff sued to redeem and recover possession of the suit property after accounts had been taken under the Dekkhan Agriculturists' Relief Act.

The property was originally mortgaged in 1836 by Shankar Janardan Joshi for Rs. 100 repayable in ten years, to Ramchandra Motiram. Ramchandra sub-mortgaged the property to Rajaram Renukadas in 1841. Defendants Nos. 1 and 2 were in possession as his heirs. Ramchandra died without leaving heirs. The plaintiff, defendant 3 and one Vishwanath were the heirs of Shankar Janardan, but Vishwanath renounced his rights in favour of the plaintiff's father.

Prima facie a suit for redemption became time-barred in 1906 but the plaintiff relied upon a rent-note,

(1) (1893) P. J. 346.

dated the 11th February 1878 taken by Shankar Narhar, the father of defendant No. 1, in which the property was described "as the property mortgaged to you." Shankar Narhar presented the document for registration, and signed it. Shankar Narhar thereby acknowledged his liability as a mortgagee to be redeemed by his mortgagor Ramchandra Motiram or his successors. The learned trial Judge appears to have come to the conclusion that Shankar also by the same signature acknowledged his liability to be redeemed by the original mortgagor and decreed the plaintiff's claim. The learned Assistant Judge was of opinion that as the acknowledgment was made by the sub-mortgagee, it was not intended to acknowledge the original mortgage also. Admitting that Shankar knew that Ramchandra Motiram was himself only a mortgagee of the property, he was not concerned with the question whether time was running in favour of Ramchandra against his mortgagor and I am not prepared to give an extended meaning to Shankar's signature on the rent-note so as to make it an acknowledgment under section 19 of the Indian Limitation Act XV of 1877 of a liability to be redeemed by the original mortgagor with whom he had no privity.

As pointed out in *Hiralal Ichhalal v. Narsilal Chaturbhujdas*⁽¹⁾ an acknowledgment to whomsoever made is a valid acknowledgment only if it points with reasonable certainty to the liability under dispute. It was argued that when a mortgagor brings a redemption suit against his mortgagee who has sub-mortgaged, the sub-mortgagee is a necessary party under Order XXXIV, Rule 1, and that consequently if he admits his own mortgage he admits the mortgage to his mortgagor. But I agree with the learned Assistant Judge that this inference in the absence of direct authority in its favour is too

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far-fetched. Taken at its highest, Shankar's signature on the rent-note cannot mean more than this. "I admit Ramchandra and his heirs can redeem me and as Ramchandra is a mortgagee he is liable to be redeemed himself. If his mortgagor sued for redemption I know I can claim to be made a party to that suit, so that my mortgage rights against Ramchandra can be considered when his claim against his mortgagor is adjusted." But if a suit against Ramchandra were barred it is difficult to see how it would not also be barred against Shankar unless he had directly admitted his liability to be redeemed by the mortgagor, and the signature on the rent-note does not point with reasonable certainty to that liability.

Then it was argued that as the mortgagee was in possession of the mortgaged property and receiving the rents and profits the right to redeem was preserved by section 20, sub-section (2) of the Indian Limitation Act.

In *Ganu v. Krishnaji*⁽¹⁾ it was held that the receipt of produce of the mortgaged property by a mortgagee could be deemed to be a payment for keeping alive the period of limitation for a suit to recover the mortgage debt, but only an acknowledgment of the right to redeem under section 19 could keep the right to redeem alive. It may be said that the question was not directly in point in that suit but in *Chinto v. Ballerishna*⁽²⁾ it was held that in a redemption suit by plaintiff the application of section 20 of the Indian Limitation Act did not keep alive the right to redeem. These decisions were followed in *Anwar Husain v. Lalmir Khan*⁽³⁾. Blair J. said: "It appears to me on further consideration that the scope of section 20 is limited by the opening words of that section and extends only to the remedies of persons entitled to a debt or legacy." And Banerji J.

(1) (1893) P. J. 318.

(2) (1893) P. J. 346.

(3) (1903) 26 All. 167.

said: "The effect of any other view of section 20 would be practically to exclude suits for redemption of usufructuary mortgages from the operation of the Limitation Act."

I think, therefore, the decision of the lower appellate Court was right and the appeal must be dismissed with costs.

COYAJEE, J.:—The property in dispute in this case belonged to Shankar Janardan who mortgaged it with possession to Ramchandra Motiram in the year 1836. In 1841 Ramchandra sub-mortgaged it to Rajaram Renukadas. Shankar, the mortgagor, Ramchandra, the mortgagee, and Rajaram, the sub-mortgagee, all died long before the commencement of the present litigation. The plaintiff (now appellant), claiming to be an heir of Shankar Janardan, institutes this suit to redeem the mortgage effected by the latter in the year 1836. The mortgagee, Ramchandra, is said to have left no heirs. The 1st defendant, who alone contests the plaintiff's claim, is now in possession of the suit property, Rajaram's interest having descended to him by inheritance.

The plaint was filed on the 3rd of October 1919; the suit was, therefore, instituted after the expiry of the period prescribed by Article 148 of the Indian Limitation Act, 1908. It was, however, alleged in the plaint that the claim was saved from the bar of limitation by certain recitals contained in a document, a copy of which is put in as Exhibit 23 in the case. It appears that the defendant No. 1's father, Shankar Narhar, being the heir of the sub-mortgagee Rajaram and being in possession of the suit property, let it to one Pandu on the 11th February 1878 for a period of five years. Pandu executed a rent-note—the original of Exhibit 23—in favour of Shankar Narhar, describing the property as

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"of your ownership by mortgage." Shankar Narhar presented this document for registration; certain particulars were then endorsed thereon as required by the Registration Act; and Shankar Narhar signed such endorsement. It was claimed for the plaintiff in the trial Court that this signature amounted to an admission by Shankar Narhar of the contents of the rent-note; that the description of the property as "of your ownership by mortgage" was an acknowledgment of liability in respect of the plaintiff's right to redeem the original mortgage of 1836; and that, therefore, under the provisions of section 19 of the Indian Limitation Act, a fresh period of limitation should be computed from the date of the rent-note. This contention was accepted by the trial Judge who gave a decree for redemption as prayed.

Against this decree the 1st defendant appealed to the Court of the Assistant Judge at Sholapur. The plaintiff, in support of the decree, relied on the provisions of section 19 as also on those contained in section 20 (2) of the Indian Limitation Act. The Assistant Judge held that the plaintiff was not entitled to claim exemption from the law of limitation under either of those provisions; he, therefore, dismissed the plaintiff's suit. In my opinion the decision of the learned Assistant Judge is right.

Dealing first with section 19, it may be conceded that for the purpose of excluding the law of limitation "any expression...referring to the estate as mortgaged.....will...be a sufficient acknowledgment. No particular form is necessary,.....the acknowledgment may be made as well by affidavit in a suit, or in a schedule to a deed, or by an answer to interrogatories, as by a letter or other writing" (Fisher's Law of Mortgage, 6th edn., section 1408). Here it is urged that the acknowledgment took

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the form of a description; that Shankar Narhar allowed himself to be described as mortgagee of the property in question; and that his acceptance of that position amounted to an acknowledgment of his liability to be redeemed by the mortgagor. This proposition would be clearly unassailable if Ramchandra's heirs had been suing Shankar Narhar or his successors in interest to redeem the sub-mortgage of 1841: *Pranjivandas v. Bai Mani*⁽¹⁾. But in my opinion the said admission cannot avail the plaintiff; for he is seeking to redeem the mortgage effected by Shankar Janardan in favour of Ramchandra. There is nothing in the document, Exhibit 23, which could be held to amount to an acknowledgment of the particular liability now in dispute, namely, the liability in respect of the plaintiff's right to redeem the mortgage effected by Shankar Janardan in the year 1836: *Gopalrao v. Hari-lal*⁽²⁾. The effect of the rent-note is correctly described by the Assistant Judge thus: "At the most, he (Shankar Narhar) admitted that the origin of his possession was a mortgage, and obviously he meant the mortgage to him, or rather to his ancestor Rajaram by Ramchandra Motiram, but he made no admission in the acknowledgment that the said Ramchandra himself was a mortgagee." Moreover, it is not shown that Shankar Narhar signed the acknowledgment as Ramchandra's agent "duly authorized" in that behalf (Explanation II, section 19). The result is that the plaintiff is not entitled to claim the benefit of an extended period under the provisions of section 19.

The argument based on sub-section (2) of section 20 is, in my opinion, equally untenable. Even assuming that the 1st defendant is "the mortgagee" contemplated in that section, still the provisions contained therein do not operate to extend the period prescribed by Article 148

⁽¹⁾ (1920) 45 Bom. 934.

⁽²⁾ (1907) 9 Bom. L. R. 715.

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of the Act for the redemption of a mortgage; they are clearly intended for the benefit of a mortgagee suing on the mortgage-debt. For by section 20 (2) it is enacted that the receipt of the rent or produce of mortgaged property by the mortgagee in possession "shall be deemed to be a payment for the purpose of sub-section (1)". The purpose of sub-section (1) is clear: where interest on a debt or legacy is paid by the person liable to pay the debt or legacy, or where part of the principal of a debt is paid by the debtor, *the person entitled to the debt* or legacy acquires the benefit of a fresh period of limitation. The scope of sub-section (2), then, is limited; it extends the period of limitation allowed to a mortgagee for suing on the mortgage-debt; it does not confer a like indulgence on a mortgagor suing to redeem the mortgage. This was the interpretation put upon the clause by Sargent C. J. and Telang J. in *Ganu v. Krishnaji*⁽¹⁾ and again in *Chinto v. Balkrishna*⁽²⁾. A similar view was taken by the High Court at Allahabad in *Anwar Husain v. Lalmir Khan*⁽³⁾. It was, however, urged in this second appeal that the rights of the mortgagor and the mortgagee being co-extensive and reciprocal, there is no reason to suppose that the Legislature extended the indulgence to the mortgagee alone, but declined it to the mortgagor. The answer to this argument may best be given in the words of Rattigan J. in *Khilanda Ram v. Jinda*⁽⁴⁾: "No doubt by the general law the right to redeem and the right to foreclose are co-extensive rights, but in the present case we have to apply the provisions of the law of limitation which is a special law, and we cannot enlarge the exemptions or extensions of time allowed by that law beyond their legitimate scope."

(1) (1893) P. J. 318.

(2) (1903) 26 All. 167.

(3) (1895) P. J. 346.

(4) (1882) P. R. No. 37 of 1883.

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.

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Before Mr. Justice Pratt and Mr. Justice Fawcett.

BAI REWA, WIDOW OF AMBARAM GOPAL (ORIGINAL DEFENDANT), APPELLANT v. VALI MAHOMED MIYA MAHOMED AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS².

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February 23.

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.

²Appeal under the Letters Patent No. 37 of 1921.