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32 C. 1072= 10 C. W. N. 805=2 C. L. J. 590.

is not there referred to, we need only say that there was a claim to some right in the property. The grievance alleged by the plaintiff in the present case seems to be merely sentimental. The plaint does not even set out any right in the plaintiff to interfere with the discretion of the defendants to locate the gods in the western temple. It only says that the defendants have acted in violation of an old practice to bring the idols back to the eastern temple after a few days' visit to the western temple. The plaintiff is opposed to what he considered to be an innovation: the question he raises is not in our opinion of a nature cognizable by a Civil Court.

The appeal is accordingly dismissed with costs.

Appeal dismissed.

32 C. 1077 (=9 C. W. N. 868.)

[1077] APPELLATE CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, and Mr. Justice Mitra.

KRISHNA CHANDRA SAHA *v.* BHAIRAB CHANDRA SAHA.*

[21st July, 1905.]

Limitation—Mortgage—Limitation Act (XV of 1877) ss. 19, 20—Acknowledgment of debt—Acknowledgment by predecessor in interest—Part Payment—payment of interest.

A mortgaged several properties to the plaintiffs and then sold one of them, property No. 3, to B who again mortgaged the property to C, and in a mortgage suit by C, the property was sold and purchased by D.

A afterwards paid part of the principal as well as of interest under the mortgage and made an acknowledgment of his liability under it.

D contended that any such acknowledgment as against her was of no avail.

Held, that under sections 19 and 20 of the Limitation Act the acknowledgment as well as the payments were sufficient to keep the debt alive against the property No. 3.

Chinnery v. *Evans* (1) referred to.

[Appl. 22 I. C. 510; Fol. 33 Cal. 1278=11 C. W. N. 107; Ref. 12 M. L. T. 610=24 M. L. J. 66=17 I. C. 619; 32 I. C. 603; 37 Cal. 461; 40 M. L. J. 126=62 I. C. 833.]

APPEAL by some of the plaintiffs, Krishna Chandra Saha and others.

The plaintiffs brought the suit on the 7th February 1903 to enforce a mortgage bond executed by the defendant No. 1 Bhairab Chandra Saha in favour of the father of the plaintiffs Nos. 2 to 6 and of the remaining plaintiffs on the 28th April 1887, the date of payment fixed in the bond being in January 1888. Bhairab then sold one of the mortgaged properties, referred to in the judgment as property No. 3, to one Barada Charan Banerjee on the 20th December 1888 for Rs. 23,000, who motgaged it to Sew Bux Bogla. In execution of a decree obtained by Sew Bux on the 21st August 1896 on the Original Side of the High Court against the executrix and executor of the will of Barada Charan, the property was sold by the Subordinate Judge of [1078] Alipore and was purchased by the defendant No. 2 Bhaba Bhabani Dasi in the *benami* of one Tarini Churn Ghose on the 15th June 1897, the sale being confirmed on the 26th July 1897. To avoid the operation of the Limitation Act the plaintiffs relied on certain payments of part of the principal as well as of interest duly made by the defendant No. 1 Bhairab

* Appeal from Original Decree No. 292 of 1904 against the decree of Hari Nath Dey, Subordinate Judge of Dacca, dated the 23rd of June 1903.

(1) (1864) 11 H. L. C. 115.

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32 C. 1077 = 9 C. W. N. 818.

Chandra on the 29th December 1893, the 2nd and the 17th February 1894 and on the 9th February 1900, and on an acknowledgment in writing signed by him on the 2nd February 1894.

The suit was defended by the defendant No. 2, Bhaba Bhabani Dasi. She pleaded that the plaintiffs were bound to prove their claim and to show that the claim under the bond was not barred by limitation. She further pleaded that Barada Charan, Sew Bux and she herself were *bona fide* purchasers without notice of the plaintiff's mortgage and that the property No. 3 should be sold only if the plaintiffs' claim could not be satisfied out of the other mortgaged properties.

The Subordinate Judge held that the defendant No. 2 by her purchase became a joint contractor with defendant No. 1 and that therefore the payments and the acknowledgment pleaded by the plaintiff did not save the suit as against her. He accordingly dismissed the suit as against her and ordered that the property No. 3 should not be sold.

He made a decree for the sale of the other properties.

Some of the plaintiffs appealed to the High Court.

Mr. *Sinha* (Babu *Baikanta Nath Das* with him) for the appellants.

Babu *Lal Mohun Das* (Babu *Shiba Prasanna Bhattacharya* with him) for the respondent, referred to the following cases : *Chinnery* v. *Evans* (1), *Surjiram Marwari* v. *Barhamdeo Persad* (2), *Newbould* v. *Smith* (3).

MACLEAN, C. J. This is a suit to enforce a mortgage dated the 28th April 1887. The due date of payment was in January [1079] 1888. The mortgage covered various properties, and on the 28th December 1888, the mortgagor, without apparently any knowledge on the part of the mortgagee, sold one of the mortgaged properties, namely, property No. 3, to one Barada Charan Banerjee. Barada Charan subsequently mortgaged that property to one Sew Bux Bogla, who obtained a decree in a suit to realise his security, and, at a sale in execution of that mortgage decree, the property was purchased by the present defendant No. 2 on the 15th June 1897.

The defendant No. 2 is the only respondent who has appeared in the present appeal.

The present suit was instituted on the 7th February 1903, and admittedly the suit would have have been out of time but for the fact that there had been various payments on account made by the mortgagor and an acknowledgment given by him of his liability under the mortgage. On the 29th December 1893, a sum of Rs. 1,000 was paid by him, and on the 2nd February 1894 a small sum of Rs. 10 was paid, and on that date there was an acknowledgment by the mortgagor of his liability under the mortgage. A further payment apparently was made by the mortgagor on the 9th February 1900. So that, as against the mortgagor, defendant No. 1, the case is clear and his liability has not been disputed by him. But the defendant No. 2 contends that she is not bound by any acknowledgment given by the mortgagor. She says that the mortgagor was not her agent, that he had sold the property No. 3, that she claimed through that purchaser, and that any acknowledgment given by the mortgagor was, as against her, of no avail.

The Subordinate Judge in the Court below in deciding this point in favour of the present respondent based his decision on section 21 of the Limitation Act, but his view of that section has not been supported by the learned Vakeel, who appears on her behalf.

(1) (1864) 11 H. L. C. 115.
(2) (1905) 1 C. L. J. 327.
(3) (1886) 33 Ch. D. 127 ; 14 App. Cas 423.

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I should have been disposed myself, on the evidence, to hold that when Barada Charan purchased in 1888, he had notice of the plaintiff's mortgage, for not only was the mortgage by registered deed, but the defendant No. 1, the mortgagor himself, swears positively that he informed the purchaser of the existence [1080] of this mortgage. But for some reason not given the Court below has not treated this evidence as sufficient and has arrived at the conclusion that Barada had no notice of the mortgage at the time he made the purchase. The question is, to say the least, very doubtful. But whether Barada had notice or not, we think the acknowledgment given by the mortgagor, defendant No. 1, was in the circumstances sufficient to keep the debt alive as against property No. 3. It is not disputed that there was an acknowledgment on the bond by defendant No. 1 of his liability. The question is whether that binds defendant No. 2. The case seems to depend upon the effect of section 19 or 20 of the Indian Limitation Act. Section 19 runs as follows:—"If, before the expiration of the period prescribed for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by some person through whom he derives his title or liability, a new period of limitation, according to the nature of the original liability, shall be computed from the time when the acknowledgment was so signed." It is not disputed that the acknowledgment made by the defendant No. 1 in respect of the properties, which had not been sold, was perfectly good as against him. But it was also an acknowledgment given by a person through whom the defendant No. 2 derived his title. It was given by the mortgagor and it was through that mortgagor that the defendant No. 2 derived his title. It seems difficult therefore to get over the precise language of this section. Again it may be said that the language of section 20 meets the case. That section prescribes that when part of the principal of a debt is, "before the expiration of the prescribed period paid by the debtor or by his agent authorized in that behalf, a new period of limitation according to the nature of the original liability shall be computed from the time when the payment was made." Here part of the principal was undoubtedly paid by the debtor, defendant No. 1, that is the mortgagor, before the expiration of the prescribed period, and would perhaps be sufficient to bring the case within that section. The section would consequently seem to apply. In our opinion, having regard to the language [1081] of this section, we do not think the action is barred as against property No. 3. We may add that the principle to be deduced from the case of *Maria Chinnery* v. *Eyre Evans* (1) is applicable to the present case, viz., that a mortgagee cannot, by the act of the parties entitled only to the equity of redemption, be deprived of his right to resort to any estate comprised in his mortgage so long as he has not released or given it up and so long as that mortgage is legally kept alive.

It may be that the question may become of no practical importance to defendant No. 2, for Mr. Sinha for the plaintiffs is quite willing that the property No. 3 should not be sold, until the other properties comprised in the mortgage have been sold first. If the proceeds of sale of these properties are sufficient to pay off the mortgage debt, defendant No. 2 will not be hurt.

The result, therefore, is that the decree of the Court below must be reversed and the mortgage decree will extend to property No. 3 with this

(1) (1864) 11 H. L. C. 115.

limitation that, by consent of parties, it is not to be sold until the other properties covered by the mortgage have been first sold. The appellants will get their costs both in this Court and in the Court below, which may be added to their security.

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MITRA, J. I am of the same opinion.

Appeal allowed.

32 C. 1077=9 C. W. N. 868.

32 C. 1082 (=9 C. W. N. 1021.)

[1082] APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Justice Geidt.

CHAITANYA GOBINDA PUJARI ADHIKARI *v.* DAYAL GOBINDA ADHIKARI.*

[19th July, 1905.]

Probate—Of what documents granted—Document appointing successor to sebaitship—Will—Probate and Administration Act (V of 1881), s. 3.

Where the mohant of an *akhra* executed a document described as a will, but purporting merely to appoint the petitioner as the next *sebait* or manager for the purpose of carrying out the *seba*, *pujas*, and other rites and ceremonies appertaining to the *akhra*, with full power to manage and supervise the properties belonging to the *akhra*:

Held that the document was not a will and could not be admitted to probate.

[Ref. 1 I. C. 216; 15 C. W.N. 1014=11 I. C. 152 : Dist. 10 C. L. J. 644=3 I. C. 380 ; 14 C. W. N. 174: Fol. 20 C. L. J. 307=27 I. C. 24 ; 51 I. C. 884=23 C. W. N. 401.]

APPEAL by the petitioner Chaitanya Gobinda Pujari Adhikari.

One Dole Gobinda Adhikhari was the mohant of the *akhra* of Syam Sundar and Lakshmi Narayan *Bigrahas*. He died on the 32nd Chait 1310, having on the 29th Falgoon 1309 executed a document described as a will, the material provisions of which are set out in the judgment of the High Court.

The petitioner applied for probate of this document. The Subordinate Judge to whom the case was transferred by the District Judge refused the application on the ground *inter alia* that the document was not a will.

The petitioner appealed to the High Court.

Babu *Baikunta Nath Das* for the appellant. Sebaitship is property ; it carries with it the right to possession and management of the endowed properties ; it comprises the right to institute and defend suits in respect of these properties ; it is therefore property and can be disposed of by will ; the document disposing of the sebaitship, such disposition taking effect after [1083] the death of the person executing it, is a will and may be admitted to probate.

Babu *Dwarka Nath Chakrabarti* (Babu *Gobinda Chandra Dey Roy* with him) for the respondent. The test is, does any property of the testator pass—sebaitship is an office ; it comes to an end with the death of the holder, who cannot therefore dispose of it by will. Position of sebait is that of guardian of a minor ; he may appoint his successor, but by the appointment nothing passes, which belonged to him ; his rights as sebait cease with his death. *Bhagaban Ramanuj Das* v. *Ram Praparna Ramanuj Das* (1).

GHOSE AND GEIDT, JJ. This appeal arises out of an application made by one Chaitanya Gobinda Pujari Adhikari for probate of a document

* Appeal from Original Decree No. 191 of 1904, against the decree of Rash Behari Bose, Subordinate Judge of Mymensingh, dated the 27th of February, 1904.

(1) (1895) I. L. R. 22 Cal. 843.