

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Lala Soni Ram v. Kanhaiya Lal and others, from the High Court of Judicature for the North-Western Provinces, Allahabad (P.C. Appeal No. 107 of 1911); delivered the 6th March 1913.

PRESENT AT THE HEARING:

LORD SHAW.

LORD MOULTON.

SIR JOHN EDGE.

MR. AMEER ALI.

[DELIVERED BY SIR JOHN EDGE.]

The suit in which this Appeal has arisen was brought on the 4th March 1907 by Lala Soni Ram the Appellant here for the redemption of a mortgage which had been made on the 2nd January 1842 by the then owners of Mauza Kheria Buzurg in favour of Khushwakt Rai, who was on the making of the mortgage put in possession by the mortgagors. The mortgage was usufructory, the profits except Rs. 80 per annum were to be taken by the mortgagee in lieu of interest and the mortgagee was to pay to the mortgagors annually the Rs. 80 as malikana.

By the mortgage it was provided that the mortgagors should be entitled to redeem and to obtain possession of the mortgaged property on payment of Rs. 4,000, which was the amount advanced to them. No date for the redemption of the mortgage was specified, and consequently the mortgage became liable to be redeemed

immediately after it was made. The whole 20 *biswas* of Kheria Buzurg were included in the mortgage, but the original mortgagors or some of them redeemed the mortgage so far as it affected 6 *biswas* 17½ *biswanis* of Kheria Buzurg, and this suit relates to the right to redeem the mortgage so far as it affects the remaining 13 *biswas* 2½ *biswanis* of the property which was mortgaged in 1842, if that right could at the date of the suit have been enforced by suit.

In order to understand the issues which were raised and were tried in the Court of first instance, or on appeal below, it is necessary briefly to refer to the title of Lala Soni Ram, the Plaintiff-Appellant, as representing the original mortgagors, and to the title of the Defendants-Respondents as representing the original mortgagee Khushwakt Rai, and to refer to a suit which was brought on the 18th May 1904 by the present Defendant-Respondant Babu Charan Behari Lal, and his brother Lala Shib Shankar Lal against the present Plaintiff-Appellant, Lala Soni Ram. Lala Shib Shankar Lal was a defendant to this suit and is represented here by the Respondents to this Appeal.

Between the years 1880 and 1883 Mannu Lal, since deceased, who was the father of the Plaintiff-Appellant, acquired the rights and interests of the original mortgagors in the 13 *biswas* 2½ *biswanis* of Kheria Buzurg to which this suit relates. These rights and interests so far as they can be enforced are now vested in the Plaintiff-Appellant, Lala Soni Ram.

Khushwakt Rai, the original mortgagee, died shortly before 1855, leaving surviving him his widow, Musammat Jamna, who died on the 10th May 1866, and a daughter Musammat

Janki, who died on the 30th May 1898. Babu Charan Behari Lal and Lala Shib Shankar Lal, who were the plaintiffs in the suit of 1904, were the sons of Musammat Janki.

On the 31st March 1866 Musammat Jamna, who had succeeded to a Hindu widow's estate on the death of her husband Khushwakt Rai, executed a sale-deed by which she transferred a moiety of her interest as mortgagee of Kheria Buzurg to Debi Parshad and Gulab Rai, and on the same date by deed hypothecated to them the other moiety of her interest as mortgagee. On the 29th April 1867 Musammat Janki executed a sale-deed in favour of Debi Parshad and Gulab Rai, by which she transferred to them her interest as mortgagee in the moiety of Kheria Buzurg which had been hypothecated to them by Musammat Jamna in 1866. The mortgagee's interest in Kheria Buzurg which, by the sale-deeds of 1866 and 1867, had vested for the lives of Musammat Jamna and Musammat Janki in Debi Parshad and Gulab Rai, vested by assignments in or before 1883 in Mannu Lal, and from 1883 until Musammat Janki's death in 1898 Mannu Lal or his son, Lala Soni Ram, the Plaintiff-Appellant, who succeeded him, enjoyed the rights of the mortgagors and the mortgagee in the 13 *biswas* 2½ *biswanis*.

In the deeds of the 31st March 1866, Musammat Jamna had described herself as a mortgagee and had acknowledged the existence of the mortgage of 1842, and in the deed of the 29th April 1867 Musammat Janki had similarly described herself as mortgagee and acknowledged the existence of the mortgage. Neither of those deeds is before this Board, but that is the inference which their Lordships draw from the proceedings and the judgments in the Courts below.

After the death of Musammat Janki her sons, Babu Charan Behari Lal and Lala Shib Shankar Lal, brought a suit on the 18th May 1904 against Lala Soni Ram, the present Plaintiff-Appellant, to obtain possession as mortgagees of the 13 *biswas*, 2½ *biswanis* of Kheria Buzurg on the ground that the transfers which were made in the lifetime of Musammat Jamna and Musammat Janki became ineffectual as against them on the death of those ladies. In that suit Babu Charan Behari Lal and Lala Shib Shankar Lal on the 12th October 1904 obtained a decree for possession.

So far as appears from that part of the record which is before this Board, Babu Charan Behari Lal and Lala Shib Shankar Lal did not in the suit of 1904 allege or admit that the mortgagors' interest had vested in Mannu, or was vested in Lala Soni Ram the present Plaintiff-Appellant; their case apparently simply was that the title to the mortgagees' interest which had been transferred by Musammat Jamna and Musammat Janki had determined so far as Lala Soni Ram was concerned, on the death of Musammat Janki, and that they became entitled as representing Khushwakt Rai, the mortgagee, on her death to possession as mortgagees. Their case was, that after the death of Musammat Janki, Lala Soni Ram was a trespasser, as in fact he was, and they claimed mesne profits. It does not appear that Babu Charan Behari Lal and Lala Shib Shankar Lal alleged, or otherwise admitted, in the suit of 1904, that a right to redeem the mortgage of 1842, which could be enforced by suit, was vested in any one, nor was it material to their cause of action that a right to redeem which could be enforced by suit should be vested in any one. Their title to possession on the death of Musammat Janki, which was the title they

claimed, related back to and was based on the mortgage of 1842 whether the right to enforce by suit redemption of that mortgage had or had not been extinguished before the 18th May 1902 by limitation. The mortgage had not been redeemed and nothing had happened between the death of Musammat Janki and the 18th May 1904 to disentitle Babu Charan Behari Lal and Lala Shib Shankar Lal to a decree for possession based on that original title. As a matter of fact if Lala Soni Ram had desired, on the death of Musammat Janki, in 1898, to redeem, he could have brought his suit within sixty years from the date of the mortgage, as the sixty years did not expire until January 1902, but apparently he hoped, by holding on to the possession of the 13 *biswas* 2½ *biswanis* to escape from having to pay the Rs. 4,000 redemption money. When the suit of 1904 was brought, the period of 60 years, computed from the 2nd January 1842, had expired.

In this Appeal, which is *ex parte*, the plaint and other pleadings in the suit of 1904 are not before their Lordships, but they draw the inference which they have expressed from the judgment of the 12th October 1904 and from the judgments of the Courts below in this suit. The effect of the suit of 1904 was to give by process of law to Babu Charan Behari Lal and Lala Shib Shankar Lal the possession as mortgagees to which they had become entitled on the death of their mother Musammat Janki on the 30th May 1898.

Lala Soni Ram, the present Plaintiff-Appellant, on the 4th March 1907 brought in the Court of the Subordinate Judge of Aligarh this suit against Lala Shib Shankar Lal and Babu Charan Behari Lal for the redemption of the mortgage of the 2nd January 1842 so far as it affected the 13 *biswas* 2½ *biswanis* of Kheria Buzurg. Other

Defendants were subsequently added. In their written statement Lala Shib Shankar Lal and Babu Charan Behari Lal admitted that the mortgage of the 2nd January 1842 was made, and so far as is now material pleaded that the suit was not brought within 60 years of the date of the mortgage, that no admission of the right of the mortgagor was made within 60 years from the date of the mortgage, and consequently that the suit was barred by limitation. They also alleged that in the suit of 1904 Lala Soni Ram had pleaded that he had a right to redeem, but that the Court in that suit had decreed their claim for possession, and they relied upon Section 13 of the Code of Civil Procedure. They further pleaded that in the suit of 1904 it had been decided that the deeds which had been executed by Musammat Jamna and Musammat Janki were not binding upon them the answering Defendants after the deaths of those ladies.

The Subordinate Judge held, and rightly as their Lordships consider, that the suit of 1904 did not by the operation of Section 13 of the Code of Civil Procedure bar the present suit. The suit of 1904 was a suit by Lala Shib Shankar Lal and Babu Chavan Behari Lal for possession as mortgagees. The mortgage had not been redeemed and the plea of Lala Soni Ram that he was entitled to redeem was irrelevant to a suit by the usufructory mortgagee for possession. Lala Soni Lal's title as mortgagor was not in question in that suit, nor could he as a defendant to that suit have converted that suit into one in which he could have obtained a decree for redemption. The Subordinate Judge, however, applying Section 15 of Act XIV. of 1859 to the case, held that the acknowledgments of the existence of the mortgage by Musammat Jamna and Musammat Janki in their respective deeds brought this suit within time, and he gave the plaintiff a decree for redemption.

The District Judge of Aligarh, on Appeal from the decree of the Subordinate Judge, affirmed the judgment of the Subordinate Judge, and by his decree of the 24th March 1908 dismissed the Appeal. From the decree of the District Judge the Defendants appealed to the High Court at Allahabad. The High Court, rightly holding that the law of limitation applicable to a suit or proceeding is the law in force at the date of the institution of the suit or proceeding, unless there is a distinct provision to the contrary, held that Act XV. of 1877, and not Act XIV. of 1859, was the Limitation Act which was applicable to the suit. By Section 19 of Act XV. of 1877, it is so far as is material for present purposes enacted 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 claims 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.”

This is a suit to redeem, and the period prescribed by Article 148 of the Second Schedule of Act XV. of 1877 within which a suit against a mortgagee to redeem or to recover possession of immovable property mortgaged is 60 years from the time when the right to redeem or to recover possession accrues.

The learned judges of the High Court held that there could not be any doubt that the mortgage of 1842 was in terms admitted by Musammat Jamna and Musammat Janki in their respective deeds, but they also held that the Defendants derived title through their grandfather Khushwakt Rai, who was mortgagee and the last full owner of the rights of the mortgagee, and did not derive title through

Musammat Jamna or Musammat Janki who, although for certain purposes they did represent the estate, were not persons who could be deemed to have admitted for the benefit of the mortgagee's estate a right of redemption in the mortgagor, and that in making such acknowledgments they had no power to bind any interests except their own. To have held otherwise would, in their Lordships' opinion, have been to extend the power of a Hindu woman in possession for her limited interest to bind the estate to an extent which has not been sanctioned by authority.

It was also contended in the High Court on behalf of the Plaintiff that there had been a fusion of the interests of the mortgagee and the mortgagor in the same person between the years 1883 and 1898; and that no mortgage was in existence during that period; and that Article 120 of the Second Schedule of Act XV. of 1877, and not Article 148 applied; and that the suit was within time. The learned Judges of the High Court pointed out one obvious answer to that contention. It was that, if Article 120 applied, the suit was not within time, as Musammat Janki had died more than six years before the suit was brought. They also pointed out that the mortgagee's interest which became vested in Mannu was only the limited interest of a Hindu lady, and consequently there had been no merger. The High Court, by its decree of the 7th August 1909, allowed the Appeal on the ground that the suit was barred by limitation and dismissed the suit with costs in all Courts. From that decree the plaintiff Lala Soni Ram has brought this appeal.

In this appeal it has been contended that the Limitation Act applicable to this case is Act XIV. of 1859, and consequently the acknowledgments of the existence of the mort-

gage of 1842 which were contained in the deeds which were executed by Musammat Jamna and Musammat Janki brought this suit within time. As to that contention it is sufficient for their Lordships to say that they agree with the High Court that Act XIV. of 1859 does not apply to this suit and that the Limitation Act which does apply is Act XV. of 1877, and further that the acknowledgments which were made by Musammat Jamna and Musammat Janki were not acknowledgments within the meaning of Section 19 of Act XV. of 1877 made by a person or persons through whom the Defendants derived title or liability. Their Lordships consequently consider that these acknowledgments were ineffectual to give a new period of limitation. The contention in this Appeal which is based upon Section 6 of the General Clauses Act and Section 2 of Act XV. of 1877 was pressed upon the High Court. Their Lordships agree with the High Court that an acknowledgment of liability only extends the period of limitation within which a suit must be brought and does not confer title, and is not a "thing done" within the meaning of Section 6 of the General Clauses Act.

In this Appeal it was also contended that the operation of Act XV. of 1877 was suspended during the whole period 1883-1898 when Mannu or his son Lala Soni Ram, the Plaintiff, were in the position of mortgagors and mortgagees, the contention being that that period should be excluded from the computation of the 60 years provided by Article 148 of the Second Schedule of Act XV. of 1877, as between 1883 and 1898 no suit for redemption could have been brought by Mannu or after his death by the plaintiff Lala Soni Ram. Their Lordships are by no means certain that this

particular contention was raised in the High Court, the contention there apparently was—not that the operation of Article 148 was suspended during the period 1883–1898—but that by reason of the fusion of the interests of mortgagor and mortgagee Article 148 did not apply to this case and that the Article which did apply was Article 120. In support of the contention in this Appeal this Board was urged to apply in this suit the principle which Lord Langdale, Master of the Rolls, applied when construing Section 40 of 3 & 4 William IV. chap. 27, in *Burrell v. The Earl of Egremont*, 7 Beavan's Reports, 205. Their Lordships are unable to accede to that contention, as Article 148 of Act XV. of 1877 is essentially different in its language and intention from Section 40 of 3 & 4 William IV., chap. 27, and the facts upon which Lord Langdale acted were not in any way similar to the facts in this suit. Under Section 40 of 3 & 4 William IV. chap. 27, no suit could be brought to recover money secured on a mortgage or otherwise charged upon land, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or a release of the same, unless in one or other of the events specified in the section. The 60 years' period of limitation allowed by Article 148 of Act XV. of 1877 begins to run in such a case as this "when the right to redeem or to recover possession accrues." In *Burrell v. The Earl of Egremont* there was a charge upon an estate which no assignable person was liable to pay and in respect of which no person was capable of making an acknowledgment that it was due. In this case the right to redeem the mortgage of the 2nd January 1842 accrued to the mort-

gators the moment the mortgage was executed, and the 60 years' period of limitation must be computed as having begun on the 3rd January 1842. There is nothing in Act XV. of 1877 which would justify this Board in holding that, once that period of limitation had begun to run in this case, it could be suspended. Their Lordships consider that if they were to hold that, by reason of the fusion of interests between 1883 and 1898, the period of limitation was suspended, they would—this not being a suit to which the proviso to Section 9 of Act XV. of 1887 applies—be deciding contrary to the express enactment of that section that “when once time has begun to run, no subsequent disability or inability to sue stops it.”

At the hearing of this Appeal two other contentions, each of which involved the consideration of facts and of law as applied to these facts, were raised. Neither of those contentions, so far as appears from the record which is before this Board, had previously been raised by anyone at any stage of this suit either in the Court of first instance or on either of the Appeals, and consequently had not been considered either by the Subordinate Judge, or the District Judge or the learned Judges of the High Court. Further, neither of these contentions is even suggested by any of the grounds of appeal which were set out in Lala Soni Ram's application to the High Court for leave to appeal to His Majesty in Council, nor is either of them suggested in the Reasons contained in the case for the Appellant here, and it must be remembered that this Appeal has been heard *ex parte*, neither the Respondents nor any Counsel on their behalf having appeared. Their Lordships are not disposed

to depart from the established practice of this Board not to allow on Appeals to His Majesty in Council new cases to be made which were not made below.

The result is that their Lordships will humbly advise His Majesty that this Appeal should be dismissed, and the decree of the High Court should be affirmed.

In the Privy Council.

LALA SONI RAM

vs.

KANHAIA LAL AND OTHERS.

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SIR JOHN EDGE.

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