

Sir Mohammad Akbar Khan - - - - - *Appellant*

*v.*

Musammatt Motai and others - - - - - *Respondents*

FROM

THE COURT OF THE JUDICIAL COMMISSIONER  
NORTH-WEST FRONTIER PROVINCE

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE  
OF THE PRIVY COUNCIL, DELIVERED THE 29TH JULY, 1947

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*Present at the Hearing :*

LORD SIMONDS

MR. M. R. JAYAKAR

SIR JOHN BEAUMONT

[*Delivered by* SIR JOHN BEAUMONT]

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This is an appeal by special leave from a judgment and decree of the Court of the Judicial Commissioner, North-West Frontier Province, dated 28th April, 1941, affirming a judgment of the Additional Judge of Peshawar dated 17th January, 1941, which affirmed the judgment and decree of the Subordinate Judge, 4th Class, Mardan, dated 11th June, 1937. The appeal arises out of a suit brought by the appellant against the respondents for possession of certain lands by redemption of a mortgage on paying the amount due upon the mortgage which is claimed to be Rs.8.

The facts giving rise to the appeal, which are not in dispute, are as follows:—

The mortgage for the sum of Rs.8 which the appellant seeks to redeem has not been produced, and there is no evidence that any written mortgage ever existed. The evidence that the respondents are in possession of the lands in suit as mortgagees consists of:—

(a) An entry in the Jamabandi (Register of owners holding) for the year 1885-86 of the village of Mardan, in which under the heading "Name of owners with particulars" Burhan-ud-din is mentioned as mortgagor and Fazal Shah is mentioned as mortgagee for Rs.8 in King Emperor's coin. The property is stated to be cultivated by the mortgagees themselves.

(b) An extract from the Record of Rights relating to the village of Mardan for the year 1895-96 in which Burhanuddin is stated to be mortgagor, and Mst. Motai 1st wife, Mst. Mustafa 2nd wife Mst. Walagai 3rd wife, and Mst. Ajjo 4th wife of Fazal Shah are stated to be mortgagees in equal shares, and to be cultivating themselves.

(c) An entry in the Mutation Register for the village of Mardan relating to the years 1925-26, in which Burhan-ud-din is stated to be mortgagor and the said four wives of Fazal Shah are stated to be mortgagees in equal shares.

Mst. Motai, the first wife of Fazal Shah, is the first respondent. The other respondents claim under Sherdil to whom the three other wives of Fazal Shah transferred their rights.

On the 1st June, 1935, the appellant purchased from the sons of Burhan-ud-din, the original mortgagor, the equity of redemption in the property for the sum of Rs.25,000.

On the 27th August, 1936, the appellant instituted the present suit in the Court of the Subordinate Judge, Mardan, claiming to redeem the mortgage vested in the respondents on payment of Rs.8 and praying for a decree for possession of the land. The suit was valued in the plaint for purposes of Court fee and jurisdiction at Rs.8.

The case was tried by the Subordinate Judge of the 4th Class, Mardan. The learned Judge raised various issues of which the first was: "Is the Plaintiff's suit within time?" He held that the burden of proving that the suit was within time was on the plaintiff; that, inasmuch as under Article 148 of the Limitation Act a suit for redemption must be brought within 60 years from the time when the right to redeem, or to recover possession, accrued, and there was no evidence that the mortgage was for any fixed term, the plaintiff must prove that the mortgage was effected on or after the 27th August, 1876, being 60 years before the date of suit, and this he had failed to do. Accordingly, the suit was dismissed.

In appeal the District Judge of Peshawar admitted in evidence under Order 41, Rule 27 (1) (b), a further document which he thought might be material, and remanded the case to the Lower Court under Order 41, Rule 23, for a decision on all the issues.

From the Order of the District Judge an appeal was brought to the Court of the Judicial Commissioner, North-West Frontier Province. It was argued for the appellant that the Trial Judge had no jurisdiction to hear the case which was beyond the limits of his pecuniary jurisdiction. This argument was rejected. It was then held that an appeal lay from the Order of Remand made by the District Judge, and that such Order was not justified, since no case for admitting further evidence had been shown. Accordingly, the Order of the District Judge was set aside, and the case was sent back to the lower Appellate Judge with directions that he should proceed to decide the case on merits.

On the appeal from the Subordinate Judge coming again before the District Judge it was held that the Subordinate Judge was right in the view he had taken on the issue of limitation, and the appeal was dismissed.

From this judgment there was an appeal to the Court of the Judicial Commissioner. That Court agreed with the views of the Lower Courts on the question of limitation. They also rejected an argument presented to them that there had been an acknowledgment of the mortgage giving a fresh start for limitation under Section 19 of the Limitation Act, a point which has not been argued before this Board. In the result the appeal was dismissed, and from that decision this appeal has been brought.

The points argued before the Board were:—

First: that the case was beyond the limits of the pecuniary jurisdiction of the Trial Judge.

Secondly: that the burden of proving that the suit was within time was wrongly placed on the appellant and, alternatively, that if such burden lay initially on the appellant, the evidence produced was sufficient to shift the burden to the respondents.

Thirdly: that the District Judge at the first hearing before him was right in admitting further evidence and in remanding the case.

Their Lordships can dispose of the third point shortly. The power of an Appellate Court to admit further evidence under Order 27 (1) (b) is confined to cases in which the Court requires any document to be produced, or any witness to be examined, to enable it to pronounce judgment

or for any other substantial cause. As pointed out by this Board in the case of *Parsotim v. Lal Mohar*, 58 I.A. Page 254, the power only arises where the Court requires the further evidence for one of the two causes specified. The document which the learned District Judge allowed to be given in evidence in this case was a copy of a Mutation from the Settlement Record of 1883-84 of the village of Mardan, and it was suggested that that document would help the case of the appellant. But the document in question was a copy of a public document which the appellant could have put in evidence at the trial. It was certainly not required to enable the learned District Judge to pronounce judgment, nor does there appear to have been any other substantial cause for which the Judge required the document. Their Lordships agree with the view of the Court of the Judicial Commissioner that the effect of the Remand Order was "to allow the plaintiff to fish out evidence in order to prove his case and make up the lacuna which, at the present moment, exists". Their Lordships agree that the Remand Order was not justified.

The question of jurisdiction arises in this way: The Trial Judge, as already noted, was a Subordinate Judge of the 4th Class and under Regulation 19 of the North-West Frontier Province Courts Regulation, 1931, his jurisdiction was limited to cases in which the value does not exceed Rs.1,000. The effect of the Court Fees Act, 1870, Section 7, Sub-section (ix), and Section 8 of the Suit Valuation Act, 1887, is that the normal rule that valuation for Court fees and jurisdiction is the same does not apply to (amongst others) redemption suits and there is no statutory provision as to the amount at which a suit for redemption is to be valued for purposes of jurisdiction. The question which arises is whether, in a redemption suit with the mortgagee in possession, the value should be based upon the value of the property concerned, or upon the value of the interest therein of the mortgagee. Reliance is placed by the appellant on the case of *Ma Hla Saing v. Ma Su We* (1927) I.L.R. 5 Rangoon, page 499, where it was held that in a redemption suit where the mortgagee is in possession the subject matter is the land sought to be redeemed and the valuation of such suits for the purposes of jurisdiction should be based on the value of the land. That view has not prevailed in the Indian High Courts where it has been held that value for purposes of jurisdiction in a redemption suit depends on the amount found due to the mortgagee. In their Lordships' opinion this latter view is clearly correct. As pointed out in the judgment of the Court of the Judicial Commissioner a redemption suit is concerned with the interest of the mortgagee only and not with the interest of the mortgagor, and the value of the equity of redemption is irrelevant. It is no doubt true that where the mortgagee is in possession the effect of granting or withholding an Order for redemption may be to confirm the title of the mortgagor or the mortgagee, as the case may be, to the whole property, but this is an incidental effect of the Order made, and does not involve that the whole property is the subject matter of the litigation. In their Lordships' view, therefore, the suit was correctly valued for purposes of jurisdiction at Rs.8.

That leaves only the question of limitation. Section 3 of the Limitation Act enacts that: "Subject to the provisions contained in Sections 4 to 25 inclusive, every suit instituted, appeal preferred, and application made, after the period of limitation prescribed therefor by the first schedule shall be dismissed, although limitation has not been set up as a defence." In Order VII of the Civil Procedure Code, Rule 1 requires the plaint to contain amongst other particulars the facts constituting the cause of action and when it arose. Rule 6 requires that where the suit is instituted after the expiration of the period prescribed by the law of limitation, the plaint must show the ground upon which exemption from such law is claimed. Rule 11 enacts that the plaint shall be rejected if the suit appears from the statement in the plaint to be barred by any law. It is clear from these provisions that the burden rests in the first instance upon a plaintiff to show that his suit was not instituted after the period prescribed therefor by the first schedule and accordingly is not required to be dismissed under Section 3. The appellant therefore has to show, as the learned Subordinate Judge held, that the mortgage on which his

title is based was made on or after the 27th August, 1876. All that he does show is that the mortgage was in existence in the year 1885. The appellant has argued that this is sufficient to shift to the respondents the burden of showing that the suit was not within time. No doubt, in some cases, the evidence may reach a point at which the onus of proving a suit to be out of time rests upon the defendant, and regard must always be had to the party in whose knowledge the relevant facts may appear to be. But their Lordships agree with the Courts in India in thinking that the fact that a mortgage existed in 1885 affords no ground for presuming that it arose in or after 1876; nor does there appear to be any reason in this case for thinking that the mortgagees are withholding relevant information. The mortgagors admittedly left in possession of a valuable estate for over 50 years parties claiming under a mortgage for a nominal amount and no explanation of this conduct is forthcoming. If there is a difficulty now in proving the origin of the mortgage, that is due to the long delay by the mortgagors in attempting to enforce their claim.

It was argued before this Board, though not before the Courts in India, that the time for redemption had been extended by the operation of Section 20 of the Limitation Act. Section 20 (1) provides:—

“ Where interest on a debt or legacy is, before the expiration of the prescribed period, paid as such by the person liable to pay the debt or legacy, or by his agent duly authorized in this behalf, or where part of the principal of a debt is, before the expiration of the prescribed period, paid by the debtor or by his agent duly authorized in this behalf, a fresh period of limitation shall be computed from the time when the payment was made.”

Sub-section (2) provides:—

“ Where mortgaged land is in the possession of the mortgagee, the receipt of the rent or produce of such land shall be deemed to be a payment for the purpose of sub-section (1).”

The Section, in terms, refers to the payment of interest on a debt or legacy and makes receipt of the rent or produce of the land by a mortgagee in possession equivalent to a payment of interest, and a fresh period of limitation has to be computed from the time when the payment was made. This must clearly mean a fresh period of limitation for payment of the debt or legacy, and no reference is made in the Section to the right of redemption. The argument, however, is that the mortgage contract is one, that the rights of mortgagor and mortgagee are reciprocal and correlative, and that the legislature in extending the time within which the mortgagee may sue for his debt must have intended at the same time to extend the period in which the mortgagor can redeem the property, since it would be anomalous to leave the right of the mortgagee to recover his debt alive, after his obligation to be redeemed is dead. Mr. Khambatta for the respondents has referred the Board to three decisions in India, namely, *Anwar Husain v. Lalmir Khan*, I.L.R. 26 Allahabad 167; *Bhagwan Ganpati Mankeshwar v. Madhav Shankar*, I.L.R. 46 Bombay 1,000; *Piroze Khan and others v. Kanhiya Ram*, A.I.R. 1924 Lahore 484, in which this argument was rejected, and it was held that Section 20 applied only to extend the time for recovery of the mortgage debt. In their Lordships' opinion these cases were rightly decided. The wording of Section 20 is clear and to extract from it an extension of the time for redemption would involve reading into the Section something which is not there, and this could only be justified if it appeared to be necessary in order to give effect to the intention of the legislature to be ascertained from the Act as a whole. The construction suggested would involve that

there was in effect no time limit for the redemption of a usufructuary mortgage, and this is not an intention which can be readily imputed to the legislature. Their Lordships are not impressed with the suggested anomaly arising from the construction which they place upon the Section. In the unlikely event of a mortgagee suing to recover his money after the right of redemption has become barred it can hardly be supposed that he would be successful without being required to perform the condition inherent in every mortgage contract that the security will be returned when the money is paid.

For these reasons, which are substantially those which appealed to the Court of the Judicial Commissioner, their Lordships think that this appeal fails and they will humbly advise His Majesty accordingly. The appellant must pay the costs of the respondents.

In the Privy Council

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SIR MOHAMMAD AKBAR KHAN

v.

MUSAMMAT MOTAI AND OTHERS

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DELIVERED BY SIR JOHN BEAUMONT

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