

pay their own costs throughout.

APPELLATE CIVIL

Before Falshaw, J.

RAM CHANDER,—Appellant.

versus

PRABHU DAYAL AND OTHERS,—Respondents

Regular Second Appeal No. 789 of 1951

Indian Limitation Act (IX of 1908)—Articles 134, 144 and

1955
February, 9th 148—*One co-mortgagor redeeming the mortgage—Suit by the other co-mortgagor for possession by redemption of his share—Period of limitation for such suit—Whether Articles 134, 144 or 148 applies—Transfer of Property Act (IV of 1882)—Section 95.*

Shop in suit belonged to C.L., brother of the grandfather of P.D., plaintiff and the father of G.M., Defendant No. 1. On 8th February 1908 C.L. mortgaged the shop for Rs 300 to G.S., ancestor of S.D., Defendant No. 2. After C. L.'s death G.M. redeemed the shop on 20th July 1934 and a few days later he purported to sell the shop for Rs. 700 to his son R.C. P.D. filed a suit for possession by redemption of $\frac{1}{2}$ of the shop on payment of Rs. 150 on the ground that after C.L.'s death he became owner co-mortgagor of the half of the shop. G.M. and R.C. resisted the suit among other grounds on the ground that the suit was barred by time.

Held, that a co-mortgagor who redeems the mortgage is subrogated to the rights of the original mortgagee for all purposes, and that therefore the period of limitation for a co-sharer to bring a suit to redeem his share is sixty years from the date of the original mortgage under article 148 of the Limitation Act.

Khuda Bakhsh v. Ata Mohammad (1), *Abdul Ghafar Khan v. Firm Mangat Rai-Ganga Sahai* (2), *Mukh Narain v. Ramlochan* (3), *Jhandu v. Nur Mohammad* (4), ~~followed~~ and *Ganda Ram v. Munshi Ram* (5), not followed.

Second Appeal from the decree of the Court of Shri Gurcharan Singh, Senior Sub-Judge, with enhanced appellate powers, Gurgaon, dated the 9th day of February, 1951, affirming that of Shri A.N. Bhanot, II Additional Sub-Judge, 1st Class, Gurgaon, dated the 20th January, 1950, passing a preliminary decree with costs throughout for possession by redemption of the Plaintiff's one-half share of the shop in dispute on payment of Rs. 170 up to 7th February 1950.

P. C. PANDIT, for Appellant.

F. C. MITTAL, for Respondents.

JUDGMENT

FALSHAW, J. This second appeal has arisen in the following circumstances. The shop in suit originally belonged to Chhote Lal, the brother of the grandfather of Prabhu Dayal plaintiff and of the father of Gujar Mal, defendant No. 1. Chhote Lal mortgaged a shop on the 8th of February 1908

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(1) A.I.R. 1942 Lah. 135

(2) A.I.R. 1938 Lah. 184

(3) A.I.R. 1941 Pat. 147

(4) I.L.R. 12 Lah. 671

(5) 1931 P.L.R. 649

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followed;

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for Rs. 300 in favour of one Ganga Sahai, the ancestor of Shambhu Dial defendant No. 2 Long after Chhote Lal had died without leaving any issue, Gujar Mal defendant redeemed the shop on the 20th of July 1934 and a few days later, on the 30th of July, 1934, he purported to sell the shop for Rs. 700 to his own son Ram Chander, the present appellant.

The present suit was instituted by Prabhu Dayal on the 18th of August 1946 claiming possession by redemption of one-half of the shop on payment of Rs 150 on the ground that after the death of Chhote Lal he became owner co-mortgagor of one-half of the shop.

The suit was contested by Gujar Mal and Ram Chander who pleaded that as the mortgage had been redeemed it no longer subsisted and therefore the suit for possession by redemption did not lie, and also alleged that a partition had taken place between Prabhu Dayal and Gujar Mal by which the shop in dispute had fallen to the share of Gujar Mal who had sold it to Ram Chander. It was also alleged that Mst. Ramon, the widow of Chhote Lal, had redeemed the mortgage before the plaintiff and Gujar Mal succeeded. Finally it was pleaded that Ram Chander had effected improvements to the extent of Rs 2,000 and that the suit was barred by time. On the pleadings of the parties the trial Court framed the issues—

1. Was there a partition between the plaintiff and defendant No. 1 and did the shop in dispute fall to the share of defendant No. 1 and so defendant No. 1 is the sole proprietor of it?
2. Has defendant No. 1 sold the shop in dispute to defendant No. 3? If so, what is its effect?

3. Is not the plaintiff's suit maintainable for reasons stated in the written statement?
4. After payment of what amount is the plaintiff entitled to redeem?
5. Whether Gujar Mal redeemed the mortgage in suit? If so, when and on payment of what sum was it redeemed by him?
6. Whether Mst. Ramon, widow of Chhote Lal mortgagor, redeemed the mortgage in suit before the plaintiff and Gujar Mal succeeded to the suit property after her death and what is its effect?
7. Whether and, if so, what improvements have been made by the defendant in the suit property? If so, when and of what value?
8. Whether the defendant is entitled to any compensation for these improvements, if any? If so, to what amount?
9. Whether the suit is barred by time?

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The findings of the trial Court may be summed up as being that there had been no partition of the property as between the plaintiff and Gujar Mal; that the so-called sale by Gujar Mal in favour of his son Ram Chander was a fictitious transaction as the defendants' own witnesses admitted that they were joint and living together; that Gujar Mal had redeemed the property in

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July 1934 on payment of Rs 340 and that it had not been redeemed earlier by the widow of Chhote Lal; that no improvements were proved to have been made by Ram Chander defendant and that he was not entitled to any compensation on this account and that the suit was not barred by time. The plaintiff was therefore granted a preliminary decree for possession by redemption of one-half of the shop on payment of Rs 170.

Ram Chander appealed against this decree but the findings of the trial Court were upheld on all points by the learned Senior Sub-Judge and the appeal was dismissed. Ram Chander has accordingly filed the present appeal.

It is obvious that many of the points which had been agitated in the Courts below have been finally settled by findings of fact not open to challenge in second appeal. The case has accordingly to be argued on the basis that there had been no partition between the plaintiff and Gujar Mal and that at the time when the mortgage was redeemed that the plaintiff was owner of one-half of the shop and thus a co-mortgagor, and that the so-called sale of the shop after the redemption by Gujar Mal in favour of the present appellant was a wholly fictitious transaction. The main question which has been agitated before me was whether the suit was within time. The Courts below have held that the case was governed by Article 148 of the Limitation Act, but it is contended on behalf of the appellant that this view is not correct and that the case was governed by Article 144 or, in the alternative, Article 134.

The argument in favour of the applicability of Article 144 was based mainly on two decisions of a Division Bench of the Lahore High Court in

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Jhandu v. Nur Mohammad (1), by Addison and Bhide JJ. and in *Ganda Ram v. Munshi Ram*, (2), by Broadway and Johnstone JJ. In both of these cases it was held that where a co-owner redeems a mortgage, he becomes a charge-holder and the other co-owner is not entitled to possession unless he pays his share of the money and a suit for possession by the latter co-owner against the first is governed by Article 144 and not by Article 148. It was also held that the period of limitation does not start from the date of the redemption but from the date of some clear act showing an intention to hold adversely to the other co-owner. If this Article applies in the present case it would appear that the starting point of limitation is so-called sale of the shop by Gujar Mal in favour of Ram Chander, i.e., 30th of July 1934, and as the period fixed in Article 144 is 12 years, the present suit would be barred by time as it was instituted in August 1946.

On the other hand it is contended that the view expressed in these decisions is not correct and was based, although the decisions themselves were delivered in 1931, on the state of the law at the time of the transactions in suit and at the time when the suits were pending in the lower Courts, when there was some uncertainty before the previous section 95 of the Transfer of Property Act was replaced in the year 1929 by the present section. At that time this section read—

“Where one of several mortgagors redeems the mortgaged property and obtains possession thereof, he has a charge on the share of each of the other co-mortgagors in the property for his proportion of the expenses properly incurred in so redeeming and obtaining possession.”

(1) I.L.R. 12 Lah. 671
(2) 1931 P.L.R. 649,

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In 1929 this was replaced by the following—

“Where one of several mortgagors redeems the mortgaged property, he shall, in enforcing his right of subrogation under section 92 against his co-mortgagors, be entitled to add to the mortgage-money recoverable from them such proportion of the expenses properly incurred in such redemption as is attributable to their share in the property.”

On behalf of the respondents reliance is placed on the remarks of Tek Chand J. (Abdul Rashid J. concurring) in *Abdul Ghafar Khan v. Firm Mangat Rai-Ganga Sahai* (1), in the following passage :—

“It is well settled that if a subsequent mortgagee or purchaser pays off a mortgage, he is subrogated to the rights of the prior mortgagee whose debt he discharges. If this is so, there is no reason why one of the co-mortgagors, who pays off the entire mortgage, should not be equally subrogated. Indeed, it seems to me that the position of the co-mortgagor is much stronger than that of a subsequent mortgagee or purchaser who pays off a prior mortgagee, for, under the law, it is incumbent on the co-mortgagor to pay the entire mortgage charge before he can redeem his own share of the mortgage. This equitable principle has long been recognised in England, and it appears to have been followed by the Courts in India before the Transfer of Property Act was passed in 1882 ; see

(1) A.I.R. 1938 Lah. 184

inter alia 2 Mad. 223 at p. 225 and 14 All. 1. In 1882, however, the Transfer of Property Act was enacted, section 95 of which ran as follows :—

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Where one of several mortgagors redeems the mortgaged property and obtains possession thereof, he has a charge on the share of each of the other co-mortgagors in the property for his proportion of the expenses properly incurred in so redeeming and obtaining possession.

But, as observed by Dr. Rashbehary Ghose in his Law of Mortgages in India, Edition 5, Volume I, page 372, this 'Unskillfully drawn and clumsily worded section' gave rise to considerable confusion in the applicability of the equitable doctrine mentioned above. In some Courts, the view was taken that the word 'charge' in this section must be construed strictly according to the definition given in section 100 of the Act and therefore a redeeming co-mortgagor was not subrogated to all the rights of the mortgagee to whom he had redeemed. In other Courts it was held, on the contrary, that notwithstanding the wording of section 95 the correct legal position was that the redeeming co-mortgagor stepped into the shoes of the mortgagee and was subrogated to his rights and remedies. In this state of the law, the Legislature intervened in 1929, when the relevant sections of the

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Transfer of Property Act were amended, and it has now been clearly laid down in section 92 that any co-mortgagor shall on redeeming property subject to the mortgage, have, so far as regards redemption, foreclosure or sale of such property, the same rights as the mortgagee whose mortgage he redeems, may have against the mortgagor or any other mortgagee. The position therefore has now been put beyond doubt in the provinces where the Transfer of Property Act is in force. In the Punjab, where that Act has not been applied so far, the legal position has all along been that the equitable doctrine of subrogation applied to the case of a redeeming co-mortgagor."

Admittedly no question of limitation arose in that case. Indeed in dealing with certain cases cited before him Tek Chand J. said that it was not necessary for him to decide in that case whether those cases were correctly decided on the question of limitation. The matter has, however, been taken further by Bhide J. in *Khuda Bakhsh v. Ata Mohammad* (1), this learned Judge having been a party to the decision in *Jhandu v. Nur Mohammed* (2), referred to above. Here the question of limitation did arise and Bhide J. held that Article 148 and not Article 144 applied and, although the decision in *Jhandu v. Nur Mohammad* (2), was referred to before him, he preferred to follow the view expressed in *Abdul Ghafar Khan v. Firm Mangat Rai-Ganga Sahai* (3), that the position of a co-mortgagor who redeems an entire mortgage is that of a mortgagee and not of a mere chargeholder in respect of the other co-sharers. The

(1) A.I.R. 1942 Lah. 135

(2) I.L.R. 12 Lah. 671

(3) A.I.R. 1938 Lah. 184

same view has been taken by Aggarwala and Rowland JJ. in *Mukh Narain v. Ramlochan* (1).

On the whole I am of the opinion that the view which was apparently universally accepted except for a period of uncertainty created by the wording of the old section 95 of the Transfer of Property Act is the correct view and that the co-mortgagor who redeems the mortgage is subrogated to the rights of the original mortgagee for all purposes, and that therefore the period of limitation for a co-sharer to bring a suit to redeem his share is sixty years from the date of the original mortgage under Article 148 of the Limitation Act.

There still remains the question whether the fact that Gujar Mal purported to sell the property in suit to his son shortly after redeeming the mortgage brings the case within the scope of Article 134 in spite of the above finding as regards Articles 144 and 148. Article 134 fixes the period of limitation for a suit to recover possession of immovable property conveyed or bequeathed in trust or mortgaged and afterwards transferred by the trustee or mortgagee for a valuable consideration at twelve years from the date when the transfer becomes known to the plaintiff. On this point learned counsel for the appellant relies on the decision of Addison J. in *Fazal Din v. Mohammad Hafiz* (2), and the decision of a Full Bench of five Judges including Malik C. J. in *Mst. Chunai v. Ram Prasad* (3). In the first of these cases Addison J. after reviewing a large number of cases cited before him held that suit for redemption brought by a mortgagor against an alienee from the mortgagee is governed by Article 134 and that this Article is not restricted in its application to a purchaser in good faith, but it applies equally to an alienee from a mortgagee for value

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(1) A.I.R. 1941 Pat. 147

(2) A.I.R. 1931 Lah. 129

(3) A.I.R. 1951 All. 167

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even when he takes the property with full knowledge that the mortgagee was acting in excess of his power. The view expressed by the full Bench of the Allahabad High Court was that the words "good faith" having been deliberately omitted from Article 134 it is not open to the Court to import these words into that Article which are no longer there and hence the element of good faith on the part of mortgagee or transferee from him is immaterial for the applicability of Article 134.

It seems to me, however, that the present case can be distinguished from those cases on the ground that although the words "good faith" may have been deliberately omitted from Article 134, the words "for a valuable consideration" still exist there, and the sale in the present case by the father in favour of his son, the two constituting a joint family and residing together, is quite evidently, as it has been held by the lower Courts to be, a wholly fictitious transaction in which no real consideration could have passed. I am therefore of the opinion that the suit was rightly held by the Courts below to be within time.

The only other matters raised before me by the learned counsel for the appellant were the questions of compensation for improvements and interest. These do not call for much comment since the Courts below quite rightly declined to act on the uncorroborated statement of Ram Chander alone to the effect that he had spent any money on improvements and therefore the question of compensation could not arise and, as regards the interest, no accounts were produced to show that profits had been made from the property. I, accordingly, dismiss the appeal but in the circumstances order the parties to bear their own costs in this Court.