

(1918) 08 AHC CK 0006

Allahabad High Court

Case No: None

Kanhaiya Lal and Others

APPELLANT

Vs

Roshan Lal and Others

RESPONDENT

Date of Decision: Aug. 10, 1918

Citation: (1919) ILR (All) 111

Hon'ble Judges: Walsh, J; Piggott, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

Piggott and Walsh, JJ.

The essential point for determination in this second appeal lies within a very narrow compass. The plaintiffs sued to enforce a simple mortgage of the 8th of January, 1891. They impleaded the mortgagors as defendants first party, one set of subsequent mortgagees as defendants second party and the present appellants, as purchasers of a portion of the equity of redemption, as defendants third party. The defendants of the first and second parties do not contest the suit, at any rate at this stage. The defendants third party contend that the claim is barred by limitation. Prima facie this suit, instituted on the 7th of November, 1914 would be well outside the prescribed period of limitation for a suit on a simple mortgage of the 8th of January, 1891. The plaintiffs' case is that limitation is saved u/s 20 of this Indian Limitation Act (No. IX of 1908) by three payments on account of interest as such. The last of these payments is of a sum of Rs. 800 made on the 25th of November, 1902. This payment is proved beyond doubt. It was made by means of a sale by the mortgagors to the prior mortgagees of certain property other than that hypothecated in the simple mortgage deed in suit. The consideration of the sale was a sum of Rs. 800. There was an express acknowledgment that on that date, namely, the 25th of November, 1902, a sum of Rs. 1,400 was due as interest on the deed of the 8th of January, 1891; in order to pay off a portion of this interest the property specified in the deed of the 25th of November, 1902; was sold for a sum of Rs. 800

and the entire consideration was set off in part-payment of the interest as above stated. The present suit is within limitation from the 25th of November, 1902, and it is not denied that Section 20 of the Indian Limitation Act would apply as against the mortgagors themselves. The contention is that the provisions of that section cannot be applied so as to save limitation as against these appellants, who are subsequent purchasers of a portion of the equity of redemption. The appellants bought under a sale deed of the 24th of June, 1913, a portion of the property hypothecated under the plaintiff's mortgage of the 8th of January, 1891, along with certain other property with which of course this suit is not concerned. They paid a sum of Rs. 9,000, a large part of which was due to them on account of previous transactions between themselves and their vendors. They undertook, however, to pay off a certain older mortgage of the year 1911, which again seems to have been executed in satisfaction of an older mortgage of 1905, by which again a still older mortgage of the 21st of December, 1899, was paid off; and under this mortgage a portion of the property now in suit was hypothecated. The appellants contend before us that they occupy two positions. They are not merely purchasers of a portion of the equity of redemption under their deed of the 24th of June, 1913, but they are also entitled to stand in the shoes of the mortgagees under the deed of the 21st of December, 1899. Even this mortgage, however, is, subsequent in date to the mortgage in suit, so that the real question, for determination namely, whether the payment of interest effected by the deed of the 25th of November, 1902, does or does not save limitation as against these appellants, has to be determined upon the wording of Section 20 of the Indian Limitation Act, on substantially the same principles, whether we deal with these appellants as purchasers of the equity of redemption or as subsequent mortgagees in respect of a portion of the property in suit. We have not been referred to any reported case of this Court, but in the Calcutta High Court there is a good deal of authority, and this authority seems to us, as to the learned Judge of the court below, very strongly in favour of the plaintiffs respondents. The important cases are Krishna Chandra Saha v. Bhairab Chandra Saha I.L.R.(1905) . Cal 1077 and Domi Lal Sahu v. Roshan Dobay ILR(1906) Cal. 1278. In each of these cases the transaction pleaded as extending the period of limitation was a payment on account of interest., Now on behalf of the appellants, strong reliance has been placed on another case of the same Court decided a little before either of the two cases reported above. This is the case of Surjiram Marwari v. Barhamdeo Persad, to be found in volume of the Calcutta Law Journal Reports at page 337. The question there was of an acknowledgment by the mortgage as saving limitation against a subsequent mortgagee. The learned Judges who decided that case relied partly on, the wording of Section 19 of the Indian Limitation Act and partly on an., English case, that of Bolding v. Lane (1863) 1 G. & S 123. That case was itself discussed shortly afterwards before the House of Lords in a case referred to in the subsequent Calcutta decisions, namely, the case of Chinnery v. Evans (1864) 11 H.L.C. 115, The case of Bolding v. Lane (1863) 1 G. & S 123, was not dissented from in Chinnery v. Evans (1864) 11 H.L.C. 115 , but it was distinguished against and explained. And it is

quite clear that a distinction was drawn between the effect of a payment and the effect of a mere acknowledgment. This point has been very clearly brought out in another decision of the Privy Council, on appeal from the Supreme Court of Canada, in the case of *Lewin v. Wilson* (1886) 11 A.C. 639. The words of Lord Hobhouse at page 645 of that report are worth quoting: "It must be remembered that payment and acknowledgment are two very different things, As regards the person making them, acknowledgment may, as pointed out in *Balding v. Lane* (1863) 1 G. & S. 123, be made by a person who, though a party to the mortgage contract, has ceased to have any substantial interest in it, and has nothing to lose by the acknowledgment; whereas payment is certain to be made only by those who have some duty or interest to pay. As regards the recipient, so long as he is paid according to the intention of the contracting parties, he is in full enjoyment of his bargain and is not put upon any further assertion of his rights; but not so if he only receives acknowledgment. If, therefore, we find that the Legislature has used different language about the two cases we must not readily conclude that it has done so by accident or without meaning it." This is probably the reason why the decision in *Surjiram Marwari v. Barhamdeo Persad* (1905) 1 C.L.J. 337, although referred to in argument, was not discussed by the learned Chief Justice of the Calcutta High Court when deciding the case of *Krishna Chandra Saha v. Bhairab Chandra Saka* I.L.R (1905) Cal 1077. He felt that he was dealing with a different section of the Statute, and that a decision based upon Section 19 of the Indian Limitation Act, whether correct or not, was not necessarily an authority on a case which turned on the wording of Section 20 of the same Act. We have been referred to one or two other decisions substantially to the same effect, but we think that on the authorities and on the wording of Section 20 of the Indian Limitation Act the decision of the court below was clearly right and that this appeal must fail. It may be that the mortgagors dealt unfairly with these appellants on the 24th of June, 1913, when they conveyed certain property to the latter without stating that a portion of this property was also subject, along with other property, to a simple mortgage of the year 1891 which was still in force. But it is to be noted that in the sale deed above referred to in favour of the appellants there is no definite statement on the part of the vendors that the property which they are conveying is subject to no charge other than those specified in the deed itself, still less is there any express covenant of title or of indemnity. The question, however, of the rights and liabilities inter se of these appellants and their vendors, the persons impleaded as defendants first party in this suit is not before us. The question is whether anything which took place between these parties in the year 1913, can affect the rights of the present plaintiffs in respect of their mortgage deed of the 8th of January, 1891. If the question is put in this way it seems clear that the answer must be in the negative. The suit as brought is not barred by limitation, time being saved by the payment on account of interest effected by the sale of the 25th of January, 1902. This appeal therefore fails, and we dismiss it with costs.