

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Fatimatunnissa Begum and Others v. Soonder Das and Others, from the High Court of Judicature at Fort William in Bengal; delivered 24th March 1900.

Present at the Hearing :

LORD HOBHOUSE.

LORD DAVEY.

LORD ROBERTSON.

SIR RICHARD COUCH.

[*Delivered by Lord Hobhouse.*]

The Plaintiffs below, now Appellants, are the representatives in estate of one Nurud Hossein Khow, who on the 17th of October 1788 effected a usufructuary mortgage of the property now in dispute along with other property to secure the sum of Rs. 105,783 due on bonds to three several persons. One of the mortgagees was named Sadhu Ram to whom one of the bonds was owing. In some way not now apparent a settlement was made in or about the year 1806 by virtue of which the other creditors were satisfied and 14 annas of the property released. A two anna share remained as a security to Sadhu Ram, but on the terms of the original mortgage adjusted to the division of interests. It will be convenient to speak of the parties and their successors respectively as mortgagors and mortgagees. The terms of the mortgage are as follows:—"Until the whole and "entire sum, the principal aforementioned and "interest thereon, whatever that may be by "account, is not repaid to the aforementioned "persons, the said villages shall remain in

“ the possession and enjoyment of the afore-
 “ named persons : they will year by year take
 “ the proceeds thereof, and then give, without
 “ objection, receipt annually for Rs. 6,201, in
 “ part payment of the aforementioned debt.
 “ They will with confidence keep cultivating the
 “ aforesaid mouzahs. If there be an increase in
 “ the proceeds derived from the villages, or if
 “ there be a decrease, which God forbid, they
 “ will take the profit and loss on themselves. I
 “ have and will have by no means any concern
 “ with the increase or decrease.”

In the year 1817 the mortgagees, having been dispossessed by the mortgagors, sued for possession of their two anna share, and the Court granted them a decree on that footing, adding that if the Defendants have any objection as to the money of the usufructuary mortgage having been liquidated they are at liberty to bring a separate suit (Rec. p. 42).

The mortgagors did bring a suit accordingly in the year 1819 praying for possession of the land and return of their bonds on the ground that the mortgagees had been overpaid. By the decree of the District Judge dated 3rd October 1820, it was found that the mortgagees had not been paid; and the suit was dismissed, but with some directions for the final payment in liquidation of the mortgage and for the restoration of the land in the year 1231 Fusli, A.D. 1824 or thereabouts. This litigation was continued by appeals to the Provincial Court and thence to the Sudder Dewani Adawlat. On 27th August 1833 a final decree was passed finding that the mortgagees were not paid and dismissing the mortgagors' Appeal. The mortgagees have been in possession ever since.

On the 20th February 1893 the present suit was commenced by the mortgagors who allege that the whole debt was discharged in

1288 Fusli (A.D. 1881), and pray for possession and other relief. It is not necessary to consider any other defence than that of bar by time.

The earliest law which placed a limit of time upon suits by mortgagors to recover the mortgaged property is Act XIV. of 1859. It was thereby provided (Sec. 1. Cl. 15) that no suit shall be maintained against a mortgagee of immovable property for recovery of the same unless it is instituted within 60 years from the time of the mortgage; or, if in the meantime an acknowledgment of the title of the mortgagor or of his right of redemption shall have been given in writing signed by the mortgagee or some person claiming under him, from the date of such acknowledgment in writing. This Act remained in force till repealed by the Limitation Act of 1871. By Section 18, coupled with a subsequent Act XI. of 1861, suits instituted before the 1st January 1862 were to be determined as if the Act had not been passed.

According to the terms of this law suits by the mortgagors of 1788 were barred on the 17th October 1848 unless in the meantime the required acknowledgment was given. Their right to sue was kept alive till 1862; but as they did not sue, the Act remains unqualified by that proviso.

The Act of 1871 provided the same limits of time for suits of this kind, and it added the provision (Sec. 29) that at the expiration of the period thereby limited to any person for instituting a suit for the possession of any land his right to such land shall be extinguished. The period thereby limited in the case of this mortgage was the 17th October 1848 and the title of the mortgagors was extinguished on that day unless they can show a previous acknowledgment in writing.

The Subordinate Judge decided in their favour on this point. He relied on the pro-

ceedings in the suits of 1817 and 1819. The records had been destroyed in the Mutiny, but the mortgagors produced copies of the decrees which recited the pleadings. The plaint in the earlier suit and the written statement in the later asserted the title of the mortgagees as such. The Subordinate Judge considered that he was bound to presume that these pleadings were signed by the mortgagees because the law required them to do it. The High Court however point out that there was no such law then existing; plaints might be and were signed by Vakils, and written statements did not require any signature at all. Therefore there could be no presumption that any such acknowledgment as the Acts of 1859 and 1871 require was given by the mortgagees.

These pleadings constitute the only ground for alleging that prior to the 17th October 1848 any written acknowledgment of title was given by the mortgagees to the mortgagors. As this ground fails, it follows that as from the 17th October 1848 the right of the mortgagors to sue was barred by force of the Act of 1859, and their right to the land was extinguished by force of the Act of 1871.

The Subordinate Judge also relies on a number of transactions which go to show that the mortgagees considered that they still retained that character. In that character they applied for mutation of names in the Collectorate Register, and they granted leases, and they gave receipts for rent. The High Court did not think it necessary, nor do their Lordships, to examine those transactions in detail. Only one took place prior to the extinction of the mortgagors' title in 1848, and that is an application for mutation of names in 1839 which was not an acknowledgment made to the mortgagors, but only an official proceeding to substitute the successor of a

mortgagee for his predecessor under the title which then actually existed.

Only one of these transactions has been seriously insisted upon during the present argument. On the 8th January 1872 Beni Prashad a mortgagee granted to Makbul Fatima a mortgagor a lease of the mortgaged property or part of it for a term of 10 years. In this grant the lessor is described as usufructuary mortgagee. This is not now put forward as an acknowledgment which gave a new starting point of time for limitation. But Mr. Haldane contended that it estopped the mortgagee from repudiating that character in a litigation with the mortgagor. If the lessor were seeking to impeach the lease on the ground that he was not usufructuary mortgagee he would be estopped. But the lessee had the full benefit of the lease, and for matters outside the lease it contains nothing to preclude the lessor from asserting his true title.

But it is further contended that this description of the lessor amounts to a representation which he is bound to make good. In order to succeed on this ground the mortgagors must show that the description of the lessor was an essential part of the contract, that the lessee made the contract in reliance on those terms, and that her position was in some way altered by the terms in which her lessor spoke of himself. See *Citizens Bank of Louisiana v. First National Bank of New Orleans and Others* L. R. 6 E. and I. App. at p. 360. Unless the lessee could show at least so much she would have no foundation for contending that her extinct right was revived or rather re-granted by the terms of the lease. In effect what is asserted for her is the creation of a new right. But there is not a vestige of evidence for any such case, nor any reason to believe

that the description of the lessor was anything but a mere continuance of the description by which the mortgagees were entered as proprietors in the Collector's books in 1839.

The case is a singular one. Probably the time at which the title of the mortgagors to sue became extinct or at which their right was barred was not clearly present to the minds of the mortgagees or indeed of either party. But that does not prevent the operation of the law which lays down fixed rules for the bar of suits by time. The High Court have rightly interpreted it and their Lordships will humbly advise Her Majesty to dismiss the Appeal. The Appellants must pay the costs.
