OUDH HIGH COURT

Nanak Prasad

Vs

Raja Bahadur

(Madeley, J.)

26.07.1943

JUDGMENT

Madeley, J.

1. This is an appeal arising out of Encumbered Estates Act proceedings, and the appellants are the applicants under Section 4 of that Act. On 31st July 1871, a simple mortgage for Rupees 1000 was executed by Avadh Behari and Lal Behari in favour of Thakur Jawahar Singh, father of the present, respondent 1, mortgaging 5 biswas in village Newadia, district Sitapur. The period fixed was two years. It was further provided that the rate of interest should be Re. 1-4-0 per cent, per mensem, and that if the interest is not paid, the mortgagee may take possession and appropriate the profits in lieu of interest. Thereafter another mortgage deed was executed on 30th January 1872, for ₹ 3000 by the same persons. In this 15 biswas were mortgaged. The mortgagee and the rate of interest are both the same, and the period is one year and a half. In this deed it is provided that the entire mortgage money will be paid in Jeth 1280 Fasli=1872 A.D., and also that in ease of default the mortgagee can take possession in Asarh and appropriate the profits in lieu of interest. It is also provided that the mortgagors can redeem the property. The deed says that when the mortgage has become usufructuary the mortgagors will be entitled to redeem in Jeth of any year for ten years. After 10 years the mortgagors should execute a sale deed in favour of the mortgagee, and in case they fail to do so, the mortgagee can get the sale deed executed through Court. In 1874 Thakur Jawahar Singh filed a suit for mortgagee possession in accordance with the terms of the mortgage deed. On 19th December 1874, a decree for possession was granted, but in respect of only 10 biswas, as it was found that the remaining 10 biswas had already been transferred to Ishri Prasad and Dhiraj Lal Khattri who were previous mortgagees. Thakur Jawahar Singh obtained possession by virtue of this decree on 27th July 1875. On 13th August 1936, Nanak Prasad and others, the present appellants, applied under the Encumbered Estates Act. They are the heirs of Lal Behari, one of the original mortgagors. The other mortgagor was Avadh Behari and his descendants are respondents 2 to 6. The mortgaged property consisting of 10 biswas now belongs to the descendants of Avadh Behari to the extent of 5 biswas and to the descendants of Lal Behari to the extent of the other 5 biswas. The applicants under the Encumbered Estates Act are the descendants of Lal Behari, and they therefore showed 5 biswas as their property which was mortgaged with respondent 1, Raja Bahadur Suraj Bakhsh Singh, son of Thakur Jawahar Singh. On 30th May 1937, Raja Bahadur Suraj Bakhsh Singh filed his

claim under the Encumbered Estates Act for ₹ 4646-14-0 as the money due in respect of the mortgage. On 2nd August 1937, the landlord applicants admitted that this was the amount due, but they claimed that they were liable to pay only one-half as the entire amount was due on 10 biswas. On 25th October 1937, Raja Bahadur Suraj Bakhsh Singh filed a claim before the Special Judge that he had become the owner of 10 biswas under the irredeemable mortgages and prayed that his claim to ownership might be disposed of before the determination of the claim under Section 14.

2. The questions involved in this appeal are of limitations only. With regard to the second deed it is alleged that the period of limitation has not expired. With regard to the first deed it is admitted that the period of limitation would have expired if it had not been for certain acknowledgments in writing signed by or on behalf of the mortgagee, which are said to save limitation. The second deed, Ex. 2, was executed on 30th January 1872. The period fixed in the deed is 10 years from the date of taking, possession. Possession was taken on 27th July 1875. Ten years from this date brings us to 27th July 1885, so that the limitation of 60 years would not expire before 27th July 1945. According to the provisions of Article 148, Limitation Act, 60 years is to run from the time when the right to redeem or to recover possession accrues. The appellants learned Counsel relies on Section 60, Transfer of Property Act, as amended for determination of the question when such right accrues. Section 60 begins, "At any time after the principal money has become due." The word "due" is substituted in the amended section for the word "payable," and it is argued that this substitution makes all the difference where questions of limitation are concerned. The section relates to the rights of the mortgagor to redeem, and this right arises when the mortgage money becomes due. The right of redemption being co-extensive with the right of foreclosure, the period of limitation, it is argued, must start to run 11 1/2 years from the date of the execution of the second deed, that is 10 years after the taking of possession. The amount, it is argued, became due on 27th July 1885. In *Akbar Husain v. Ahsanul Haq*[1]*.,* this co-extensiveness of the right to redeem and to foreclose was recognized, but it was said:

> It is no doubt open to the parties to fix two different dates for the enforcement of the right of the mortgagor and the mortgagee respectively.

3. In *Bakhtawar Begam v. Husaini Khanum*[2] the same principle was laid down. Ordinarily speaking, a mortgagor cannot redeem during the specified period, but if the provision in the mortgage deed permits it, then he can do so. There is no illegality about it. *Kuddin Lal v. Aisha Jehan Begam*[3]*,* was to the same effect. In *Har Bakhsh Singh v. Mahabir Singh*[4] it was held that the fact that the mortgagee had done something which he was not authorized to do, did not give the mortgagor a cause of action for redemption.

4. None of these rulings really helps the appellants in the least when once it is recognized that the right to redeem in the month of Jeth of every year after possession was taken was given to the mortgagors in the deed. It is only by omitting this clause in the mortgage deed that these rulings can be speciously cited on behalf of the appellants. The argument of the appellants is really founded upon the discussion in Chitaley's Transfer of Property Act, vol. II, (Edn. 1), p. 1282. After commenting on the change made by the substitution of the word "due" for "payable," it remarks:

> In the undermentioned case *Bageshwari Tewari v. Nandoo Singh*[5], where a mortgage deed of 1869 provided that if the mortgage-money was paid in any Jeth month within ten years, the mortgagor might redeem the mortgage, it was held by the High Court of Allahabad that the right to redeem arose in the first Jeth succeeding the mortgage. This view will not be correct under the present section if such a mortgage were executed after the amendment.

5. Even this passage does not support the appellants' contention since the amendment was made in 1929. Respondent's learned Counsel points out that the "terminus a quo" for Article 148 is provided in the Limitation Act itself in col. 3, "When the right to redeem or to recover possession accrues." As it is provided in this mortgage deed that redemption may be made in the Jeth of any year after the mortgage has become usufructuary, it follows that the right to redeem accrued in the first Jeth affair that event. The appellants contention on this point therefore cannot be accepted, and unless saved by acknowledgments both these deeds have become irredeemable by effluxion of time. The second argument relates to acknowledgments which are said to save limitation. These acknowledgments apply to both documents. The first of these is Ex. A-4, dated 2nd September 1898, which contains the statement of the "mukhtar-e-am" of the mortgagee. The next is Ex. A-5 dated 21st February 1907, made by Lal Bahadur, general agent, on behalf of Thakur Jawahar Singh mortgagee. The third document is Ex. A-13, dated 14th July 1928. This is a plaint in a profits suit filed by Ajudhia Prasad as a cosharer in? village Newadia against Raja Suraj Bakhs Singh in the year 1928. In Ex. A-14, the written statement, it was admitted that the appellants were owners and respondent 1 was mortgagee in possession, vide para. 2.

6. The next set of acknowledgments is said to be contained in Exs. A-18 and A-17. Exhibit A-18 is a written statement and Ex. A-17 is an annexure to it. On the death of Thakur Jawahar Singh there was a dispute between the present respondent 1 and Sripal Singh. It was referred to arbitration. During the arbitration proceedings Raja Bahadur Suraj Bakhsh Singh filed a written statement. Certain lists were attached to this statement showing the properties of Thakur Jawahar Singh. Exhibit A-17 is an extract from one of the lists. In Ex. A-17 at No. 95 this village Newadia is mentioned as held under mortgage executed by Avadh Behari. The dates of the mortgage deeds and the amount of the mortgage money and the property are given. The date of this extract is 15th August 1910, and in it, it is argued, Raja Bahadur Suraj Bakhsh Singh acknowledged the appellants' right to the property. Appellants' learned Counsel also relied upon Ex. A-7, but has now given this up. In *Hiralal Ichhalal v. Narsilal Chaturbhujdas*[6] a certain customary payment on account of some land was made by the Government to persons holding the land. They were described as mortgagees in the Collector's book in which the payments were made. They signed a receipt to this entry. It was held that this amounted to an acknowledgment. The next case is *Daia Chand v. Sarfraz*[7] in which it was held that where the defendants attested as correct
the record of rights prepared at a settlement with them of an estate in which they were described as mortgagees of the estate but which did not mention the name of the mortgagor, there was an acknowledgment of the mortgagor's right to redeem within the meaning of Section 19, Limitation Act. *Chheda Lal v. Ghulam Abbas*[8], lays down:

> An admission by a mortgagee in his written statement that he is a mortgagee in possession of the land in dispute is a sufficient acknowledgment that the maker of the statement

thinks and believes that he is liable to be redeemed at the date of the making of the statement.

7. *Suraj Bakhsh v. Ganga Bakhsh*[9], In this case it was held:

> Evidence of a statement mentioning the mortgage in a pedigree of the cosharers of a village which was the subject of mortgage, signed by the mortgagees, and of an entry signed by them in the village wajib-ul-arz, duly verified before a Settlement Officer the pedigree and wajib-ul-arz both forming part of the settlement record, satisfies all the' essentials of a valid acknowledgment required by Section 19.

8. In *Sanwal Das v. Ali Madhi*[10] in the list of properties to be sold by court auction and signed by himself describes certain property as subject to a mortgage; it was held that this was a valid acknowledgment within the meaning of Section 19. In *Sheo Prasad v. Mt. Parkash Rani*[11] it was held:

> Where in a suit by a prior mortgagee, the subsequent mortgagee is also impleaded, and the latter files his mortgage, and the genuineness of the mortgage is admitted by the plaintiff, and the admission is recorded on a list and signed by the plaintiff, it amounts to an acknowledgment of liability within the meaning of Section 19.

9. On the other hand respondent's learned Counsel points out that in cases of redemption where the law provides a period of 60 years the Courts are jealous in their interpretation of Section 19. It seems obvious that where the period of limitation is so long as 60 years it must be necessary for business purposes on certain occasions to describe the property so that it can be identified and that such descriptions are often given without any idea of liability attaching to the person who gives them. Whether he is still liable or not liable to redemption is not the matter which is before his mind at all. These descriptions might equally be made even if the period of limitation has run out to identify the property by showing how it came into the possession of the mortgagee. For an acknowledgment therefore to save limitation it has been held that it must be a conscious acknowledgment of the liability. Learned Counsel points out throe main factors which are required before Section 19 can be applied, (1) The acknowledgment must be one of liability. (2) The liability must have reference to the right or property. It follows that unless a man makes an intentional statement by which he acknowledges liability, it will not be sufficient. He must have the conscious intention of acknowledging the liability. A casual reference to the mortgage for some
other purpose is not enough. (8) It must be in writing and it must be signed by the
person or his agent duly authorized on this behalf. Rustomji at p. 297 in his commentary on the Law of Limitation, vol. 1, (5th Edn.) says:

> To take a demand out of the statute of limitation on the ground of an acknowledgment, the language of the debtor must amount to an unequivocal admission of a 'subsisting debt,' that is, subsisting 'at the time of acknowledgment.' In 45 Mad. 44312 the suit was on foot of a mortgage which would be time-barred except for a certain statement in a plaint once

> filed by the defendants. In that suit the defendants as plaintiffs of the suit had stated that they had executed on a certain date a certain hypothecation deed of a certain amount of money and that they had received the consideration in a certain way. The learned Judges were of opinion that the mere statement of a fact that a certain mortgage had been executed did not amount to an acknowledgment of an existing liability under it. The words used must be such as to show that there was an existing jural relationship (e. g., as debtor and creditor) between the parties at the time when the acknowledgment was made (and not merely at some time before), and an intention to continue it until it is lawfully determined, must also be evident.

10. The note goes on to discuss various decisions which do not follow the rule already laid down. Later while interpreting the Privy Council decision, *Dharma Vithal v. Govind Sadvalkar*[12] *Dharma Vithal v. Govind Sadvalkar* the learned Commentator remarks:

> I cannot extract from the Privy Council judgment in *Mani Ram Seth v. Rup Chand*[13] any rule of law that an admission of past liability unaccompanied by an allegation of discharge should in all cases be interpreted as an admission of subsisting liability.

11. The acknowledgments, Exs. A-4, A-5 and A-14 read with A-13 are said to be signed by the agent of the respondent. Exhibit A-4 is the statement of Lal Bahadur, general agent of Thakur Jawahar Singh. Respondent's learned Counsel, without admitting that this is an acknowledgment at all, argues that at any rate the agent had no authority to make it. There is another written statement signed by Lal Bahadur in mutation proceedings. The same remark applies to this. Exhibit A-14 is signed by Tirbhawan Dutt. All he says is "hujjat nahin hai" in reply to the allegation that he is mortgagee of the property. These two persons were general agents and had general powers to do court work. They had no right to acknowledge liabilities on behalf of their principal. The powers-of-attorney in favour of these two mukhtars were produced on the summons of the appellants. Both the lower Courts have definitely held that these two powers do not contain any authorisation to acknowledge these liabilities. Appellants" learned Counsel has tried to show from the surrounding circumstances that these agents had the power, but there is a finding of fact against them, see the finding of the lower appellate Court, p. 21 of the paper book. Next we turn to the acknowledgments said to have been made by Thakur Suraj Baksh Singh himself. These are contained in Exs. A-17 and A-18. Exhibit A-18 is a written statement and Ex. A-17 is the annexure consisting of an extract from register No. 5 kept in the office of the taluqdar filed in the case to show what property was to be divided. Raja, Bahadur Suraj Bakhsh Singh signed the written statement, but there is nothing on record to show that he signed the annexure. It is correctly argued by respondent's learned Counsel that the signature on the written statement is not sufficient to make the extract from the list valid as an acknowledgment signed by the mortgagee. He cites *Sanwal Das v. Ali Madhi*[14] In that a plaint and a plan were filed, the plaint being signed but the plan not. It was held that the descriptions given in the plan were not validated as acknowledgments by the signa nature given on the plaint. In 8 Bom. 99 the headnote is:

> The plaintiff's ancestor mortgaged a piece of land to the defendants' ancestor in 1797, and placed him in possession as agreed upon. Three years afterwards both the mortgagor and

mortgagee went out of the country. The mortgagor returning first resumed possession of the land, the mortgagee returning afterwards filed a suit in 1826 to recover possession under the terms of the mortgage, and obtaining a decree in his favour possession was restored to him by the Civil Court in 1827. When taking delivery of possession from the Court, the mortgagee passed to the officers of the Court a receipt in which the mortgagee acknowledged having received possession of the mortgaged land as directed by the decree. The plaintiff, the representative of the original mortgagor, on 4th December 1880, sued the defendant, the representative of the original mortgagee, to redeem the land.

Held that the suit was barred; the receipt incorporating the decree by reference did not operate as an acknowledgment of a mortgage subsisting in 1827 so as to give to the mortgagor a new period of limitation under Section 19 of Act 15 of 1877. This section intends a distinct acknowledgment of an existing liability or jural relation, not an acknowledgment without knowledge that the party is admitting anything.

12. In *Sanwal Das v. Ali Madhi*[15], it was held that when a man says that he purchased a certain mortgagee right he only means that he purchased certain property which came into possession of the vendor as a mortgagee. In *Kandaswami Reddi v. Suppammal*[16] the headnote runs:

> A statement by a person that he executed a hypothecation in favour of another cannot be construed as containing an implied acknowledgment of liability unless it is clear therefrom that he admitted that the debt was still subsisting or unless there was a clear necessity at the same time to mention the fact of discharge.

13. In *Har Bakhsh Singh v. Mahabir Singh*[17] the same view was taken. Every document has to be interpreted according to its own terms, and though certain general principles can be enunciated, it is scarcely possible to apply a decision interpreting one document as an authority for the proposition that another document must be interpreted in the same way. The question whether an apparent acknowledgment contained in a document is a conscious acknowledgment or not is obviously one of considerable difficulty, unless it clearly and expressly acknowledges the liability as an existing liability. I do not find this to be the case in the so-called acknowledgments now before me. I am inclined to think that even if these statements had been signed by the mortgagee himself, they could not have operated as valid acknowledgments under Section 19. It is sufficient for me to say therefore that (1) some of the necessary factors for the purposes of Section 19 are absent and (2) the lower Court, after carefully considering the law on the subject, has come to the conclusion that these were not conscious acknowledgments of the liability, I see no reason to differ from this view. This appeal therefore fails and is dismissed with costs.

Cases Referred.

[1] AIR 1982 All 155
[2] A.I R 1914 P.C. 36
[3] AIR 1927 Oudh 199
[4] A.I.R. 1936 Oudh 130
[5] AIR 1937 All 32 : 1936 AWR (H.C.) 1080 : 166 Ind. Cas. 473
[6] 37 Bom. 326
[7] 1 All. 117

[8] AIR 1929 All 242
[9] AIR 1927 Oudh 457
[10] A.I.R. 192 All. 174
[11] A.I.R. 1943 Oudh 164
[12]8 Bom. 99
[13]33 Cal. 1047
[14] A.I.R. 1925 Lah. 529
[15] AIR 1925 All 898 : AIR 1925 All 353 : 85 Ind. Cas. 584
[16] A.I.R. 1922 Mad. 104
[17] A.I.R. 1936 Mad. 70