

APPELLATE CIVIL.

Before Mr. Justice Batchelor and Mr. Justice Hayward.

MANCHHARAM PRANJIVANDAS (ORIGINAL DEFENDANT No. 1) APPELLANT
v. PANABHAI LALLUBHAI AND OTHERS (ORIGINAL PLAINTIFFS) RES-
PONDENTS.*

1915.

July 16.

*Limitation Act (IX of 1908), article 91—Alienation by Hindu widow—
Suit by reversioner to recover possession of property alienated—Alienation
found to be sham—Limitation.*

A Hindu widow having alienated a property of her husband, the reversioners sued more than three years after the date of alienation to recover possession of the property. It was found that the alienation was merely a sham. The lower Courts held that article 91 of the Second Schedule of the Limitation Act 1908 did not apply and decreed the suit. The defendant having appealed :—

Held, that article 91 of the Second Schedule of the Limitation Act had no application, for the apparent obstacle presented by the mortgage proved unreal and ineffectual.

SECOND appeal from the decision of M. S. Advani, District Judge of Surat, confirming the decree passed by N. V. Desai, Subordinate Judge at Surat.

The plaintiffs, who were reversionary heirs of one Tribhuvandas, sued to recover possession of property belonging to the deceased. He died on the 9th July 1900. After his death, his widow Dahi gave birth to a posthumous son, who died when he was three years of age.

On the 21st October 1903, the widow gave an equitable mortgage of the property to the defendant No. 1 who was her brother. On the 15th June 1904, she executed a registered mortgage of the property in favour of her brother.

Dahi (defendant No. 2) next contracted a remarriage.

On the 21st December 1908 the plaintiff sued to recover possession of the property free from the encumbrance created by Dahi.

* Second Appeal No. 283 of 1914.

1915.

MANCHHA-
BAM
v.
PANABHAI
LALLUBHAI.

The Subordinate Judge decreed the plaintiffs' suit holding that "the registered mortgage was never intended to operate as a real mortgage at all; and that article 91 of the Limitation Act did not apply.

This decree was, on appeal, confirmed by the District Judge who treated "the story of the equitable mortgage" as "absolutely false."

The defendant No. 1 appealed to the High Court.

K. N. Koyajee for the appellant:—I submit the suit was barred under article 91 of the Indian Limitation Act. The plaintiffs could not succeed until the mortgage-deed was first set aside, which was the substantial relief sought, though possession was asked for: *Rampal Singh v. Balbhaddar Singh*⁽¹⁾; *Raghubar Dyal Sahu v. Bhikya Lal Misser*⁽²⁾ and *Malkarjun v. Narhari*⁽³⁾.

[BATCHELOR, J.:—The lower Courts treat the mortgage-deed as a sham document and inoperative. Would not the principle of the Privy Council decision in *Petherpermal Chetty v. Muniandy Servai*⁽⁴⁾ apply?]

Here the respondents knew of the mortgage-deed all along and the appellant had taken possession of the property and so if there was any fraud, it was carried out.

P. D. Bhide, for respondents Nos. 1 to 3, was not called upon.

BATCHELOR, J.:—The appellant here was the 1st defendant in the suit, and the suit was brought by the plaintiffs for possession of a house. The plaintiffs claimed as legatees or reversioners either of one Tribhondas or of Tribhowandas' posthumous son, who

⁽¹⁾ (1902) 25 All. 1 at p. 16.

⁽²⁾ (1885) 12 Cal. 69 at p. 75.

⁽³⁾ (1900) 25 Bom. 337 at p. 351.

⁽⁴⁾ (1908) 35 Cal. 551.

survived Tribhōwandas for a period of three years. Four years after Tribhowandas' death his widow, who was the 2nd defendant, mortgaged the house in suit to the present appellant who was her own brother.

The only questions with which we are concerned in this appeal are, whether the mortgage by the widow was without necessity and whether the plaintiffs' suit is out of time. On the first point the finding of the lower Courts that the mortgage was without necessity is conclusive as being a finding of fact, and though we have allowed Mr. Koyajee, for the appellant, to point out to us some alleged slips in the judgment of the lower Court upon this question, we are clearly of opinion, without examining whether the alleged slips or mistakes are really mistakes, that there is ample and convincing evidence for the lower Court's finding on this point.

As to the question of limitation, the argument for the appellant is that the suit is governed by article 91 of the Indian Limitation Act, which prescribes for the institution of the suit a period of three years from the date when the facts entitling the plaintiff to have an instrument cancelled or set aside become known to him. The contention is that though in form the present suit is a suit for possession, yet it must be regarded as essentially a suit to set aside the widow's mortgage, because until that mortgage is set aside, the plaintiffs cannot obtain possession of the property. As to this point the authorities, we think, are in accord, and are to the effect that where the deed or instrument which seems to stand between a plaintiff and the realization of his claim in the suit is an actual nullity, the plaintiff is entitled to bring his suit for possession within twelve years, and is not hindered by the narrower period laid down by article 91, and that, if one may say so, seems to be good sense. For the only object of article 91, is

1915.

MANCHHA-
RAM
v.
PANABHAI
LALLUBHAI.

1915.

MANCHHA-
RAM
v.
PANABHAI
LALLUBHAI.

to compel a plaintiff to remove out of his way some real existing obstacle ; but where there is no real obstacle, the article has no scope for operation. Now here it is found in the words of the learned District Judge that "the story of the equitable mortgage is absolutely false" or in the still plainer language of the trial Judge "the deed passed by the widow to her brother was never intended to operate as a real mortgage transaction." What we have, therefore, is not a mortgage or any real thing whatsoever, but a mere sham or nothing, which the plaintiffs were under no obligation to sue to remove.

There are many decisions which seem to us to bear out this construction of article 91, but it will be sufficient for our present purpose to refer to what was said by the Privy Council in *Petherpermal Chetty v. Muniandy Servai* ⁽¹⁾ where Lord Atkinson observed : "As to the point raised on the Indian Limitation Act, 1877, their Lordships are of opinion that the conveyance of the 11th June 1895, being an inoperative instrument, as, in effect, it has been found to be, does not bar the plaintiff's right to recover possession of his land, and that it is unnecessary for him to have it set aside as a preliminary to his obtaining the relief he claims." So here, the apparent obstacle created by the mortgage is now ascertained to be no obstacle or real thing at all. Therefore, there was never anything which it could have been the plaintiffs' duty to remove from their path before they could claim possession.

The appeal is dismissed with costs.

Appeal dismissed.

R. E.

(1) (1908) 35 Cal. 551 at pp. 559-560.