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that the period between May 1, 1948, and June 29, 1948, was a period requisite for the purpose of applying for a certified copy of the decree within the meaning of s. 12 (2), and the whole of this period must be excluded in computing the period of limitation.

Under these circumstances we must hold that the appeal preferred to the District Judge was in time, that the decree of the appellate Court will be set aside, and the appeal remanded to him for disposal according to law. I think the fair order to make with regard to costs is that the appellants should get their costs of the Letters Patent appeal, but costs of the second appeal before Mr. Justice Dixit and the costs of the appeal before the District Judge should be costs in the appeal which we are now remanding to the learned District Judge. We direct that the learned District Judge should dispose of the appeal expeditiously, and that the papers be sent to the District Court immediately.

Case remanded.

M. W. P.

APPELLATE CIVIL

Before Mr. M. C. Chagla, Chief Justice, and Mr. Justice Gajendragadkar.

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August 1

MANEKCHAND BHARMAPPA LENGADE AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS *v.* RACHAPPA VIRSANGAPPA CHINAWAL AND OTHERS (HEIRS OF ORIGINAL DEFENDANTS), RESPONDENTS.*

Indian Limitation Act (IX of 1908), s. 20—Mortgage—Mortgaged property in possession of mortgagee by reason of mortgage deed—Mortgagee receiving rent—Whether limitation is saved in respect of whole debt by receipt of rent.

The expression "where mortgaged land is in the possession of the mortgagee" in s. 20 (2) of the Indian Limitation Act, 1908, does not merely apply to cases where the mortgagee is in possession under a usufructuary mortgage; it applies to all cases where the mortgagee is in possession in his capacity as the mortgagee and under the terms of the mortgage. Therefore, if the mortgagee is in possession by reason of the mortgage deed and if in that capacity he receives any rent or produce from the mortgaged property, then the receipt of the rent is deemed to be a payment for the purpose of s. 20 (1) of the Act, and limitation is saved in respect of the whole debt secured by the mortgage.

FIRST APPEAL from the decision M. S. Bagali, Esquire, Civil Judge (Senior Division), at Belgaum.

* First Appeal No. 134 of 1948.

Suit for sale of mortgaged property.

Veerappa and Gurshidappa were the owners of a house situate at Belgaum. On February 7, 1917, they mortgaged the house to one Bharmappa for Rs. 4,500. The relevant terms of the mortgage deed were as follows:

"We have to pay this sum (viz. Rs. 4,500) to you, but we are unable to pay you the sum owing to difficulties in business. We have, therefore, agreed to pay you an interest at 9 per cent. For the security of the sum and for the liquidation of the interest, we have mortgaged with possession to you the property of our ownership described below..... The property with things attached to, so described is mortgaged to you for the aforesaid sum and is given into your possession. We shall pay you annually a sum of Rs. 900 and pay up the sum. The period for this is fixed at five years. By paying the sum of Rs. 900 annually we shall fully redeem the mortgage or you are to take interest on the sum, that shall remain payable after whatever payments we make.....You have been in possession as our tenant of the said shop at an annual rent of Rs. 300. The same possession has been confirmed for five years. The said sum of Rs. 300 is to be deducted for the interest and the balance we shall pay by the end of the year. You are to continue in possession as before after the stipulated period till the amount is fully paid."

On January 23, 1925, the mortgagors executed another document in favour of the mortgagee by which they gave him an additional charge on the property in respect of a further advance of Rs. 4,000. The relevant terms of the document were:

"The property described as above which is of our full ownership is now in your possession on the strength of the possessory mortgage deed referred to above. Keeping in tact your said previous possessory mortgagee-rights and the possession, today (we) have placed a further charge of the additional amount on the very same property. We have to pay you the Khata balance. Out of it for Rs. 4,000 we having executed this document, have placed the charge thereof on the said mortgaged property. A condition is made to pay interest thereon at the rate of 0-12-0 per cent. per month. We will go on paying you the interest on the said principal amount year by year and obtain receipts. After five years from today, we will pay you the principal amount and the interest that will remain in arrears and obtain back this document with your endorsement of payment. In case the payment is not made in time, we will pay you the principal amount together with further interest as per the said condition whenever you demand or the amount should be recovered by sale of the mortgaged property through Court. If there be any deficit we will pay it personally or from out of our other properties."

On February 4, 1938, one Virsangappa purchased the suit property at a Court sale subject to the aforesaid two mortgages.

On August 26, 1946, the mortgagee's sons (plaintiffs) filed the present suit against the sons of Virsangappa (defendants)

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to recover by sale of the mortgaged property Rs. 8,500 the principal amount of the two mortgages, Rs. 8,500 as interest on the principal amount under the rule of *dam dupat* and some other sums for costs of repairs etc.

The trial Judge held that the plaintiffs were entitled to the principal amount of Rs. 4,500 and twelve years' balance of interest prior to the date of the suit, viz. Rs. 1,260 under the first mortgage and nothing under the second mortgage as it was time-barred. He awarded a further sum of Rs. 1,425-12-6 for repairs etc. and ultimately passed a decree for Rs. 7,185-12-6 in favour of the plaintiffs and disallowed rest of their claim.

The plaintiffs appealed to the High Court.

S. R. Parulekar and *D. M. Honavar*, for the appellants.

G. R. Madbhavi and *H. B. Datar*, for respondents Nos. 1 and 3.

CHAGLA C. J. This is an appeal from a judgment of the Civil Judge, Senior Division, Belgaum, by which he decreed the plaintiffs' suit on two mortgages to a certain extent and it is the plaintiffs who have come in appeal before us contending that they were entitled to the full claim comprised in their suit.

One Veerappa and Gurshiddappa mortgaged to plaintiffs' father on February 7, 1917, a shop to secure a debt for Rs. 4,500. The period of the mortgage was fixed at five years and there was a provision for sale of the property in the event of the mortgage amount not being paid within the stipulated period. It was further provided in this mortgage that the mortgagee was to be in possession of the shop, that he was to recover the rent of Rs. 300 of the shop and appropriate it towards the interest fixed on the mortgage. The interest was fixed at 9 per cent. Therefore, in this mortgage there was provision with regard to the payment of interest to the extent of Rs. 300. That left a balance of Rs. 105 payable by the mortgagor under the mortgage. On January 23, 1925, another document was executed by the two mortgagors in favour of the plaintiffs' father, and by that document the two mortgagors gave an additional charge to the mortgagee in respect of a further advance of Rs. 4,000. The document describes the mortgage as a possessory mortgage and it emphasises the fact that the possession of the mortgaged property was already with the mortgagee. The rate of interest is the same as under the earlier document, viz., 9 per cent. The plaintiffs filed the suit to enforce these two mortgages and they claimed in the suit Rs. 4,500 and

Rs. 4,000 for principal under the two mortgages, in all Rs. 8,500, and they also claimed interest on the sum of Rs. 8,500 on the principle of *dam dupat*. There were some other claims with which we are not concerned in this appeal. The learned Judge below held that the plaintiffs were entitled to the principal, viz. Rs. 4,500 under the first mortgage; they were only entitled to interest for 12 years up to the date of the filing of the suit, and that the plaintiffs' claim with regard to the second mortgage was out of time and therefore no relief was given by the learned Judge in respect of the second mortgage.

Now, as far as the first mortgage is concerned, the question that arises is whether the receipt by the mortgagee of Rs. 300 every year under the mortgage constitutes an acknowledgement within the meaning of s. 20 of the Indian Limitation Act so as to start a fresh period of limitation in respect of the debt secured by the mortgage. Section 20 deals with the effect of payment on account of a debt, to the extent that section is material for the purpose of this appeal, and it contains a proviso that the acknowledgment of the payment must appear in the handwriting of, or in a writing signed by, the person making the payment. Therefore, a mere part payment of the debt would not save limitation. The proviso further requires that the fact of the payment must appear in the handwriting or in a writing signed by the person making the payment. Provided these two conditions are satisfied then a fresh period of limitation would start under s. 20. Now, there is another subclause to this section which provides that when mortgaged land is in possession of the mortgagee the receipt of the rent or produce of such land shall be deemed to be a payment for the purpose of sub-s. (*1*). Now, in our opinion, the expression "where mortgaged land is in the possession of the mortgagee" does not merely apply to cases where the mortgagee is in possession under a usufructuary mortgage; it applies to all cases where the mortgagee is in possession in his capacity as the mortgagee and under the terms of the mortgage. One may easily conceive of a case where in a simple mortgage there may be a provision that on default of payment of interest the mortgagee would be entitled to go into possession. Therefore, if the mortgagee went into possession under a simple mortgage, he would be in possession in his capacity as a mortgagee and under the right given to him under the mortgage deed. Therefore, we see no reason why we should restrict this provision to a case where a mortgagee is entitled to possession by

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reason of the fact that the mortgage is a usufructuary mortgage. Therefore, if the mortgagee is in possession by reason of the mortgage deed and if in that capacity he receives any rent or produce from the mortgaged property, then the receipt of the rent is deemed to be a payment for the purpose of sub-s. (*1*). It is contended by Mr. Madbhavi that even if a mortgagee receives rent or produce it will not constitute an acknowledgment unless that acknowledgment appears in the handwriting of the person making the payment. In our opinion that contention is not tenable. Sub-s. (*2*) makes the receipts of rent or produce by the mortgagee a payment for the purpose of sub-s. (*1*) including the purpose of the proviso. In other words, if rent is received by the mortgagee, then in the eye of the law the conditions of sub-s. (*1*) and the proviso are satisfied. The receipt of the rent is just as good as if the mortgagor had made the payment and the payment appeared in his writing or in the writing of the person who actually made the payment. Any other interpretation would make sub-s. (*2*) entirely nugatory. It is impossible to conceive how if the mortgagee is in possession and if he recovers rent that fact can ever appear in the handwriting of the mortgagor. Therefore, we are giving to sub-s. (*1*) a construction which is in consonance with reason and good sense. If that be the correct position in law, then when the mortgagee received Rs. 300 every year under the terms of the mortgage deed of February 7, 1917, being in possession of the mortgaged property also under the terms of that mortgage deed, it must constitute a part payment within the meaning of s. 20 (*1*). If it constituted a part payment, then limitation was saved in respect of the whole debt secured by the mortgage. The mortgage debt was the principal and the interest and both the principal and the interest were secured. Therefore, payment of part of the interest was a part payment of the mortgage debt and the result of the part payment was that a fresh period of limitation commenced in respect of the whole debt whenever a part payment was made within the meaning of s. 20 (*2*). Therefore, we are unable to agree with the learned Judge below that the mortgagee is entitled only to recover interest within 12 years of the date of the filing of the suit. In our opinion the whole of the plaintiffs' claim under the first mortgage is within time and the whole claim consists of principal and of the interest which they are entitled to under the mortgage deed.

Turning to the second point, it is contended by Mr. Parulekar that the plaintiffs' suit on the additional charge is also in time because he points out that the mortgagee continued to be in possession of the property, that the fact of the possession is referred to in the second document and the result of the second document is that the two debts are consolidated and the mortgaged property becomes a security for the consolidated debt and the receipt by the mortgagee of Rs. 300 is to be attributed not to the debt under the first mortgage but to the consolidated debt both under the mortgage deed and under the deed of the additional charge. We do not think that Mr. Parulekar's argument can be accepted. It may be that it was possible for the mortgage by a proper document so to provide that the receipt by the mortgagee of Rs. 300 was in respect of both the debts. But the second document does not refer to the payment of Rs. 300 at all; it does not provide for receipt by the mortgagee of his principal or interest out of any income arising from the property. All that it provides is that for the additional loan of Rs. 4,000 the mortgaged property shall constitute an additional security. Mr. Parulekar has emphasised the expression "additional security." All that additional security means is that whereas before this document was signed the mortgaged property was security only for the payment of Rs. 4,500 and interest, after the execution of this document the mortgaged property became security for the additional loan of Rs. 4,000 with interest thereon. But it is impossible to read this document as consolidating the two debts and creating one mortgage in respect of both the debts. Therefore, in our opinion the receipt by the mortgagee of Rs. 300 every year out of the income of the property cannot and does not save the debt secured by the deed of additional charge and as the mortgagee did not sue on that debt within 12 years of January 23, 1930, his suit to enforce the deed of additional charge is out of time.

Mr. Parulekar has drawn our attention to the form of the decree passed by the learned Judge. The form is the usual and proper form of a mortgage decree and the form provides that the mortgage debt is to be paid within six months; in default the plaintiffs would be at liberty to apply for a final decree for sale of the mortgaged property. This carries with it the necessary implication that if the mortgage debt is paid within six months it would be obligatory upon the mortgagee to reconvey the property. But we wish to make it clear that as the decree deals only with the mortgage of the February 7,

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1917, and as payment has been directed to be made in respect of that mortgage, the only obligation on the part of the mortgagee would be if the mortgagor discharges the debt under the first mortgage to reconvey whatever right, title and interest the mortgagee has got under the first mortgage. That reconveyance will not in any way prejudice or affect his rights under the second mortgage. If he is entitled to remain in possession under the second document, the deed of additional charge, then this decree will not prejudice his right. We will, therefore vary the decree of the trial Court by providing that there will be a preliminary mortgage decree under O. XXXIV, r. 4, in favour of the plaintiffs for Rs. 9,025-12-6 with future interest on Rs. 5,318-3-6 at the rate of 6 per cent till the date fixed for redemption and thereafter at 4 per cent. The period of redemption fixed at three months from today. Parties to pay proportionate costs both in the suit and the appeal.

Decree varied.

M. W. P.

APPELLATE CRIMINAL

FULL BENCH

Before Mr. M. C. Chagla, Chief Justice, Mr. Justice Rajadhyaksha and Mr. Justice Dixit.

D. K. CHANDRA *v.* THE STATE.*

1951

August 3

Criminal Procedure Code (Act V of 1898), ss. 233, 234, 235, 236—Joinder of four charges in one trial—Alternative charges of breach of trust and cheating in respect of each of two separate transactions—Whether joinder of charges is permissible.

If the prosecution wishes to justify a trial in which charges are joined, it is for the prosecution strictly to establish that the joinder is permissible under either s. 234, 235 or 236 of the Criminal Procedure Code, 1898. It is a well known canon of construction that exceptions must be strictly construed, and unless the prosecution satisfies the Court that the exception has been strictly complied with, the joinder of charges in a trial must be held to be contrary to law. It may be possible in a conceivable case for the prosecution to establish that a case falls under more than one exception. But if it falls under more than one exception it must so fall that it must not infringe the provisions of any of the three sections. It is not permissible for the prosecution to combine and supplement the three sections in such a manner as to contravene the provisions of any of these three sections.

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* Criminal Appeal No. 433 of 1951.