Prithi Singh vs Ganesh Pd. Singh on 14 March, 1950

Equivalent citations: AIR1951ALL462, AIR 1951 ALLAHABAD 462

JUDGMENT

Mustaq Ahmad, J.

1. This, a plaintiff's application in revision under Section 115, Civil P. C., against a decree of the learned Civil Judge, Banaras, affirming a decree of the Additional Munsif, Banaras, in proceedings under Section 12, U. P. Agriculturists' Relief Act.

2. The mortgage in question was a usufructuary mortgage dated 23-5-1902, executed by the plaintiff's father, Payag Singh, in favour of the defendant's ancestor in respect of twelve bighas of land, a part of which lay in the Banaras district and the balance within the Banaras State territory. The mortgagee lived within the said district and the mortgage deed also was executed there.

3. In defence, the mortgagee had raised a number of pleas, one of which was that the suit, in so far as it related to lands within the Banaras State, was not maintainable. In this revision we are concerned only with this plea, although a number of subsidiary points were also raised with which I shall have to deal to restrict the duration of the suit.

4. The trial Court dismissed the suit on the ground that it was not maintainable for the reason just mentioned, relying on a Bench, decision of this Court in Wahid-Uddin v. Makhan Lal, 1938 A. L. J. 872: (A. I. R. (25) 1938 ALL. 564). The lower appellate Court affirmed this decree, pointing out that the suit for redemption in regard to the lands within the Banaras State could not be maintained, inasmuch as, if it was decreed, the Court could not enforce the decree by putting the mortgagor in possession, as required by Section 18, Agriculturists' Relief Act. The learned Judge mentioned that the mortgagor had withdrawn his claim in the present suit in respect of the lands within the said State and had even offered to pay the entire mortgage money for the plots within that State. He did not think it possible to allow this amendment and agreed with the learned. Additional Munsif in dismissing the suit.

5. There can be no doubt that the mortgage deed, as executed, was perfectly valid, and no illegality attached to it on the mere score that a part of the property was outside British India. Section 5, Transfer of Property Act, defines 'transfer of property' as "an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself, or to himself and one or more other living persons";

and "to transfer property is to perform suck act". There is no reference in this definition to the locus to which the property belongs, so that, if the other conditions mentioned in this section are present, there is a complete transfer of property by one person to another, and nothing else remains to make

it effective. Section 28, Registration Act, permits the registration of a deed required to be registered under Section 17 thereof by the Sub-Registrar 'within whose sub-district the whole or some portion of the property to which such document relates is situate'. This also does not make any reference to the place or the locality in which the property covered by the document lies. The point arose in a Bombay case Central Bank of India Ltd. v. Nusserwanji H. Bharucha, A. I. R. (19) 1932 Bom. 642 : (57 Bom. 234) where Kania J. (now the Chief Justice of the Supreme Court of India) remarked :

> "I find that Section 5, T. P. Act, which defines 'transfer of property', does no' in terms exclude properties outside British India. ..... The definition has nothing to do with the question whether the property is inside or outside British India. ..... The construction which I think should be put on the section is that the Transfer of Property Act which is to be enforced by the Court is to be construed irrespective of the fact whether the property is inside or outside British India, or whether the property is situate in a province to which the Act applies or not."

I, therefore, think that the mortgage deed dated 23-5-1902, could not be challenged on the ground that the entire property embraced by it did not lie within British India.

6. The two important and interesting questions on which the Bench was addressed at length by the learned counsel for the parties were these : (i) Whether the suit was maintainable, although a part of the property involved lay outside British India ; and (ii) Whether, even if no decree for redemption in respect of the lands outside British India could be granted, the plaintiff was entitled at least to claim an account of the profits of those lands as of those within the Banaras district, and that at the statutory rate prescribed by Section 30, U. P. Agriculturists' Relief Act (XXVII [27] of 1934). I would deal with these questions seriatim.

7. As regards the first question, learned counsel for the appellant relied on the words within whose jurisdiction the mortgaged property or any part of it is situate' in Section 12 of the Act and argued that the suit, though embracing both the sets of property, was cognisable by the Banaras Court. Now, similar words are found in Section 17, Civil P. C., namely, 'within the local limits of whose jurisdiction any portion of the property is situate', and these have been interpreted as referring only to Courts within the territories to which the Code applies. Under Section 1(3) of the Code, it applies only to British India excluding the Scheduled Districts. The term "British India" is defined in Section 3(7), General Clauses Act (X [10] of 1897) as not including the Native States. The Judicial Committee in Nilkanth Balwant v. Vidya Narasinh Bharathi, A. I. R.. (17) 1930 P. C. 188 : (54 Bom. 495) pointed out :

> "No doubt the words 'a suit to obtain relief respecting immoveable property' are wide enough to cover, suits for foreclosure, sale or redemption in the case of mortgages or charges upon immoveable property, but the words in Section 17 'within the jurisdiction of the different Courts' must mean within the jurisdiction of different Courts to which the Code applies, i. e., Courts in British India. Where, therefore, in a mortgage suit part of the property is situated not within the jurisdiction of the Courts in British India, British Indian Courts have no jurisdiction to try the suit so far as it

relates to mortgage properties situate outside British, India."

In the case of suits for redemption, the forum is rigidly prescribed by Section 16(c) of the Code restricting jurisdiction only to such Courts, within which the entire mortgaged property lies. Any other rule would have presented a practical difficulty in the way of the mortgagor in obtaining possession under the redemption decree, as the Court within whose jurisdiction a part of the property does not lie would not be able to carry out the provisions of Section 18, Agriculturists' Relief Act, in respect of that, part. I would, therefore, hold that the suit, in so far as it embraced the lands in the Banaras' State, was not maintainable.

8. In the present case, however, it appears from the judgment of the lower appellate Court, as I have already remarked, that the plaintiff withdrew his claim for redemption regarding the lands in the said State and even offered to pay the entire principal amount to obtain redemption of the property in the Banaras district. The learned Civil Judge, notwithstanding this, affirmed the dismissal of the entire suit by the trial Court. This, in my opinion, was legally wrong.

9. In Girdhari v. Sheoraj, 1 ALL. 431, the Suit for redemption embraced properties both in the district of Mirzapur and also lying within the domains of the Maharaja of Banaras. The subordinate Judge of Mirzapur had taken an account of the sums realised by the mortgagee from the entire property mortgaged, and, finding that these sums were sufficient to discharge the entire mortgage debt, had given the plaintiff a decree; the lower appellate Court dismissed the suit on the ground that such account could not be taken without deciding questions lying ultra vires of the Mirzapur Court. A Bench of this Court held that the Mirzapur Court might take such account for the purpose of deciding whether the entire mortgage debt had been satisfied and might give the plaintiff a decree for the redemption of the property lying within its jurisdiction, notwithstanding that, in doing so, it would have incidentally to determine questions relating to lands lying within the domains of the Maharaja. I am referring to this case at present only on the point that this Court did allow redemption of a part of the property only, i. e., that lying within the Mirzapur district. As for the other point of the Court taking into account the profits of the other property also in determining the amount of the mortgage debt, I shall refer to it when dealing with the other point arising in this case.

10. In Setrucharlu v. Maharaja of Jeypore, 46 I. A. 151 : (A. I. R. (6) 1919 P. C. 150), the suit was one for sale, partly of properties lying in what is known as the Agency Districts over which the Court in British India had no jurisdiction. The Judicial Committee varied the decree of the Indian Court by deleting the order for sale so far as applicable to the lands within those Districts, though all the same reserving the right of the plaintiff to seek remedy in the Agency Court regarding those lands.

11. Under the mortgage contract in this case, which was entered into within British India, the mortgagee agreed to return the property to the mortgagor on receipt of the mortgage money. Apart from the question what that amount now is, the defendant was bound to fulfil that agreement, if no statutory hindrance was found in the way of such fulfilment. Such hindrance was suggested by the learned counsel for the mortgagee as relating only to the lands in the Banaras State, unless it was granted that the incidents governing both the parcels of land were inseparably the same and redemption only of the entire mortgaged property, and not merely of a portion of it, was to be

allowed or disallowed. The cases I have just cited did grant the relief for a part of the property only, and no difficulty was conceived in decreeing the suits, one for sale and the other for redemption, in respect of that property at least.

12. Learned counsel for the respondent strongly relied on the Bench decision of this Court in Wahid-Uddin v. Makhan Lal, 1938 A. L. J. 872 : (A. I. R. (25) 1938 ALL. 564), on which the judgment of the trial Court, as I have already mentioned, was based. That was a case of a suit for accounts under Section 33, Agriculturists' Relief Act, embracing properties both in the United Provinces and in the Province of Delhi. On the view that the Court could not go into the accounts without affecting the property in the latter province, the Bench affirmed the view of the learned Civil Judge of Meerut that the suit was not maintainable. The learned Judges concluded their judgment in these words :

> "Sub-section (2) of Section 33, Agriculturists' Relief Act, provides that Chap. IV of the Act and the Usurious Loans Act shall be followed. In other words, the interest is to be reduced, accounts have to be taken and then a decree has to be passed. It is clear, therefore, that any decree passed under Section 33 of the Act will affect the rights in the property in Delhi. That, in our opinion, is not permissible."

Neither of the two cases referred to by me above, one of this Court and the other of the Privy Council, was cited before the Bench. The essence of the decision is that the determination of the amount under the two Acts mentioned in the quotation would "affect rights in the property in Delhi." When considering the second point I have formulated, I would hold that the provisions of the Agriculturists' Relief Act and, by parity of reasoning, of the Usurious Loans Act, have reference only to the indebtedness of the agriculturist-debtor without any reference to the property on which the debt is charged and that any other view would defeat the very object from which these Acts were passed. I am, therefore, not inclined to agree with this decision.

13. I must, therefore, hold that it was open to the plaintiff, after withdrawing his claim for redemption about the lands within the Banaras State, to ask the Court, as he actually did, to pass a decree only in regard to the plots of land in the Banaras district.

14. By far the more important and interesting is the second question formulated by me above. This comprises two sub-questions : (i) whether the plaintiff was entitled in this suit to claim accounts of the lands in the Banaras State, and (ii) whether this could be done at the statutory rate of interest provided by the U. P. Agriculturists' Relief Act. While the first is a substantive question, involving the right of the mortgagor and the liability of the mortgagee, the second is only a question of the method by which the said right and liability should be determined in this case.

15. The mortgage in this case was no doubt a usufructuary mortgage under which the mortgagee had taken possession of the property in lieu of interest, that is to say, prima facie he was not liable to render accounts of the mortgaged property to the mortgagor, as provided by Section 77, read with Section 76(g), T. P. Act. But this is not really the question that falls to be considered in this case. What has to be decided is whether in this case the mortgagor could claim an inquiry into the profits

of the lands within the Banaras State, although the Court in which the suit for redemption had been filed had no jurisdiction to entertain the same with regard to those lands under Section 16(c), Civil P. C. If under the second sub-question I have just mentioned it is held that the mortgagor is entitled to enforce the provisions of the Agriculturists' Relief Act with regard to the rate of interest against the mortgagee in respect of the entire property mortgaged, of course, it would mean that the mortgagee is under an obligation to render accounts of the entire property, irrespective of the fact that a portion of it was outside the jurisdiction of the Banaras Court. At present I need consider only the abstract question whether, even though the Banaras Court had no jurisdiction to entertain the claim for redemption in respect of these lands, the plaintiff was still entitled to ask the Court to determine the profits of those lands. If such a procedure conflicted with the provisions of Section 16 of the Code, the plaintiff was of course not entitled to insist upon it. On the other hand, if it only indirectly affected those lands without involving the determination of any question of title to, or interest in, the same, it seems to me that the Court was fully justified in acceding to the mortgagor's request.

16. Instances in which reliefs of an indirect or incidental nature even qua properties outside the jurisdiction of the Court trying the cause were claimed are furnished by particular classes of suits, e. g., suits for a declaration that a will is a forgery N. Achayya v. N. Yellemma, A. I. R. (10) 1923 Mad. 109 : (72 I. C. 920), or that a certain adoption is invalid, Ramakrishnayya v. Mahalakshamma Guru, 30 M. L. W. 691, or for the dissolution of a partnership, Durgadas v. Jai Narain, 41 ALL. 513 : (A. I. R. (6) 1919 ALL. 350), etc. The enquiry in these and similar cases would be primarily concerned with the defendant's conduct which is impugned, although it would incidentally have a bearing on some property outside the jurisdiction of the Court.

17. By far the larger number of decisions in this country are baaed on the proviso to Section 16, Civil P. C., which reads :

> "Provided that a suit to obtain a relief respecting, or compensation for wrong to, immoveable property held by or on behalf of the defendant may, where the relief sought can be entirely obtained through his personal obedience, be instituted either in the Court within the local limits of whose jurisdiction the property is situate, or in the Court within the local limits of whose jurisdiction the defendant actually and voluntarily resides, or carries on business, or personally works for gain."

18. Where the defendant is guilty of breach of an obligation arising out of a contract or his action amounts to a tort or where a Court having personal jurisdiction over him has to compel him to obey the laws applicable to him within its jurisdiction, he can be sued in that Court, even, though the proceeding may involve some reference to a 'foreign immoveable'. The rule is based on the practice followed by the Chancery Courts in England except in cases where the law in the outside territory has some impediment to offer. In Ewing v. Orr Swing, (1883) 9 A. C. 34 at p. 40 : (53 L. J. Ch. 435), Lord Selbourn remarked :

> "The Courts of Equity in England are, and always have been, Courts of conscience, operating in personam and not in rem; and in the exercise of this personal

> jurisdiction they have always been accustomed to compel the performance of contracts and trust as to subjects which were not either locally or rations domicilli within their jurisdiction. They have done so, as to land, in Scotland, in Ireland, in the Colonies, in foreign countries."

As observed by Kania J. in Central Bank of India, Ltd. v. Nusserwanji H. Bharucha, A. I. R. (19) 1932 Bom. 642 at pp. 649 and 650 : (57 Bom. 234), the relief sought in a suit on a mortgage was one which the Court could grant in personam. The equities arising out of the mortgage can be enforced by the Court within whose territorial jurisdiction the mortgage is made, subject to any disability entailed by the law of the country outside such jurisdiction in which a part of the property lies.

19. Westlake in Article 172 of his 'Private International Law', Edn. 5, p. 230, enunciates the position thus :

> "A proprietor of foreign immovables, or personal interest in such, may be compelled by the English Court if it has personal jurisdiction over him, to dispose of his property or interest in them, so as to give effect to any obligation relating to them which arises from, or as from, his own contract or tort."

He then quotes the following passage from Lord Cottenham's judgment in Exp. Pollard, (1840) Mont. and Ch. 239 at p. 250 : 4 Deacon 27 :

> "If indeed the law of the country where the land is situate should not permit, or not enable, the defendant to do what the Court might otherwise think it right to decree, it would be useless and unjust to direct him to do the act ; but when there is no such impediment the Courts of this country in the exercise of their jurisdiction over contracts made here, or in administering equities between parties residing here, act upon their own rules, and are not influenced by any consideration of what the effect of such contracts might be in the country where the lands are situate, or of the manner in which the Courts of such countries might deal with such equities."

20. Applying the rule to suits on mortgages, the learned author in Article 174 observed:

> "The redemption or foreclosure of mortgages of foreign lands deserves separate notice. The fact that a debt is secured by such a mortgage can be ho objection to taking the accounts between a debtor and creditor, and decreeing payment by the former of the balance found due from him, in any Court having personal jurisdiction over him."

and regarding money demands in Article 176, observed :

> "Where a money demand is made in a Court having personal jurisdiction over the defendant, it is no objection to the demand that it is in any way connected with foreign immovables."

21. The rule which can obviously be evolved from these observations is that, unless the law of the country in which a part of the property covered by the contract is situate offers any statutory impediment to the performance of any particular term of the contract, the Court within whose jurisdiction the contract was made is entitled to enforce it against the defendant in all its terms. In the present case, not only the contract of mortgage was made in British India but, in fact, the defendant who entered into it lived and lives there, so that the Court at Banaras had full jurisdiction to compel him to carry out his agreement, no matter if this had an incidental reference to a property outside such jurisdiction.

22. I may now turn to some decisions of the Indian Courts, besides the three cases I have already mentioned, to illustrate the same rule.

23. In Kashi Nath v. Anant Sita Ram, 24 Bom. 407 : (2 Bom. L. R. 47), the plaintiff sued in the Court at Nasik in British India to establish his right to a share in the income derived from certain grants of land situate outside British India, but received by the defendant within the jurisdiction of the Nasik Court. It was held that the suit was within the jurisdiction of the Court, there being no dispute as to title. The judgment of Sir Lawrence Jenkins C. J. in this case was based on the dicta of Lord Cottenham and Lord Selbourn I have already quoted.

24. This case was followed by the same Court in Mahadeo Govind v. Ram Chandra, A. I. R. (9) 1922 Bom. 188 : (46 Bom. 108), where it was held that, in accordance with the general principles of English law applicable to India, a suit to recover mesne profits of land situated outside British India can be instituted in British India and that, although Section 16, Civil P. C., did not seem to be applicable to cases of land outside British India, there was reason to believe that the whole of the section followed the English law with regard to jurisdiction in cases of suits in which specially the decree could be executed by the personal obedience of the defendant.

25. Again, in Yado v. Krishnaji, A.I.R. (15) 1928 Nag. 56: (23 N L R 170), the same rule was affirmed in these words :

> "A British Indian Court will not adjudicate on questions relating to the title to, or the right to the possession of, immovable property out of British India. But the Civil Procedure Code does not forbid the institution of a suit for mesne profits, even if the decision in the suit involves adjudication regarding the plaintiff's title to immovable property outside British India, when the decree of the Court for mesne profits can effectively be enforced by the personal obedience of the defendant within the jurisdiction."

26. To the same effect are the cases in, Goculdas v. Chaganlal, A.I.R. (14) 1927 Cal. 768 : (54 Cal. 655) and Krishnaji v. Gajanan, 33 Bom. 373 : (2 I. C. 489).

27. In the case of Durgadas v. Jai Narain, 17 A. L. J. 567 : (A.I.R. (6) 1919 ALL. 350), the relief claimed was for dissolution of partnership in a factory outside the jurisdiction of the Court in which the suit was filed and the case of Nihal Chand v. Jai Ramdas, A.I.R. (18) 1931 Lah. 673 : (132 I. C.

218) was also one in which accounts were claimed in respect of a factory outside such jurisdiction. It was held in the former that no question of title to immovable property was involved and in the latter that the suit was not regarding an interest in such property, and the plea of want of jurisdiction in both was repelled.

28. On a careful survey of these authorities, I have come to the conclusion that the Banaras Court in this case was competent to entertain a claim for accounting even as regards the lands lying within the Banaras State.

29. Now this leads to a consideration of the vexed question whether this accounting could be at the statutory rate of interest prescribed' by Section 30, U. P. Agriculturists' Relief Act, read with Schedule 3 of that Act.

30. The Preamble of the Act reveals that it was intended 'for the relief of agriculturists from indebtedness." That the plaintiff is an agriculturist was not denied, it not being pleaded by the defendant that the former had no right to apply for redemption of the mortgage under Section 12 of the Act. Nor was it suggested to the Bench during the arguments that the plaintiff was or is not an agriculturist within the meaning of the Act. It is, therefore, unnecessary to enquire whether the plaintiff was really an agriculturist as understood by this Act. The term 'agriculturist' is defined in Section 2 (2) by enumerating several classes of persons as embraced by that word. In substance.

> "A person who, in district not subject to the Banaras Permanent Settlement Regulation 1795, pays land revenue not exceeding Rs. 1000 per annum," or A person who, in districts subject to the Banaras Permanent Settlement Regulation, 1795, pays a local. rate under Section 109, District Boards Act, 1922, not exceeding Rs. 120 per annum," or "A person holding land free of revenue, who pays a local rate under Section 109, District Boards Act, 1922, not exceeding Rs. 120 per annum," etc. etc.

31. In this classification which I have cited only as typical of the other classes or in the provisos to the definition of an 'agriculturist,' the reference throughout is only to the status of the debtor and not to the place where his property lies. That is to say, if he comes within a certain status irrespective of the place or places where his property may lie, he is an 'agriculturist.' This is consistent with the circumstance that the defendant himself never challenged that status with reference to the plaintiff as an agriculturist within the meaning of the Act, nor, on that account, his right to apply for redemption under Section 12 of same.

32. The sections in the Act affording relief to an agriculturist-debtor also do not make any reference to the place where his property lies. In Section 30, the reference is only to a 'debtor' without any accompanying reference to the place where the property charged with his debt is situate. Section 32 only talks of a 'creditor' and an ''agriculturist-debtor' and Section 33 also uses only the latter expression. Lastly, Section 34 merely refers to a 'loan' and an 'agriculturist'. The definition of the term 'loan' in Section 2 (10) also makes no reference to the property on which the same may be charged, much less to the place where that property may be.

33. On a consideration of these features of the Act, I am forced to the conclusion that, if a debtor occupies the status mentioned in the definition of an 'agriculturist', no matter where his property may fall, he is entitled to the relief for which, according to the Preamble the Act was intended. In this view, there is no meaning in the contention of the learned counsel for the defendant that this particular Act did not apply to the Banaras State. The Act, as I have pointed out, applies to certain persons occupying a certain status in the United Provinces, quite irrespective of where their properties are situated.

34. This Court having held in Dharam Singh v. Bishen Swarup, 1937 A. L. J. 882 : (A. I. R. (25) 1938 ALL. 1), that a usufructuary mortgagee was entitled to claim accounts under Section 33 and in Sheo Charan Lal v. Umrao Begum, 1938 A.L.J. 892 : (A.I.R. (25) 1938 ALL. 611), that he was entitled to claim redemption under Section 12, Agriculturists' Relief Act, no difficulty remains in the plaintiff asking for the former relief even qua that part of the mortgaged lands which falls within the Banaras State. As for his relief for redemption, while there was no difficulty on any score of the non-applicability of the latter section, it could not be granted in view of the provisions of Section 18 of the said Act and Section 16(c) of the Code.

35. The matter of the applicability of the Agriculturists' Relief Act to the defendant, even if it involves a reduction of his indebtedness charged on property outside the jurisdiction of the Banaras Court may be considered from yet another standpoint. It cannot be denied that every citizen of a State is subject as much to the obligations arising out of a contract as those imposed on him by the laws of the State. After the passing of this Act which prescribed a certain scale of interest in replacement of what may have been settled under a contract, every citizen of the United Provinces became liable to observe the statutory scale which the party benefiting thereunder could lawfully enforce. Dicey in his "Conflict of Laws", Edn. 6, p. 708, Rule 157 observes :

> "The liability to pay interest, and the rate of interest payable in respect of a debt, e. g., in respect of a loan, is determined by the proper law of the contract under which the debt is incurred, e. g. by the proper law of the contract under which the loan is made."

Now Section 30 of the said Act prescribing a particular rate of interest begins with the words "notwithstanding anything in any contract to the contrary". It must mean that for the rate of interest settled was substituted the smaller statutory rate enjoined by this local enactment and that, this being now the "proper law of the contract under which the debt is incurred", the debtor was entitled to have his indebtedness determined accordingly. The question of the locus to which the property charged with his debt belongs nowhere comes into the picture.

36. I, therefore, hold that the plaintiff, along with a relief for redemption of the mortgaged lands in the Banaras district, was also entitled to have the profits of the other lands lying in the Banaras State determined in the ascertainment of the amount, if any, still due from him under the mortgage.

37. Accordingly, I would allow the appeal, set aside the decrees of the Courts below and remand the case for a fresh decision of the suit after the determination of such profits and the other issues in the case with costs to the plaintiff-applicant in this Court.

38. The applicant wants to redeem under Section 12, Agriculturists' Relief Act, a usufructuary mortgage executed by him in the British territory (Banaras district) in respect of lands situated in the British territory and Banaras State, without paying anything on the ground that the mortgage has been discharged out of the usufruct. Though he wants redemption of the entire mortgage, he seeks a decree for possession over only the land situated in the British territory; he does not want a decree for possession of the land situated in Banaras State. Banaras State has now merged in the Republic of India and there no longer exists any distinction between Banaras State and Banaras district but the Agriculturists' Relief Act which was in force in Banaras district has not been in force in what was previously Banaras State. It is conceded by the parties that the case is to be decided as if there were no merger of Banaras State in the Republic of India.

Desai, J.

39. Two main questions arise for decision by us; one is of forum or jurisdiction and the other is of lex or choice of law. These are two distinct questions; the former is to be decided by applying the rules of conflict of jurisdiction and the latter by applying the rules of conflict of laws or choice of law. The question of forum is whether the learned Munsif had jurisdiction over the suit. If that question is answered in the affirmative, a subsidiary question arises, namely, whether he had jurisdiction over the entire suit or over only that part of it which may be said to relate to redemption of the mortgage of the land situated in British India. The question of lex is which law should be applied to the case. The Agriculturists' Relief Act is the law in force in Banaras district; it was not in force in Banaras State. I presume that the law that was in force in Banaras State is the ordinary law contained in the Transfer of Property Act and Civil P. C., Order 34. It has to be decided whether we should apply the Agriculturists' Relief Act or the ordinary law. If we decide to apply the Agriculturists' Relief Act, a subsidiary question arises whether we should apply it to the entire case or only to that portion of the case which may be said to relate to the mortgage of the land situate in Banaras district. If we answer this question by saying that the Agriculturists' Relief Act cannot be applied to that part of the case which relates to the mortgage of the land in Banaras State, there would arise the further, subsidiary question--how to apply the Agriculturists' Relief Act as well as the ordinary law contained in the Transfer of Property Act and the Code of Civil Procedure to redemption of one mortgage?

40. I do not think I should say much on the question of forum. I agree with my brother Mustaq Ahmad that the learned Munsif had jurisdiction over the suit. Even according to the language of Section 12, Agriculturists' Relief Act, he had jurisdiction because part of the mortgaged lands is situated within his territorial jurisdiction. If he refused jurisdiction on the ground that the remaining part did not lie within his jurisdiction or in British India, on the same reasoning the Banaras State Court also should refuse jurisdiction and the result would be that no Court would have jurisdiction--an impossible result. Either Court or both Courts must have jurisdiction; it cannot be that no Court will have jurisdiction. I further agree with my brother that the learned Munsif had jurisdiction to pass a decree for possession on redemption of only that land which lies within his jurisdiction and had no jurisdiction to pass a decree for possession over the land lying in Banaras State.

41. Dicey's General Principle No. 3 (see his Conflict of Laws, Edn. 6 p. 22) is as follows :

> "The Courts of any country are considered by English law to have jurisdiction over (i. e., to be able to adjudicate upon) any matter with regard to which they can give an effective judgment, and are considered by English law not to have jurisdiction over (i. e., not to be able to adjudicate upon) any matter with regard to which they cannot give effective judgment." "An effective judgment" is explained by Dicey to mean "a decree which the State, under whose authority it is delivered, had in fact the power to enforce against the person bound by it, and which therefore its Court can enforce against such person."

If an Italian Court gives a judgment entitling A to the possession of land in London occupied by X, the judgment is clearly ineffective, for, it cannot, by the mere power of the State, be enforced against X or in favour of A.

42. Foote writes in his Private International Jurisprudence, Edn. 4 at p. 180, that an English Court ought not to pronounce a decree, "which can have no specific operation without the intervention of a foreign Court, and which, in the country where the lands lie which it assumes to charge, would probably be treated as a brutum fulmen."

So the learned Munsif had no jurisdiction to pass a decree for possession over the State land. This position was conceded by the plaintiff who gave up his claim for possession over the State land. When the learned Munsif had no jurisdiction to pass that decree, it follows that he had no jurisdiction to decide the question of right of possession of the State land.

43. Dicey's Rule 66 is :

> "The Courts of a foreign country have no jurisdiction (1) to adjudicate upon the title, or the right to the possession, of any immovable not situate in such country; or (2) (semble) to give redress for any injury in respect of any immovable not situate in such country."

This rule is subject to the exception of Rule 67 according to which a Court of a foreign country has jurisdiction "in an action or proceeding in personam." The corresponding rule for the domestic Courts is Rule 20 which is similarly worded.

44. Dr. Martin Wolff writes in his Private International Law (1945) at p. 89 that "an English Court has no jurisdiction to adjudicate upon rights to immovables situate outside England" and that "actions on rights of this kind belong exclusively to the forum rei sitae."

The learned Munsif, therefore, could not decide the question of right of possession over the State land.

45. Though the learned Munsif had no jurisdiction to decide the question of right of possession over the State land, it does not mean that he had no jurisdiction to decide the question of redemption of the entire mortgage." The mortgage had to be redeemed in its entirety; its integrity could not be broken by the mortgagor simply because part of the mortgaged land lay outside the British territory. Either the whole mortgage was to be redeemed or there was to be no redemption at all. The question of redemption must not be confounded with the question of possession over the mortgaged property as the result of redemption. The learned Munsif could not pass a decree for possession over the State land, but he could certainly declare that the entire mortgage stood redeemed. This declaration did not amount to his passing a decree for possession over the State land. After declaring that the entire mortgage was redeemed he could pass a decree for possession over only the land in Banaras district, leaving it open to the mortgagor to take his judgment containing the declaration to the State Court and ask it to pass a decree for possession over the State land on the basis of that judgment.

46. Even if no portion of the mortgaged property lay within Banaras district, the learned Munsif could pass a decree for redemption because the contract of mortgage was entered into in Banaras district and the defendant lives within his jurisdiction. Dicey's Rule 27 is :

> "When the defendant in an action in personam is, at the time for the service of the writ, in England, the Court has jurisdiction in respect of any cause of action in whatever country such cause of action arises."

An action in personam is defined by him to mean "an action against a person with a view to enforce the doing by him of some particular thing." (see p. 171). Dr. Martin Wolff writes at p. 64:

> "English lawyers call actions in personam all those actions which aim at determining the rights of parties inter se in the subject-matter, and it makes no difference whether they spring from an obligation (contract, tort) or from an jus in rem."

According to him also in an action in personam mere physical presence of the defendant is sufficient to confer jurisdiction upon the Court. In the present case, the mortgagee was present in Banaras district when the summons was served upon him. The action was an action in personam because it was brought with a view to enforce the return of the mortgaged property by the mortgagee to the mortgagor and also aimed at determining the rights of the parties inter se in the matter of the loan and the security. The mortgagee was under a personal duty to transfer the mortgaged property on redemption to the mortgagor. He could not dispute the mortgagor's title to the mortgaged property and the mortgagor's suit for redemption cannot be said to be a suit based on proprietary rights in land. It was based on contract only. It is stated by Dr. Martin Wolff at p. 90 that "actions which are based not on proprietary rights in foreign land as such, but on contracts creating a personal duty to transfer proprietary rights, may be entertained by an English Court."

As an example of this Rule he quotes an English Court's giving judgment for redemption of a mortgage of land abroad. That the action is in respect of land lying outside the jurisdiction of an English Court is no obstacle in the way of an English Court's exercising jurisdiction in an action in personam. The conditions on which the existence of this jurisdiction depends are mentioned by

Dicey at pp. 146 and 147 and are all fulfilled in the present case. There is no evidence that the lex situs would prohibit the enforcement of the decree, the mortgagee is not a stranger to the equity, no question arises of the Court's inability to supervise effectively the execution of the decree to be passed and there is some personal equity running from the mortgagor to the mortgagee. Among the examples given by him on p. 148 are that a decree for foreclosure of a mortgage of foreign land can be made by a domestic Court within whose jurisdiction the mortgagor resides, and that a decree can be passed for taking accounts between A and X, tenants of foreign land but resident within the limits of the domestic Court. In In re Hawthorne; Graham v. Massey, (1883) 23 Ch. d. 743 : (52 L. J. Ch. 750), an English Court was held to have jurisdiction, as between an English mortgagor and an English mortgagee, to enforce the personal contract between them, even though the mortgaged property lay in a colony. See also Fisher and Lightwood's Law of Mortgage, Edn. 7, p. 692.

47. Coming to the question of lex, ownership of immovables and other rights in immovables are subject to the lex situs. A person's capacity to mortgage or end a mortgage right and also the formalities necessary for creating a mortgage are governed by the lex situs. See Wolff, pp. 515, 532 and 533. But it is emphasised that only transactions of a real character, that is, transactions which immediately create transfer or extinguish a jus in rem are governed by the lex situs and that the rule of the lex situs does not apply to contracts, that is, to transactions which impose on one party a duty to constitute, to transfer or to terminate such right. When a mortgagor seeks redemption of a mortgage, he only wants to enforce the contract of return of possession of the mortgaged property after receiving the money due under the mortgage. A suit simply for the recovery of immovable property would be governed by the lex situs, but not a suit for redemption of a mortgage of immovable property. As stated by Wolff at p. 542, the lex situs "is not the test for contracts connected with the thing in question". Dicey's Rule on this point is Rule 127: "All rights over, or in relation to, an immovable (land) are (subject to the exceptions hereinafter mentioned) governed by the law of the country where the immovable is situate (lex situs)".

The lex situs does not necessarily mean the domestic law of the foreign country; it means the law that a Court of that country would apply to the particular case and that law might, in certain circumstances, be the domestic law of another country. As in the instant case the mortgage contract was entered into in British territory, and the parties also are residing in British territory, the Banaras State Court itself might have applied the law prevailing in Banaras district if the mortgagor had sued there for redemption of the mortgage. If so, the lex situs in respect of the entire mortgage would be the law prevailing in Banaras district. The mortgagor simply wants to discharge the debt due from him and the question, how the debt should be discharged cannot be decided by applying the lex situs of the property which is given as security. When even the mortgagee's foreclosure suit would not be governed by the lex situs, the mortgagor's suit for redemption would still less be governed by it. The distinction between a suit for foreclosure and a suit for redemption is emphasised by Westlake in Article 174, quoted by my brother. According to Westlake, whatever might be the case of a suit for foreclosure, there is no doubt that a suit for redemption is governed by the' lex loci contractus and not the lex loci situs of the mortgaged property. The validity or otherwise of the mortgage will be judged by the lex situs, but that of the debt or contract will be judged by the lex contractus. It is stated in Phillimore's Commentaries on International Law, Edn. 3, p. 608, that "it may happen that the hypotheca or mortgage security may be valid according to the lex situs of the

property, and yet the debt or contract be invalid, because contrary to the lex contractus."

So the lex situs governs only a particular matter and not all matters involved in a mortgage. Phillimore has cited a case in which the Supreme Court of the United States of America did not allow interest on a loan of money made in England with a mortgage security in a West Indian Colony, because it was contrary to the lex contractus (i. e., of England) though permissible by the lex situs (i. e. of the Colony).

48. A contract is to be governed by what is known as the "proper law of contract". When the parties have expressed their intention in the contract itself that a certain law will govern the contract, that is the proper law of contract. If in the absence of expressed intention, intention to apply a certain law can be inferred from the terms and nature of the contract and from the general circumstances of the case, that law becomes the proper law of the contract. If it is not possible even to infer the intention, the proper law of the contract is presumed to be the lex loci contractus. This presumption is stronger when the contract is to be performed wholly in the country where it is made or may be performed anywhere. The phrase lex loci contractus is sometimes used to mean lex loci celebrationis and sometimes, lex loci solutionis. Here it is used in the former sense, that is, the law of the country where the contract is made. This is the substance of Dicey's Rule 136 and its sub-rules. In the mortgage deed under consideration no intention of the parties about the law by which the contract was to be governed was expressed or implied. When the deed was executed, there was no difference between the laws prevailing in Banaras district and Banaras State. The laws became different in 1934 when the Agriculturists' Relief Act was enacted by the United Provinces Legislature. In the circumstances, the contract would be governed by the lex loci contractus. It is stated by Foote at page 372 that the broad rule is that the lex loci celebrationis presumably governs the nature, the obligation and the interpretation of the contract unless the contrary appears to be the expressed intention of the parties. In the present case the contract was made in Banaras district and was to be performed also in Banaras district. The only connexion of Banaras State with the contract is that part of the mortgage security lies there. It is stated by Story in Article 287 of his "Commentaries on the Conflict of Laws" that taking mortgage security does not necessarily draw after it the consequence, that the contract is to be fulfilled, where the security is stated, that the legal fulfilment of a contract of loan even secured by a mortgage is repayment of the money and that the security given is but the means of securing the repayment of the loan at the place where the mortgagor borrows unless another place for repayment is expressly designated by the contract. In such a case not only the validity, of the contract but also the time, mode and conditions of its performance are governed by the lex loci contractus. When a contract made in one country is to be performed in another country, some matters may be governed by the lex loci celebrationis and the others by the lex loci solutionis, as stated by Rattigan in his Private International Law, p. 115, but here all questions will be governed by the same law because the place of making the contract is also the place of its performance.

49. When one is considering the lex to be applied to a contract, as stated by Story in Article 293 :

> "It will make no difference, (as we have seen), that the due performance of the contract is secured by a mortgage, or other security, upon property situate in another

country, where the interest is lower."

50. The question of lex arises in the instant case in respect of two matters of the contract, one of taking accounts and the other of rate of interest. I have assumed that according to the law prevailing in the State, no question arises of interest and of taking accounts of the profits of the property because the mortgage being usufructuary whatever the profits were, were to be in lieu of the interest, and neither was the mortgagee entitled to claim anything on account of interest, nor was the mortgagor entitled to call upon him to account for the profits of the mortgaged property. But under the Agriculturists' Relief Act, the mortgagee is liable to render accounts and he is not entitled to interest exceeding 41/2 per cent. per annum. The two questions of taking accounts and the rate of interest are connected together. One has to take accounts in order to find how much the mortgagee has realised in satisfaction of the debt, and one has to decide the rate of interest in order to find to how much he is entitled. Both are matters relating to the question of repayment of the loan. The profits certainly accrue at the situs, but they would accrue wherever the situs is and their accrual does not depend upon its being in one territory rather than in another. It is a question of contract whether the profits should be taken towards the satisfaction of the debt or not. This question has nothing to do with the situs. The rate of interest has still less to do with the situs; it is a question of contract pure and dimple. There would be no good reason for applying the lex situs to these questions; they ought to be governed by the lex contractus.

51. According to Phillimore (p. 577):

> "The interest due or accruing upon a contract is to be paid according to the law o{ the place of the performance of the contract."

He quotes the following from Kent's Commentaries, vol. II, p. 460 :

> "The law of the place where the contract is made is to determine the rate of interest when the contract specifically gives interest; and this will be the case, though the loan be secured by a mortgage on land in another State, unless there be circumstances to show that the parties had in view the laws of the latter place."

The same is the view of other authorities ; see, Rattigan (p. 116), Story (Articles 291 and 293) and Dicey (Rule 157). The exact words used in Rule 157 of Dicey are :

> "The liability to pay interest, and the rate of interest payable in respect of a debt, e.g., in respect of a loan, is determined by the proper law of the contract under which the debt is incurred, e.g., by the proper law of the contract under which the loan is made." (p. 708).
>
> In Connor v. Earl of Bellamont, (1742) 2 Atk. 382 : (26 E. R. 631), a debt was contracted in England, a mortgage bond was executed in Ireland, the mortgaged property also was situated in Ireland, and it was held that the rate of interest was governed by the Irish Law. That case differs from the instant case, because there the

> contract was made at the place where the mortgaged property was situated. Stapleton v. Conway, (1750) 3 Atk. 727: (26 E. R. 1217) is a case similar to the American case referred to by Phillimore. Lord Hardwicke stated in that case :
>
> "If a contract is made in England for a mortgage of plantation in the West-Indies no more than legal interest shall be paid upon such mortgage, and if in such case there is a covenant in the mortgage for payment of eight per cent. interest, it would be within the statute or usury, notwithstanding this is the 'rata of interest where the land lies."

So I hold that the questions of the rate of interest and the mortgagee's liability to render accounts for the profits of the entire mortgaged property are governed by the Agriculturists' Relief Act. As the lex contractus is applied, the subsidiary question, whether the property situated in the British territory and the State should be governed by different laws, does not arise. This question would have arisen only if the lex situs had been applied. Further, while it is possible to apply the different laws of accounting to the two classes of properties, it is not possible to apply the different laws of interest. There is only one loan and the question of interest must be governed by only one law. The loan cannot be broken up arbitrarily into two portions, one secured by the property in the British territory, and the other by the property in the State, to be subjected to different rules of interest.

52. Our finding does not really go counter to any decision of this Court. In Wahid-uddin v. Makhan Lal, 1938 A. L. J. 872 : (A. I. R. (25) 1938 ALL. 564) it was held that a law passed by the U. P. Legislature cannot affect land situated outside the Province. We have no quarrel with this proposition. It is not claimed by anyone before us, nor have we said, that the Agriculturists' Relief Act affect the State land. A State Court would certainly not apply the U. P. Agriculturists' Relief Act to the land within its jurisdiction, but this is only if it were applying the domestic law. If it were applying a rule of the Conflict of Laws, it might have to apply the U. P. Agriculturists' Relief Act as the lex loci contractus (in either sense). The question before us is not whether the U. P. Legislature could enact a law to affect property situated outside U. P.; it is which of the two laws, which might possibly be applied to the case, should be applied. In Wahid-uddin's case, (1938 A. L. J. 872 : A. I. R. (25) 1938 ALL. 564) a Bench of this Court dismissed an application under Section 33, Agriculturists' Relief Act, by P who had mortgaged properties situated in U. P. and Delhi to M under a mortgage deed registered at Delhi. This Court refused to apply the law of the United Provinces to the mortgage contract. In the judgment, there is no discussion of the rules of Conflict of Laws and jurisdiction. Actually the decision is in no way against what I have stated. The contract was made in Delhi; so the lex loci contractus was applied. (That is exactly what we propose to do in the case in hand.) Under the law in force in Delhi, there could be no such suit for accounting as is contemplated by Section 33, Agriculturists' Relief Act. Our view finds support in Girdhari v. Sheoraj, 1 ALL. 431 in which it was held that a Mirzapur Court could entertain a suit for redemption of a mortgage of properties situated in Mirzapur district and Banaras State, take accounts of profits of both properties, decide if the mortgage-debt was discharged from the profits and then grant a decree for possession over only the land situated in Mirzapur district.

53. I agree that the appeal should be allowed.

54. By the Court. -- The appeal is allowed and the case is remanded to the trial Court for re-hearing. It should take accounts of the entire mortgaged property, calculate interest at 41/2 per cent. per annum, ascertain what sum, if any, is still due from the mortgagor to the mortgagee and pass a decree for possession over only the property situated in Banaras district on condition of the mortgagors paying that sum within a time to be fixed by it. The mortgagor will have his costs of this Court from the mortgagee. The costs so far incurred in the trial Court and in the lower appellate Court will be the costs in the suit.