

(1929) 03 PRI CK 0002

In the Privy Council

Case No : Privy Council Appeal No. 86 of 1927

James Richard, Rennel Skinner

APPELLANT

Vs

Kunwar Naunihal Singh

RESPONDENT

Date of Decision : 19-03-1929

Acts Referred:

Citation : (1929) AIR(PC) 158

Hon'ble Judges : Salvesen, Atkin, Carson, JJ.

Advocate : Dold, Douglas Grant, Shephard, Chapman Walker, B. Dube, W.H. Upjohn, Kenworthy Brown, L.De Gruyther, for the Appearing Parties.

Judgement

Lord Atkin

This is an appeal from the High Court at Allahabad in a suit brought by Mrs. Alice Georgina Skinner against the respondent for the redemption of five villages specified in the plaint. The question that has to be determined by this Board is whether the defendant is protected by Art. 134, Lim. Act, 1908. The suit involves the dispositions of the property of the plaintiff's family which have been the subject of litigation in India on previous occasions. For the present purpose it is necessary to state the material facts in order of date. In September 1863, Thomas Skinner, the plaintiff's father, mortgaged the villages in suit together with other property to Seth Lakshmi Chand and Seth Gobind Das for the sum of Rs. 50,000. It was a simple mortgage, with a covenant to pay the principal on 31st December 1863, and to put the mortgagees in possession if there was default in payment of principal and interest. The principal was not duly paid; but it does not appear that the mortgagees took possession at any rate during the mortgagor's lifetime. In October 1864, Thomas Skinner, made a will by which in the events that happened he left successive life-interests to three of his sons with ultimate remainder to his daughter, the plaintiff. Each interest was contingent on the holder of the prior estate dying without male issue; but the three sons who were successively life-tenants did die without lawful issue.

In November 1864, Thomas Skinner died, and his eldest son, Thomas Browne

Skinner became tenant for life. In fact, however, Thomas Browne Skinner assumed an absolute interest in the property; it was not until the will of his father received interpretation from this Board in 1913 in a suit brought by the second son that the limited interests were judicially ascertained. Acting as absolute owner in November 1867, Thomas Browne Skinner mortgaged the property which was the subject of the original mortgage of 1863 to Seth Gobind Das for the sum of Rs. 50,000, which was expressed to include Rs. 43,294 due on the original mortgage. The principal sum and interest was to be paid in eight years. The name of Seth Gobind Das was to be entered in the revenue papers as mortgagee and that of Thomas Browne Skinner as proprietor; the mortgagor was to continue to collect the rents under the supervision of agents of the mortgagee and the proceeds less agreed deductions were to be applied to reducing the amount due. In 1872, money decrees were obtained against Thomas Browne Skinner and his equity of redemption in the villages in suit was sold in execution and bought by Seth Lakshmi Das who therefore entered into possession of them on the footing of being absolute owner. It will be observed that the above transactions took place in the names of Lachman Chand and Gobind Das, Gobind Das, and Lachman Das respectively, but it has been assumed throughout, no doubt accurately, that the parties duly represented the original mortgagees of the mortgage of September 1863. On 26th December 1898, Lachman Das, purporting to be absolute owner, mortgaged with possession the five villages with much other property to the Nawab of Rampur for Rs. 15,00,000 "with all the proprietary and zemindari rights." On 24th September 1903, the Collector of Muttra, acting as guardian of the infant sons of Lachman Das, sold the whole of the mortgaged property together with jewellery, which had been the subject of a previous mortgage, to the Nawab of Rampur in satisfaction of all claims under the mortgages. The conveyance transfers all the estate right, title and interest of the wards in the property which included, of course, the five suit villages. On 11th April 1904, the Nawab of Rampur sold the five villages to the respondent, Naunihal Singh, for Rs. 1,77,000. The purchaser had the prudence to take what appears to be a warranty of title, for which he may ultimately have occasion to be grateful. Meantime, in 1900, Thomas Browne Skinner died. He was succeeded by his brother, Richard Ross Skinner, who, in 1906, commenced a suit against the present respondent, amongst others, to recover possession of the suit villages and other property. In this suit it was decided by this Board reversing the decision of the High Court that under the will of Thomas Skinner, his son, Thomas Browne Skinner, took only a life-interest, and, therefore, respondent's predecessors in title could not have acquired through him an absolute interest. They held, however, that though Lachman Das did not acquire an absolute interest from Thomas Browne he yet, notwithstanding the terms of the mortgage of 1864, must be held to be still entitled to his rights under the mortgage of 1863 created by Thomas Skinner.

These rights, it was held, passed to the subsequent purchasers, and, therefore, the plaintiff Richard Boss Skinner was not entitled to recover possession of the

property except on condition that he redeemed the mortgage security. The suit was remitted for this condition to be performed, but in 1913 Richard, the plaintiff, died and the suit abated. He was succeeded by his brother George who, in 1917, filed a suit for redemption against the present respondent and others in respect of the five suit villages and other property. However, in 1919 George died and his suit abated. He was succeeded by his sister Alice, who brought her suit for redemption against the present respondent and others for recovery of possession and redemption of the suit villages and other property. In the course of the proceedings Mrs. Alice Skinner, the plaintiff, died, but as she had acquired an absolute interest this suit was not abated, and is continued by James Skinner, her executor, the present appellant. By their written statement the defendants disputed the plaintiff's title and claimed to have been in adverse possession by themselves or their predecessors since 1872.

The learned Subordinate Judge found in favour of the plaintiff's title as to which there is now no dispute. He held that the defendants could not avail themselves of adverse possession both because the time for redemption was, by Art. 148, Lim. Act, 60 years which had not expired, and because in any case, by Art. 140, the plaintiff's right to sue did not arise until 1919, when after the death of the tenants for life she, by virtue of the remainder to her, became entitled to possession. The learned Judge, therefore, decided in favour of the plaintiff and made a preliminary order on 28th February 1922, that the defendants should within a month deliver accounts of the income received from the villages during their possession in order that he might arrive at a fixed sum. This order not being appealed, on 20th January 1923, the learned Judge made a preliminary decree for redemption in which he fixed the sum due to the defendants on account of principal, interest and costs to be Rs. 1,09,641, and decreed that if the plaintiff paid that sum into Court before 3rd July 1923, the defendants should retransfer the property to her and that on default by the plaintiff the property should be sold. From this decree an appeal was brought and by permission of the High Court a further appeal was entered from the order of 28th February 1922. On the hearing before the High Court the defendants for the first time raised the defence that they were entitled to succeed by reason of the provisions of Art. 134, which fixed the period of limitation for a suit, "to recover possession of immovable property conveyed or bequeathed in trust or mortgaged and afterwards transferred by the trustee or mortgagee for a valuable consideration,"

at 12 years from the date of the transfer. No evidence had been given in the Court below to support the plea. Such evidence must include all the documents of mortgage and sale which have been set out above, and which had not been proved or printed. The learned Judges, however, came to the conclusion that as there could be no doubt as to the material facts and as the necessary documents had been printed before in the case decided by the Privy Council in 1913 they should allow the point to be argued. Their Lordships cannot approve of this decision, which appears to have been made against the protest of the then respondents. It appears to their Lordships to be highly irregular for any Court

either to assume without the admission of all parties that material facts are not in dispute or to proceed to draw inferences from those facts where no evidence of them has been placed before the Court. The position is not improved where the matter is mooted for the first time in an appellate Court on a point not taken before the trial Judge. Their Lordships would have felt a difficulty in permitting the respondent to rely upon this ground before them were it not that before the Board the appellant consented to the question being raised on the materials placed before the High Court. With this expression of opinion upon the procedure below their Lordships, therefore proceed to determine the appeal. When the facts and documents are examined it appears that the defence founded on Art. 134, cannot be supported.

The transfer of property mortgaged contemplated by Art. 131 is admittedly something other than an express transfer of the original mortgage. The article contemplates a transfer by the mortgagee purporting to transfer a larger interest than that given by the mortgage or at any rate an interest unencumbered by a mortgage. Such an interest purported to be transferred by Lachman Das by mortgage to the Nawab of Rampur in 1898 where the mortgagor purported to mortgage as absolute owner ; and also purported to be transferred by the sale in September 1903, under which the respondent claims his absolute title. Their Lordships have little doubt that had Thomas Browne Skinner had the absolute title to the equity of redemption at the time when Lachman Das purported to transfer the absolute title to the Nawab the case would have been brought within S. 134. The appellant sought to put a limited construction on the article by contending that it only applied where the transfer took place while the mortgagee was mortgagee, or at any rate transferred possession which he had obtained as mortgagee. It did not apply, they said, where, as here, the mortgagee had apparently ceased to be mortgagee by getting in the equity of redemption and had obtained possession not under the mortgage but under the purchase of the equity in 1872. Their Lordships see no reason for accepting this view. It appears to them to be immaterial that the mortgagee should have thought he was absolute owner if in fact he was mortgagee , and immaterial whether he got possession before, under or after the mortgage if in fact he purported to transfer the property to the transferee. But in the present case the transfer which is ex concessis ineffective to give the absolute title was made during the existence of the particular estate vested in Thomas Browne Skinner, and in such a case the provisions of Art. 140 apply. It was, indeed, faintly contended by the appellant that the plaintiff claiming only an equity of redemption did not come within the meaning of a remainderman. It appears to their Lordships that so to hold would be to do violence to the language and reasoning of this Board in *Skinner v. Nounihal Singh* 1918 35 All. 211 : 19 I. C. 267 : 40 I. A. 105 (P. C.), and would be inconsistent with the ordinary meaning of the term. Whether Thomas Skinner settled the estate subject to the incumbrance or whether he settled the equity in either case he created a contingent remainder which vested in the plaintiff in possession in 1919 on the

death of the last of her brothers without issue.

So far, therefore, as the defendant relies upon the enjoyment of the absolute title for ten years from the transfers from Lachman Das and his successors in 1898 and 1903 he is defeated by the provisions of S. 140. It is unnecessary to add that if the transfer ultra the mortgage interest, had taken place in the lifetime of Thomas Skinner, the settlor, so that time had begun to run in his lifetime Art. 140 would not have availed the plaintiff. This is in accordance with S. 9, Lim. Act, which itself follows the provisions of the English law. As it is, however, the defendant is defeated in his enjoyment of the absolute title by the provisions of Art. 140. He then has to fall back upon the transfer to him of the mortgage interest of Lachman Das in the original mortgage of 1863 which according to the decision of the Privy Council in 1913, was quoad tantum transferred to him in the folds of the larger title which he thought he was getting. But if he has to rely upon a mortgage title then he must take it subject to the obligation of all mortgage titles, viz., the obligation to be redeemed. It is conceded and is plain that Art. 134 does not protect the transferee of a mortgage by express transfer, and it appears to their Lordships idle to suppose that it protects a person who has taken a transfer only of a mortgage, but has taken it without his knowledge mistakingly supposing that he was getting something better in circumstances like the present, where he cannot maintain his superior title by reliance on any period of limitation. Resting as he does on the interest of mortgagee he is liable to be redeemed. The period of redemption began, it is true, in the lifetime of Thomas Skinner, and Art. 140 has no application but the statutory period runs for 60 years and had not expired when the plaintiff filed the present suit.

Their Lordships, therefore, are of opinion that this appeal should be allowed with costs here and below and the order of the Subordinate Judge restored, and that the case should be remitted to the High Court to make such additions to the decree as may seem just to the plaintiff in view of the fact that possession has been withheld from him and his testatrix since the date fixed in the preliminary decree. The right to possession will be governed by the preliminary decree with which, as their Lordships are informed the plaintiff has complied. Their Lordships will humbly advise His Majesty accordingly.