

(1902) 01 CAL CK 0005

In the Calcutta High Court

Case No : Appeals from Original Decrees No. 264 of 1897

Lalla Kanhoo Lal and another

APPELLANT

Vs

Musamat Manki Bibi and others

RESPONDENT

Date of Decision : 14-01-1902

Acts Referred:

Citation : (1902) 01 CAL CK 0005

Judgement

1. These appeals arise out of two suits instituted, respectively, on the 23rd July and the 6th September 1896, in the Court of the Third Subordinate Judge of Patna. Although decided on different dates the suits were dealt with in that Court virtually as if they had been consolidated. The evidence in each suit being treated as evidence in the other and by consent the appeals have been treated in this Court in the same way. In the suit of earlier date out of which F. A. 264 of 1897 arises Musamat Manki sued as the daughter and heiress of one Musamat Janki, deceased, for the redemption and possession of a 5 annas 4 pie share in a village named Jagdispur Tiari, and with her were joined as co-Plaintiffs certain persons who claimed different interests in the mortgaged property as her vendees. The Defendants were Kanhoo Lal, the heir and representative of the mortgagor; certain persons who may be described as the devisees of Narain Das, the husband of Musamat Janki, and whose position will be referred to more particularly later on ; and Lala Chaudhuri who derives his title to a one anna share in the property through one of these devisees.

2. In the other suit out of which F. A. 281 of 1898 arises, Musamat Manki sued alone in effect for a declaration of her title to a 4 pies share of the same property, the principal Defendant being Musamat Subhuji Koer, the purchaser of the share in question, from Behari Lal Misser, the donee of one of Narain Dass devisees. The remaining Defendants were Omrao Singh, the husband of Musamat Subhuji, Behari Lal Misser and Musamat Bahart or Bisso, his donor. The questions raised in both suits were the same, namely, whether Musamat Manki was the daughter of Musamat Janki, and whether if she was, her right to the relief claimed was barred by the operation of the statute of limitation, Admittedly

the property in suit was the exclusive property of Musamat Janki at the time of her death, and admittedly Musamat Manki, if the daughter of Musamat Janki, was her rightful heir. The Subordinate Judge found on both the above questions in favour of Musamat Manki and he accordingly decreed the suits.

3. In appeal No. 264 of 1897 Kanhoo Lal and Lala Chaudhuri are alone Appellants, and in the other appeal Musamat Sabhuji and her husband. In the former appeal, however, which was filed on the 13th August 1897 a compromise was entered into on the 22nd December 1900 between Kanhoo Lal, the mortgagor, and the five Respondents by which the matter in dispute in the suit were settled so far as the parties to the compromise are concerned, and a petition recording the terms of the compromise was presented to the Court at the hearing of the appeal by which it was prayed that the suit might be disposed of in accordance with the terms therein mentioned. This has now been done, and the result is that all questions as between the mortgagor and the Respondents are now eliminated from the appeal and it remains only to be considered whether the Respondents are entitled to recover from Lala Chaudhuri the one anna share of the property of which he is now in possession. This will depend on the answers to be given to the questions on which the suits in the Court below turned, as to the parentage of Musamat Manki, and the effect upon her rights (if any) of the statute of limitations. In the other appeal also these are the questions which have to be decided.

4. Having premised this much I now turn to the facts of the case, many of which (excepting those which bear on the parentage of Musamat Manki) are undisputed and I propose to deal in the first instance with those which more immediately affect the question of limitation since if that question be decided against Musamat Manki it will be unnecessary to inquire into her parentage.

5. It appears that on the 14th June 1860 Musamat Janki who was a resident of Patna mortgaged the property in suit to Lala Bissessur Lal, the father of Kanhoo Lal, under a zurpeshgi patta for a term of seven years to secure a loan of Rs. 6,200. The mortgagee was thereupon let into possession and from that time down to the date of suit he and his successor in interest have been in possession of all the property subject to the mortgage with the exception of that portion of it which is now claimed by Lala Chaudhuri and to which it will be necessary to refer more particularly later on. Under the zurpeshgi patta, an annual rent of Rs. 920 was reserved for the term which was to be applied by the mortgagee in specified amounts to the payment of interest on the loan and the reduction of principal and the balance over was to be paid to the mortgagor. There was also a covenant by the mortgagor to repay the amount due under the mortgage. At the end of the term of the thika, and upon such payment she was to be restored to possession. Failing payment the property was to continue in the possession of the mortgagee. Subsequently Musamat Janki took a further loan of Rs. 3,000 from Bissessur Lal on the same security. At her death which occurred on the 15th July 1879, these loans had not been discharged. She died, unless Musamat

Manki is her daughter, without issue, but her husband Narain Das survived her and on her death he took possession of her property which consisted of the mouzah subject to Bissessur Lal's mortgage and four houses and a garden in the city of Patna. He would seem to have received thereafter from Bissessur Lal, so long as he himself lived, the surplus of the rent reserved by the zurpeshgi patta after the application of the amounts agreed upon to the payment of the interest and principal of the mortgage loan.

6. For some time prior to Musamat Janki's death, she and her husband had lived apart. He and a woman named Nehalo who lived with him as his mistress, however, occupied one of Musamat Janki's houses in which also lived Nehalo's daughter Gobinda, Madan Lal. Gobinda's husband, and Behari, their son Another of Musamat Janki's houses and the garden were occupied when she died by her nephew Nidhu Lal and a third by her niece Rukmini Bibi and her husband Moolchand. These persona--at all events her husband and her nephew and niece--appear to have been dependent upon Musamat Janki during her life and Narain Das when he took possession of her estate allowed Nidhu Lal and Musamat Rukmini to live on in the houses which they had previously occupied, and then on the 21st November 1879 he executed an instrument, described on the face of it as a taquininama or deed of partition, but which it is agreed was in reality a Will, by which with the avowed purpose of maintaining the state of things subsisting in his wife's lifetime he purported to divide her property into four parts, one of which he apportioned to himself and the three remaining parts to Musamat Rukmini, Nidhu Lal and Musamat Gobinda respectively. Each of these portions comprised a house and a fractional share of the zamindari property now in suit. The share of Musamat Rukmini in the latter being 3 annas, that of Musamat Gobinda one anna and that of Nidhu Lal one annas. The garden also fell to the share of Nidhu Lal. To himself he reserved a four pies share of the zamindari property which with the house which fell to his lot was to go on his death to a Musamat Bahuti or Bisso Bibi, a sister-in-law of Musamat Janki in the event of her surviving him, which in point of fact she did. During the life of Narain Das the houses and zamindari property were to remain under his control and management and provision was made for the maintenance in the meantime of his devisees by small monthly payments of money. The Will also contained an acknowledgment by Narain Das that the rent reserved by the zurpeshgi patta had been received, in full by Musamat Janki during her life and by him after her death from the mortgagee. The Will was executed in the presence of several witnesses among whom was Bissessur Lal, the mortgagee, and after execution it was duly registered.

7. On the 1st April 1880 Narain Das obtained a certificate under the provisions of Act XXVII of 1860 for the collection of his wife's debts, and on the 31st August 1883 he died. Whereupon (vide the evidence of Kanhoo Lal) the beneficiaries under his Will entered into possession. Some years later, namely, in December 1888, letters of administration with the Will annexed of his property and credits were granted to Musamat Rukmini and Bahuti but to what extent they have

concerned themselves in the character of his legal representatives with the administration of his estate, if they have done so at all, does not appear.

8. In appeal 264 of 1897 (with the other appeal I shall deal so far as is necessary separately) we are concerned only with the one anna share of the zamindari property taken by Nidhu Lal under the Will of Narain Das. The Appellant Kanhoo Lal has, as has been already mentioned, gone out of the appeal and the remaining Defendants Musamat Bahuti, Madan Lal, the husband of Musamat Gobinda, Behari, his son and Nidhu Lal have acquiesced in the decree of the Court below. Nidhu Lal's share is however now in the hands of the Appellant Lala Chaudhuri and its history is to be traced from the time of Narain Dass' death. There is with respect to it the evidence already alluded to of Kanhoo Lal which shows that immediately after that event Nidhu Lal in common with the rest of the devisees under Narain Dass' Will entered into possession of their respective shares. The earliest piece of documentary evidence however bearing upon the matter is a receipt, dated the 13th October 1883, that is about 3 months after the death of Narain Dass which is said by Kanhoo Lal who produced it to have been given by Nidhu Lal to Bissessur Lal. It purports to be a receipt for Rs. 15 out of the rent of the property held by the latter as zurpeshgi thikadar. This receipt is one of a series which goes down to the 2nd March 1885. It, however, unlike the rest of the series is unsigned, and its genuineness was on this ground as well as on others challenged by the Respondents in this Court. I see no reason however for supposing that it is not what Kanhoo Lal says it is, and it must, I think, be taken as affording evidence of the assumption on the part of Nidhu Lal, from the time of Narain Dass' death, of the position of owner of the share of the property now in question. Similar receipts, it may be mentioned, given by Narain Dass' other devisees to the mortgagee and which go down to a much later date than those of Nidhu Lal have been produced and proved by Kanhoo Lal. The absence of later receipts in his case, it may be observed, may perhaps be accounted for by his dealings with the property for, on the 5th June 1884, there is a mortgage by him to Bissessur Lal of his one anna share to secure a fresh loan of Rs. 2,000, the interest on which would probably have absorbed whatever he might otherwise have received from the mortgagee by way of rent, But however this may be, he again mortgaged his share on the 30th of July 1884. On this occasion to Lala Chaudhuri to secure a loan of Rs. 600, the deed reciting that the mortgagor was the exclusive owner of the mortgaged property and that he had previously mortgaged it by deeds duly registered in Patna on the 16th September 1883, the 2nd January 1884 and the 30th March 1884. Then on the 1st February 1885 he again mortgaged the same property to Lala Chaudhuri for a further sum of Rs. 600 and again on the 3rd March 1885 Bissessur Lal having made various fresh advances to the beneficiaries under the Will of Narain Dass, and an account having been taken in which the rent due from him under the zurpeshgi thika was set off, Nidhu Lal mortgaged to him the same property in order to secure his proportionate share of the ultimate balance. All these mortgages were registered. The mortgage of the 3rd March 1885 is the last

transaction affecting the property to which our attention was called and to which Nidhu Lal was a voluntary party. Probably he had by this time so heavily encumbered his share as to render it practically valueless. There follows at all events, a period of several years during which there is not in the evidence which was brought to our notice any reference to his share of the property. Then, apparently in the year 1890, Lala Chaudhuri sued him on his mortgages and obtained a decree in execution of which the mortgaged property was brought to sale, and on the 15th June 1890 it was purchased by Lala Chaudhuri. On the 30th August 1895 Lala Chaudhuri entered into an agreement with Kanhoo Lal, Bissessur Lal having in the meantime died, by which in consideration of the payment of Rs. 1,000 Kanhoo Lal released to him all his interest as mortgagee in the one anna share of Nidhu Lal and placed him in possession, and there he has since then remained. Such is the history of the share of the property now in question, and it is clear that from the death of Musamat Janki, a period of some 20 years it has been dealt with first by Narain Dass and then by Nidhu Lal and Lala Chaudhuri as if they were the owners and in a manner wholly inconsistent with the asserted rights of Musamat Manki. It is said however that for the greater part of the period referred to she was a minor and absent from Patna, that on the 20th July 1883 when she was only about 8 years old she was married to a resident of the Punjab and immediately went away with him to live at Lahore and only returned to Patna in 1890 on her husband's death, when she first became aware of the various dealings with the property of Musamat Janki to which reference has now been made. This account of her proceedings is however not accepted by the Appellant whose case is that she is a mere fraudulent pretender, but it was contended on his behalf that even assuming her to be in truth the daughter of Musamat Janki her title had been extinguished by adverse possession, and further, that if it be taken that she was a minor at the time when her right to sue accrued she had failed to prove the date of her birth and therefore of the cessation of her disability and as a consequence had not brought herself within the provisions of sec. 7 of the Limitation Act.

9. It was, I would observe, upon these lines that the appeal was, without objection on the part of the Respondents, argued before us and it was met by the Respondents on these lines. Our attention was not directed either to the pleadings or issues in the Court below in connection with the question though when one comes to look into them it certainly does not appear that the plea of adverse possession was there raised by the Appellant now before us nor was there any issue specifically framed with respect to it. The argument, however, as is apparent from the judgment of the Subordinate Judge, was advanced at some stage of the suit and received the consideration of the Court and as there has been here no suggestion of surprise and the materials before us are sufficient to enable us to deal with the question, I think that we ought under all the circumstances to entertain it.

10. The primary point then for consideration is whether the interest in the property remaining in a mortgagor after the mortgage has been effected,

commonly called the equity of redemption, can in the case of an usufructuary mortgage be extinguished by adverse possession on the part of a stranger while the mortgagee continues in possession and the period of redemption is still running. Upon this question the decisions in the Indian Courts can hardly be said to be uniform but on the whole I am disposed to think that the balance of authority lies in favour of the affirmative view. Our attention was not at the hearing drawn to any decision of this Court though there is a case, which has an important bearing upon the question, *Nand Coomar Lall v. Brojo Bhookun Singh* 4 Wymans Rep. 36 (1867). There the suit was for redemption of an usufructuary mortgage granted in 1844 to four persons by one Futteh Chung and was brought by a person alleging himself to be the heir of the mortgagor. The claim was met by the principal Defendant Choyt Koer by a plea of adverse possession, Futteh Chung died in 1850, and in 1853 Choyt Koer purchased the equity of redemption though from whom is not stated. In the same year she executed a fresh mortgage to one of the original mortgagees (who had some time previously become solely entitled to the mortgage of 1844) and a third person and they remained in possession down to the date of suit. Choyt Koer in the meantime receiving from them a sum of Rs. 21 annually which it had been agreed by the second mortgage deed was to be paid to her in respect of rent and Government revenue. In these circumstances it was held that the suit was barred by limitation. Hobhouse, J., in delivering the judgment of the Court observed : "If Plaintiff had any title at all, clearly to my mind, that title accrued when Futteh Chung died in 1850 and Choyt Koer's receipt of the quit rents from that year up to date of suit, a period of some sixteen years, is conclusive evidence of a real possession adverse to the Plaintiff for a period of more than 12 years."

11. In the next case in order of time *Vithoba v. Gangaram* 12 Bom. H. C. 180 (1875) a contrary view however was taken by the Bombay Court. That was also a suit for redemption but what the precise nature of the mortgage was does not very clearly appear from the report. It was however referred to in a later case in the same Court [*Chinto v. Janki* I. L. R. 18 Bom. 51 at p. 56 (1892)] as a mortgage with possession and that may therefore, I think, be taken to have been its character. The person in possession of the land claimed to hold adversely to both mortgagor and mortgagee but this plea was held by the Court to be unmentionable. "It might well be," it was said, "that a mortgagee in whom the legal estate is vested may lose by lapse of time, his right to recover possession of his security as against a trespasser; but it is difficult to understand how there can be any trespass on the mortgagor's possession so long as he has only the equitable estate. "This decision has not however, so far as I am aware, been followed in later cases, and it would seem to be opposed in principle to the doctrine laid down by Sir Thomas Plumer, M. R., in *Cholmondely v. Clinton* 2 J. & W. 1 (1820): On App. 4 Bligh's Rep. 1 (1821) where it was held that an equity of redemption, in common with other equitable estates, in land, is capable of being extinguished by the operation of the statutes of limitation. When that case came on appeal before the House of Lords, Lord Eldon stated his opinion to be that

adverse possession of an equity of redemption for 20 years was a bar to another person claiming the same equity of redemption and worked the same effect as disseizin, abatement or intrusion with respect to legal estates [see *Cholmondely v. Clinton* 2 J. & W. 1 (1820): On App. 4 Bligh's Rep. 1 (1821)]. The case of *Ammu v. Rama Krishna*, I. L. R. 2 Mad. 226 (1870) was cited for the Appellant. It was a suit for redemption of a possessory mortgage brought by the heir of the mortgagor. The Government had after the mortgage but more than 12 years before suit assumed the proprietorship of the land and had settled it with the Defendants who had previously been let into the land by the mortgagee as tenants and who afterwards had paid their rent not to the mortgagee but to the Government. The suit had been decided in the lower Court, on the authority of *Vithoba v. Gangaram* 12 Bom. H. C. 180 (1875) in favour of the Plaintiff, but this decision was reversed in the High Court by Turner, C. J., and Muttusami Ayyar, J., the learned Chief Justice in the course of his judgment observing : "We cannot assent to the contention that so long as the mortgagor is entitled only to the equity of redemption there can be no invasion of his interest. Of course there may be cases in which the estate of the mortgagee is alone the subject of trespass and the interest of the mortgagor is not assailed. A title by prescription may be acquired to the estate of the mortgagee leaving the interest of the mortgagor unaffected * * * *. But there are other cases in which the rights and interests of the mortgagor and mortgagee are equally invaded," and later on he says: "If in the case now before the Court the Appellant had not at one time held the plot now in her possession as tenant of the mortgagee, we fail to see that she could be regarded otherwise than as a trespasser who has acquired by prescription a right to hold the plot directly from the Government and adversely to the title of both mortgagor and mortgagee." The learned Chief Justice then goes on to deal with the question of estoppel holding that the Appellant was not estopped from contending that the interest of the former landlord had expired.

12. *Puttappa v. Timmaji* 14 Bom. 176 (1889) was also relied on for the Appellant. It was a suit for possession and was brought under the following circumstances. The Plaintiff's grandfather Appama mortgaged the property in suit in the year 1845 to one Dyavapa and placed the mortgagee in possession. Appama died in 1849 leaving him surviving his daughter, the Plaintiff's mother, and a daughter-in-law, Narsubai, the widow of his adopted son. In 1856 the mortgagee sued Narsubai on his mortgage and obtained a decree against her directing the sale of the mortgaged property. Thereupon Narsubai in the same year sold the property to Ramappa and out of the purchase-money paid off the mortgage-debt and the mortgagee then at the instance of Narsubai gave up possession to Ramappa. The Defendant afterwards obtained a decree against Ramappa for a sum of money and attached and sold the property in execution, he himself becoming the purchaser. In 1884 he obtained possession. Under these circumstances, Sarjent, C.J., and Candy, J., held that the suit was barred on the ground that at the time of the sale in 1856 to Ramappa, Narsubai was in possession of the equity of redemption adversely to the rightful heir of the

mortgagor. She was then, it was said, acting as if she were the owner of the property and was receiving the rent which the mortgagee had agreed to pay by the mortgage-bond. In support of their opinion the learned Judges refer to the case of *Cholmondely v. Clinton* 2 J. & W. 1 (1820): On App. 4 Blighs Rep. 1 (1821). These two cases then, as well as the case of *Nand Coomar Lall v. Brojo Bhookun Singh* 4 Wymans Rep. 36 (1867) are authorities for the position that the equity of redemption may be extinguished by the possession of an adverse holder notwithstanding that the mortgagee has entered into possession under the mortgage. So also in *Chinto v. Janki* I. L. R. 18 Bom. 51 at p. 56 (1892) which was a suit for redemption, the case was remanded to the Court below for the purpose of determining at what time the possession of the Defendant, who had ousted the mortgagee, had become adverse to the mortgagor. There are indeed, in this case, some remarks in the judgment of Telang, J., which might seem to indicate that his opinion was in favour of the view that upon the principle *contra non valentem agere nulla currit proscriptio* the dispossession of the mortgagee by an adverse holder could not affect the title of the mortgagor. The learned Judge however concurred in the order of remand, observing towards the end of his judgment, "The result of these considerations in the present case is that it lies upon the Defendant before he can succeed to make out that his possession for twelve years prior to the suit was adverse to the Plaintiff." So that the principle in question was at all events recognised by the learned Judge and it may, I think moreover be open to doubt whether the maxim referred to by him would be applicable to the case of a mortgagor after the term of the mortgage has expired or the debt has been paid off from the usufruct. Perhaps it was not intended to apply it to such cases. But on the occurrence of either of these events the right of the mortgagor to recover possession would accrue and I do not think that men in ability to pay would bring him within the principle of the maxim. It is on this ground; *inter alia*, that it has been held in England that a person entitled in remainder to the equity of redemption may be barred of his right to redeem, by the possession of the mortgagee although that possession has been wholly during the lifetime of the tenant for life.

13. But the Respondents on the other hand relied on *Chathu v. Aku* I. L. R. 7 Mad. 26 (1883). There the suit was to set aside a sale held in execution of a decree obtained by the fourth Defendant against the first three Defendants, and the question was whether the Plaintiff had by adverse possession acquired a title to the property to the exclusion of the first three Defendants. He and the first three Defendants were the heirs of one Kundu Nayar who had mortgaged the property and placed the mortgagee in possession. At the time of Kundu's death the Plaintiff and the first three Defendants were not in union and the Plaintiff had apparently been in the exclusive receipt of the rents and profits of the land from Kundu's death. He had in other respects dealt with the property as owner but had not taken physical possession of it until within 12 years before the institution of the suit. The learned Judges were of opinion that although the exclusive receipt by the Plaintiff of the rents and profits for 12 years would be evidence of

an exclusive right on his part to redeem the mortgage, which right they treat as a right of action, it had not had the effect of extinguishing the ownership of the first three Defendants. They say "But notwithstanding" this, i.e., the receipt of the rents and profits, "the right of the first three Defendants to sue for possession of the property would not be affected until Plaintiff had had possession of the property itself for upwards of 12 years. For the possession of the property was all this time with the mortgagee, and as against the mortgagee Defendants would have sixty years." I confess I find some difficulty in accepting the distinction thus drawn between the title to the ownership of the property and the title to the equity of redemption. Nor do I think that the view that the mortgagor's right to redeem is but a right of action, can be said to be consistent with authority. In *Casbourne v. Scarfe* 1 Atk. 603 (1737) Lord Hardwicke thus describes the nature of an equity of redemption : "An equity of redemption has always been considered as estate in the land, for it may be devised, granted, or entailed with remainders, and such entail and remainders may be barred by time and recovery, and therefore cannot be considered as a mere right only, but such an estate whereof there may be seisin ; the person therefore entitled to the equity of redemption is considered as the owner of the land and a mortgage in fee is considered as personal assets." Another passage to the same effect from the same judgment was cited by Sir Thomas Plumer, M.R., in *Cholmondely v. Clinton* 2 J. & W. 1 (1820): On App. 4 Blyth's Rep. 1 (1821) and the learned Master of the Rolls himself observes that "in the hands of the mortgagee the mortgage is considered in equity as a mere persona] chattel which passes to the executor. It is a chose in action" whence the conclusion followed, and for this the Master of the Rolls referred to the judgment of Lord Hardwicke; the ownership of the land must remain in the mortgagor. If these doctrines be applicable to mortgages in this country, which I think they are, the view that the equity of redemption is nothing more than a right of action, would hardly seem to be sustainable, while if in the words of Lord Hardwicke "the person entitled to the equity of redemption is considered as the owner of the land" it would seem to follow that if the equity of redemption should, by reason of its being adversely held by another, pass from the true owner, the ownership of the land would pass with it. Indeed the two seem to me to be incapable of separation and I find it difficult to conceive of a case in which the ownership of the land, less the right of redemption is in one person, and the right of redemption less the ownership is in another where, that is, the question arises between claimants of the ownership. Then the Respondents relied further on *Krishna Menon v. Kesavan* I. L. R. 20 Mad. 305 (1897) where it was held that a right to redeem is not capable of possession within the meaning of sec. 28 of the Limitation Act. "That section," it was there said, "contemplates suits which a person who is kept out of property admitting of physical possession could have brought for such possession" and the argument addressed to us upon the authority of this case was that inasmuch as a suit could not be brought for the possession of an equity of redemption, the title of the rightful owner, could not by the operation of the section be extinguished. But I am disposed to think that it cannot have been intended to

limit the meaning of the term possession, where it occurs in the section, to physical possession merely. The word is, I think, understood in legal phraseology in a wider sense and embraces both actual possession and "possession in law" which latter is defined in the *Temus de la Ley* as follows ;--"Possession in law is where lands or tenements are descended to a man and he hath not as yet really, actually, and in deed entered into them : and it is called possession in law, because that in the eye and consideration of the law he is deemed to be in possession for as much as he is tenant to every man's action that will sue concerning the same lands or tenements;" so not to multiply examples, if property be tenanted, putting a purchaser into the receipt of the rent will be giving him "possession," where possession is to be given on the completion of a purchase [*Lake v. Dean* 28 Beav. 607 (1860)] and in the Limitation Act itself the term is used to signify something different from physical possession vide Art. 140 of the 2nd Schedule where the time limited for a suit by a remainderman, reversioner or a devisee for possession of immoveable property is twelve years from the time when his estate falls into "possession." Similarly, I think, an equity of redemption may with propriety be said to fall into possession or to be in the possession of the person legally entitled to it although he may not be in the actual possession of the land. See also sec. 26 of the Limitation Act. The cases in India are numerous in which it has, I think, been generally understood that the title to immoveable property may be affected by sec. 28 of the Limitation Act, although the physical possession of the property is not in question and I should therefore with all deference hesitate to adopt what appears to me the somewhat too narrow construction placed upon the section in this case.

14. The last authority relied upon for the Respondents was a passage in the judgment of Subramania Ayyar, J., in the case of *Ittappan v. Manavikrama* ILR 21 Mad. 153 at p. 162 (1897), but there is nothing there, it seems to me, conclusive against the principle contended for by the Appellant in the present case.

15. Such being the state of the authorities it seems to me that the view which we ought to follow is that the continued possession of the mortgagee is not per se sufficient to keep alive the title of the mortgagor, but that his title to redeem and consequently to the ownership of the mortgaged property is capable notwithstanding such possession of being extinguished by adverse possession for the required period.

16. Turning then to the evidence of adverse possession relied upon by the Appellant it is to be considered with reference to two different periods : firstly, that between the death of Musamat Janki and the death of Narain Dass, and then that between the death of the latter and the institution of the suit. With respect to the former period it may be taken, though the question appears to me to be not altogether free from doubt, that Narain Dass entered on the property of his deceased wife as the natural guardian of Musamat Manki who was at the time a minor--assuming, that is, that she is in fact the daughter of Musamat Janki. See *Thomas v. Thomas* 2 K. & J. 79 (1855) and other cases of the same class which

are to be found collected in Simpson on the Law of Infants, p. 114. During Narain Dass' life it may therefore be taken that the statute would not run against her rights. But on his death the possession taken by Nidhu Lal was of a different character. It was not on behalf of Musamat Manki but was on his own behalf and as owner and was quite inconsistent with her title. He incurred the responsibilities and exercised the rights of a proprietor, receiving his proportionate share of the rent payable by the mortgagee and dealing notoriously with the property as if it was his own. It appears to me that under such circumstances his possession must be regarded as adverse to the title of Musamat Manki and it originated with the death of Narain Dass on the 31st August 1883. When he lost possession the Appellant immediately obtained it and from that time, there can be no doubt, that the possession of the latter has been of the same character as that of his predecessor, whose possession he is entitled to attach to his own [see *Ali Saheb v. Kaji Ahmed I. L. R. 16 Bom. 197 (1891)*]. The suit was brought on the 23rd July 1896, about a month, that is, short of thirteen years from the time when the adverse possession commenced, and I think therefore that unless Musamat Manki can bring her case within the exemptions provided for by sec. 7 of the Limitation Act, the suit must fail. It is true that she has not claimed this privilege by her plaint; but the appeal was argued on the footing that she was entitled nevertheless to do so, and I think therefore that the right may be conceded to her.

17. It is not questioned that on the 31st August 1883 when Nidhu Lal took possession she was a minor and her right to sue therefore accrued during her minority. Under the provisions of sec. 7 of the Limitation Act she would accordingly, if her minority terminated simultaneously with the expiration of 12 years from that date, have three full years more, or up to the 31st August 1898 within which to bring the suit. But if it terminated before the expiration of the 12 years, the extended period allowed by the section would be diminished proportionably to the length of time intervening between the termination of her minority and the expiration of the 12 years, so that if that time amounted to 3 years she would gain no advantage from her minority. Thus it lies on her to show that she still was a minor on the 23rd July 1893 or that her birth took place not earlier than the 23rd July 1875. The evidence on the question is of a very loose and unsatisfactory kind. Her own evidence as to her age is far from explicit. She stated that at the time of her examination on commission on the 9th March 1897 she was 20, 21 or 22 years of age, and again that at the death of Musamat Janki which took place on the 15th July 1879 that she was 5 or 6 years of age. So that according to her, her birth might have taken place at any time between the years 1873 and 1877. One of her witnesses Musamat Jasoda, the only member of Musamat Janki's family, who gave evidence on her behalf stated that she was 4 or 5 years old when Musamat Janki died, according to which she would have been born either in 1874 or 1875. But this witness stated that she first saw Musamat Manki when she was 4 or 5 years of age and her evidence is, in my opinion, worth little or nothing. Dr. Whitwell, Civil Surgeon of Bankipur, however,

examined Musamat Manki on the 25th June 1897, at her own instance for the purpose of determining her age, and he certified that her age then was from 25 to 30 years. His certificate has been produced and put in evidence by Musamat Manki. He was afterwards examined as a witness in Court, and there re-affirmed the opinion stated in his certificate and further said that he was strongly of opinion that her age was not over 30 years. In cross-examination he stated that if he had known her to be ill (as she apparently was) before he formed his opinion as to her age he would have put it at between 25 and 30 years. A Mrs. Woods, a female doctor or midwife who examined her in Court, and who was a witness for Kanhoo Lal stated that in her opinion she was 35, and was positive that she was over 30. But the Subordinate Judge who saw and examined her in Court, as the result of his own observations, and having considered the evidence of Dr. Whitwell which, however, he appears to have misunderstood, put her age at 23 or 24 years. If his view be accepted and taking it in the sense most favourable to Musamat Manki--namely, that she was then 23 years of age, her birth must have taken place about the middle of the year 1874. But for my own part I should feel disposed to accept rather the opinion of Dr. Whitwell upon the question, as he has had an experience of some 17 years as a Jail official, in judging of age ; and it does not appear that the Subordinate Judge is in any special way qualified to form an opinion upon the subject. Dr. Whitwell was moreover a witness for Musamat Manki, though it is to be observed that the precise question now under consideration was probably not before the minds of Musamat Manki's advisers when he was put into the witness-box, Such however being the state of the evidence, I do not think that the birth of Musamat Manki could with any safety be put later than the middle of the year 1874 (probably it was some two years earlier) and she would on that hypothesis have attained her majority in the middle of the year 1892 from which time she would have had three years to institute her suit. That would carry her on to the middle of the year 1895, but the suit was not instituted until the 23rd July 1896--and it is therefore, so far as the Appellant Lala Chaudhuri is concerned, in my opinion barred.

18. In this view of the case it is unnecessary, and it seems to me that it would be undesirable, to enter upon the somewhat difficult question whether Musamat Manki is in fact the daughter of Musamat Janki. The appeal of Lala Chaudhuri ought in my opinion to be decreed and the suit as against him dismissed with costs in both Courts. This judgment will govern F. A. 281 of 1898 which, I think, ought to be decreed with costs in both Courts. The only difference between the two cases is that the latter is concerned with the share of another of the devisees of Narain Dass, which was in all material respects dealt with in a manner similar to that of Nidhu Lal,