(1911) 02 MAD CK 0014

In the Madras High Court

Parthasarathi Naikan alias Subbiah Naikan and Others APPELLANT

Vs

Lakshmana Naicken and Others RESPONDENT

Date of Decision : 09-02-1911

Acts Referred:

Citation : 9 Ind. Cas. 791

Hon'ble Judges : Ralph Benson, J;Munro, J

Bench : Division Bench

Judgement

Munro, J.—The suit is to recover, by sale of the mortgaged property, the amount remaining due under a registered simple mortgage-bond

executed in favour of the Ist plaintiff by the paternal grandfather of defendants Nos. 1 and 2 in 1871. It is found that in execution of a simple

money-decree obtained against the mortgagor, after the execution of the mortgage-bond (the suit property was attached and sold in Court

auction), that delivery was obtained by the purchaser in 1873, and that thereafter the property was held by him and those claiming under him

adversely to the mortgagor, so that, before the present suit was brought, the mortgagor''s right to the property had become extinguished. It was

contended that the plaintiff''s mortgage-right had also become extinguished, at the same time as the right of the mortgagor. The District Judge

negatived the contention and the main question in this appeal which is by defendants Nos. 1 and 3 to 5, is whether the District Judge was wrong in

so doing.

2. It will be observed that under his mortgage the plaintiff was not entitled to possession and that the mortgage was created before adverse

possession had begun to run against the mortgagor. A number of cases have been cited by the appellants in support of their contention, and it will

be convenient first to consider these cases and see whether they really do support the appellants. In Anundo Moyee Dossee v. Dhonendro

Chunder Mookerjee 14 M.I.A. 101 : 8 B.L.R. 122 : 16 W.R. 19 one Sree Nath Manick in 1841 mortgaged certain property to Mutty Lal Seal,

who brought a foreclosure suit and purchased the property with the sanction of the Master of the Supreme Court at Calcutta. He failed to get

possession and his executors sued the defendants for possession. It was found that prior to the mortgage the property had been attached in

execution of a decree and that the defendants had purchased it in the sale that followed. Their Lordships of the Privy Council, therefore, held that

the title of the defendants, independently of the Regulation of Limitations, was paramount and Superior to the title of the mortgagee. They added,

however, that even if the attachment had been posterior to the mortgage, still the Regulations of Limitations would have been a conclusive bar.

They pointed out that a purchaser at a Court-sale who has no notice of a mortgage on the property purchased, thinks he is acquiring the absolute

title to the property and that he is in possession as absolute owner. They then proceeded thus,--""Under these circumstances they are of opinion

that if the title of the mortgagee to enter by reason of a default having occurred before, had accrued, and if the purchaser under such a title had

been in possession for 12 years believing himself to be a bona fide owner under a claim to the ownership of the property and not being in

possession in any way as mortgagor or under the mortgagor then in accordance with the cases...they are of opinion that the suit to disturb the

possession of such a purchaser ought to be brought within the 12 years after the commencement of his possession."" This decision is manifestly an

authority for the appellant''s contention but is rather against it. Their Lordships were dealing with a case in which the mortgagee had apparently a

right to enter into possession of the mortgaged property on the mortgagor''s default, and their conclusion is based not only on the purchaser''s

possession for 12 years, but also on the right of entry having accrued to the mortgagee, and I understand their Lordships to mean that time did not

begin to run against the mortgagee until the right of entry had accrued. The decision is thus in accordance with the general rule that adverse possession begins to run against the true owner when the true owner has the right to immediate possession--See the definition of adverse

possession given by Markby, J., in Bejoy Chunder Banerjee v. Kalli Prosonno Mookerjee 4 CP. 327.; Brojonath Koondoo Chowdhry v. Khelut

Chunder Ghose 14 M.I.A. 144 : 8 B.L.R. 104 : 16 W.R. 33 was also a case in which the mortgagee had a right of entry on the mortgagor''s

default. Default occurred, but the mortgagor was left in possession and sold part of the property mortgaged. The purchaser took possession. Their

Lordships observed,--""It is impossible to hold that the defendant, the purchaser, was holding, or supposed he was holding by the permission of the

mortgagee; and when both things concur--possession by such a holder for more than 12 years, and the right of entry under the mortgage-deed

more than 12 years old--it is impossible to say that such a possession is not protected by the Law of Limitation."" This decision no more supports

the appellant''s contention than the decision last quoted. The remarks at page 151 of the report also clearly apply only to mortgagees who are

entitled to possession, for they refer to mortgagees who allow the mortgagor to be the ostensible owner in possession. In Ammu v. Rama Krishna

Sastri 2 MP. 226 the following passage occurs: Bat there are other cases in which the rights and interests of the mortgagor and the mortgagee are

equally invaded, e.g. when the mortgagor has remained in possession and a stranger ousts him from the lands."" The mortgage in that case was a

mortgage under which the mortgagee was entitled to possession, and we are not bound to assume that the learned Judges intended their remarks

to apply to a mortgagee not entitled to possession under his mortgage. The words when the mortgagor has remained in possession"" are quite

consistent with a case where the mortgagee, though entitled to possession, has not taken possession. The passage cannot, therefore, be regarded

as an authority for the appellant''s contention. In Nallamuthu Pillai v. Betha Naicken 23 MK. 37 the mortgagee was not entitled to possession

under his mortgage. Adverse possession had, however, begun to run"" against the mortgagor before the mortgage was granted ami such possession

was treated as adverse to both mortgagor and mortgagee. In the present case, adverse possession had not begun to run against the mortgagor,

when the mortgage was granted, so that the case cited is clearly distinguishable. In the case cited the fact that the mortgagee was not entitled to possession made no difference, for time had begun to run against the mortgagor when the entire interest in the property vested in him, and nothing

subsequently occurred which could have the effect of interrupting the running of time. Thus, both the mortgagor and the mortgagee who derived

title from him, were equally barred. In Ram Lal v. Masum Alikhan 25 AP. 35 also, the property mortgaged was held adversely to the mortgagor at

the date of the mortgage. In Sheoumber Sahoo v. Bhowaneedeen Kulwar 2 N.W.P.H.C.R. 223 the mortgage was a mortgage by conditional sale

which was to become absolute in two years on certain terms. The suit was for possession under the mortgage, and was resisted by persons who

did not claim under either the mortgagor or the mortgagee, on the ground that they had been in adverse possession for 12 years. In holding that the

suit was barred the High Court observed,--""where possession of the property alleged to have been mortgaged has been taken by a third party

who does not claim under the alleged mortgagor, and has been held by such third party adversely to the mortgagee, the mortgagee is bound to

come in within 12 years to vindicate his right."" The possession in that case was evidently held to be adverse to the mortgagee but as the facts are

not set out in detail we have to conjecture as to the circumstances which were considered to render the possession adverse. The case is

distinguishable because the mortgagee was entitled to possession under his mortgage. Further, we do not know when the defendant''s possession

began, a most important consideration as already pointed out. Prannath Roy Choudhry v. Rookea Begum 7 M.I.A. 323 4 W.R. 37 was also a

case of mortgage by conditional sale and so distinguishable. The appellants rely on the following remarks at page 355,--""Where a mortgage is

subject by law to be foreclosed the title to foreclose is in the nature of a limit to the title to redeem. It by no means follows as a consequence that

the mortgagee foreclosing will be able in a suit for possession to make good against all occupants a title to possession."" There is nothing in this to

support the appellant''s contention. As already indicated, there are cases in which a mortgagee can be successfully met by a plea of adverse

possession. Ram Coomar Sein v. Prosunno Coomar Sein (1864) W.R. 375 is also not in point for there the mortgagee was entitled to sue for

fore-closure and possession before the adverse possession which was pleaded as a defence to his suit began.

3. Much stress has been laid upon Karan Singh v. Baker Ali Khan 5 AP. 1 : 9 I.A. 9. There the mortgage was created in 1862 and was a simple

mortgage, so that so far the case is on all fours with the present case. The defendant''s own possession was found to have commenced in 1864 that

is after the mortgage. As, however, this possession did not extend over twelve 2 M.W.N. 209 : 9 M.L.T. 264 : 9 Ind. Cas. 28 years he sought to

tack on the possession of the Collector which began in 1861 before the mortgage on the ground that the possession of the Collector was

possession on his behalf and adverse. Their Lordships of the Privy Council observed with reference to the rule of limitation that it was not for the

plaintiff, the mortgagee, to prove possession within 12 years but that his suit might be brought within 12 years from the time when the possession of

the defendant became adverse to the plaintiff. They then pointed out that the defendant had not been in possession for 12 years and that he could

not take on the Collector''s possession from 1861 to the time when in 1863 the Collector delivered possession to him, inasmuch as since the

Collector did not hold for him he did not claim through the Collector. They did not enter, nor was it necessary to enter upon the question whether

the defendant''s possession from 1863 standing by itself should be considered adverse to the mortgagee. It is suggested that we must infer that they

considered that possession adverse because they went into the question whether the defendant was entitled to tack the Collector''s possession.

Such an inference is not a necessary inference in the circumstances. Had the Collector''s possession which began before the mortgage been

adverse to the mortgagors and had the defendant claimed through the Collector then the mortgagee''s suit would have been barred as in

Nallamuthu Pillai v. Betha Naickan 23 MK. 37. This supplies a reason why it was considered necessary to consider the question of tacking.

4. There is nothing in Nilakant Banerji v. Suresh Chandra Mullick 12 0P.414 : 12 I.A. 171 which throws any light upon the present question, and

the only other decision relied on is the decision of a Bench of this Court in Ramaswami Chetti v. Ponna Padayachi 2 M.W.N. 209 : 9 M.L.T. 264 :

9 Ind. Cas. 28. That decision undoubtedly supports the appellants'' contention. It is, however, mainly based upon Prannath Roy Chowdhry v.

Rookea Begum 7 M.I.A. 323 4 W.R. 37; Ammu v. Rama Kishnasastri 2 MK. 226; Ram Coomar v. Prosunno Kumar (1864) W.R. 375;

Sheoumber Sahoo v. Bhowaneedeen Kulvar 2 N.W.P.H.C.R. 223 and Karansingh v. Bakar Ali Khan 5 AP. 1 : 9 I.A. 9 which have been dealt

with above. The reasons which I have given for holding that these cases do not support the appellants'' contention, do not, so far as I can gather

from the judgment, appear to have been present to the minds of the learned Judges who decided Ramaswami Chetti v. Ponna Padayachi 2

M.W.N. 209 : 9 M.L.T. 264 : 9 Ind. Cas. 28. It may also be observed that the precise proposition which they rejected was ""that though the right

of the mortgagor in the mortgaged property may be extinguished by adverse possession by a person for 12 years after the execution of the

mortgage, yet in no case would the mortgagee''s remedy against the mortgaged property be lost if his right to enforce the mortgage against the

mortgagor is not barred."" Enough has been already said in the judgment to show that such a broad proposition cannot be successfully maintained.

In Aimadar Mandal v. Mukhan Lal Day 33 CP. 1015 : 10 C.W.N. 904 the mortgage was a simple mortgage. Possession which began after the

grant of the mortgage was held for more than 12 years prior to the suit by a person claiming under a purchaser of the mortgaged property in

execution of a decree against the mortgagor. It was held that limitation did not begin to run against the mortgagee until he became entitled to claim

possession after he purchased the property in execution of the decree which he obtained upon his mortgage. This decision was dissented from in

Ramaswami Chetti v. Ponna Padayachi 2 M.W.N. 209 : 9 M.L.T. 264 : 9 Ind. Cas. 28 above referred to, but was followed by myself and

Krishnaswamy Aiyar, J. in Venkatachala Asri v. Subramania Chetty 1 M.W.N. 633 : 8 M.L.T. 377 : 8 Ind. Cas. 264 and I shall think it is correct.

It is in accordance with what I conceive to be the correct principle, viz., that the interest in Immovable property which is affected by adverse

possession is the interest and that interest only, which the person who was entitled to immediate possession at the time the adverse possession

began, had at that time. This principle can be deduced from the language of Article 144 of Schedule II of the Limitation Act of 1877 itself and the

cases already cited supply instances of its application. Under Article 144, limitation begins to run from the time when the possession of the

defendant becomes adverse to the plaintiff. This shows that a claim to Immovable property will not cause time to run against the true owner unless it is accompanied by possession; while the term adverse possession"" clearly implies that the person against whom adverse possession is exercised

is a person who is entitled to demand possession at the moment the adverse possession begins. As the possession is thus adverse only to the

person having the right to immediate possession it follows, that only the interest which that person has in the property when the adverse possession

begins can be affected by this adverse possession. If such a person has the entire interest when the adverse possession begins, he cannot by

afterwards transferring the whole interest, as by sale, or by transferring a part of the interest, as by mortgage, prevent the operation of prescription

upon the entire interest, unless he also interrupts the possession which is adverse. If, however, while still in possession he transfers a part of his

interest, the transferee will not be affected by the subsequent possession of a third party, if under his transfer he is not entitled to possession of the

property. In the two cases quoted Anundo Moyee Dassi v. Dhonendro Chunder Mookerjee 14 M.I.A. 101 : 8 B.L.R. 122 : 16 W.R. 19 and

Brojanath Koondoo Chowdhry v. Khelut Chund Ghose 14 M.I.A. 144 : 8 B.L.R. 104 : 16 W.R. 33 the mortgagees were affected by the

possession of the third party because they were entitled to possession under their mortgages. In Nallamuthu Pillai v. Betha Naicken 23 MP. 37

and Ram Lal v. Masum Ali Khan 25 AP. 35 the possession of the third party began before the mortgage, and the mortgagee was, therefore,

affected by it. Except the decision in Ramaswami Chetti v. Ponna Padayachi 2 M.W.N. 209 : 9 M.L.T. 264 : 9 Ind. Cas. 28 no decision has been

brought to our notice which is clearly contrary to the views above expressed. The contention of the appellants must, therefore, fail.

5. The only other question is whether Article 147 or Article 132 of Schedule II of the Limitation Act of 1877 applies. The Courts below have

rightly followed the decision of this Court in Appeal No. 164 of 1902.

6. I would dismiss this second appeal with costs.

Benson, J.

7. I concur. The simple mortgage in favour of the defendants was granted before the plaintiffs got possession. When plaintiffs got possession the

mortgagee was not entitled to possession; so the plaintiffs'' possession though adverse to the mortgagor was not adverse, to the mortgagee for it was not inconsistent with his rights. The decision of the lower Appellate Court is, therefore, right and the second appeal is dismissed with Costs.

