
(1911) 02 MAD CK 0041
In the Madras High Court

Parthasarathi Naikan and Others

APPELLANT

Vs

Lakshmana Naikan and Others

RESPONDENT

Date of Decision : 09-02-1911

Acts Referred:

Citation : (1911) 21 MLJ 467

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

Bench : Full 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 1st plaintiff by the paternal grandfather of the 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 i was not entitled to possession and that the mortgage was created before adverse possession had begun to run against the tnmortgal gor. A number of cases has 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 Moves Dosse v. Dinendro Chunder Mookerjee (1871) 14 M.I.A. 101, one Srinath Manick, in 1841, mortgaged certain property to Multy 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 Limitation, was paramount and superior to the title of the mortgagees. They added, however, that even if the attachment had been posterior to the mortgage, still the Regulation of Limitation 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 that 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 appellants' 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 *Bejocyhunder Banerjee v. Kalli Prosunno Mookerjee* ILR (1879) C. 327. *Brejonath Kundoo Chowdhry v. Khelut Chunder Ghose* (1871) 14 M.I.A. 144 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 appellants' contention than the decision last quoted. The remarks at p. 157 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. Ratnakrishna Sastri* ILR (1878) M. 26 the following passage occurs: - "But 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 appellants' contention. In *Nallamuthu Pillai v. Betha Naicken* ILR (1900) M. 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 and 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 Ali Khan* ILR (1903) A. 35 also, the property mortgaged was held adversely to the mortgagor at the date of the mortgage. In *Sheo Amber Sahoo v. Bhowaneedeen Kuhvar* (1870) 2 N.W.P.H.C.R. 223 the mortgage was a mortgage by conditional sale 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 Chaudhri v. Rookea Begum and Ors.* (1859) 7 M.I.A. 323 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 appellants' contention. As already indicated there are cases in which a mortgagee can be successfully met by a plea of adverse possession. *Ram Coomar Sein and Ors. v. Prosunno Coomar Sein and Ors.* (1864) W.R. 375 is also not in point, for there the mortgagee was entitled to sue

for foreclosure and possession before the adverse possession began, which was pleaded as a defence to his suit.

3. Much stress has been laid upon *Karan Singh v. Baker Ali Khan* ILR (1883) A. 1. 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 defendants' own possession was found to have commenced in 1864, that is after the mortgage. As, however, this possession did not extend over twelve (12) 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 tack 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 defendants' 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 on 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 mortgagor's and had the defendant claimed through the Collector, then the mortgagee's suit would have been barred as in *Nallamuthu Pillai v. Betha Naickan* ILR (1900) M. 37. This supplies a reason why it was considered necessary to consider the question of tacking.

4. There is nothing in *Nilakant Banerji v. Chandra Mullick* ILR (1886) C. 414 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 Second Appeal No. 1689 of 1909 - *Ramaswami Chetty Vs. Ponna Padayachi and Others*, . That decision undoubtedly supports the appellants' contention. It is, however, mainly based upon *Prannath Roy Chowdry v. Rookea Begum and Ors.* (1859) 7 M.I.A. 323, *Ammu v. Ramakrishna Sastry* ILR (1878) M. 226, *Ram Coommar Sein and Ors. v. Prosunno Coommar Sein and Ors.* (1864) W.R. 375, *Sheo Amber Sahoo v. Bhowaneedeen Kuhvar* (1870) 2 N.W.P.H.C.R. 223, and *Karan Singh v. Bakar Ali Singh* ILR (1883) A.I 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 S.A. No. 1689 of 1909. 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 Nandal v. Makhan Lal Dey* ILR (1906) C. 1015 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 S.A. No. 1689 of 1909 above referred to, but was followed by myself and Krishnaswami Aiydr J. in S.A. No. 682 of 1909, 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 - *Anando Moyee Dossee v. Dhonenndro Chunder Mookerjee* (1871) 14 M.I.A. 101 and *Brojonath Koondoo Chowdhry v. Khelut Chunder Ghose* (1871) 14 M.I.A. 144 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 Naickan* ILR (1900) M. 37 and *Ram Lal v. Masum Ali Khan* ILR (1903) A. 35 the possession of the third party began before the mortgage, and the mortgagee was therefore affected by it. Except the decision in S.A. 1689 of 1909 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.