

(1913) 12 MAD CK 0004
In the Madras High Court

Peria Aiya Ambalam and Another

APPELLANT

Vs

Shunmugasundaram and Others

RESPONDENT

Date of Decision : 10-12-1913

Acts Referred:

Citation : AIR 1914 Mad 334(2) : (1915) ILR (Mad) 903 : 22 Ind. Cas. 615 : (1914) 1 LW 113 : (1914) 26 MLJ 140

Hon'ble Judges : Arnold White, C.J;Sankaran Nair, J;OldField, J;Old field, J

Bench : Full Bench

Judgement

Sankaran Nair, J.—The first question that is referred to us is ""where a trespasser dispossesses a mortgagor in possession (the mortgage

being simple) or a mortgagee in possession (where the mortgage is usufructuary), is such possession of the trespasser adverse against the simple mortgagee in the one case or against the mortgagor who is not entitled to possession in the other case?"".

2. The facts which gave rise to this reference are these: the plaintiff mortgaged his house with possession for a term which would expire in 1917.

The mortgagee was dispossessed by the defendants in 1898. In 1908 they made certain additions to the building, and when the plaintiff

remonstrated with them they denied the plaintiff's title to the equity of redemption. The plaintiff brings this suit for a declaration of his title within six years from 1908. The defendants' plea is that limitation for the suit must be calculated from 1898, when they took possession of the property from the mortgagee.

3. On behalf of the plaintiff it may be argued that, as a mortgagor is not entitled to the possession of his property until he redeems his mortgage, the

possession of a trespasser who dispossesses a mortgagee cannot be adverse to him and, in any event, as the mortgage in the case before us is for

a term which has not expired, he could not redeem and recover possession from the trespasser; and limitation cannot run against him when there is

no remedy open to him to recover possession of his property. Mr. Anantakrishna Aiyar contends that a mortgagor may sue to recover possession

to be delivered to the mortgagee and therefore limitation runs against the mortgagor when a trespasser takes possession of the property from the

mortgagee claiming the property himself.

4. The question when limitation begins to run against the mortgagor when the usufructuary mortgagee is deprived of the possession of the property

mortgaged has come often before this Court. The earliest decision is reported in *Ammu v. Ramakrishna Sastri* ILR (1879) M. 226. In that case,

while the representatives of the mortgagees were in possession, of the property, there was an enquiry by an officer of the Government, who held

that the mortgaged property belonged to the Government, and it was thereupon granted to them by the Government under separate pattas. The

mortgagor was a party to that enquiry. The District Judge following a Bombay decision (*Vithoba Bin Chabu v. Gangaram* (1875) 12 Bom. H.C.R.

180, held that there could be no trespass on the title of the mortgagor so long as he had only an equitable interest. This decision was reversed in

appeal the learned Judges holding that, though there might be cases in which the estate of the mortgagee alone was the subject of trespass and the

title by prescription might therefore be acquired to the estate of the mortgagee leaving the estate of the mortgagor unaffected, yet there were other

cases in which the rights and interests of both the mortgagor and the mortgagee might be invaded and possession held adversely to them both. And

in such cases, where the mortgagor may have made over possession to the mortgagee, if the interest of the mortgagor is invaded, although he has not

actual possession of the land, his remedy is to bring a suit for the recovery of the interest from which he has been ousted, and he cannot bring a suit

for redemption against the wrong-doer within the time allotted for suits for redemption. It will be noticed that in this case a representative of the

mortgagee himself was allowed to claim title by prescription. A fortiori, therefore, a stranger in adverse possession of the equity of redemption

would be entitled to claim such a title.

5. In *Chathu v. Aku* ILR (1883) M. 26 it was pointed out that the right to redeem was only a right of action and therefore, though person received

the rents and profits from the mortgagee, claiming to be the owner of the equity of redemption, the right of the true owner was not barred unless

the claimant had had actual possession of the property itself for twelve years.

6. In *Mussad v. The Collector of Malabar* ILR (1886) M. 189 the Court held that the action of the Government in merely declaring the lands to be

Government property and conferring a title upon the representative of the mortgagee could not affect the mortgagor's title unless the latter was

shown to have been aware of these proceedings, and the decision in *Ammu v. Ramakrishna Sastri* ILR (1879) M. 226 was distinguished on the

ground that in that case there was a formal enquiry to which the mortgagor was a party. In *Ittappan v. Manavikraman* ILR (1897) M. 153 Mr.

Justice Subramania Aiyar was apparently prepared to go further and to hold that, as the mortgagor having once put the mortgagee in possession

had no right to the possession of the property himself until the mortgage was paid off, limitation would not commence to run against him in favour of

a trespasser till redemption; but he stated that in the case before him, even if the view adopted in *Ammu v. Ramakrishna Sastri* I.L.R.(1879) M.

226 be correct the possession of the person taking the property from the mortgagee would not be adverse until the mortgagor had notice of it.

That was also the opinion of Shephard J.

7. According to these Madras cases, therefore, where a stranger dispossesses a mortgagee in possession, whether adverse possession will run

against the mortgagor or not depends upon the fact whether there was dispossession of the mortgagor also. Mere dispossession of the mortgagee

will not amount to such adverse possession; there must be at least notice to the mortgagor that possession is held against him also.

8. The decisions of the other High Courts also are substantially to the same effect. The decision in *Vithoba Bin Chabu v. Gangaram* (1875) 12

B.H.C.R. 180 which holds that there can be no adverse possession of an equity of redemption, has been already referred to. It is dissented from

by the learned Judges in *Ammu v. Ramakrishna Sastri* ILR (1879) M. 226 In a later case, *Puttappa v. Timmaj* ILR (1889) B. 176 Sargent C.J.

and Candy J., following the English case of *Gholmondeley v. Clinton* (1821) 4 Bligh 1. S.C. 4 E.R. 72 held that the possession of a trespasser may be adverse to the mortgagor. In *Chinto v. Janki* ILR (1892) B. 51 the same question was fully discussed, and Mr. Justice Fulton stated the law in the following terms: "I think that, although the possession of a trespasser may undoubtedly be adverse to the mortgagor, the burden of proving when it became so rests on the former. Prima facie, by his act of possession he merely ousts the mortgagee who is entitled to hold the property. Referring to the plea of the trespasser in that case that he had many years before got his name entered in the Government records as owner and had since then purported to hold directly under the Government, he pointed out that there was no finding as to when the plaintiff's name was removed from the survey records and whether the plaintiff had any notice of it, and that it was for the defendant to show when he asserted that he was the owner of the property and not the mortgagee; and he referred to the lower court the issue when the trespasser's possession became adverse to the plaintiff. Telang J. was strongly inclined to hold that the mortgagor had no right to recover possession of the property so long as the mortgage money was not paid off but he agreed with Mr. Justice Fulton in remitting the issue to the lower court for trial. The question was again discussed in a more recent case, *Tarab v. Venkatrao* (1902) I.L.E. 27 B. 43 where Bitty J. laid down the law correctly in the following words;

No doubt, as long as the mortgagee is in possession, he and all claiming under him represent the mortgagor's possession. If the mortgagee in possession is dispossessed on grounds affecting only his right, as for instance, his right as heir to represent the original mortgagee, or his right, as in *Puramandas v. Jamna Bai* (1885) I.L.E. 10 B. 49 to possession in spite of a third party's lien on the property, then the dispossession of the mortgagee obviously does not imperil or call in question any right of the mortgagor, and the mortgagor is not concerned or entitled to insist on being immediately restored to possession ; and the possession taken is not adverse to him and cannot cause time to run against him. To give the mortgagor a right to insist on immediate possession, there must be an unequivocal ouster preventing the possession of the mortgagor from continuing altogether by leaving no room for doubt that the person taking possession does not profess to represent the mortgagor, but to hold in

spite of him. In such a case, the mortgagor is as effectually and unmistakably displaced as if there had been no mortgage at all. When an ouster

takes place in that manner the mortgagor knows that no one is in possession who can represent or continue his possession, or who is entitled

preferentially to possession, and, therefore, he becomes entitled (and it is necessary and his duty, if he does not want his right to be barred) to

claim possession immediately.

9. There was only one Allahabad case cited--*Ismdar Khan v. Ahmad Husain* ILR (1907) A. 119, where also the same principle is laid down, that

prima facie the possession of the trespasser is not full proprietary possession but was possession of a limited nature which would have the effect

ordinarily of extinguishing the limited interest of the mortgagee and vesting that in the defendant; but there may be oases where the adverse

possession against the mortgagee would also be adverse possession against the mortgagor, as, for example, where the mortgagor is entitled to

immediate possession or where the possession of the trespasser is coupled with a denial of the title of the mortgagor.

10. These cases establish that an equity of redemption may be lost by adverse possession; but, for that purpose it is not sufficient for a trespasser,

who has ousted a mortgagee, to prove that possession is held on an exclusive title, without also showing that it was acquired and retained with an

assertion of an adverse title to the knowledge of the mortgagor. These decisions were apparently not cited before the learned Judges who made

the reference. They are in accordance with the English Law also. That an equity of redemption may be barred, has been finally decided in England.

In the leading case of *Cholmondeley v. Clinton* (1881) 4 Bligh I. S.C. 4 E.R. 721, Lord Chancellor Eldon said "I say, without entangling myself

with the difficulties about seisin and intrusion, I am of opinion, that the adverse possession of an equity of redemption for twenty years is a bar to

any other person claiming that equity of redemption; and it is an adverse possession which produces the same effect as those things you call

abatement, intrusion and disseisin which belong to legal estates. It is an adverse possession which has the same effect, and, for the peace of

families, and for the peace of the world, I think ought to have the same effect; and therefore, without going through more of the cases, I submit it to

your Lordships, as my humble opinion upon this grave and important question, that this bill cannot be maintained."" The owner of the equity of

redemption had full notice of the claim of the trespasser.

11. These decisions also seem to be consistent with principle. When the owner of the property in possession is dispossessed, the trespasser's

possession is clearly adverse to him from its inception, as, to his knowledge, the property is held against his will, and he must assert his right within

twelve years of his dispossession. But if his mortgagee, who has been placed in possession by him, is followed by another person there is no

presumption in law that such possession was taken without any right. He may be an assignee of the mortgagee, or one who purchases the

mortgage as a mortgage; or he may be an adverse claimant to the mortgage right; where more than one inference may be drawn, that inference

should not be drawn which imputes a wrongful act to a person. The defendant has therefore to show that he took possession of this property as

absolute property in contradistinction to mortgage property. Nor is this sufficient; as his possession may be consistent with the mortgagor's title,

the mortgagor must obviously have notice that he is holding it as absolute property in denial of any right in him. Otherwise no laches can be imputed

to him and the possession cannot be said to be adverse.

12. It is argued that, as the mortgagor is not entitled to sue the trespasser for possession, possession can never be adverse. A mortgagor, no doubt

must be entitled to protect himself against the loss of his property by adverse possession. In the judgment in *Ammu v. Ramakrishna Sastri* ILR

(1879) M. 226 it is stated that he may sue for the recovery of his interest. This apparently proceeds on the ground that by mortgage a person

transfers only an interest and not the legal estate as in English Law. In *Tarubxi v. Venkataras* ILR (1902) B. 43 Mr. Justice Batty says he could sue

for possession. This proceeds probably on the ground that the mortgagor is bound to secure possession to the mortgagee. Mr Anantakrishna Aiyar

contends that a mortgagor may by impleading the mortgagee obtain a decree for the surrender of the property to the latter. Suits by persons

interested for delivery of properties to a trustee of an endowment, by junior members of tarwards for delivery of properties improperly alienated to

Karnavans, are analogous instances. The question what the proper remedy is

does not however arise on this reference.

13. The reply to the reference is that possession may be adverse; but whether it is so or not in any case, will depend upon the facts of each case.

On the facts stated in the order of reference, possession of the trespasser was not adverse from 1898 to 1908 but it became adverse in 1908.

The question whether the possession of a trespasser who dispossesses a mortgagor in possession is adverse against a simple mortgagee does not arise in the case and we express no opinion with regard to it.

14. As the cause of action in this case arose only in 1908, the second question, whether a fresh cause of action arises from each distinct denial of

the plaintiff's title, also does not arise in the case and we express no opinion with regard to it.

Arnold White, C.J.

15. I agree.

Oldfield, J.

16. I concur.