
(1916) 06 CAL CK 0023
In the Calcutta High Court

Srimati Priya Sakhi Debi

APPELLANT

Vs

Bireshwar Samanta and Others

RESPONDENT

Date of Decision : 06-06-1916

Acts Referred:

Limitation Act, 1908 — Section 28

Citation : 37 Ind. Cas. 277

Hon'ble Judges : Lancelot Sanderson, C.J.; Asutosh Mookerjee, J

Bench : Division Bench

Judgement

Sanderson, C.J.—This is an appeal by the plaintiff from the judgment of Mr. Justice Fletcher See 28 Ind. Cas. 917---Ed, whereby he set aside the judgment and decree of the Subordinate Judge of Burdwan.

2. The action was brought to enforce a mortgage-bond, dated the 27th June 1887, executed in favour of the plaintiff by the original defendants Nos. 1 and 2. Under the bond the principal was to be paid by instalments and it was provided that the whole amount remaining unpaid should become payable upon default in payment of any one of the instalments with interest at 2 per cent, per mensem. One of the instalments was not paid on 11th February 1893; there was, however, a payment of interest on 18th October 1893 and the suit was brought on the 22nd August 1905.

3. The dispute in this case relates to certain land which has been described as plot No. 1. It appears that on 16th February 1894, this plot of land was sold by the, then owners, called Mullick, to the predecessor-in-title of defendants Nos. 1 and 2, and that these defendants and their predecessors were in possession of the plot from that date until 1892.

4. On the 7th May 1875 the Mullicks, although they had already sold the plot, purported to execute a mortgage of the said land in favour of defendant No. 3.

5. On the 27th June 1887 the defendants No. 1 and 2 (as already stated) mortgaged the plot to the plaintiff.

6. The defendant No. 3 brought a suit on his mortgage and on the 6th February 1891 he obtained a decree. On the 7th December 1891 at an auction, held in execution of the said decree, the defendant No. 3 purchased the said land and in 1892 obtained possession thereof and from that time up to the institution of this suit, on 22nd August 1905, he remained in possession.

7. The defendant No. 3, having been made a party to this suit, set up the defence that he had been in adverse possession of the said land for more than twelve years before the institution of this suit.

8. The case having come up on appeal, two learned Judges of the High Court, in a judgment of 23rd March 1910, remanded it for the decision of this question as far as defendant No. 3 was concerned and whether the plaintiff was entitled to bring the said plot to sale as against defendant No. 3.

9. The Court of first instance decided against the plaintiff. The Subordinate Judge, however, held that the plaintiff was not made a party to the mortgage suit brought by the defendant No. 3 and consequently she was not bound by it. Further, that if defendants Nos. 1 and 2, after executing the mortgage in favour of the plaintiff, had entered into any compromise with defendant No. 3 by which they relinquished their right to the said plot (upon which he came to no definite conclusion as to the facts), the plaintiff could not be bound thereby, as she was no party to that proceeding; and finally that the possession of the defendant No. 3 could not be held to be adverse to the plaintiff before the time when she could enforce the mortgage and, therefore, the learned Judge decided in favour of the plaintiff.

10. The learned Judge, Mr. Justice Fletcher, held that the possession of the defendant No. 3 was adverse to the plaintiff and consequently he reversed the judgment of the Subordinate Judge and decided in favour of defendant No. 3.

11. The mortgage was a simple mortgage and it is to be noted that this suit was merely one for the realisation of the plaintiff's security; the plaintiff asked for a decree for the principal and interest due and a sale of the mortgaged property.

12. It was held by the Subordinate Judge, when the case was first before the 1st Appellate Court, in his judgment of 4th May 1907 that the suit was not barred, for although there had been default in the payment of an instalment in February 1893, there had been a payment of interest on the 18th October 1893 and that consequently u/s 20 of the Limitation Act a fresh period of limitation should be computed from the time when the interest was paid and that the suit being instituted on 22nd August 1905 was, therefore, in time.

13. This finding, so far as defendants Nos. 1 and 2 were concerned, was affirmed by the High Court on 23rd March 1910.

14. The matter, therefore, in this appeal is between the plaintiff and defendant No. 3, for whom it was argued that the possession of defendant No. 3 was adverse to the mortgagors, defendants Nos. 1 and 2, and it must, therefore, be

taken as adverse to the plaintiff, the mortgagee, and no decree for sale of the property should be made.

15. It was argued on behalf of the respondent (defendant No. 3) that this question between plaintiff and defendant No. 3 must be treated as if it were a claim by the plaintiff for possession of Immovable property against defendant No. 3, and that Article 144 of the Limitation Act was applicable, that defendant's possession became adverse to the plaintiff in 1892, and as the suit was not brought until 22nd August 1905, the plaintiff's claim against defendant No. 3 is barred. Assuming that this Article is applicable to this suit, the question remains, when did the possession of defendant No. 3 become adverse to the plaintiff?

16. In my judgment the term "adverse possession" implies that the person, against whom adverse possession is exercised, is a person who is entitled to demand possession at the moment adverse possession begins.

17. The mortgage in this case being a simple mortgage, the mortgagee was not entitled to demand possession of the property at the time the defendant No. 3 went into possession in 1892, and indeed the plaintiff, has never yet become so entitled. Consequently in my judgment Article 144, even if applicable, will not avail the defendant No. 3 to dispute the plaintiff's claim.

18. In my judgment the principle upon which this matter should be decided is that adverse possession affects the interest, and the interest only, which the person who was entitled to immediate possession had at that time, or, in other words, only the interest which the person, having the right to immediate possession, has in the property, when the adverse possession begins, can be affected by such adverse possession.

19. In this case the mortgage in favour of the plaintiff was created before the defendant No. 3 purchased the property at auction and obtained possession thereof in 1892. The position of the plaintiff, the mortgagee, then was that he had an interest in the property with a right to bring it to sale for the realisation of the mortgage-debt, but with no right to take possession of the property. When, therefore, the defendant took possession of the property after the mortgage to the plaintiff, he took possession only of what belonged to the mortgagor, viz, his equity of redemption, and in my judgment held it subject to the liability of its being gold for the satisfaction of the mortgage debt.

20. This conclusion is in accordance with the decision of this Court in *Aimadar Mondul v. Makhan Lal Dey* 33 C. 1015 : 10 C.W.N. 904. and the judgment of the Madras High Court in *Parthasarathi Naikan v. Lakshmana Naicken* 9 Ind. Cas. 791 : 35 M. 231: 9 M.L.T.389 : 21 M. L.J. 466 : (1911) 1 M. W. N. 201.

21. This last mentioned case, though reported in 35 Mad. was later in date than *Ramasaami Chetti v. Ponna Padayachi* 9 Ind. Cas. 36 M. 97 : 9 M.L.T. 264 : 21 M L.J. 397 : (1911) 1 M. W. N. 209. which was one of the cases relied on by the learned Judge and which has now been overruled by a Full Bench in *Viyapuri v.*

Sonamma Boi Ammani 31 Ind. Cas. 412: 29 M. L.J. 645 : 2 L. W. 1080 : (1915)
M. W. N. 927 : 18 M.L.T. 436.

22. Karan Singh v. Bakar Ali Khan 5 A. 1 : 9 I.A. 99 : 4 Sar. P.C.J 182: 2 Ind. Dec. (N.S.) 1044., which was considered by the learned Chief Justice in Aimadar Mondul v. Makhan Lai Dey 33 C. 1015 : 10 C.W.N. 904. in my judgment, is not inconsistent therewith or with the principle above stated: for, in that case, if the defendant's contention had been maintained and he had been allowed to tack on to his own possession the possession of the Collector, and treat that as possession on his own behalf and adverse, then his possession would have begun before the mortgage, and in such case the operation of the adverse possession would not have been affected by the subsequent grant of the mortgage security.

23. It was necessary, therefore, for the Privy Council to consider the question of tacking, and their Lordships did not decide that the possession of the defendant standing by itself should be considered adverse to the plaintiff.

24. Nor do I think that the decision in the case of Prannath Roy Chowdry v. Rookea Begum 7 M. I.A. 323 : 4 W. R. 37 (P. C.) 1 Suth. P.C.J. 367 : 1 Sar. P.C.J. 692 : 19 E. R. 331., another of the cases relied on for the respondent, covers the case now under consideration. For these reasons the appeal, in my judgment, should be allowed with the costs of both hearings in the High Court, the judgment of the learned Judge of the High Court should be set aside and the decree of the learned Subordinate Judge should be restored.

Mookerjee, J.

25. I am of opinion that the judgment of Mr. Justice Fletcher cannot be supported.

26. The plaintiff seeks to enforce a mortgage security granted to her by the first defendant on the 27th June 1887. The mortgage provided that, on default of payment of specified instalments, the entire mortgage money would become repayable with interest. As the result of such default, the mortgage money became recoverable on the 11th February 1893. Thereafter interest was paid by the mortgagors on the 16th October 1893. the present suit was instituted on the 22nd August 1905. The claim was resisted by the third defendant, who had been joined as a party, because the plaintiff found him in possession of one of the properties comprised in the mortgage security. His contention in substance was that the mortgage had ceased to be operative upon the property in his hands. The Trial Court decreed the claim in full, and this decision was affirmed by the Subordinate Judge on appeal. On a second appeal to this Court, the suit was remanded to the Court of First Instance for re-trial. That Court dismissed the suit in respect of the property held by the third defendant. This decision was reversed by the Subordinate Judge on appeal. Mr. Justice Fletcher next set aside the decision of the Subordinate Judge and restored the decree of the Primary Court. The plaintiff has preferred this appeal against the judgment of Mr. Justice Fletcher under clause 15 of the Letters Patent, and the question for determination is whether what has been called the first property claimed by the

third defendant is liable for the satisfaction of the mortgage debt, The circumstances under which that defendant claims title to the property may be briefly narrated. The property belonged originally to a family of Mulicks who sold it to the Chaudhuris (the mortgagers of the plaintiff) on the 16th February 1874. Notwithstanding this sale, the Mulicks mortgaged the property to the Samantas (now represented by the third defendant) on the 7th May 1875. The Samantas sued in 1890 to enforce their security, obtained a decree for sale on the 6th February 1891, and, in due course, purchased the mortgaged property in execution on the 7th December 1891. In 1892 the third defendant as purchaser obtained delivery through Court, and dispossessed the first two defendants (the Chaudhuris) who had meanwhile, on the 27th June 1887, granted the simple mortgage in suit. The case for the third defendant is that his adverse possession of the property from 1892 had by 1901 extinguished the title of all persons interested therein, whether as mortgagor or as mortgagee, and that, consequently at the date of the institution of the present suit on the 22nd August 1905, there was no subsisting charge on the property in his hands. Mr. Justice Fletcher has given effect to this contention.

27. It is desirable to observe at the outset that the defence raised by the third defendant is not a question of the Rule of limitation applicable to the suit. The suit is obviously in time under Article 132 of the Indian Limitation Act, read with Section 20 : it is a suit to enforce payment of money charged upon Immovable property and it has been instituted within twelve years from the date when interest was paid on the sum due. The question raised is in essence one of title; the substance of the defence is that the third defendant has by adverse possession for the statutory period acquired a title paramount to that of both the mortgagor and mortgagee. On principle such a question should not have been litigated in a mortgage suit. The proper scope of a mortgage suit is to cut off the equity of redemption and to bar the rights of the mortgagor and of those claiming under him; the only proper persons to such a suit are the mortgagor and the mortgagee and those who have acquired interest under them subsequent to the mortgage [*Jaggewar Dutt v. Bhuban Mohan Mitra* 17) and *Bhaju Chowdhury v. Chuni Lal Marwari* 5 C.L.J. 95 : 11 C.W.N. 284]. Consequently, the third defendant should have been discharged from this suit, when he claimed a title adverse to that of both the mortgagor and the mortgagee. The parties, however, have deliberately adopted a different course, and the question in controversy had been raised and decided : both parties have in this Court expressed a desire that the matter in difference should be settled in this litigation, which has now lasted for over ten years. In these circumstances and in view of the qualifications to the general Rule explained in the judgment in *Bhaju Chowdhury v. Chuni Lal Marwari* 5 C.L.J. 95 : 11 C.W.N. 284, it is competent to this Court to determine, whether the third defendant holds the property free of the mortgage, in other words, whether the right of the mortgagee to appropriate the property to the satisfaction of his debt no longer exists. As there has been much divergence of judicial opinion on this topic, it is

desirable to investigate at in the first instance as a question of principle apart from authorities.

28. Section 53 of the Transfer of Property Act defines a mortgage as the transfer of an interest in specific Immovable property. Consequently when the owner of a property executes a simple mortgage thereof, the entire interest originally vested in him is thereafter vested partly in him as the mortgagor and partly in the mortgagee. A simple mortgagee as such is not entitled under the Transfer of Property Act to take possession of the mortgaged premises, he hold the property as security for the loan while the mortgagor continues in possession thereof [Sri Raja Papamma Rao v. Sri Vira Pratapa 23 I.A. 32 : 19 M. 249 : 6 M.L.J. 53 : 7 Sar. P.C.J. 10 : 6 Ind. Dec. (N.S.) 879. If, then, after the grant of the simple mortgage, the mortgagor is dispossessed, what is the effect of the possession of the adverse holder upon the tide, first, of the mortgagor, and secondly, of the mortgagee? The answer depends obviously upon the true construction of Section 28 of the Indian Limitation Act, which is in these terms: "at the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished." It is plain that this Section which prescribes a Rule for extinguishment of right to property is expressly limited to suits for possession : it has accordingly been held that in respect of debts, the provisions of the Limitation Act merely bar the remedy, but do not extinguish the right [Nursing Doyal v. Hurryhur Saha 5 C. 897 : 6 C. L.R. 489 : 3 Shome L.R. 154 : 2 Ind. Dec. (N.S.) 1180 and Mohesh Lal v. Busunt Kumaree 6 C. 340 : 7 C. L.R. 121 : 3 Ind. Dec. (N.S.) 222.]. Consequently when the mortgagor in possession is dispossessed, he must, under Article 142, institute a suit for recovery of possession against the trespasser within twelve years from the date of dispossession : if he does not institute such a suit, his right to the property is extinguished. But what is his right to the property? Clearly the equity of redemption, which is all that remains in him after he has executed the simple mortgage and which is all that he had when the adverse possession commenced against him. From this it follows that after the lapse of the statutory period for the institution of a suit for possession, his equity of redemption, and prima facie nothing more, becomes vested in the adverse possessor, for, as pointed out in Gossian Das Chunder v. Issur Chunder Nath 3 C. 224 : 1 Ind. Dec. (N.S.) 731.; Jagrani Bibi v. Ganeshi 3 A. 435 : A. W. N. (1881) 9 : 5 Ind. Jur. 652 : 2 Ind. Dec (N. s.) 219. and Nandkumar Dobey v. Ajodhya Sahu 11 Ind. Cas, 465 : 14 C. L.J. 203 : 16 C.W.N. 351, the practical effect of Section 28, when a person suffers his right to be barred by the law of limitation, is the extinction of his title in favour of the party in possession. The question next arises, what is the effect, if any, on the title of the simple mortgagee produced by the dispossession of the mortgagor? Does Section 28 extinguish his interest? Obviously, the answer is in the negative. The simple mortgagee is not competent to institute a suit for possession of the property, because admittedly he is not entitled to possession either under the Statute or under the contract. Section 23 clearly contemplates that the person whose right is extinguished by

lapse of time is a person entitled to institute a suit for possession of the property. Consequently, the dispossession of the mortgagor does not extinguish the title of the mortgagee by the lapse of time u/s 28 of the Indian Limitation Act, and our attention has not been invited to any other statutory provision which is applicable to the present case and which operates to extinguish interest in land. The true effect of a Statute of Limitation is lucidly stated by Angell: "The principle on which the Statute of Limitation is predicated is not that the party in whose favour it is invoked, has set up an adverse claim for the period specified, but that such adverse claim is accompanied by such invasion of the rights of the opposite party v as to give him a cause of action, which, having failed to prosecute within the time limited by law, he is presumed to have extinguished or surrendered. A mere claim of title, unaccompanied by adverse possession, gives no right of action to the person against whom it is asserted and consequently his rights are unaffected by Statute" (Angell on Limitation, page 308), The question of the extinction of an incorporeal right by adverse possession thus presents considerable difficulties [Lakshminarayana Aiyar v. Ulagammal 26 Ind. Gas. 528 : 28 M. L.J. 256. and I am not prepared to accept the view indicated by Subramania Iyer, J., in Nallamuttu Pillai v. Betha Naicken 23 M. 37 : 9 M. L.J. 258 : 8 Ind. Dec. (N.S.) 420. where, however, the adverse possession had commenced before the date of the mortgage. The broad proposition that a hypothecation right is liable to be affected not only by lapse of time as between the creditor and the debtor, but also by possession of the hypothecated property held for the required period by a third person on a claim inconsistent with the rights of both the creditor and the debtor, was sought to be supported, from the following passage of the Code (c. 7, 36, 1): "Long standing silence, supported by regular limitation, renders nugatory the action for creditors taking proceedings for their pledge unless the debtors or those who have entered into their rights, command possession of the security" (Salkowski's Roman Law tr Whitfield 503 : Mackeldy's Roman Law tr. Dropsit 287.) But it must be remembered that in later Roman Law, in the case of a pignus as in that of a hypotheca the mortgagee was entitled to possession of the mortgaged property, in the former at the time of the transaction, in the latter when the debt became due (Salkowski 485, Mackeldy 285 : Hunter 436, 447). This, however, is not the position of a simple mortgagee under the Transfer of Property Act, Sri Raja Papamma Rao v. Sri Vira Pratapa 23 I.A. 32 : 19 M. 249 : 6 M. L.J. 53 : 7 Sar. P.C.J. 10 : 6 Ind. Dec. (N.S.) 879. On principle, accordingly, it is fairly plain that where a simple mortgage has been executed by a person in possession, the subsequent dispossession of the mortgagor, though it may operate by lapse of time, u/s 28, to extinguish the equity of redemption in favour of the adverse possessor, does not affect the interest of the mortgagee who is not entitled to possession of the mortgaged premises either under the Statute or under the contract. This is substantially the view taken in Aimadar Mondul v. Makhan Lal Dey 33 C. 1015 : 10 C.W.N. 904. Mr. Justice Fletcher, however, has declined to follow the Rule laid down in that decision, on the ground that it is inconsistent with two decisions of the Judicial Committee, namely, Prannath Roy Chowdhry v. Rookea Begum 7 M. I.A. 323 : 4

W. R. 37 (P. C.) 1 Suth. P.C.J. 367 : 1 Sar. P.C.J. 692 : 19 E. R. 331. and Karan Singh v. Bakir Ali Khan 5 A. 1 : 9 I.A. 99 : 4 Sar. P. C. J 182 : 2 Ind. Dec. (N.S.) 1044. The respondent has endeavoured to support the decision of Mr. Justice Fletcher by a three-fold argument, namely, first, that the Rule laid down in Aimadar Mondul v. Makhan Lal Dey 33 C. 1015 : 10 C.W.N. 904, is inconsistent with the decisions of the Judicial Committee just mentioned and cannot consequently be treated as good law, secondly, that it is in conflict with the earlier decision of this Court in Ram Coomar Sein v. Prosunna Coomar Sein (1864) W. R. 375. and consequently a reference to a Full Bench is unavoidable under the rules of Court: and thirdly, that there is weighty judicial opinion in support of this view, for instance, Ramaswami Chetti v. Ponna Padayachi 9 Ind. Cas. 28:36 M. 97 : 9 M.L.T. 264 : 21 M L.J. 397 : (1911) 1 M. W. N. 209. In my opinion, these contentions cannot prevail.

29. As regards the first branch of this contention, I am of opinion that neither of the two decisions of the Judicial Committee supports the contention of the respondent. In Prannath Roy Chowdhry v. Rookea Begum 7 M. I.A. 323 : 4 W. R. 37 P. C.) 1: Suth. P.C.J. 367 : 1 Sar. P.C.J. 692 : 19 E. R. 331. the plaintiff, a mortgagee by conditional sale, had obtained a foreclosure order in proceedings instituted under Regulation XVII of 1806. He then sued to recover possession of the properties as owner from the defendant, who claimed under a purchase from the mortgagor which was neither proved nor admitted. The question was raised whether the plaintiff had validly foreclosed the mortgage by conditional sale so as to entitle him to bring ejectment as owner, as the proceedings for foreclosure were taken more than twelve years after the due date for the repayment of the mortgage money. The law of limitation then in force was contained in Section 14 of Regulation III of 1793, whereby a suit was barred where the causes of action had arisen twelve years before any suit was commenced on account of it. Lord Kingsdown pointed out that a suit for foreclosure against the mortgager or against persons claiming privity with the mortgagor might not be barred, while a suit for possession against a stranger who claimed to hold the property free of any mortgage might be barred; but he did not say that the mortgagee's right might be barred by the possession of an adverse claimant even if the mortgagee's right to possession had not accrued or where the mortgagee was not entitled to possession at all. It was not necessary to make such a pronouncement, because it was found that the possession of the claimant had been originally not adverse to but consistent with the mortgage title, and there was nothing whatever to show that it became adverse at any time before twelve years preceding the institution of the foreclosure suit. On the other hand, there are passages in the judgment of James, L.J., in Anundo Moyee Dossee v. Dhondro Chunder Mookerjee 14 M. I.A. 101 : 16 W. R. 19 (P. C.) : 8 B. L.R. 122 : 2 Suth. P.C.J. 457 : 2 Sar. P.C.J. 698 : 20 E. R. 724. and in Brojonath Koondoo Chowdry v. Khelut Chunder Ghose 14 M. I.A. 144 : 16 W. R. 38 (P. C.) : 8 B. L.R. 104 : 2 Suth. P.C.J. 480 : 2 Sar. P.C.J. 711 : 20 E. R. 740. which indicate that adverse possession operates against a mortgagee only when the

mortgagee is entitled to possession and time runs against him from the date when he is entitled to enter upon the land. The case of *Koran Singh v. Bakar Ali Khan* 5 A. 1 : 9 I.A. 99 : 4 Sar. P. C. J 182 : 2 Ind. Dec. (N.S.) 1044. also does not support the contention of the respondent. There the Collector had, for protection of the Government revenue, taken possession of the property in 1861, pending the settlement of disputes between rival claimants. The mortgages were executed in 1862 on behalf of one set of claimants, namely, the daughter's sons of the last male owner. In 1863, by an award of arbitrators, the title of the defendant, who was the brother's grandson of the late owner, was established against the daughter's sons. The mortgagee was not a party to these proceedings and was not bound thereby. The Collector then made over possession of the property, together with the arrears of income of the estate in his hands, to the successful claimant. In 1874, the mortgagee sued to enforce his securities. The defendant pleaded that he had been in adverse possession for the statutory period from 1861 on the assumption that the possession of the Collector was his possession. If this contention was well founded, the case would be, not that of the dispossession of a mortgagor after he had granted a simple mortgage, but that of the grant of a mortgage by a person previously dispossessed : in such a contingency, the adverse possession which had commenced to operate against the mortgagor would not, by the grant of the mortgage, be arrested, but would operate equally against the mortgagee, for in the words of Lord Kingsdown in *Prannath Roy Chowdhry v. Rookea Begum* 7 M. I.A. 323 : 4 W.R. 37 (P. C.) 1 Suth : 1 Sar. P.C.J. 692 : 19 E. R. 331., a cause of action is not prolonged by mere transfer of the title. The Judicial Committee, however, found that the defendant could not take to his possession the possession of the Collector and had consequently not been in adverse possession for the statutory period since 1863. Sir Barnes Peacock observed, first, that the possession of the Collector was possession on behalf of the rightful owners, and, secondly, that the rightful owners were the daughter's sons and not the brother's grandsons, as found in a proceeding of the arbitrators whose decision did not bind the plaintiff as his bonds were prior to the submission to arbitration. I must decline to hold that the Judicial Committee by implication decided a question of law which was not argued before them and which upon the pleadings and facts found could not arise for consideration. There is no warrant whatever for the inference that the Judicial Committee assumed that a suit for sale by a simple mortgagee was a suit for possession. Sir Barnes Peacock expressly referred to the change in the law effected by the Limitation Act of 1871 and could not have held that a suit for sale was a suit for possession, to might possibly have been held under the Limitation Act of 1859 [*Surwan Hossein v. Shahasadah Golam Mahomed* 9 W.R. 170 : B. L.R. Sup. 879., *Juneswar Dass v. Mahabeer Singh* 3 I.A. 1 : 1 C. 163 : 25 W.R. 84 : 3 Sar. P.C.J. 58 : 3 Suth. P. C. 222 : 1 Ind. Dec. (N.S.) 105. and *Chetti Goundan v. Sundaram Pillai* 2 M. H. C. R. 51.]. Under the present law, however a suit for sale such as the present is in no sense a suit by a simple mortgagee for possession of an interest in Immovable property, *Vasudeva Mudaliar v. Srinivasa Pillai* 17 M. L.J. 444 : 11

C.W.N. 1005 : 4 A. L.J. 625 : 2 M.L.T. 333 : 9 Bom, L.R. 1104 : 34 I.A. 187 : 30 M. 426 : 6 C. L.J. 379. The Judicial Committee could hardly have overlooked the distinction between Section 1, clause 12 : of Act XIV of 1859 and Article 145 of Act IX of 1871, the former of which they have characterised as an inartificially drawn Statute and the latter as a more carefully drawn Statute [Maharana Fattehsangji Jaswantsangji v. Desai Kullianraiji Hakoomutraiji 1 I.A. 34 : 13 B. L.R. 254 : 21 W. R. 178 : 10 B. H. C. R. 281 : 3 Sar. P.C.J. 306, and Delhi and London Bank Limited v. Orchard 4 I.A. 27 : 3 C. 47 : 3 Sar. P.C.J. 721 : 3 Suth. P.C.J. 423 : 7 P. R. 1878 : 1 Ind. Jur. 457 : 1 Ind. Dec. (N.S.) 622.] I think it is reasonably plain that the decisions of the Judicial Committee in Prannath Roy Chowdhry v. Rookea Begum 7 M. I.A. 323 : 4 W. R. 37 (P. C.) 1 Suth. P.C.J. 367 : 1 Sar. P.C.J. 692 : 19 E. R. 331. and Kafan Singh v. Bakar Ali Khan 5 A. 1 : 9 I.A. 99 : 4 Sar. P. C. J 182 : 2 Ind. Dec. (N.S.) 1044. do not conclude the question in controversy and do not directly or indirectly Support the contention of the respondents.

30. As regards the second branch of the contention of the respondent, I am of opinion that the decision in Ram Coomar Sein v. Prosunno Coomar Sein (1864) W. R. 375. does not, conflict with that in Aimadar Mondul v. Makhan Lal Pep 33 C. 1015 : 10 C.W.N. 904. The earlier case arose out of a suit by a mortgagee for possession after foreclosure and was decided under the Limitation Act of 1859. The provisions of that Statute were, as I have just explained, radically different from those in the Limitation Act now in force, and that decision cannot be treated as an authority now binding upon us. I do not, however, decide that, the case of Earn Coomar Sein v Prosunno Coomar Sein (17) was correctly decided even under the law as it stood in 1859; indeed, it appears to me to be incapable of reconciliation with the principle deducible from the decision of the House of Lords in Pugh v, Heath (1882) 7 A. C. 235 : 51 L.J. Q.B. 367 : 46 L.T. 321 : 30 W. R. 553, namely, that on foreclosure, a fresh right of action arises for possession as owner, or, as it is said, the decree absolute gives a new right, confers a new estate and thereby absolutely bars the Statute of Limitation. I cannot, consequently, accept the contention that the decision in Bam Coomar Sein v. Prosunno Coomar Sein (1864) W. R. 375. assists the respondent and the same, observation applies to Sheoumber Sahoo v. Bhowaneedeen Kulwar 2 N. W. P. H. C. R. 223.

31. As regards the third branch of the contention of the respondent, it is indisputable that the balance of judicial opinion is in favour of the appellant. The earlier cases are reviewed in my judgment in the case of Nandkumar Dobey v. Ajodhya Sahu 11 Ind. Cas. 465 : 14 C. L.J. 203 : 16 C.W.N. 351, where the question was expressly left open for future consideration and need not be analysed afresh. It is sufficient to state that the conflict of judicial opinion in Madras, as indicated in Parthasarathi Naihan v. Lakshmana Naicken 9 Ind. Cas. 791 : 35 M. 231: 9 M.L.T. 389 : 21 M. L.J. 466 : (1911) 1 M. W. N. 201. and Ramasami Chetti v. Ponna Padayachi 9 Ind. Cas. 28 M. 97 : 9 M.L.T. 264 : 21 M L.J. 397 : (1911) 1 M. W. N. 209., has now been settled by a Full Bench in

Viyapuri v. Sonamma Boi Ammam 31 Ind. Cas. 412: 29 M. L.J. 645 : 2 L. W. 1080 : (1915) M. W. N. 927 : 18 M.L.T. 436. which, upon an exhaustive examination of the question from various points of view, affirms the principle that the possession of the trespasser who has dispossessed a simple mortgagor is not adverse to the simple mortgagee [see also Peria Aiya Ambalam v. Shunmugasundaram 22 Ind. Cas. 615 : 38 M. 903 : 26 M. L.J. 140 : 15 M.L.T. 112 : 1 L. W. 119.]. The same view has been adopted in Allahabad [Nandan Singh v. Jumman 17 Ind. Cas. 632 : 34 A. 640 : 10 A. L.J. 278. and Raj Nath v. Narain Das 24 Ind. Cas. 997 : 36 A. 567 : 12 A. L.J. 982 (F. B.).]. It is not necessary to consider the class of cases of which Lalla Kanhoo Lal v. Musammat Manki Bibi 6 C.W.N. 601 and Tarubai v. Venkatrao 27 B. 43 : 4 Bom. L.R. 721, may be taken as the type, where a question arose as to the effect., of adverse possession against a mortgagee upon the title of the mortgagor: nor needs we consider the law on the subject in England which, as shown in Nandkumar Dobey, v. Ajodhya Sahu 11 Ind. Cas. 465 : 14 C. L.J. 203 : 16 C.W.N. 351, does not support to contention of the respondent and lays down in fact that a charge on the property can be enforced against a trespasser who has acquired a title by adverse possession [see the judgment of Farwell, J., in Nisbet Pott's Contract, In re (1906) 1 Ch. 386 : 75 L.J. Ch. 238 : 94 L.T. 297 : 54 W. R. 286 : 22 T. L.R. 234, and Ludbrook v. Ludbrook (1901) 2 K. B. 96 : 70 L.J. K. B. 552 : 84 L.T. 485 : 49 W. R. 465 : 17 T. L.R. 397.].

32. I hold, accordingly, that this appeal must, be allowed with costs, the decree of Mr. Justice Fletcher reversed and that of the Subordinate Judge restored.