

(1880) 12 CAL CK 0010

Calcutta High Court

Case No: None

Patterson

APPELLANT

Vs

Manly

RESPONDENT

Date of Decision: Dec. 16, 1880

Citation: (1881) ILR (Cal) 394

Hon'ble Judges: Pontifex, J; McDonell, J

Bench: Division Bench

Judgement

Pontifex, J.

This case arises under somewhat singular circumstances. About the year 1823, a sum of Rs. 10,000 was settled in trust for Mr. Robert Manly for life, with remainder to his wife for life, with remainder for the children of the marriage, as Robert Manly and his wife or the survivor of them should appoint, and in default of appointment, for the children. Shortly after the settlement, the husband, Mr. Manly, being possessed of a piece of land, persuaded the trustees to advance him the Rs. 10,000 in order to build a house upon it.

2. The deed under which the Rs. 10,000 was advanced was drawn in the form of an absolute conveyance to the trustees without any proper proviso for redemption, and without any covenant for payment of the money to the trustees. The conveyance was to the trustees of the settlement and the succeeding trustees to be appointed thereunder, to be held upon and subject to the several trusts of the settlement, and thus an express trust was impressed on the property. There was a proviso in the deed that the tenant-for-life, Robert Manly, should be entitled to the use and enjoyment of the house at all events, during his life, though the terms of the clause are rather vague. Of course, during his life, he being entitled to the interest of the trust-money, it was immaterial whether interest was paid to him or whether he enjoyed possession of the house. A decree by a stranger to the settlement having been obtained against Robert Manly, execution was taken out against him in the year 1866, and all his right, title and interest in the house was

sold and purchased by Mrs. Verplough. The defendant, Jane Manly, who is the present appellant, represents Mrs. Verplough, and is now entitled, by virtue of such sale and representation, to the equity of redemption. Notwithstanding the purchase by Mrs. Verplough, Robert Manly was allowed to remain in possession of the house, and was ostensibly in possession of it up to his death in 1867. This suit is instituted within twelve years from the elate of his death. The trustees having died, new trustees were appointed; and the survivor of them, with the concurrence of Sarah Manly and her daughter, to whom the Rs. 10,000 had been apportioned, conveyed to the present plaintiff all their rights in the house. There are some suggestions in these proceedings that the conveyance was not a bond fide, conveyance; but we think it does not lie in the mouth, at all events of the present appellant, to take that objection. It has been objected on behalf of the present appellant, that the plaintiff is barred by limitation, and the case of *Anundo Moyee Dossee v. Dhonendro Chunder Mookerjee* (14 Moore's I. A. 101), has been cited, in which the Privy Council seem to have laid down, that when, by an act of law, there has been an alienation from a mortgagor to a third person, the limitation law applicable between mortgagor and mortgagee ceases to apply, and the ordinary limitation thenceforward applies. That seems to have been decided under the Limitation Act of 1859. Whatever may have been the principle on which that case was decided, it is sufficient to say that it does not apply here, because (even if the property was not impressed with a trust) the tenant-for-life under the deed was entitled to possession of the house during his life, and having been in ostensible possession until the time of his death, there was nothing to show that the property had passed to a stranger; and we are of opinion that limitation, at all events, would not run until the death of the tenant-for-life, and that would be within twelve years of the institution of this suit. We think, therefore, that the suit is not barred by limitation.

3. The plaintiff has sued the (sic)mesent defendant Jane Manly, who is the owner of the equity of redemptio and also Mr. D. W. Manly, who seems to have been in possession of this house so far as we can see, as a trespasser. The Subordinate Judge has decreed, that the principal money, with interest at the rate of Rs. 6 per cont. per annum from the date of demand, should be paid by the sale of the property, and that any deficiency should be borne by the present appellant, Jane Manly, the owner of the equity of redemption, and that both the defendants should pay the costs of the suit.

4. Now, we are of opinion that this decree in some respects is improper. We think that the owner of the equity of redemption ought not to be directed to pay any deficiency of principal and interest moneys and costs, which the moneys to arise from the sale may be insufficient to meet, this suit being in the nature of a foreclosure suit. We also think that the plaintiff is not entitled to interest from the date of demand, at all events as against Jane Manly, the present appellant, inasmuch as Jane Manly has not been in possession of the property and offered no obstacle to the plaintiff" entering into possession and receiving the profits of the

property. We also think that the decree was wrong in ordering an immediate sale. We think that Jane Manly, the owner of the equity of redemption, ought to have been afforded time for the purpose of raising money, if possible, to redeem the estate, if so advised. In the mofussil, under the Regulations, a year is the time allowed before foreclosure becomes absolute, and we think by analogy that that period ought to have been allowed to the present appellant. The decree was passed on the 22nd April 1880; the year would, therefore, expire on the 21st April 1881. We shall, therefore, modify the decree of the Subordinate Judge in so far as it concerns the present appellant, and declare that, unless the appellant, Jane Manly, pays the 10,000 sicca rupees secured by the deed, together with interest at 6 per cent, per annum from the 22nd April 1880, the date of the decree of the Court below, on or before the 21st April 1881, the property shall be sold, and out of the proceeds of the sale, if sufficient (but not otherwise), the plaintiff will be entitled to 10,000 sicca rupees and the interest and the costs of suit both in this Court and in the Court below. The decree as against the other defendant will stand. If, however, the appellant, Jane Manly, does, on or before the 21st April 1881, pay the principal sum of 10,000 sicca rupees with one year's interest and the costs of the suit both in this Court and the Court below, the plaintiff shall execute a conveyance free from all encumbrances to the said Jane Manly.

5. The appellant Jane Manly will be entitled to a refund of the money paid by her into this Court as security for costs.