
(1874) 09 CAL CK 0001

Calcutta High Court

Case No: Special Appeal No. 2545 of 1873

Mankee Kooer

APPELLANT

Vs

Sheikh Munnoo

RESPONDENT

Date of Decision: Sept. 18, 1874

Final Decision: Allowed

Judgement

Phear, J.

It is plain that the first question to which we have to address ourselves is this, namely, when did the plaintiff's cause of action first accrue to him? And, for the purpose of determining thin, it is necessary to see what, under a contract such as that which is the foundation of the plaintiff's suit, is the nature of the mortgagee's right. This matter has been more than once discussed in this Court, and has been also dealt with more than once by the Privy Council. The last case is that of Brajanath Kundu Chowdhry v. Khilatchandra Ghose 8 B.L.R., 104; S.C., 14 Moore's I.A., 144. The subject of appeal in that case was a decision passed by the late Chief Justice upon a mortgage which bore the form of an English mortgage deed. In the judgment of the High Court it was said that the mortgagee's right in the land is a right to possession, subject to the right of the mortgagor to redeem on the one hand, and a right on the part of the mortgagee himself to foreclose that right of redemption on the other. It might perhaps have been well added that it is coupled with this restriction, namely, that possession, if obtained before foreclosure, is merely possession by way of lien and without any beneficial interest. Their Lordships of the Privy Council accepted this view of the High Court, and in a judgment of the Privy Council delivered by Lord Kingsdown in the case of Prannath Roy Chowdry vs. Rookea Begum, , and which is the case referred to by both the lower Courts, it was said that the transaction of mortgage effected by a bye-bil-wafa was under the Regulations essentially the same in regard to the relation between the mortgagor and mortgagee as an English mortgage. In the case first cited--Brajanath Kundu Chowdhry v. Khilatchandra Ghose 8 B.L.R., 104; S.C., 14 Moore's I.A., 144,--the Privy Council, how ever, thought that the judgment of the High Court, although perfectly correct in the decision of the particular case before it, was couched in terms which were calculated to extend the bar of

the Statute of Limitation somewhat too broadly. They say with reference to the manner in which the High Court had applied, s. 6, Act XIV of 1859 (the late limitation Act):--"It may, however, have been deemed necessary to introduce the exception stated above," i.e., the exception of s. 6, "in order to put mortgages in the English form, when put in suit in the Supreme Court, which was generally governed by English law, upon the same footing as that in which English mortgages are under the existing Statutes of Limitation, and their Lordships, dealing with suits upon mortgages in the ordinary Courts of India, might in the simple case of a mortgagee and his mortgagor permitted to remain in possession so long as he paid interest, have found ground for considering that there was a permissive possession, and that a new cause of action and right of entry accrued when that permission ceased." This precise point, however, did not arise in that case, and consequently the Privy Council's expression of opinion does not perhaps amount to a binding authority. But it still is extremely useful as a guide to the proper determination of the matter which is now before us. The Subordinate Judge said in his judgment that the withholding of the property from the mortgagee, after the execution of the deed, was a hostile act, and his possession (that is, the mortgagor's possession) thenceforward an adverse possession. But the Privy Council in the passage just now quoted, said that "their Lordships might," to use their own words, "in the simple case of a mortgagee and his mortgagor permitted to remain in possession so long as he paid interest, have found ground for considering that there was a permissive possession." Also Lord Kingsdown said in *Prannath Roy Chowdry v. Rookea Begum* 7 Moore's I.A., 323 that, under the old Regulation law of limitation, "it could not be laid down as a rule universally true that a mortgagee's proceeding for a foreclosure under a mortgage of the class of *bye-bil-wafa* simply, cannot be preferred after twelve years from the expiration of the time which the instrument fixes as the period of redemption by payment, and on the expiration of which the condition of sale will become absolute, for this indiscriminating ground" of decision would include alike adverse occupations, and those which had not the semblance even of such a character, and would establish a bar arising from simple occupation and not from the laches of the demandant or of others before him." And yet this seems to be, what the Subordinate Judge has done with this judgment before him. The true view seems to be that, although the mortgagee has, on the occurrence of the default named in the deed, a cause of action to recover possession of the property, provided it is then withheld from him adversely, he has no cause of suit if the possession of the property by the mortgagor is from that time held and continued with his permission. And so long as the relation between the mortgagor and the mortgagee created by the *bye-bil-wafa* or mortgage deed can be said to be subsisting, it would probably be right to infer that the possession of the mortgaged property by the mortgagor, if it be so held, was had with the permission of the mortgagee, unless some act was done by the mortgagor, or some claim advanced by him which was inconsistent with the subsistence of that relation.

2. In the case of *Denonath Gangooly v. Nursing Prashad Dass Ante.*, p. 87, it was said:--"Now the cause of action" in a case of this kind," would arise when two things have concurred: that the plaintiff had a right to possession, and that the defendant was holding

possession not permissively, and acknowledging the plaintiffs right, but relying upon his own right, or adversely as it is called. If the plaintiff had not a right to immediate possession, or if, having a right to possession, the defendants were holding with the plaintiff's permission and acknowledging his right, no suit could be brought, in the one case because the right to possession had not accrued, and in the other because it had not been disturbed or denied."

3. That particular case turned upon another point, and, although the foregoing illustration was made in the course of the judgment of the High Court, the decision itself does not furnish any judicial authority with regard to the question which we have to consider.

4. In the case of *Srimati Anund Mayi Dasi v. Dharandra Chandra Mookerjee* 8 B.L.R., 122; S.C., 14 Moore's I.A. 101, the plaintiff, mortgagee, was seeking to recover possession of the mortgaged premises from the defendant who had purchased them at an auction-sale held in execution of a decree against the mortgagors. And in that case their Lordships in the Privy Council held that, inasmuch as the possession which the purchaser at an auction-sale obtains, is the possession as of an owner, therefore it must be taken, at least prima facie, that, unless the purchaser purchased with notice of the mortgage, from the moment he entered upon the mortgaged premises, his possession was adverse to the mortgagee. And their Lordships expressly said "that the possession of a purchaser under such circumstances is really not the possession of a person holding in privity with the mortgagor, or holding so as to be an acknowledgment of the continuance of the title of the mortgagee." And, therefore, the case was completely distinguished from any case where the mortgagee might be suing the mortgagor for possession.

5. And in the still earlier case of *Prannath Roy Chowdry v. Rookea Begum* 7 Moore's I.A., 323, which has already been more than once referred to--a case very much resembling the present,--their Lordships of the Privy Council said:--"But if the transaction be viewed, as it should now be regarded under the Regulations, as one of mortgage redeemable at any time by the mortgagor, or those claiming under him in privity with his title his mortgagor, then as no difference between the law prevalent in India and the law prevalent here as to the relation between mortgagor and mortgagee on this point has been suggested to their Lordships, the possession of those who claim under the mortgagor, so long as they assert a title to redeem and advance no other title inconsistent with it, must, prima facie at least, be treated as perfectly reconcilable with, and not adverse to, the title of the mortgagee, and the continuation of his lien on the thing pledged. It is by no means the essence of such a title there, any more than it is here, that it should be accompanied by an actual continuing possession of the lands. The pledge may, from various causes, be reluctant to assume possession of the pledge, or to shorten the period of its redeemable quality." These last observations are pregnant with exceedingly important matter for consideration. In all cases where the mortgagee has good reason to trust his debtor, it can be very well understood that he may be reluctant to take actual possession of the property which in itself can be no pecuniary benefit to himself, but possession of which has the affect of placing upon his shoulders the burden of keeping the accounts of

rents and profits and disbursements, together with the liability to account at any time for all sums received. And it is quite easy to conceive in cases of this kind, where the mortgagee has little occasion to doubt the honesty of his debtor he would readily leave the mortgagor in possession of the property over which he retains his lien in equity. The possession which the mortgagor would in this way have released to him and retain, notwithstanding that no express words might pass between the parties, would be strictly speaking possession enjoyed by the permission of the mortgagee. The two parties thus situated entirely understand their mutual relation; and it surely would not be reasonable, when once an occupation had commenced in this manner, to say afterwards, at any particular point, that it had ceased to be permissive, and had become adverse, unless something had occurred between the parties to change that natural relation. In the judgment of the Privy Council which was first referred to *Brajanath Kundu Chowdhary v. Kilatchandra Ghose*, the opinion was expressed that it would be reasonable to infer from the payment of interest that the possession on behalf of the mortgagor was permissive. But the judgment in *Prannath Roy Chowdry v. Rookea Begum* 7 Moore's I.A., 323 goes even further, and says that the possession of the mortgagor ought not to be treated as adverse, so long as the mortgagor asserts a title to redeem and advances no other title inconsistent with it. "It must be treated at any rate as perfectly reconcilable with, and not adverse to the title of the mortgagee and the continuance of his lien on the thing pledged."

6. So that, in the case before us, the time when the plaintiff's cause of suit first accrued depends upon the question when, if at all, did the mortgagor's possession first cease to be permissive and become adverse to the mortgagee, i.e., inconsistent with the relation of mortgagor and mortgagee. The Subordinate Judge assuming the fact of the original mortgage/admits that there was some evidence on the record of payment of interest by the mortgagor, but he refuses to give any serious consideration to it, because he thinks that interest is not rent. Of course that position is entirely correct. But it was the undisturbed subsistence of the relation of mortgagor and mortgagee which might be indicated by the payment of interest which was the principal question in this matter, and it was an error on the part of the Subordinate Judge to consider that the payment of money could only be of value as evidence of the continuance of that relation if it was paid by way of rent. By the nature of the case, in all probability, if the mortgagor was allowed to retain possession of the property, he would not pay a money rent for it, he would merely pay money by way of interest upon the mortgage debt.

7. It seems to us, therefore, on the whole, that the Subordinate Judge has taken a wrong view of the nature of the plaintiffs cause of action, and in consequence of the error thus committed, may have wrongly determined the issue of limitation. It becomes necessary for us, therefore, to reverse his decision, and to send back the case to the lower Appellate Court for retrial. The costs of this appeal will abide the event.