(1874) 05 CAL CK 0005

Calcutta High Court

Case No: Regular Appeal No. 118 of 1873

Denonath Gangooly		APPELLANT
	Vs	
Nursing Proshad Dass and Others		RESPONDENT

Date of Decision: May 7, 1874

Final Decision: Dismissed

Judgement

Markby, J.
I deem it convenient first to dispose of the questions of fact which have been raised before us in the appeal. It has been contended for the plaintiff that notice of the mortgage is proved to have been given to the purchasers, but I see no reason to differ with the finding of the Subordinate Judge upon that point. All that is proved is, that Mr. Gillanders, the attorney of the mortgagee, wrote and sent to the Sheriff this letter (reads letter set out, ante, p. 88). From this we are asked to presume that the Sheriff gave notice of the mortgage at the time of sale. I do not think it safe to presume this: there is no evidence whatever of the practice of the Sheriff"s office in this respect.

2. With respect to the service of notice of foreclosure, I think there is no ground for disagreeing with the Subordinate Judge as to the service of notice in due form upon Nursing Dass and the other purchasers of Cossimpore. Even if the answers of Nursing Dass cannot be treated (as the Subordinate Judge would treat them) as an admission of service of notice, they certainly are not as clear and explicit a denial as I should expect. On the other hand, I think, the evidence of Subeerooddeen, the piada, who served the notice, is reliable. Of course, it is not improbable that he should forget having served this notice; but, I think in a matter of this kind, the report which he made in the usual course of business to the Nazir, and which he swears to be a true report, may be looked at. This report is on the record, and should have been inserted in our printed book; and it appears from the Nazir"s evidence (which is also on the record, and should also have been printed), that it was made according to the usual course of business in the office. I think, therefore, that in the absence of any very satisfactory contradiction, we may assume that

a copy of the notice of foreclosure was affixed to the door of the house, together with a copy of the application; that the requirements of s. 8 of Regulation XVII of 1806 have been thereby complied with; and that, therefore, the foreclosure proceedings, as against the purchasers of Cossimpore, have been regularly taken.

3. With regard to the purchasers of Nowpara, I think it is proved that the notice of foreclosure was delivered at the house of Grish Chunder Banerjee, the auction-purchaser, but I can find no proof whatsoever that the notice was accompanied by a copy of the application to the Judge as required by s. 8 of the above Regulation. The words of the Regulation are express that the Judge shall cause the mortgagor or his representative to be served with a copy of the application; and it has been, I believe, always considered that proceedings in foreclosure are not regular, unless a copy of the application accompanies the notice; see the Constructions of the Sadder Dewany Adawlut, No. 644, June 24th, 1831, At p. 224. It was said that it was altogether unnecessary that this should be done, and that in fact all the information which the purchasers could make any use of was given by this notice. Bat I do not feel justified in saying that the mortgagor or his representative loses his right of redemption when one of the formalities expressly required by the Regulation has not been fulfilled.

4. Upon the evidence, I dot not think it possible to hold that a copy of the application was served with the notice. The notice recites that a copy of the application (in the notice called the petition) was sent therewith. But in the order of Phear, J., in the return of the Sheriff, and in the deposition of Krishto Roy, only a notice is mentioned; and, according to the practice of this Court on the Original Side, had the application accompanied the notice, it would have been so mentioned in the order of Phear, J., and the return of the Sheriff.

5. It seems to me, therefore, that if it be necessary for the plaintiff''s case to show, as against the purchaser of Nowpara, that the mortgage had been foreclosed, this has not been done.

6. It remains to consider whether the suit should have been dismissed, as against all the defendants, on the ground of the Statute of Limitation. I will first take the case of the purchasers of Cossimpore; and as regards these defendants, the case stands in precisely the same position as it did before the Subordinate Judge. These persons acquired their title by a purchase in good faith without notice of the mortgage; they were in possession for more than twelve years prior to this suit, but within twelve years of their purchase proceedings for foreclosure were duly taken, and within the twelve years the year of grace expired. In the case in the Privy Council S.M. Anand Mayi Dasi v. Dharandra Chandra Mookerjee, 8 B.L.R., 122 : S.C., 14 Moore''s I.A., 101 upon which the Subordinate Judge relied, the real facts were wholly different from the present case. The Privy Council however, expressed their opinion as to what would be the effect of the Statute of Limitation, if the facts had been such as one of the parties unsuccessfully asserted them to be. These hypothetical facts were, that a purchaser at a sale in

execution of a decree against a mortgagor had got into possession and remained in possession for twelve years before the suit was brought. That is also the case here, but there is this distinction, that in the hypothetical case, which was being dealt with by the Privy Council, it is assumed that no proceedings by way of foreclosure had been taken against the purchaser; where as in the case with which I am now dealing (that of the purchasers of Cossimpore) such proceedings have been taken.

7. The same distinction may be drawn between this present case, so far as it relates to the defendants, who are the purchasers of Cossimpore, and the later decision of the Privy Council in Brajanath Kundu Chowdhry v. Khilatchandra Ghose (2) 8 B.L.R., 104 : S.C., 14 Moore''s I.A., 144, where also no proceedings by way of foreclosure had been taken which were effectual against the mortgagor. The only other difference which was suggested on the argument between these two cases in the Privy Council and the case of the purchasers of Cossimpore is, that in the second, and apparently in the first also, of the cases before the Privy Council, the mortgage was in the English form, and not in the form of mortgage under which the plaintiff here claims. In the two cases to which I have referred, the suit against the purchaser, who had been twelve years in possession, was held to be barred; so that, as regards the purchaser of Cossimpore, our decision will depend upon how tar these two distinctions affect those decisions.

8. Now, in order to enable us to appreciate, the value of these distinctions, we must consider what the law of limitation is as applicable to a mortgagee seeking to recover possession of the mortgaged property. It is sufficient to advert to the law as laid down by Act XIV of 1859, which governs the present suit. The only provision in that Statute which is applicable is that contained in s. 1, cl. 12, which provides that in suits for the recovery of immoveable property, the suit should be instituted within twelve years from the date when the cause of action arose.

9. Now the cause of action 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 plaintiff''s 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. Now it has been contended for the plaintiff that under a conditional sale in this form, no right of entry accrued until foreclosure, but it seems to me impossible to hold that consistently with the provisions in the deed which is before us, and which is operative except so far as the Regulations of 1793 and 1805 prevented its being so. The deed recites that the mortgagor had received Rs. 25,000; that the net annual profits of the property are Rs. 3,000; that in liquidation of the interest, the mortgagee is to receive that amount from the ijardar under the mortgagor; that the money borrowed, is to be repaid on the 26th Assar 1262 (9th of July 1855;, and then follows this clause:--''If I do not repay the whole money within the period, then this conditional bill of sale will be reckoned as a true

and absolute bill of sale; my and my successors'' rights will cease to the said zamindari; the proprietary rights, with the rights of gift and sale to it, will accrue to you and your successors, and registering your names in the sarrishta of the Collectorate, you will take possession of it in the mofussil; and, on payment of revenue, you, your sons, grandsons, &c., will continue to have felicitous occupation and possession thereof."

10. Now the law has provided that if the mortgagee take possession, he is accountable to the mortgagor for the profits which he has received; the law has also provided that if the mortgagor desire to redeem the property, he may do so Within the period specified in the Statutes of Limitation, unless the mortgagee shall in the meantime have taken proceedings for foreclosure; and the effect of these provisions is no doubt greatly to curtail the rights which the mortgagee has stipulated for. But one of the rights here expressly stipulated for is the right to possession and the law has nowhere provided that this right shall not be exercised by the mortgagee. There is, indeed, a case in which it appears to be laid down that the mortgagee under a conditional sale has no right of possession until foreclosure--Buddinath Paul v. Raja of Burdwan 13 S.D.A., 1857, 1816; but I cannot reconcile that with the two decisions of the Privy Council to which I have referred. In both these cases the property was situate in the mofussil, and it would, I think, be impossible to hold that the mortgagee of property in the mofussil under a mortgage in the English form had a right to the possession, and a mortgagee by conditional sale had not. In both cases the mortgagee has contracted for the possession at a certain date; and therefore, if he is debarred from his right to possession, it must be by reason of the Regulations. But the Privy Council has given a construction to the Regulations, which is that they do not debar the mortgagee from possession, if he has stipulated for it, after default; but, on the contrary, on default the right of entry immediately accrues. It seems to me, therefore, that the first distinction relied on avails nothing, and that the plaintiff under this deed of conditional sale, had the same right of entry after default, as the mortgagees had in the two cases decided by the Privy Council.

11. But it is said that even if the plaintiff had a right to possession, he had no cause of action, because the possession of the purchasers was not adverse. This argument is, I think, also answered by the observations of the Privy Council in Anand Mayi Dasi v. Dharandra Chandra Mookerjee 8 B.L.R., 122; see p. 127; and 14 Moore''s I.A., 101; see p. 311; where it is said:--"Their Lordships think that the title of a judgment-creditor, or a purchaser under a judgment decree, cannot be put on the same footing as the title of a mortgagor, or of a person claiming under a voluntary alienation from the mortgagor. They are of opinion that the possession of a purchaser, under such circumstances, is really not the possession of a person holding in priority of the mortgagor--(this is so printed in all the books: qu■re--whether it should not be "in privity with the mortgagor" The judgment, as printed in 8 B.L.R., contains the reading suggested by the learned Judge.--or holding so as to be an acknowledgment of the continuance of the title of the mortgagee. The possession which the purchaser supposed he acquired, was a possession as owner. He thought he was acquiring the absolute title to the property, and that he was in possession

as absolute owner."

12. That was a judgment upon the earlier Regulations. But in Brajanath Kundu Chowdhary v. Khilatchandra Ghose 8 B.L.R., 104; see p. 109; and 14 Moore''s I.A., 144; see p. 150, a case under Act XIV of 1859, it is said of a purchaser under similar circumstances "that it is impossible to hold that the defendant, the purchaser, was holding, or supposed that be was holding, by permission of the mortgagee: and when both things concur,--possession by such a holder for more than twelve years, and the right of entry under the mortgage-deed more than twelve years, old,--it is impossible to say that such a possession is not protected by the Law of Limitations."

13. I think, therefore, that there was a complete cause of action against the purchasers of Cossimpore on the 9th July 1855; and that a suit founded upon that cause of action was, therefore, barred when this suit was brought.

14. But it is said, and was pressed strongly upon us by Baboo Gopal Law Mitter in his very able argument for the appellants, that an entirely new cause of action arose when foreclosure became absolute by the expiry of the year of grace. Now, at first, I was inclined to think that some of the decisions in India favored, this contention, but upon a careful examination of all the cases quoted and some others, I am satisfied that, whilst there are some decisions expressly against it, there is no decision which countenances it. The doubt has been, not whether the mortgagee is wholly barred when twelve years have elapsed from the time when his cause of action first accrued, but when it can be first said that he has a cause of action. It has nowhere been said that upon foreclosure the mortgagee has a new cause of action, but it has been doubted in some cases whether before foreclosure he had any cause of action at all. This was the ground of the decision in favor of the mortgagee in the case of Buddinath Paul v. Raja of Burdwan 13 S.D.A., 1857, 1816. The Court there says:--"The mortgagee''s right to possession of the property does not become complete, till he has performed certain acts prescribed by law; consequently, as the mortgagee''s right to sue to enforce the conditions of his bond, is not complete till those acts hive been carried out, the date of his cause of action must be considered to arise from the time when those acts are completed, and not from the date when the money becomes due. The law moreover does not compel a mortgagee to complete his right within any fixed period." Clearly here the Court thought that in that case there was no right of entry at all until foreclosure. So, too, in the case of Buldeen v. Mussamat Golab Koonwer Agra F.B. Rul. for 1866-67, 102, decided by a Full Bench of the High Court of the N.W.P. on the 3rd June 1867. The Court say:--"We cannot concur in the rule which has been laid down in some of the authorities cited to the effect that, as a mortgagee''s cause of action arises on the mortgagor''s making default, the mortgagee''s suit for possession must be instituted within twelve years from the date of default with allowance for the year of grace, when foreclosure proceedings are instituted at the earliest possible date. A default may be made by the mortgagors, which may give the mortgagee a right to sue or to enter into possession (if he chooses to assert such right), but which may notwithstanding have no effect whatsoever in altering the nature of the

mortgage title. So long as the mortgagor in possession, or those who claim under him, assert merely a title to redeem, and advance no other title inconsistent with it, such possession must, prima facie at least, be treated as perfectly reconcilable with, and not adverse to, the title of the mortgagee, and the continuation of the lien on the property pledged."

15. But this was a suit not between the mortgagee and a purchaser from the mortgagor, bat a suit between the mortgagee and the mortgagor herself. There might, therefore, well be reasons for holding that the possession of the mortgagor was not adverse; and it appears that the Courts below had not found that it was so. But so far from saying that if the possession prior to the foreclosure had been adverse, a new cause of action would arise upon foreclosure, the High Court remanded the case with directions which seems to me inconsistent with this view. They say:--"It will be for the Courts to consider the effect of the whole evidence, and whether it tends to show a possession by the mortgagors for any and what number of years adverse to, and inconsistent with, the alleged mortgage title. It is well settled that foreclosure proceedings under the Regulations give no efficiency to transactions not in themselves valid. If there was really no mortgage, the mortgagees having never advanced the money, or if the mortgagors have repudiated the mortgagees" right, and have held adversely to them and without recognition of their title for twelve years, they can derive no benefit whatsoever in this suit from the foreclosure proceedings. The mortgagors are entitled to put them to the proof of a valid and existing mortgage title at the time of foreclosure, and that such title has been finally and duly foreclosed. If such a title is proved, this suit to recover possession is brought within the limited time." And the suit was accordingly remanded. But if foreclosure gives a new cause of action, there was no necessity to remand the suit at all, for the proceedings in foreclosure had only been recently taken.

16. The case of Prannath Roy Chowdry vs. Rookea Begum, , is also consistent with the view that no new cause of action arises upon foreclosure. It was held in that case that the suit of the mortgagee was not barred; but the ground of the decision is stated at p. 354. After observing that it cannot be laid down as a rule universally true that under Regulation III of 1793, s. 14, a mortgagee is barred after twelve years from the date of redemption fixed by the deed, the Privy Council say:--"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." The Privy Council then, after observing that "it by no means follows, as a consequence, that a mortgagee foreclosing will be able, in a suit for possession, to make good against all occupants a title to possession," proceed to enquire whether the mortgagee"s title to enforce possession was barred, But this enquiry would

have been wholly unnecessary if the proceedings in foreclosure gave a new cause of action; for the mortgage in that case was not finally foreclosed until the 25th June 1849, and the suit for possession was brought immediately afterwards.

17. The decisions which lay down directly that a mortgagee is barred altogether after twelve years'' adverse possession are, Insan Rai v. Narain Dass S.D.A. (N.W.P.), 1863, 100 Nilambur Mujoomdar v. Parbuttee Churn Mujoomdar Id., 1859, 1495, and Jankee Pershad v. Hurnarain Id., (N.W.P.), 1854, 234, where also previous cases of the like nature are referred to.

18. So too, if foreclosure gave a new cause of action, the law of limitation would be thrown into much confusion. No safe title could ever be acquired against a mortgagee in the mofussil for, as to mortgages in the mofussil, no time is prescribed for taking proceedings in foreclosure, and the provision contained in s. 6, Act XIV of 1859, would not (as is generally supposed) be an exception to the general law in favor of the mortgagee, but it would be a restriction upon the rights of the mortgagee in favor of the parties in possession. This is certainly not the view taken by the Privy Council of this section in the case of Brajanath Kundu Chowdhry v. Khilatchandra Ghose 8 B.L.R., 104; S.C., 14 Moore''s I.A., 144. The Privy Council clearly treat this provision as an exception made in favor of the mortgagee, and consider that where this exception does not apply, the only resource for the mortgagee would be to prove that the possession of the mortgagor or his assignees had not been adverse.

19. It seems to me, therefore, that upon the whole there is nothing in the decided cases to warrant us in holding that a new cause of action arises upon foreclosure.

20. It has been contended that the mortgagee is at any rate not barred if he commences foreclosure proceedings within twelve years of the date when the possession first became adverse, and brings his suit for possession within twelve years of the expiration of the year of grace. No doubt, this suggestion avoids some of the inconveniences which would arise if the right of the mortgagee to foreclose, and take possession, were wholly unlimited. But it does not seem to me to rest on any foundation in law. If foreclosure does give a new cause of action, the question whether foreclosure took place within twelve years of default will be immaterial. If on the other hand it does not, then the operation of the Statute can only be prevented by the institution of a suit. But to take proceedings in foreclosure, in the mofussil at any rate, cannot be called the institution of a suit. There is no writ of summons, the mortgagor and his representatives are not summoned and cannot be heard, and the action of the Court is purely ministerial. Such a proceeding cannot be called the institution of a suit within the meaning of Act XIV of 1859 without a straining of language for which I see no justification.

21. I have considered this case with reference only to the provisions of the Statute Law and the decided cases, and not upon any general principles, The relation of mortgagor and mortgagee, being the result of an interference by the Legislature with the expressed

intention of the parties, is an anomalous one, and therefore a deduction from general principles cannot always be safely made with regard to it. It is for this reason that I have not considered when the mortgagee becomes the owner of the property mortgaged. It seems to me that where the relation between the parties is so anomalous, it is impossible to fix this date, so as to justify any conclusion from it upon the matter now under enquiry. If it be said that the mortgagee only becomes owner of the property after the expiration of the year of grace, and not before, still I do not think he can be said to acquire the property at that date, and thus to acquire a new title to possession.

22. The result is that as regards the purchaser of Cossimpore I hold first, that upon default of the payment of the mortgage debt, the mortgagee had a right to possession; second, that the possession which these purchasers obtained upon their purchase was not held by them under the permission of the mortgagee, but as absolute owner; and, third, that no cause of action arose upon complection of the foreclosure proceedings. I therefore hold that the purchasers of Cossimpore can successfully set up the bar of limitation.

23. With regard to the purchasers of Nowpara, they stand in a somewhat more favorable position than the purchasers of Cossimpore. As against them tire mortgage has not been fore-closed. The question, therefore, as to whether any new cause of action arises upon foreclosure has no bearing upon the suit as against them; ■ fortiori therefore, as against them the suit is barred.

24. The result is that in my opinion the decree of the Subordinate Judge dismissing the suit should be affirmed, and the appeal dismissed with costs.

Mitter, J.

25. I concur in holding that the decree of the lower Court ought to be affirmed with costs. Out of the many issues which arose from the allegations of the parties to this suit, the decision of the lower Court mainly deals with two of them only, viz., (i), whether or not notice of the foreclosure had been regularly served; and (ii), whether or not the plaintiff"s suit was barred by limitation? The lower Court has decided the first of these issues in favor of the plaintiff, and the second against him, I propose to consider the second question first.

26. The kat-kobala, or the conditional bill of sale, on which this snit is based, was executed on the 27th Srabun 1260 (10th of August 1858), and the amount taken upon it was promised to be repaid on the 26th Assar 1262 (9th of July 1855). The rights and interests in the mortgaged premises of Sookhomoney Dossee, who executed this document, were Bold at a Sheriff"s sale in the execution of a decree of the Supreme Court of Calcutta on the 18th December 1856, and purchased by the ancestors of some of the defendants in this case; and ever since their purchase they and their heirs have been in possession. The plaintiff alleges that he has acquired the entire rights of the

original holders of this kat-kobala by purchase, and that he has caused the notices of foreclosure to be served upon all the defendants, and that the year of grace has expired on the 23rd of August 1868.

27. For the purposes of the adjudication of this issue, I shall assume that all these allegations of the plaintiff have been proved, although the defendants have joined issue with hint upon every one of them. The material portion of the deed of conditional sale which bears upon this question is the following:--"If I do not repay the whole money within the period, then this conditional bill of sale will be reckoned as a true and absolute bill of sale; my and my successor"s rights will cease to the said zamindari; the proprietary rights, with the rights of gift and sale to it, will accrue to yon and your successors, and registering your names in the sarrishta of the Collectorate, yon will take possession of it in the mofussil: and, on payment of revenue, you, your sons, grandsons, &c., will continue to have felicitous occupation and possession thereof."

28. The first question that arises in determining this issue is, when did the cause of action in this suit arise. The plaintiff contends that it arose on the expiry of the year of grace, and if that contention be correct, the suit having been instituted within twelve years from that time is not barred by limitation. But I do not think that this contention is correct. From the terms of the conditional sale set forth above it is evident that on default of payment within the stipulated time the mortgagee was entitled to take possession of the properties sold, unless restrained by any legislative enactment. It is said that he was so restrained by Regulation XVII of 1806. This argument entirely proceeds from a misapprehension of the provisions of that Law. It is quite clear that parties are adversely bound by the terms of their contract, unless by legislative interference one or both of them are set at liberty to modify or annul any of its provisions to which they have mutually consented. The kat-kobala in question expressly reserves to the mortgagee the right of entry upon the mortgaged premises on default of payment within the stipulated time: Regulation XVII of 1806, or any other Law, does not render such a stipulation inoperative between the parties. I am therefore of opinion that the mortgagee in this case, immediately on default of payment, which occurred on the 9th of July 1855, was entitled to take possession of the properties mortgaged. Whatever distinction there may be between this case and the Privy Council decision in Brajanath Kundu Chowdhry v. Khilatehandra Ghost 8 B.L.R., 104 : S.C., 14 Moore"s I.A., 144, it is an authority in support of this conclusion, viz., that there is no legislative bar to the exercise of this right of entry by the mortgagee; therefore it is clear that the right to assume possession of the properties in dispute accrued to the mortgagee so far back as the 9th of July 1855, and unless the plaintiff can make out that his present suit for possession is not based upon that right, but upon some other right which came into existence at a more recent period, and within twelve years, his suit must fail as barred by limitation.

29. Baboo Gopal Lal Mitter, with some plausibility, has urged that the plaintiff is not now suing for possession on the right of entry which had accrued to the mortgagee on the 9th of July 1855, but upon the right which arose on the day the sale became absolute, the

mortgagors not having repaid the mortgage debt within the year of grace allowed by Regulation XVII of 1806. He further contends that, conceding that the mortgagee in this case might have assumed possession immediately after the default in payment had been made, still that possession would have been as a mortgagee, and the plaintiff now seeks to recover not as mortgagee but as absolute owner; therefore the present suit is not based upon the right of entry given by the conditional bill of sale, but upon the right to possession which is a necessary incident to the right of absolute ownership which has been vested in the plaintiff by the foreclosure proceedings. But is it a correct proposition to assert that a holder of a conditional bill of sale invariably acquires an absolute right to the mortgaged premises as soon as the proceedings laid down in Regulation XVII of 1806 (usually called foreclosure proceedings) have been duly carried out? If it is not, the whole argument must fail. I do not think that this proposition is universally correct. The effect of the proceedings laid down in the Regulation in question is simply to bar the right of redemption. That is to say, when the right of ownership in a particular property is divided between two persons standing to each other in the relation of mortgagee and mortgagor, these proceedings, when duly carried out, have the effect of terminating the right of the one, viz., of the mortgagor, and perfecting that of the other, viz., of the mortgagee. Bat this presupposes the existence of valid and subsisting rights in both of them, and these proceedings are quite ineffectual when this is not the case. For example, under Act XIV of 1859, which is the Law of Limitation governing this case, the mortgagor"s right of redemption is barred after the lapse of sixty years from the date of the mortgage; see s. If cl. 15. In a case where a mortgagee has been in possession for more than sixty years of the mortgaged property, it is not necessary for him to have recourse to foreclosure proceedings. On the other hand where the rights of a mortgagee have been extinguished by lapse of time these proceedings, if taken by him, would be quite ineffectual. Therefore if, on the day of the expiry of the year of grace, a valid subsisting right of a mortgagee exists in a holder of a kat-kobala, the omission of the barrower to repay the mortgage loan before that date has the effect of transferring the remaining rights of the latter to the former, who acquires from that date absolute ownership in the property mortgaged. But if, on the other hand, the mortgage rights of a holder of a kat-kobala have been extinguished by lapse of time or other causes previous to that date, the foreclosure proceedings, even if duly carried out, are entirely ineffectual, and do not affect any person"s right in the least. This view of the law is supported by the following observation which occur in a Full Bench decision of the High Court, North-Western Provinces Buldeen v. Musst. Golab Koonwer, Agra F.B. Rul. for 1866-67. 102; see p. 108:--"If there was really no mortgage, the mortgagees having never advanced the money, or if the mortgagors have repudiated the mortgagees" rights, and have held adversely to them, and without recognition of their title, for twelve years, they can derive no benefit whatever in this suit from the foreclosure proceedings."

30. Let us see what are the facts of this case connected with this question. I find that the mortgagee"s right to demand possession accrued on the 9th July 1855. It is not shown that since that date possession has not been withheld from him "in breach of the

contract;" it is not suggested--far from being proved--that the original mortgagors and the subsequent purchasers have been allowed to remain in possession with the mortgagee"s consent, either express or tacit; notices of foreclosure are alleged to have been served upon one set of defendants in December 1866, and on the other set of defendants in February 1867: therefore, before the expiry of the year of grace in either case, i.e., on 9th of July 1867, all rights of the mortgagee had been extinguished by lapse of time. In this view of the law I hold that the plaintiff is not entitled to a fresh start from the date of expiry of the year of grace, and his present claim is therefore barred by limitation. With respect to the other issue, I agree with my learned colleague, for the reasons given by him, in holding that the service of notice upon the defendants has been proved, but that the plaintiff has failed to establish that the notice upon Grish Chunder Banerjee was accompanied by a copy of the application to the Judge as required by Regulation XVII of 1806, I am also of the opinion that this omission has the effect of rendering the foreclosure proceedings against the heirs of Grish Chunder Banerjee, invalid and ineffectual.