

(1880) 12 CAL CK 0015

Calcutta High Court

Case No: None

Burmamoye Dassee

APPELLANT

Vs

Dinobundhoo Ghose
and Another

RESPONDENT

Date of Decision: Dec. 22, 1880

Acts Referred:

- Limitation Act, 1963 - Article 135

Citation: (1881) ILR (Cal) 564

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

Bench: Division Bench

Judgement

Broughton, J.

This second appeal arises out of a suit for possession after foreclosure of a mortgage of a taluq, to which the defendants plead limitation. The mortgage is dated the 30th of Jeyt 1265, corresponding with the 11th June 1858; default was made on the 30th of Jeyt 1266, or 12th of June 1859. An application under Reg. XVII of 1806 was made to foreclose the mortgage in Assin 1273 (Sept.-Oct. 1866); and the year of grace expired in Assin 1274 (Sept.-Oct. 1867).

2. The present suit was instituted in 1284, on the 10th of April 1878. And the question is, whether the data from which the period of limitation counts was to run from the 30th of Jeyt 1266, the date of default, or from Assin 1274, when the year of grace expired.

3. The new Limitation Act, XV of 1877, came into operation before the suit was filed; but the Courts below have applied Act IX of 1871, which differs materially from Act XV of 1877, on the ground that the right to sue was barred before the Act of 1877 came into operation; and it is admitted that if the right was barred by Act IX of 1871, Schedule ii, Article 135, it cannot be revived.

4. The mortgage - deed provided that if the mortgagor did not pay the debt on the 30th of Jeyt 1266, the mortgagee "will become the owner by purchase, and entitled to possession." It is admitted that, if the plaintiff had sued for possession as mortgagee, he would have been bound to file his plaint within twelve years from the 30th of Jeyt 1266; but it is contended that a different view must be taken of a suit like the present, after the termination of foreclosure proceedings, which is not, like the other suit, a suit by a "mortgagee " within the meaning of the words of Article 135 of Act IX of 1871, but it is a suit by a mortgagee who has foreclosed and who has become absolute owner; and a case decided on the 6th of last May has been quoted by Baboo Rashbehary, who has appeared for the plaintiff. In that case-Ghindram Dobey v. Ram Monaruth Ram Dobey, Second Appeal No. 126 of 1879, the point raised in the present appeal appears to have been very fully argued, and the judgment which was delivered by Mr. Justice PONTIFEX was directly in favour of the contention of the present appellant. The two cases in fact are exactly similar. The mortgage-deed was in the same form, and the suit was brought more than twelve years after the date on which the mortgagee was entitled to possession; but within that period, as in the present case, foreclosure proceedings under the regulation had been taken, and the suit had been instituted within twelve years from the expiration of the year of grace. Upon this it was remarked:

Now it cannot be said, we think, that, after taking such proceedings, he was only entitled to the time allowed by Article 135 of the Limitation Act as mortgagee. The very fact of his taking foreclosure proceedings changes his interest as mortgagee to that of absolute owner, and as he has brought his suit within twelve years from the date of such change of character, we think he is no longer bound by that article (135). By Article 145, he would be entitled to sue within twelve years after possession became adverse against him. It cannot, we think, be said, that as long as the relation of mortgagor and mortgagee subsisted, the possession of the mortgagor could be adverse to the mortgagee. For the time, therefore, that he was entitled to take possession as mortgagee up to the time that the year of grace expired, possession was not adverse to him; but directly the foreclosure became complete, possession became adverse.

5. In answer to this case, however, Dr. Gurudas Banerjee, who appeared for the defendant, drew attention to a decision of the Judicial Committee of the Privy Council, which had not, he said, been considered in the case already quoted. The case is Forbes v. Ameeroonissa Begum (10 Moore's I. A. 340); the Passage is printed at pages 350, 351. After referring to the various provisions of 568] Reg. XVII of 1806, the Judgment proceeds as follows: " The general effect of these Regulations is, that if anything be due on the mortgage, and the mortgagor make an insufficient deposit, and a fortiori if he makes no deposit at all, the right of redemption is gone at the expiration of the year of grace.

The title of the mortgagee, however, is not even then complete. It was ruled by Circular Order of the 22nd of July 1813, No. 37, and has ever since been a settled law, that the functions of the Judge under Reg. XVII of 1806, Section. 8, are purely ministerial; and that a mortgagee, after having done all that the Regulation requires to be done, in order to foreclose the mortgage and make the conditional sale absolute, must bring a regular suit to recover possession, if he is out of possession, or to obtain a declaration of his absolute title, if he is in possession.

In that suit the mortgagor may contest, on any sufficient grounds, the validity of the conditional sale, or the regularity of the proceedings taken under the Regulation in order to make it absolute. He may also allege and prove, if he can, that nothing is due, or that the deposit (if any) which he has made, is sufficient to cover what is due; but the issue, in so far as the right of redemption is concerned, will be, whether anything at the end of the year of grace remained due to the mortgagee, and if so, whether the necessary deposit has been made. If that be found against the mortgagor, the right of redemption is gone.

A very able argument has been addressed to us upon the question, and another recent decision of this Court has been cited-Lall Mohun Gungopadhyaya v. Prosunno Ghunder Banerjee (24 W. R. 433)-in which the decision; appears to have been in favour of the contention raised by the respondents in the present appeal. The case is very shortly reported, and the facts are not stated in the Judgment, which alone is printed; but on referring to the records of the case, we find that the suit was one which was instituted "on the strength of foreclosure proceedings and for possession of the mortgaged premises by virtue of the sale having become absolute.

6. The Court of first instance appears to have decided the case upon the authority of the case of Huro Chunder Gooho v. Gudadhar Kcondoo (6. W. R., 184, which case was decided in 1866, when the Limitation Act, XIV of 1859, was in operation. It was there decided, however, that the foreclosure "gave the plaintiff no fresh starting point," and these words are relied upon in the present case. The plaintiff appealed to the Additional Judge, who reversed this decision, on the ground that the mortgagor was not in possession adversely to the plaintiff.

7. The decision of this Court, on special appeal in Lall Mohun's case (24 W. R. 433), was founded on the words of Article 135 of the Limitation Act of 1871, the Court holding that the earlier decisions on the Act of 1859 were inapplicable to this case; and it was held that, under Article 135, the mortgagee must sue within the specified time, when he was entitled to possession under the deed. Thus the suit was treated as a suit by a mortgagee.

8. In the Presidencies of Madras and Bombay, where the Regulation, XVII of 1806, does not apply, the law, although it has been disturbed by a series of decisions which have been expressly declared by the Judicial Committee to be quite unsound in principle-Thumbusawmi Moodelly v. Hossain Bowthen (I. L. R. 1 Mad. 1)-gives to

the purchaser under a conditional sale an absolute right upon default of payment on the day stipulated. "The essential characteristic of a mortgage by conditional sale was, that, on the breach of the condition, the contract executed itself and the transaction was closed, and became one, of absolute sale without any further act of the parties or accountability between them. That it still has this effect in the Presidency of Madras, was what was decided by the case in 13th Moore's Appeals"; referring to the case of Pattabhiramier v. Vencatarow Naicken 13 Moore's I. A. 560; S. c. 7 B. L. R. 136, and so it was in the case of conditional sales prior to the Regulation of 1806 in Bengal; Sarifunnissa v. Sheikh Inayet Hossein B. L. R. Sup. 415; s. c. 5 W. R. 88.

9. The purpose for which the Bengal Regulation, XVII of 1806, was passed is stated in the preamble, Section 1, as follows:

It is further requisite for the purpose of preventing improvident and injurious transfers of landed property at an inadequate price by the forfeiture of mortgages accompanied with a condition of sale to the mortgagee, if the amount advanced be not repaid within a stated period (which description of mortgage is common throughout the country, under deeds of baibilwafa, kot-kobala, and other similar designations) that an equitable provision should be made for allowing a redemption of the estate within a reasonable and limited period, on payment of the principal sum lent, with interest thereupon, if the mortgagee shall not have been put in possession." So that the period within which the right of redemption was to remain, was to be extended, for a reasonable and limited period, beyond the actual date fixed for payment by the deed itself; and certain provisions as to notice to the mortgagor, & c., were made for carrying out that object. That is all the Regulation purported to do, and all that it did, in this respect. Beyond that it did not interfere with the rights of the purchaser under the conditional sale, which were well established, and which it recognised, namely, that when the period for payment had elapsed, the purchaser became absolute owner of the property. But that period was to be extended.

10. The case of Forbes v. Ameeroonissa Begum (10 Moore's I. A. 340) was a suit for possession of a taluq, which had been the subject of a mortgage by conditional sale; proceedings had been taken to foreclose under Reg. XVII of 1806. It was found that the plaintiff was really in possession under a benami lease, and it was held, that he was entitled to possession without producing accounts of the usufruct of the estate, it appearing that the foreclosure proceedings had been regular, and that the debt was admittedly unpaid.

11. If the relationship of mortgagor and mortgagee had subsisted between the plaintiff and defendant when the suit was brought, the Judicial Committee would not have decided that the accounts were unnecessary, because the liability to account is one that arises on that relationship when the mortgagee is in possession, and continues so long as he is in possession; and as it was found in that case that

the mortgagee was in possession from the beginning, the decision of the Judicial Committee that he was not to account, must have proceeded on the ground that when these foreclosure proceedings (in all respect regular) had terminated, the debt being unpaid, the relation of mortgagor and mortgagee, had ceased to exist. The plaintiff did not in that case sue to recover possession as mortgagee, but he claimed to be absolute owner, and it was decided that he was entitled to succeed.

12. So again the right to redeem is an incident which, by the terms of the Regulation, is gone when the foreclosure is completed by the expiration of the year of grace. The Judge, u/s 8, is to notify this to the mortgagor; he is to inform him that if he do not redeem the property in the manner provided within one year from the date of the notification, the mortgage will be finally foreclosed, and the conditional sale will become conclusive. The right to redeem when it existed was preserved against the operation of the law of limitation for a period of sixty years. But where foreclosure proceedings were completed by the expiration of the year of grace, the mortgagor was held to be barred, if he did not sue to open up the foreclosure within twelve years: *Loft Hossein v. Abdool Ali* (8 W.R. 476). This case can have been decided upon no other ground than that his position was changed by the foreclosure.

13. In addition to the authority of the case of *Ghinaram Dobey* (Ante, p. 566, note) lately decided by this Court, the case of *Jeora Khun Singh v. Hookum Singh* (5 Agr H. C. R. 358) has been cited. There the learned Judges of a Division Bench of the High Court, then at Agra, had before them a suit brought by the mortgagees under a deed of conditional sale, after foreclosure proceedings, the object of which was to obtain possession of the property and mesne profits from the date at which the foreclosure proceedings terminated. It was contended that their right to possession did not become complete until they had obtained a decree for possession, and the passage already quoted from the judgment in the case of *Forbes v. Ameeroonissa Begum* 10 Moore's I. A. 340 was cited in support of that argument,—namely, "the title of the mortgagee is not even then complete." But the learned Judges observed that, "reading the passage cited on behalf of the defendants with what immediately follows it, and referring to the Circular Order (of the 22nd of July 1813), to which reference is made by their Lordships, we do not understand them to rule that the absolute right of the conditional purchaser has not accrued to him at the conclusion of the proceedings taken under the Regulation, or that it is not (if those proceedings were regular) to be referred back to that period. But we understand them to rule that a conditional purchaser, if out of possession, cannot obtain possession by summary application to the Judge, before whom the foreclosure proceedings were held; but that he must proceed by regular suit. And that, in like manner, if he is in possession at the termination of the foreclosure proceedings, and finds it necessary to vindicate his title, he must do so by a regular suit."

14. The learned Judges of the High Court at Agra quote the Circular Order of 22nd July 1813, and two other Circular Orders, of the 25th of May 1832 and of the 17th of June 1834, which are to the same effect. All these Circular Orders show that they were directed against a practice which had grown up, and to which they advert, for the mortgagee to make an application to the Judge on the expiry of the year of grace to be summarily put in possession of the property. The learned Judges of the Agra Court go on to say: "The Regulation expressly declares, that, on the expiry of one year from the date of the notification, "the mortgage will be finally foreclosed, and the conditional sale will become conclusive." And the Sudder Court, while it was fully competent to keep within due limits the exercise of their legitimate powers by Courts subordinate, was not competent to legislate and impose on conditional purchasers, as necessary to the perfection of their rights, a condition not prescribed by the Regulation. But in truth the Sudder Court did no more than it was competent to do. It ordered the subordinate Courts to abstain from the exercise of a jurisdiction which was not conferred on them by the Regulation, and it left conditional purchasers, who had obtained foreclosure, if they required the assistance of the Court to obtain the enjoyment of their rights, to proceed in due course by the institution of regular suits." And they quote a passage from Mr. Justice Macpherson's work on Mortgages, - "with that year (of grace) ends the mortgagor's whole interest in his property, unless he can prove that, previous to its lapse, he was entitled to have it declared that the mortgage had been redeemed; "-and they held that the rights of the mortgagee who had foreclosed, i.e., absolute rights, must, if established where they are contested, be referred back to the period at which the proceedings under the Regulation came to an end, and must be held to have become absolute at that date; and they accordingly, gave him mesne profits, to which, if he had remained a mortgagee, he would not have been entitled. Dr. Gurudas argues, that this is not the case, but this argument appears to be answered in the case of a mortgage by conditional sale by the following passage of the judgment of the learned Judges of the Agra Court, who say:- "indeed, were we to hold otherwise, i.e., that the plaintiff is not entitled to mesne profits," we should be doing injustice to the conditional purchaser, for from the termination of the foreclosure proceedings he can claim no interest upon the mortgage debt; and if the conditional vendor was not answerable for mesne profits for the period antecedent to the recovery by the purchaser of a decree for possession, it would in many cases, be to his interest to prolong to the utmost limit frivolous and vexatious litigation.

15. Mesne profits appear to have been given by this Court in a similar case-Mussamut Pandroo Koonwar v. Mohesh Chunder Mookerjee referred to in Jeora Khun Singh v. Hookum Singh (5 Agr H. C. R. 358).

16. The two cases of Deno Nath Gungooly v. Nursingh Proshad Dass (14 B. L. R. 87; s. C. 22W.R. 90 and Mankee Kooer v. Sheik Munnoo 14 B. L. R. 315; S.C. 22 W. R., 543 do not appear to me to have any bearing upon the present case. The question in these

cases arose under the Limitation Act of 1859, and the Court was asked to decide when the cause of action arose, and that depended upon the right to possession in the plaintiff, and the adverse possession of the defendant. In the first case, the defendants having purchased from the vendor under the conditional sale at an auction without notice of the mortgage, and having got into possession, and claiming as absolute owners, their possession was held to be adverse to the conditional purchaser: and having been so in possession for twelve years, during which period, the purchaser had a right to possession, he was barred by limitation, and could not, by taking proceedings to foreclose under the Regulation, obtain a fresh start; but that decision is not inconsistent with the proposition that the purchaser has a different title under the kotkotala to that which he acquires after the termination of the year of grace. Whatever his title may have been, whether as mortgage or as absolute owner, the defendant had held adversely to him for twelve years. It was held that the purchaser had a right to possession on default of payment in terms of the deed, which stipulated that, "if I don't repay the whole money within the period, then this conditional bill will be reckoned as a true and absolute bill of sale; my and my successor's rights will cease to the said zeraindari; the proprietary rights, with the rights of gift and sale to it, will accrue to you and your successors; and registering your names on the sherista of the Collectorate you will take possession of it in the mofussil, and on payment of revenue, you, your sons, grandsons, etc., will continue to have felicitous occupation and possession thereof." This was held to give the purchaser a right to possession, not as absolute owner, but as mortgagee accountable to the mortgagor for the profits which he received subject to redemption within the period specified by the law of limitation, unless he should in the meantime have taken proceedings for foreclosure.

17. In the other case the possession of the mortgagor asserting only a title as mortgagor consistent with the mortgage by conditional sale could not be considered as a holding adversely to the conditional purchaser so as to create a cause of action within the meaning and intention of the Limitation Act.

18. The question of adverse possession in these two cases was decided in conformity with two decisions of the Judicial Committee in *Pran Nath Boy Chowdry v. Rookea Begum* (7 Moore's I. A. 323) and *Ariundo Moyee Dosse v. Dhonendro Chunder Mookerjee* 14 Moore's I. A. 101; S.C. 8 B. L. R. 122.

19. In the present case it is not contended that the possession of the vendor prior to the termination of the foreclosure was adverse to the purchaser.

20. It is not necessary to consider the question whether the article (135) had the effect of obliging the mortgagee to sue for or to take proceedings within a particular period to foreclose his mortgage, nor to do more than, to say that, agreeing with the view taken by the High Court at Agra and by Mr. Justice Pontifex, I am of opinion, that the present suit is not barred by limitation, and that the appellant is entitled to succeed.

McDonell, J.

21. This case is on all fours with the case decided on 6th May last by Mr. Justice Pontifex and by me [No. 126 of 1879 (ante, p. 566, note)], and for the reasons given in that judgement I hold that the present suit is not barred by limitation, and that the appellant is entitled to succeed. The case must be remanded to the Subordinate Judge for a trial on the merits. Costs to follow the result.