

## APPELLATE CIVIL.

—†—  
Before Jack and Mitter JJ.

HARASIT GOLDAR

v.

JALADHAR BISWAS.\*

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*Possession—Possession by mortgagee, whether becomes adverse after the mortgage debt is paid off—Symbolical possession by purchaser, whether equivalent to actual possession as against such mortgagee—Indian Limitation Act (IX of 1908), Sch I, Art. 137.*

The possession of a mortgagee, after the mortgage debt is paid off, does not become adverse so long as the right of the mortgagor to redeem is not barred and unless a title hostile to the mortgagor is set up by the mortgagee. The possession by mortgagee of mortgaged property is not *prima facie* adverse to the mortgagor. The mere payment of the mortgage money without more does not amount to adverse possession by the mortgagee after the date of payment.

Where symbolical possession is delivered of immovable property to the person entitled to possession and such person brings a suit for actual possession, the symbolical possession is deemed equivalent to actual possession as against the mortgagee of the judgment-debtor, whose mortgage debt had been paid off, and the suit is brought in time if it is brought within twelve years from the date of the symbolical possession.

*Juggobundhu Mukerjee v. Ram Chunder Bysack* (1)\* and *Jogobundhu Mitter v. Purnanund Gossami* (2) explained.

SECOND APPEAL by the defendants, Harasit Goldar and others.

The appeal arose out of a suit for recovery of *khâs* possession on the basis of an auction purchase on declaration of plaintiffs' title to one half of a plot of land alleged to be 24 *bighas* in area. The plaint was filed on the 25th May, 1921, and returned by the Additional Munsif on the 30th November, 1922, as the valuation of the suit was beyond his pecuniary jurisdiction. The plaint was filed again after amendment on 17th January, 1924, and the suit was contested by defendants Nos. 1 and 2 alone, although defendant No. 6 also appeared and filed a written statement.

\*Appeal from Appellate Decree, No. 26 of 1927, against the decree of Jadu Nath Majumdar, Additional Subordinate Judge of Khulna, dated July 13, 1926, modifying the decree of Nripendra Nath Guha, Munsif of Khulna, dated Nov. 26, 1924.

(1) (1880) I. L. R. 5 Calc. 584. (2) (1889) I. L. R. 16 Calc. 530.

The Munsif decreed the suit for one half of 24 *bighas* against defendants Nos. 1 to 14, except defendant No. 6, with whom joint possession was to be taken by the plaintiffs. The defendants Nos. 1, 2, 12, 13 and 14 preferred an appeal against the decree and contended that the suit ought to have been dismissed on the ground of limitation, and that defendants Nos. 12 to 14, who held a mortgage of some of the suit lands ought to have been given an opportunity to redeem. The facts on which the defendants relied were as follows:—

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Ratikanta Goldar and Budhai Goldar jointly held the *jama* which formed the suit lands. These lands were the subject of three mortgagees—(1) by Ratikanta Goldar, father of defendants Nos. 1 to 5 and Shambhu, father of defendants Nos. 7 to 11, for the benefit of Budhai Goldar, defendant No. 6, who was then a minor, dated 5th Baisakh, 1300, in favour of Shama Charan Biswas, father of plaintiffs Nos. 1 and 2; (2) by Ratikanta and Budhai, dated 15th Asarh, 1304, in favour of plaintiff No. 1; and (3) by Ratikanta and Budhai in 1313 in favour of defendants Nos. 12 to 14 in respect of some of the suit lands of which they were put in possession. This mortgage was created during the pendency of a suit, brought by the plaintiff's father, to enforce the mortgage of 1300, which was decreed against Ratikanta and defendants Nos. 7 to 11, and the properties described as a *jama* of 16 *bighas* were sold and purchased by plaintiffs as heirs of Shama Charan Biswas. In the meantime, the last mortgage was paid off, but defendants Nos. 12 to 14, the mortgagees, continued in possession. Plaintiffs alleged that they took delivery of possession on 19th July, 1910, by executing the sale certificate.

The lower appellate court held that, so far as the judgment-debtors in the original mortgage suit were concerned, plaintiffs got a fresh start from the date of delivery of possession, and the plaintiffs were entitled to exclude the period from 25th May, 1921, to 30th November, 1922, from the period of 12 years from 19th

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July, 1910, and so the plaint, as instituted again on the 17th January, 1924, was filed within time. The judgment of the Munsif was, therefore, confirmed, but as the evidence showed that only one half of 16 *bighas* was purchased, the lower appellate court modified the Munsif's decree from one half of 24 *bighas* to one for a half of 16 *bighas* to be jointly possessed with defendant 6, and dismissed the appeal with half costs in both the courts.

The defendants, thereupon, appealed to the High Court.

*Mr. Amarendranath Basu, Mr. Arunchandra Basu and Mr. Binoyendranath Ghosh*, for the appellants.

*Dr. Jadunath Kanjilal and Mr. Nagendrakumar Datta*, for respondents.

MITTER J. The relevant facts necessary for deciding the question of limitation, which falls for determination in this appeal, may be briefly stated thus:—Ratikanta (the predecessor-in-interest of defendants 1 to 5) and Shambhu (the predecessor-in-interest of defendants 7 to 11) mortgaged the disputed lands to the father of plaintiffs Nos. 1 and 2 in the year 1300 B.S. Ratikanta and Budhai executed another mortgage in favour of the plaintiff No. 1 in the year 1304 B.S. Plaintiff's father brought a suit on the first mortgage on the 12th April, 1906, obtained a decree on the 24th June, 1907, and purchased the mortgaged property on the 18th July, 1907, in execution of the decree. The sale was confirmed on the 7th October, 1909, and there was formal delivery of possession on the 19th July, 1910. During the pendency of the suit on the mortgage, Ratikanta and Budhai executed a mortgage in favour of defendants Nos. 12 to 14, and the mortgagees defendants Nos. 12 to 14 entered into possession. This mortgage of 1313 was fully paid off. The plaint, as originally filed, was amended, and the plaintiff prayed for recovery of joint possession of the half share of 24 *bighas* of land with Budhai, defendant No. 6.

This suit was filed on the 25th May, 1921. The Munsif, who tried the suit in the first instance, held, on the 24th November, 1922, that the valuation of the suit was beyond the pecuniary jurisdiction of the court and returned the plaint for presentation to the proper court. The plaint was refiled on the 17th January, 1924. The lower appellate court has given a partial decree to the plaintiffs and has directed that plaintiffs are to recover joint possession with defendant No. 6 of one half of 16 *bighas*.

In appeal to this court by defendants Nos. 1, 2, 12, 13 and 14, it is contended that there has not been a proper trial of the question of limitation, as the possession of defendants Nos. 12 to 14, on the basis of mortgage of 1313, became adverse to Ratikanta, the mortgagee, from the date the said mortgage was paid off, and if it is found that the payment was made more than twelve years prior to the institution of the suit, under Article 137 of the first schedule to the Limitation Act, the suit would be barred by limitation, and it is argued, for the appellant, that the case should be sent back for a proper trial of the question of limitation.

It is conceded by the appellant that, for the purpose of determining the question of limitation, the 25th May, 1921, the date on which the plaint was originally filed, might be taken to be the date of the institution of the suit and if the payment of the mortgage of 1313 (1906) was made beyond twelve years of this date, the suit is barred.

It is true the judgment-debtor, under the decree in mortgage suit instituted on the 12th April, 1906, was not in actual possession at the date of the sale, but the mortgagee of the judgment-debtor was in possession. It is said that, against such mortgagee, symbolical possession of 19th July, 1910, is not equivalent to actual possession, for the mortgagee would hold adversely to the mortgagor, Ratikanta, after the payment of the mortgage debt. It is said that symbolical possession cannot operate as actual possession against persons not parties to the suit in which the decree, which resulted

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in the sale, was made and reliance is placed on the two Full Bench decisions of this Court in *Juggobundhu Mukerjee v. Ram Chunder Bysack* (1) and *Joggobundhu Mitter v. Purnanund Gossami* (2). In the last case, the defendants were the judgment-debtors and the *ijaradar* under him. The suit was held not barred, as it was brought within 12 years from the date of symbolical possession.

In our opinion, the true rule deducible from the authorities is that, where, in execution of a decree, symbolical possession is delivered of immovable property to the person entitled to possession thereof, and such person brings a suit for recovery of actual possession, the symbolical possession is deemed equivalent to actual possession as against the judgment-debtor or his representatives, and the suit is brought in time, if it is brought within twelve years from the date of the said symbolical possession. The mortgage, in favour of defendants Nos. 12 to 14, having been executed during the pendency of the suit on the mortgage of 1300, they are bound by the decree, in execution of which symbolical possession was delivered. They are affected by the doctrine of *lis pendens* and symbolical possession as against them would be equivalent to actual possession, and, in this respect, their position is not different from that of the judgment-debtor of the mortgage decree in the suit of 1906. Further, in the present case, the defendants Nos. 12 to 14 do not claim to be in possession of the disputed property adversely to the judgment-debtor, for they entered into possession, on the foot of mortgage by the judgment-debtor. For the possession by mortgagee of mortgaged property is not *prima facie* adverse to the mortgagor. It is not said, in this case, that the defendants Nos. 12 to 14 set up a hostile title to their mortgagor, Ratikanta, but it is argued that if the mortgage debt was paid off in respect of the mortgage in favour of defendants Nos. 12 to 14, the possession of the latter became adverse to the mortgagor, Ratikanta, from that date. We are unable to accept this contention; for the mere payment

(1) (1880) I. L. R. 5 Calc. 584.

(2) (1899) I. L. R. 16 Calc. 530.

of the mortgage money without more does not amount to adverse possession by the mortgagee, after the date of payment. Under Article 148 of the first schedule to the Limitation Act, the mortgagor gets 60 years from the due date of the mortgage during which to redeem the mortgaged property and admittedly this time has not yet expired.

In this view, we think the judgment of the lower appellate court is right and must be affirmed with costs.

JACK J. I agree.

*Appeal dismissed.*

A. A.

## APPELLATE CIVIL.

*Before Jack and Mitter JJ.*

SHYAMACHARAN CHATTOPADHYAYA

*v.*

SRICHARAN CHATTOPADHYAYA.\*

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*Hindu law, Bengal School—Adoption—Person in whom property has once vested by inheritance, whether becomes divested of it by subsequent adoption—Land Registration Act (Beng. VII of 1876), s. 78—Bengal Tenancy Act (VIII of 1885), s. 60, whether applies, when defendant claims a portion of the rent himself.*

Under the Bengal School of Hindu law, an heir, who has inherited any property from the family of his birth, is not subsequently divested of it on his being adopted by another person.

*Behari Lal Laha v. Kailash Chunder Laha* (1) and *Sri Rajah Venkata Narasimha Appa Row v. Sri Rajah Rangayya Appa Row* (2) followed.

*Dattatraya Sakharan Derli v. Gorind Sambhaji Kulkarni* (3) and *Raghuraj Chandra v. Subhadra Kunwar* (4) distinguished.

*Moniram Kolita v. Keri Kolutani* (5), *Mahableshwar Narayan Bhat Devte v. Subramanya Shirram Joshi* (6) and *Manikbai v. Gokuldas Ramdas Karadgi* (7) referred to.

Section 78 of the Land Registration Act (Beng. VII of 1876) and section 60 of the Bengal Tenancy Act (VIII of 1885) do not apply to

\*Appeal from Appellate Decree, No. 234 of 1927, against the decree of Kumud Kanta Sen, Subordinate Judge of Backerganj, dated Aug. 10, 1926, affirming the decree of Basanta Behari Mukerjee, Munsif of Barisal, dated June 30, 1925.

(1) (1896) 1 C. W. N. 121.

(5) (1880) I. L. R. 5 Cal. 776;

(2) (1905) I. L. R. 29 Mad. 437.

L. R. 7 I. A. 115.

(3) (1916) I. L. R. 40 Bom. 429.

(6) (1922) I. L. R. 47 Bom. 542.

(4) (1928) L. R. 55 I. A. 139.

(7) (1924) I. L. R. 49 Bom. 520.

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