father none ran against plaintiff: and as has been pointed out above, his right to follow the property is not barred, since the suit is brought within twelve years of the accrual of the right.

The appeal must therefore be allowed and the plaintiff be declared entitled to the sole right of management and the possession of the properties attached to the kattalai must be delivered to him.

The first defendant must pay plaintiff's costs in this appeal.

PRIVY COUNCIL.

SRI RAJA PAPAMMA RAO (DEFENDANT), APPELLANT,

v.

SRI VIRA PRATAPA H. V. RAMACHANDRA RAZU AND ANOTHER (PLAINTIFFS), RESPONDENTS.

P.C.* 1896. February 12, 22.

[On appeal from the High Court at Madras.]

Simple mortgage—Remedy of mortgagee upon default made—Act IV of 1882, *section* 58*—Construction of decree.*

On default made in payment on a simple mortgage, a Court, instead of decreeing the proper relief, had made a decree (which, however, had afterwards become final, and had been executed) for possession by the mortgagee after a period of grace. That decree would rightly have been for a judicial sale (Transfer of Property Act, 1882, section 58).

In this suit, brought by the mortgagor for an account to be rendered by the mortgagee, and for re-delivery of possession, alleging that the account would show payment of the debt already made out of the rents and profits:

Held, that the decree for possession did not amount to a decree for foreclosure or preclude redemption, the possession of the decree-holder having only been as mortgagee, and having involved liability to account to the mortgagor.

APPEAL from a decree (21st February 1893) of the High Court, reversing a decree (5th September 1891) of the Subordinate Judge at Ellore.

This appeal arose out of a suit filed on the 10th March 1891 by the representatives of mortgagors against the representatives of the mortgagee, claiming re-delivery by them of possession of a

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* Present: Lords WATSON, HOBHOUSE, SHAND and DAVEY and Sir R. COUCH.

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talukhdari village, the mortgaged property, on an account being taken of the rents and profits realized by the mortgagees, from the year 1880.

No facts were in dispute, and the only question was as to the effect to be given to a decree of the District Court of Gódávari of the 16th July 1876, under which the mortgagees had taken possession; and as to whether that decree had effect to deprive the mortgagors of their title to redeem.

The mortgage was executed on the 15th June 1870 by the father and elder brother of the plaintiff in this suit to the ancestor of the first and second defendants, of whom one now appealed.

The mortgagors undertook in the deed, which was specially registered, to repay a sum of Rs. 2,011 with interest by four annual instalments, mortgaging, as security, the talukhdari village of Khandrika Sitaranavaram, their ancestral estate.

The condition of the mortgage was this:—

"If the debt is not discharged according to the instalments, "you should recover the same by means of the mortgaged pro- "perty, the crops of our cultivation, and our other property and "from our person according to your wish."

The mortgagee sued the mortgagors upon this bond in 1876, and prayed for a decree directing the defendants to pay the amount then due with subsequent interest, "by means of the "undermentioned property and other property." The District Judge of Gódávari decreed on the 16th September 1876 in favour of the plaintiff, stating in his judgment: "In accordance with "the custom prevailing in the Courts in this Presidency three "months' time will be allowed to the defendants within which to "pay up the whole sum now decreed, principal and interest and "costs; failing which, the plaintiff shall be put in possession of "the immoveable and moveable property specified in the bond "sued upon, and in the plaint and schedule, as provided in the "terms of the bond." The decree followed in the same words.

On the 26th August 1879 notice was given to the mortgagors to show cause why this decree should not be executed. On the 16th September following, stay of execution was applied for, on the ground that the decree was neither according to the terms of the mortgage deed, nor was according to what had been asked; and that the mortgagors were about to apply for a review. This

application, founded on the Judges having wrongly treated the mortgage as one of conditional sale, was rejected on the 10th November 1879 as being out of time; and in 1880 the mortgagees obtained possession. In 1883 the village was sold to a person who again sold it to the present appellant in 1884.

On the 10th March 1891 the representatives of the mortgagors brought this suit for an account alleging that the whole mortgage debt had been discharged by the rents and profits received by the mortgagees down to 1885; and that they were entitled to restitution of the property. The defendants representing the mortgagee by their written statement insisted that the village had become absolutely their property in virtue of the decree of 1876, behind which no Court could go.

On the 5th September 1891 the Subordinate Judge at Ellore dismissed the suit.

In his judgment he said:—

"I understand from the provision of three months' grace allowed "in the decree for discharging the debt the District Judge of "Gódávari meant that the mortgage would be foreclosed on the "default made, and that afterwards the land could be delivered to "the decree-holders unconditionally as was subsequently done."

On the plaintiff's appeal the High Court, (MUTTUSAMI AYYAR and HANDLEY, JJ.) on the 21st February 1893, reversed this decree of dismissal, remanding the suit for decision on the merits. The reason assigned for this result was that the true construction of the decree of 1876 was that the District Judge of Gódávari intended to put the mortgagee into possession, only that he should recoup himself the mortgage debt and interest out of the usufruct of the mortgaged property as provided for in the deed, and remain in possession until the debt and interest should have been thereby liquidated; and not that he should retain possession as if on foreclosure.

On an appeal preferred by the representative of the original mortgagee Mr. *J. D. Mayne* appeared for the appellant.

The respondent did not appear.

The argument for the appellant, in brief, was that the decree of 1876 had not received due effect. The effect intended, although that was not the right decree upon a simple mortgage on which default had been made, was that the mortgage after the three months of grace had expired should, on the further default, be

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foreclosed. Further default occurred; and that the decree in itself was wrong was no ground at the present day for its not receiving effect. The mortgagors, who might have had the decree reversed or amended by taking proceedings in due time, had, after the expiration of the three months' grace, lost all title to the land mortgaged, of which by the necessary effect of the decree of 1876 the lawful possession had passed to the mortgagee. The respondents should have sought their remedy, if they had any, by petition when the execution proceedings were pending in the suit decreed in 1876. No separate suit would lie for the construction, and virtually for the setting aside, of that former decree.

Their Lordships' judgment was, on the 22nd February 1896, delivered by Lord Hobhouse:—

JUDGMENT.—The plaintiffs in this suit, who are respondents in the appeal, represent the mortgagors of the property in dispute; and the defendants, who are appellants, represent the mortgagees. The present question is, what was the effect of a decree of the District Judge which was passed on 16th September 1876, and which directed that the mortgagees should be put into possession of the property.

The mortgage was effected by deed dated 15th July 1870 for securing Rs. 2,011 and interest. The debt was to be paid by four instalments. On failure to pay "you should recover the same by "means of the mortgaged property, the crops of our cultivation, "and our other property, and from our person." Though it is not here expressed that the mortgagee's remedy is to be by sale under decree, the mortgage falls within the class of 'simple mortgages,' as classified in Sir A. Macpherson's work on Mortgages, page 12, and in the Transfer of Property Act, 1882. In such a mortgage there is no transfer of ownership, and the mortgagee must enforce his charge by judicial sale.

In the year 1876 the mortgagee, being unpaid, filed a plaint, and prayed for a decree directing the mortgagors to pay debt and costs and interest until realization of the money by means of the mortgaged property and other property. That is precisely the relief to which a simple mortgagee is entitled, whether before the Act of 1882 or since.

The difficulty has arisen from the decree which the Court thought fit to make on this plaint. After affirming the mortgagee's right to a decree for the money, the District Judge said

that: "In accordance with the custom prevailing in the Courts "in this Presidency, three months' time will be allowed to the "defendants within which to pay up the whole sum now decreed, "principal and interest and costs, failing which the plaintiff shall "be put in possession of the immoveable and moveable property "specified in the bond sued upon and in the plaint and schedule as "provided in the terms of the bond." And he made a decree "accordingly.

That decree was not according to law. In default of payment, a simple mortgage gives to the mortgagee a right, not to possession but to sale, which he must work out in execution proceedings. In referring to a Madras custom, the District Judge probably meant only a practice of the Courts to give three months for payment. If he meant a custom to give possession on a simple mortgage as the High Court think he did, there is no such custom. And Mr. Mayne frankly admitted that the mortgagee was not entitled to the relief given; and that there is no ground for thinking that the decree was agreed on in Court, or consented to by the mortgagor.

The mortgagor however did not appeal and did not seek relief by way of review until it was too late. The decree therefore stands and is binding on the parties; and the mortgagee took possession under it. He has since sold the property, but that does not affect the rights of the mortgagor. The question is in what character was the possession taken. If in the character of a mortgagee, the mortgagor had a right to redeem, which was not barred by time when this suit began.

Mr. Mayne contends that the decree was intended as a foreclosure, and is so in effect. The only other kind of possession which can be suggested is usufructuary possession, lasting until the debt is discharged by the profits of the estate; and Mr. Mayne urges that there is nothing in the judgment to suggest such a possession, and that "the terms of the bond" do not warrant possession of any kind. All that is true; but it does not compel the inference that the decree amounts to a foreclosure. There is nothing in the judgment to suggest a foreclosure any more than usufructuary possession; nothing indeed to throw light on the terms of the decree. All we know is that possession was given, and given under some error.

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If it were necessary to speculate nicely on the meaning of the Judge, their Lordships would be disposed to agree with the High Court, who consider that when the Judge used the expression "as provided in the terms of the bond" he was thinking that the right given by the mortgage to recover by means of the mortgaged property and the crops meant a right to enter and take the profits. That is certainly more in accordance with "the terms of the bond" than is a foreclosure; which is not a recovery of the debt by means of the property, but a substitution of the property for the debt. If indeed the matter were new, it might reasonably be argued that the terms of a simple mortgage justify usufructuary possession; but long practice, now embodied in a statute, has settled that the remedy of the mortgagee is a judicial sale.

It is however hardly necessary to follow the High Court into this speculation. It is sufficient that the mortgagee, not being entitled to foreclosure, and not asking for it, got a decree which did not purport to work foreclosure. It purported to give possession "as provided in the terms of the bond." That was impossible, for there were no such terms; but it purported to do that, and did not purport to put an end to the bond and to the relations of mortgagor and mortgagee altogether. It could, though subject to correction on appeal, give possession, and did so. The mortgagee thereupon, became mortgagee in possession; and as such he must submit to be redeemed.

Their Lordships will humbly advise Her Majesty to dismiss this appeal.

Appeal dismissed.

Solicitors for the appellants—*Messrs. Burton, Yeates & Hart.*