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necessary to add to the section the words, "provided the guardian appointed does not die or cease to hold office till the minor attains the age of twenty-one." It seems to us that a guardian of the petitioner under Act XL of 1858 having been once appointed, he must by Act IX of 1875 continue to be a minor until he reaches the age of twenty-one, whether the original guardian continues to be his guardian or not. The order of the District Judge therefore disallowing the application appears to us to be correct in law.

It has also been objected that the District Judge has appointed another person provisionally to be guardian and manager for a period of two months. It is contended that there is no provision in Act IX of 1875 for such appointment. But inasmuch as the petitioner before us is a minor, no application from him can be heard unless he is properly represented.

The appeal is dismissed with costs to be recovered from the estate.

K. M. C. *Appeal dismissed.*

Before Mr. Justice Pigot and Mr. Justice O'Kinealy.

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SHURNOMOYEE DASI AND OTHERS (DEFENDANTS) *v.* SRINATH DAS (PLAINTIFF) AND OTHERS (DEFENDANTS.)*

Limitation—Mortgagor and Mortgagee—English form of mortgage—Conditional sale—Purchaser from mortgagor—Adverse possession—Regulation XVII of 1806, *s.* 8—*Transfer of Property Act, s.* 86—*Limitation Act, XV of* 1877, *Sch. II, ols.* 135, 147.

A mortgage in the English form, between Hindus, of lands in the mofussil, outside Calcutta, has always been treated by the Courts as a mortgage by conditional sale.

Under Act XIV of 1859, a mortgagee was ordinarily bound to bring his suit within 12 years from the date of default, and was barred thereafter, unless it could be shown (or might properly be inferred) that the mortgagor or the person in possession held by permission of the mortgagee after the date of default.

On the 17th of November 1865, certain property situate in the district of the 24-Pergunnahs was mortgaged by the owner thereof to secure the repayment

* Appeal from Original Decree No. 218 of 1883, against the decree of Baboo Baloram Mullick, Rai Bahadur, Second Subordinate Judge of 24-Pergunnahs, dated 7th June 1883.

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of Rs. 15,785 with interest at 18 per cent. on the 17th of February 1866. The mortgagor and mortgagee were Hindus, and the mortgage was in the ordinary form of an English mortgage of real property. After the date of the mortgage, and before the 15th of February 1872, the mortgagor sold various portions of the mortgaged property. On the 15th of February 1872 the mortgagee filed a foreclosure petition in the Court of the Judge of the district of the 24-Pergunnahs under Reg. XVII of 1806. Notice of the petition was served on the mortgagor alone. Neither principal nor interest was paid by the mortgagor, and on the 6th of September 1882, the assignee of the mortgagee filed a suit for foreclosure against the mortgagor, and the purchasers of the various portions of the property, under the provisions of the Transfer of Property Act, praying for foreclosure and sale.

Held, that as against the purchasers from the mortgagor the suit was barred by limitation under cl. 135, Sch. II of Act XV of 1877.

THIS was a suit for foreclosure of a mortgage of certain property situated in the district of the 24-Pergunnahs. The plaint stated that on and before the 17th of November 1865, the property in question was and had been the absolute property of Hurrynarain Dey, the defendant No. 1, and that on the same 17th of November, Hurrynarain, by an indenture in the ordinary English form, mortgaged the property to one Shama Sundari Debi, to secure the repayment of Rs. 15,705 with interest thereon at the rate of 18 per cent. per annum on the 17th of February 1866. Neither principal nor interest was paid on the 17th of February 1866.

On the 15th of February 1872, Shama Sundari Debi filed a petition for foreclosure under Regulation XVII of 1806 in the Court of the Judge of the district of the 24-Pergunnahs, notice of which was duly served on the mortgagor, Hurrynarain Dey.

The 4th and 5th paragraphs of the plaint were as follows:—

"4. After the date of the said mortgage, and previous to the date of the said application for foreclosure, and also subsequently, the defendants from Nos. 2 to 29 setting up their title by purchase and otherwise from the defendant No. 1, in the several plots of the mortgaged property have been holding possession of the same. The said persons ought to have been made parties to the aforesaid proceedings, but Shama Sundari Debi, the mortgagee, did not do so.

"5. On the 10th of May 1879, the plaintiff purchased from

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the mortgagee by a registered *kobala*, whatever right and interest she had in the said mortgage deed, dated the 17th November 1865, and in the properties covered by the same."

The defendants Nos. 2 to 29 claimed to be *bonâ fide* purchasers for value from Hurrynarain Dey. The latter did not defend the suit. The other facts are not material to this report, which is confined to the question of limitation decided by the High Court. The plaint was filed on the 6th of September 1882.

The Court of first instance gave the plaintiff a decree for foreclosure in accordance with the provisions of s. 86 of the Transfer of Property Act, Act IV of 1882. Some of the defendants appealed to the High Court, making the plaintiff and the other defendants respondents.

Baboo *Kali Prasanna Dutt*, and Baboo *Nil Madhub Bose*, for the appellants.

Baboo *Gurudas Banerji*, Baboo *Sharoda Churn Mitter* and Baboo *Jogendro Nath Bose*, for the plaintiff respondent.

Baboo *Romesh Chandra Bose*, and Baboo *Gopal Chandra Ghosal*, for some of the defendants respondents.

The judgment of the Court (PIGOT and O'KINEALY, JJ.) was delivered by

PIGOT, J.—[The first portion of the judgment is not material for the purposes of this report.]

The principal ground discussed before us, and upon which we have also come to the conclusion that this appeal must be allowed, is upon the question of limitation.

The parties to the mortgage of the 17th November 1865 were Hindus. The mortgage was a mortgage in English form, giving a power of sale and entry, and the due date was 17th February 1866.

So far as the form of the mortgage is concerned, it is clear that a mortgage in English form between Hindus of lands in the mofussil, outside Calcutta, is always treated by the Courts as a mortgage by conditional sale.

In the case of *Khelat Chunder Ghose* v. *Tara Charan Coondoo Chowdhry* (1), Sir Barnes Peacock said in regard to the

(1) 6 W. R., 270.

rights of the parties under a deed of this kind: "The mortgagee was entitled to possession before foreclosure immediately default was made, and he would hold possession subject to his own right to foreclose and the mortgagor's right to redeem. His right to sue for possession did not depend upon his obtaining a decree for foreclosure. The defendant might have been sued for possession immediately default was made."

And in the suit of *Srimati Sarashibala Dabi* v. *Nand Lal Sen* (1) it was decided that no suit would lie by the mortgagee as purchaser after breach of the condition, for possession of property on a mortgage in the English form, unless foreclosure proceedings had been taken under Regulation XVII of 1806.

This case shows that under an English deed of mortgage, the mortgagee had no better right than he would have under an ordinary mortgage by conditional sale, except that a mortgagee with a power of entry on default could sue for possession of property without foreclosure.

Now the next point we come to is, what were the rights of a mortgagee in Bengal, holding a mortgage by conditional sale? This has been the subject of discussion before their Lordships of the Judicial Committee in the case of *Thumbusammy Moodelly* v. *Hossain Rowthen* (2). In that case their Lordships decided that before the passing of Regulation XVII of 1806, one of the essential characteristics of a mortgage by conditional sale was that on the breach of the condition of repayment, 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. They also held that this was the law in force in Bengal, until Regulation XVII of 1806 made provisions for redemption and foreclosure by the procedure in that Regulation. The effect of that enactment was this, that it put a stop to the mortgage contract executing itself until the year of grace prescribed by s. 7 of that Regulation had passed. But after the year had passed, the contract, as before, executed itself, and the mortgagee was entitled to have possession given him.

There is a wide distinction between the rights existing under

(1) 5 B. L. R., 389. (2) I. L. R., 1 Mad., 1.

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a mortgage by conditional sale in the mofussil under the Regulations and those enforced by suit on the Origiual Side of the High Court in Calcutta. In the Supreme Court, a mortgagee might bring a suit for foreclosure, but no such suit was known outside Calcutta. There the foreclosure proceedings took place before the Judge as a ministerial officer, and at the end of the year of grace the mortgagee sued, not for foreclosure but for possession of the property as owner. This Regulation XVII of 1806 was repealed by the Transfer of Property Act, which came into force in 1882; and the only conclusion which can be arrived at is that up to the passing of the Transfer of Property Act at least, no present holder of an English mortgage in the mofussil could suo for foreclosure properly so called: but must foreclose in the manner prescribed by Regulation XVII of 1806. In the case of *Khelat Chunder Ghose* v. *Tara Charan Coondoo Chowdry* (1) to which we have already referred, it was held by this Court that under an English deed of mortgage a suit to recover possession of land under the mortgage deed was barred, unless brought within twelve years from the date of default. That case was taken on appeal before the Privy Council, and the decision was confirmed. But their Lordships seem to think that the judgment of this Court had laid down a wider rule than was absolutely necessary, and were inclined to hold that if the mortgagor was allowed to hold by permission of the mortgagee after default, a suit might be brought more than twelve years from that date. They said (2): "No such question, however, arises in the present case, for it is impossible to hold that the defendant, the purchaser, was holding, or supposed that he was holding, by the 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 limitation." This was followed in the case of *Dinonath Ganguli* v. *Nursing Prosad Dass* (3), and there it was decided that a mortgagee's cause of action arose when default was made

(1) 6 W. R., 270. (2) 14 Moore's I. A., 150.

(3) 14 B. L. R., 87.

in payment of the mortgage debt, and that no new cause of action arose by reason of the foreclosure proceedings after the expiry of the year of grace, and that such a suit was barred as against an auction-purchaser within twelve years from the due date.

The other branch of this case may be illustrated by the case of *Mankee Koer* v. *Sheikh Munnoo* (1). In that case it was decided that where the mortgagor was shown to have paid interest after the date of default, it was held that his possession being thus shown to have been permissive, might be sued more than twelve years after the date of default.

From these decisions it would appear that under Act XIV of 1859, a mortgagee was ordinarily bound to bring his suit within twelve years from the date of default, and was barred unless it could be *shown* (or might properly be inferred) that the mortgagor or the person in possession held by permission of the mortgagee after the date of default.

In Act IX of 1871, Art. 135, it was declared that a suit instituted by a mortgagee for possession of immoveable property mortgaged must be brought within twelve years from the time when the mortgagee was first entitled to possession. And in the case of *Lal Mohun Gangopadhya* v. *Prossunno Chunder Bannerjee* (2), it was decided that whether the possession of the mortgagor was permissive or adverse, was immaterial, and that the mortgagee having failed to bring his suit within twelve years from the date of default lost his remedy.

This seems to have been the received opinion, with one exception, namely, the exception referred to in *Ghinaram Dobey* v. *Ram Monaruth Ram Dobey* (3) and in *Burmamoyee Dasi* v. *Dinobundhoo Ghose* (4), in which it was held that if the mortgagee could complete the foreclosure proceedings in a District Court within twelve years from the date of default, he thus became absolute owner of the property, and the foreclosure proceedings gave him a new period of limitation.

A distinction between the decision in this case and the other

(1) 14 B. L. R., 315.
(2) 24 W. R., 433.
(3) 7 C. L. R., 580.
(4) I. L. R., 6 Calc., 564 : 7 C. L. R., 583.

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cases already referred has been pointed out in *Modun Mohun Chowdry* v. *Ashad Ally Bepari* (1).

After the repeal of Act IX of 1871 the present law, Act XV of 1877, was enacted. In it a new clause is inserted, namely, clause 147, by which a suit by a mortgagee for foreclosure or sale, can be brought within sixty years from the time when the money secured by the mortgage becomes due. But as we have already said, no suit for foreclosure could ever be brought in the mofussil. This was prohibited by the nature of the agreement and by the terms, to which we shall refer later on, of Regulation XVII of 1806. Under the contract a mortgagee was originally the absolute owner from the date of default. But by Regulation XVII of 1806 it was a condition precedent to his becoming an absolute owner, that foreclosure proceedings should be taken in the District Judge's Office.

When this has been done, a mortgagee having become absolute owner by virtue of the contract sues, not for foreclosure, but for possession as owner of the property. It appears, therefore, impossible to hold that cl. 147 of the Limitation Act would apply to any mortgage by conditional sale executed between Hindus, and in respect of properties situated in the mofussil. If that be so, the law of limitation for a conditional sale would be that given in cl. 135, corresponding to cl. 132 of Act IX of 1871, namely, twelve years from the time when the mortgagor's right to possession determines. In this case, the mortgagor's right to possession determined on the date of default, namely, February 1866, and the suit for possession would be barred on the 17th February 1878. Does it make any difference under Act IX of 1871 what the possession was? The suit is barred against the mortgagor himself or any body else. See *Lal Mohun Gangopadhya* v. *Prosunno Chunder Banerjee* (2), and *Modun Mohun Chowdry* v. *Ashad Ally Bepari* (1).

As regards the defendant Shurnomoyee Dasi, her purchase from the mortgagor must have been before the 12th September 1866, because on that day she received a pottah from the Collector of 24-Pergunnahs as owner of the property in dispute. So that as against her the suit is barred on that separate ground.

(1) I. L. R., 10 Calc., 68 : 13 C. L. R., 53. (2) 24 W. R., 433.

We think it well to refer to one argument, which led the Subordinate Judge to hold that, after the passing of the Civil Procedure Code, *suits for* foreclosure would lie in the mofussil of this Presidency, as distinguished from Regulation foreclosure proceedings, which of course, are not, as above observed, suits in any sense of the word.

He held that s. 16 of the Civil Procedure Code must be taken to have that effect. It is no doubt not applicable to the Chartered High Courts, and cannot be explained by reference to their procedure.

We think that section had not the effect of creating, for the mofussil of Bengal, a new form of suit, wholly inconsistent with the express provisions of the Regulation of 1806, which in their terms, in s. 8, expressly exclude any other mode of relief than that provided by them. The Regulation was not repealed by the Code, expressly, and we cannot hold that from the terms of s. 16 of the Civil Procedure Code (and only because that section does not apply to the High Court) it was by implication affected. That clause may well be explained upon the supposition that it was intended to apply in other parts of India, where no such law as that of the Regulation of 1806 existed. No doubt the real origin of it, in the form it now bears, was that, when it was framed, it was intended that the Transfer of Property Act should be passed during the same session as the new Code—an intention which was not, however, carried out.

We are happy to think that in this case the statute of limitation operates without harshness, and for the benevolent end for which it is framed. It is certain that several of the defendants, and probably that all of them, are, or represent, *bonâ fide* purchasers. It is to save the long possession of such persons that the statute is in part intended; and so far as we can judge from this singular record, no hardship is done in the case.

The ground of limitation is one common to all the defendants except No. 1, and under s. 544, the decree of the Subordinate Judge, which ought to have been in favour of all those defendants, is, as to all of them, save No. 1, reversed.

Appeal allowed; suit dismissed with costs throughout.

P. O'K. *Appeal allowed.*