

But we must admit the validity of the plea that the contract of mortgage is void under the provisions of s. 25 of the Contract Act. We do not quite understand the Judge's argument as to the benefit which the appellant derived from the banking transaction. It does not appear that he had received any portion of the hundis when discounted; but, assuming that he had done so, and admitting that under the circumstances he was liable on the hundis, neither the antecedent benefit, nor the existing liability, nor the anticipated advantage to which the Judge alludes, would constitute a consideration as defined in the Contract Act. To constitute a consideration as defined in that Act there must be an act, abstinence, or promise on the part of the promisee or some other person at the desire of the promisor. On the facts found there was no such act, abstinence, or promise, and therefore there was no consideration for the mortgage, and the contract is void. On this ground we must allow the appeal, and reversing the decrees of the Courts below so far as they decree the claim, we must dismiss the suit with costs.

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MANNA LAL
v.
BANK OF
BENGAL.

BEFORE A FULL BENCH.

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August 21.

(*Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie, and Mr. Justice Oilfield.*)

JAGESHAR SINGH (PLAINTIFF) v. JAWAHIR SINGH AND OTHERS
(DEFENDANTS.)*

Act IX of 1871, sch. ii, 10.—Pre-emption—Limitation—"Actual Possession."

Held (STUART, C. J., dissenting) that the purchaser of the equity of redemption of immovable property, which is at the time of sale in the usufructuary possession of the mortgagee, takes "actual possession" of the property, within the meaning of that term in art. 10, sch. ii of Act IX of 1871, when the equity of redemption is completely transferred to and vested in him.

Per STUART, C. J.—That such a purchaser does not take "actual possession" of the property until he takes visible and tangible possession thereof or enjoys the rents and profits of the same, after redemption of mortgage.

This was a suit to enforce the plaintiff's right of pre-emption of a share in a certain zemindari village and for possession of the same. The right of pre-emption was founded upon a special con-

* Special Appeal, No. 1028 of 1875, against a decree of the Subordinate Judge of Gházipur, dated the 21th June, 1875, affirming a decree of the Munsif of Saidpur, dated the 4th December, 1874.

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tract in the village administration-paper. The deed of sale which the suit impeached was dated the 15th September, 1873, at which date the property was in the possession of certain usufructuary mortgagees. The deed recited that the vendees were entitled to possession on the 31st May, 1874, by redemption of the mortgage. The suit was instituted on the 5th October, 1874.

The lower appellate Court dismissed the suit as instituted after the period of limitation prescribed therefor by art. 10, sch. ii of Act IX of 1871, holding that that period began to run from the date of the sale.

On special appeal by the plaintiff to the High Court, the Court (Turner and Oldfield, JJ.) referred to the Full Bench the question as to the time from which the period of limitation began to run.

The order of reference was accompanied with the following remarks :

By art. 10, sch. ii, Act IX of 1871, the period begins to run "when the purchaser takes actual possession under the sale sought to be impeached." The terms of the former Act were—"the time at which the purchaser shall have taken possession under the sale impeached." The word "actual" has thus been introduced in the present Act, and there appears a doubt as to the object of this change, whether in the case before us the possession meant is possession by enjoyment of the profits on expiry of the term of the mortgage, or whether such possession as the nature of the property admits of is all that is intended, dating in this case from the time of the sale.

Munshi *Haruman Parshad*, for the respondents, contended that "actual possession" meant visible and tangible possession, or enjoyment of the rents and profits of the property, after redemption of mortgage. The meaning of the term "possession" in the former Limitation Act was doubtful, as is shown by conflicting rulings. For instance, in *Gordhun v. Heera Singh* (1) the Full Bench of this Court held that it meant actual, that is, visible and tangible possession, while in *Ganeshee Lall v. Toola Ram* (2) it held that it meant such

(1) S. D. A., N.-W. P., January to May, 1866, p. 181; this case followed *Gobind Parshad v. Bebec Fatima*, 2 W. R. 5.

(2) H. C. R., N.-W. P., 1868, p. 376;

followed in *Mashook Ali Khan v. Imdad Ali Khan*, H. C. R., N.-W. P., 1869, p. 9; see also *Beehun v. Yakoob Khan*, 3 W. R. 225.

possession as the nature of the property admits of. The word "actual" has been introduced into the present Limitation Act to remove all doubt as to the meaning of the term "possession."

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Pandit *Ajudhia Nath* (with him, the *Senior Government Pleader*, *Lala Juala Parshad*), for the appellant, contended that, when a purchaser acquired such possession of the property sold as the nature of the property admitted of, he was in "actual possession" of the property.

STUART, C.J.—I am clearly of opinion that the possession intended in art. 10, sch. ii, Act IX of 1871, is possession by enjoyment of the profits on expiry of the term of the mortgage. The time mentioned in the former Act was "the time at which the purchaser shall have taken possession under the sale impeached," and the meaning of this being doubtful, as various rulings of the Calcutta Court and this Court show, the word "actual" has been introduced into the present Act with the view no doubt of making it plain what the real date was intended to be. Actual possession in my opinion means personal and immediate enjoyment of the profits; and as in the present case the mortgagee was in possession at the time of the sale, the purchaser could not take actual possession till the mortgage-term had expired. And this is my answer to the reference.

PEARSON J.—The possession of a mortgagee is tantamount to the possession of the mortgagor or his vendee, and does not interfere with his equity of redemption. Nor can the latter be said not to be in possession by enjoyment of the profits when those profits are applied to the liquidation of the mortgage-debt for which the property purchased by him is liable. He may when he has taken his vendor's place be reasonably held to have obtained actual possession under the sale, and from the date on which he acquired it will run the limitation prescribed by art. 10, sch. ii, Act IX of 1871. The introduction of the word "actual" in that article seems to render the terms used more precise than those used in the former Act, and to adopt the Full Bench ruling in *Ganeshee Lall v. Toola Ram* (1) rather than to negative it, and make any change in the law.

(1) H. C. R., N.-W. P., 1868, p. 376.

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TURNER, SPANKIE, and OLDFIELD, JJ., concurred in the following opinion :

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The provisions of the former law, Act XIV of 1859, declared that in suits for pre-emption the period of limitation should be computed from the time at which the purchaser shall have taken possession under the sale impeached. On the construction of the term possession this Court held in *Ganeshee Lall v. Toola Ram* (1) that such possession was intended as the nature of the thing sold admitted of, and that it did not necessarily mean tangible or visible possession. Thus, where a property was in the possession of the mortgagee and the rights of the mortgagor were sold, it was held that possession was acquired under the sale as soon as the right of redemption was completely transferred to the purchaser, and that limitation must be computed from that period and not from a subsequent date when the mortgage having been discharged from the usufruct the purchaser was able to resume possession. It was pointed out that at the time of the sale two persons had rights in the property, the mortgagor and the mortgagee, and that the subject of the sale was the right of the mortgagor as it subsisted at the time of the sale. Seeing that the purchaser had purchased the right to recover and enjoy the profits at an indefinite period, for it could not be ascertained with certainty at what date the debt and interest would be discharged from the usufruct, it was deemed inequitable to allow a pre-emptor to obtain the property in 1867 freed from mortgage at the price paid by the purchaser in 1860 for the estate encumbered with the mortgage. As an analogous case it was suggested that, if land were leased for a certain term at a nominal rent, and during the term the lessor sold and conveyed the reversion to a purchaser, although the purchase would not have conferred on the purchaser the right to any immediate profit from the estate, the subject of the sale would have been his and in his possession, for all intents and purposes, as completely as before the sale it was in the possession of the vendor.

The language of the present Limitation Act, IX of 1871, differs somewhat from that of the former in declaring the date from which

(1) H. C. R., N.-W. P., 1868, p. 367.

the period of limitation is to be computed in suits for pre-emption. In sch. ii, cl. 10, it is declared the period begins to run when the purchaser takes actual possession under the sale impeached, and the question put to us is, whether there has been any change in the law, whether by actual possession we are to understand in all cases visible and tangible possession or such possession as the nature of the subject of the sale allows.

We have felt some difficulty in determining this question, for it may be presumed the term actual was not introduced without a purpose. But it will equally apply to subjects of sale which admit of visible and tangible possession as well as to subjects of sale which do not admit of such possession. The purchaser of an equity of redemption or of a right of reversion is, it must be allowed, actually in possession of what he has purchased, when the rights of the mortgagor or lessor have been completely transferred to and vested in him. In the one case he and he only could maintain suit for any injury to the reversion, in the other he and he alone could maintain suit for damage done by the mortgagee to the property mortgaged in contravention of the terms of the mortgage. We are pressed, too, by the argument in *Ganeshree Lall v. Tola Ram* (1) that it would be inequitable to allow a pre-emptor to lie by for a number of years to see whether the purchase was beneficial or otherwise, and to come in and claim the benefit of the sale when the subject of the sale is freed from the encumbrance existing at the time of the sale, or where its market-value may have considerably increased. Of course if the language of the law admitted but one construction we could not allow this consideration to influence us, but where it is not incompatible with a construction that avoids hardship and injustice, we are at liberty to adopt that construction. It appears to us that full effect is given to the term actual possession if it be held that, where the nature of the subject of the sale admits of visible and tangible possession, limitation will run from the period when tangible possession is taken, but that when the nature of the subject of the sale does not admit of tangible possession, limitation runs from the date when the subject of sale is completely conveyed to and vested in the purchaser, and he has acquired such possession as before the sale was enjoyed by the seller.

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(1) H. C. R., N.-W. P., 1868, p. 367.