

FULL BENCH.

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February 16

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Blair, Mr. Justice Banerji, Mr. Justice Burkitt and Mr. Justice Aikman.

BATUL BEGAM (PLAINTIFF) v. MANSUR ALI KHAN AND OTHERS
(DEFENDANTS).*

Pre-emption—Suit for pre-emption based on a mortgage by conditional sale—Limitation—Act No. XV of 1877 (Indian Limitation Act), Schedule ii, Articles 10 and 120—“Physical possession.”

Held (1) that, the other conditions being present necessary to make article 10 of the second schedule to Act No. XV of 1877 applicable, article 10 would apply to a sale which in its inception was a mortgage by conditional sale, but which, either by the operation of Regulation No. XVII of 1806 or by the operation of Act No. IV of 1882, had become in effect an absolute sale with the right of redemption gone.

(2) That in such a case as above limitation begins to run, where Regulation No. XVII of 1806 applies, from the expiry of the year of grace.

(3) That a share in an undivided zamindari mahal is not susceptible of “physical possession” in the sense of article 10 of the second schedule to Act No. XV of 1877.

(4) That constructive possession, e.g. by receipt of rent from tenants, is not “physical possession” within the meaning of said article.

Ali Abbas v. Kalka Prasad (1); *Nath Prasad v. Ram Paltan Ram* (2); *Goordhun v. Heera Singh* (3); *Ganeshee Lall v. Toola Ram* (4); *Jageshar Singh v. Jawahir Singh* (5) and *Unkar Das v. Narain* (6) referred to.

THE FACTS OF THIS CASE ARE AS FOLLOWS:—

One Zabur Ali mortgaged by conditional sale certain shares in each of four villages. Two of these villages were of pure zamindari tenure, the others were imperfect pattidari. Proceedings were taken in 1881 by the mortgagee under Regulation No. XVII of 1806. The year of grace provided by section 8 of that Regulation expired in 1882. Before the expiry of the year of grace the heirs of the mortgagor deposited in Court what they thought was sufficient to discharge the mortgage-debt. They subsequently brought a suit for redemption, which was dismissed

*First Appeal No. 14 of 1895, from a decree of Kuar Mohan Lal, Subordinate Judge of Gorakhpur, dated the 28th November 1894.

(1) I. L. R., 14 All., 405.

(2) I. L. R., 4 All., 218.

(3) S. D. A., N.-W. P., 1866, p. 181.

(4) N.-W. P. H. C. Rep., 1863, p. 276.

(5) I. L. R., 1 All., 311.

(6) I. L. R., 4 All., 24.

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by the Privy Council on the ground that the deposit which had been made was not sufficient. Thereupon the heirs of the mortgagee brought a suit for possession, and obtained a decree from the first Court on the 28th of July 1891, which was confirmed in appeal by the High Court on the 6th of July 1893. Formal possession was given on the 27th of November 1893. Whether or not actual possession was given under the decree of the 6th of July 1893 was a matter disputed by the parties. The mortgage by conditional sale did not entitle the mortgagees to possession during the currency of the mortgage. The plaintiff brought her suit for pre-emption on the 4th of July 1894. The Court of first instance (Subordinate Judge of Gorakhpur) dismissed the suit as barred by limitation, having regard to the provisions of article 120 of the second schedule to the Indian Limitation Act 1877, and the case of *Ali Abbas v. Kalka Prasad* (1). The plaintiff appealed to the High Court.

On the appeal coming on for hearing before a Division Bench of two Judges, an issue was remitted to the lower Court under section 566 of the Code of Civil Procedure as to whether the property in suit admitted of physical possession. The lower Court returned a finding that the property did not admit of physical possession. After the receipt of this finding, to which the appellant took objections under section 567 of the Code of Civil Procedure, the appeal was laid before a Full Bench.

Pandit *Sundar Lal* (with whom Mr. *Ghulam Mujtaba*) for the appellant contended that the suit was not barred by limitation. Article 10 of schedule II of Act No. XV of 1877 applies to all cases of sales of property. It applies equally to a sale which, though in its inception it was only a mortgage by way of conditional sale, has now matured into an absolute sale by foreclosure. On the facts found by the Court below on the issue remitted by the High Court under section 566 of the Code of Civil Procedure the whole of the property sold is susceptible of physical possession being taken. Each co-sharer collected his share of rent

(1) I. L. R., 14 All., 405

directly from the tenants, and being thus in possession of his share in the *zamindari*, he was also in possession of the joint lands unoccupied by tenants which appertained to the *zamindari*. The word "*physical*" implies some corporal or perceptible act done which of itself conveys, or ought to convey, to the mind of a person notice that his right has been prejudiced. (*Shiam Sundar v. Amanat Begam*) (1). The collection of his share of the rents from the tenants was such act, and it indicated that the vendee had taken physical possession. The suit being instituted within a year from the date the physical possession was so taken is within time.

Mr. *T. Conlan* and *Munshi Jwala Prasad*, for the respondent, do not appear to have been called on.

The judgment of the Court (*EDGE, C. J., BLAIR, BANERJI, BURKITT and ATKMAN, JJ.*) was delivered by *EDGE, C. J.* :—

This was a suit for pre-emption. The Court of first instance dismissed the suit on the ground that it was barred by article 120 of the second schedule of the Indian Limitation Act, 1877. The facts of the case are shortly these :—In 1868 *Zahur Ali Khan* mortgaged by conditional sale certain shares in each of four villages. Two of those villages were of pure *zamindari* tenure, the others were imperfect *pattidari*. Proceedings were taken in 1881 by the mortgagee under Regulation No. XVII of 1806. The year of grace provided by section 8 of that regulation expired in 1882. Before the expiry of the year of grace the heirs of the mortgagor deposited in Court what they thought was sufficient to discharge the mortgage debt. They subsequently brought a suit for redemption, which was dismissed by the Privy Council on the 13th of July 1886, on the ground that the deposit which had been made was not sufficient. Thereupon the heirs of the mortgagee brought a suit for possession, and obtained a decree from the first Court on the 28th of July 1891, which was confirmed in appeal by this Court, on the 6th of July 1893. It is alleged on the one side and denied on the other that the heirs of

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(1) I. L. R., 9, All., 234; at p. 233.

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the mortgagee obtained possession in execution of the decree of the 6th of July 1893, on the 27th of November 1893. Formal possession at any rate was given on that date. The mortgage by way of conditional sale did not entitle the mortgagees to possession during the currency of the mortgage. This suit for pre-emption was brought on the 4th of July 1894. It is contended on behalf of the plaintiff, appellant here, that article 10 of the second schedule to Act No. XV of 1877 applies—that contention being based on the argument that the property sold, in respect of which pre-emption was claimed, does and did admit of physical possession being obtained of it. The Court below, misunderstanding the question actually decided by the Full Bench in *Ali Abbas v. Kalka Prasad* (1), applied article 120 to the suit, and, as the year of grace had expired more than six years before suit, dismissed the suit on the ground of limitation. We should point out here how the Full Bench ruling has been misunderstood by the Court in question. The Full Bench in that case had not to decide what article of the Limitation Act applied. In effect what the Full Bench had to decide was—when does a pre-emptor's right to sue accrue when he claims pre-emption in respect of a mortgage by conditional sale which has become absolute? That question, although the Bench referring the case had to decide the question of limitation, was one, so far as the Full Bench was concerned, apart from the question of limitation.

The real question before us turns on what is the meaning of "physical possession." The first question is—can article 10 apply to a sale which was in its inception a mortgage by conditional sale, but which in the result has become an absolute sale? In *Nath Prasad v. Ram Paltan Ram* (2), the Full Bench decided that the limitation applicable to a suit to enforce a right of pre-emption in respect of a conditional sale of a share in an undivided mahal was that prescribed by article 120 of the second schedule to Act No. XV of 1877. So far as we can ascertain from the record, the Full Bench in deciding that question decided more

(1) I. L. R., 14 All., 405.

(2) I. L. R., 4 All., 218.

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than was necessary for the disposal of the case before them. The learned Judges said :—" We think that the sale referred to in article 10 must be an absolute one having immediate effect and operation, in those cases where the interest passed is capable of physical possession, by physical possession, and where it is not by the creation of a title under an instrument duly registered."

We cannot see how a sale is any the less an absolute one because it is not to take immediate effect and operation. There is certainly nothing in article 10 to suggest that the sale mentioned in that article is limited to a sale which is to have immediate effect and operation. In our opinion, the other conditions being present necessary to make article 10 applicable, article 10 would apply to a sale which in its inception was a mortgage by conditional sale, but which, either by the operation of Regulation No. XVII of 1806 or by the operation of Act No. IV of 1882, had become in effect an absolute sale with the right of redemption gone. In such a case, the other conditions existing, article 10 would apply as soon as the mortgagee had acquired the complete interest of the mortgagor. No doubt in the case before the Full Bench to which we have been referring, article 120 was the only article which could have been applied at the particular stage of the transaction at which it came before the Court. We dissent from the proposition of law expressed *obiter* in that case.

In the present case if the whole of the property sold was capable of physical possession being taken by the mortgagee vendee, we should hold that article 10 of the second schedule of Act No. XV of 1877 applied. The question really turns, as we have said, on what is the meaning of " physical possession " as that term is used in article 10 of the second schedule to Act No. XV of 1877. It must mean something different from " actual possession," and it must mean something different from ordinary possession. In clause (1) of section 1 of Act No. XIV of 1859, which was the clause prescribing the limitation in suits for pre-emption, the term

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used was "possession," and limitation ran from the time of possession being obtained by the vendee. In *Goordhun v. Heera Singh* (1) a Full Bench of the Sadr Diwani held that the "possession" of Act No. XIV of 1859 must be an actual and not a constructive possession. In 1868 the question came again before a Full Bench, then of this Court, and in *Ganeshee Lall v. Toola Ram* (2) the Full Bench decided that the possession of Act No. XIV of 1859 included constructive as well as actual possession. It is probable that that decision led to the alteration of the wording of the article relating to limitation in pre-emption suits in the next succeeding Limitation Act. In article 10 of the second schedule to Act No. IX of 1871 it was prescribed that limitation should run from the date when actual possession was taken under the sale. Then came a Full Bench of this Court in 1876, *Jageshar Singh v. Jawahir Singh* (3), in which a majority of the Full Bench held that the "actual possession" of Act No. IX of 1871 was the same thing as the possession of Act No. XIV of 1859, and included constructive possession. The then Chief Justice of this Court, Sir Robert Stuart, in our opinion, was right in differing from the rest of the Full Bench. He held that the purchaser does not take actual possession of the property sold to him until he takes physical and tangible possession. The next matter to which we have to refer is that when Act No. XV of 1877 was passed, the Legislature, still determined, in our opinion, to exclude constructive possession from the possession from which limitation should run under article 10, used the term "physical possession," and they added a different terminus of limitation in respect of property which did not admit of physical possession. As we have said, two of the villages here were of pure zamindari tenure, that is, they were villages in which the zamindars got no shares allotted to them by metes and bounds, but held fractional shares, in respect of which fractional shares they received a proportionate amount of the profits of the village.

(1) S. D. A., N.-W. P., 1866, p. 181. (2) N.-W. P. H. C. Rep., 1868, p. 376.
(3) I. L. R., 1 All., 311.

It is said that the mortgagor used to receive direct from the tenants of the zamindari body his proportion of the rents payable by them. That in our opinion does not alter the case. In *Unkar Das v. Narain* (1) it was held that a share in an undivided zamindari mahal was not susceptible of physical possession in the sense of article 10 of the second schedule to Act No. XV of 1877. We adhere to that decision. The Legislature meant some limitation of the term "possession" by the use of the term "physical." In our opinion, for instance the owner of a house who has let the house to a tenant cannot be said to be in physical possession of that house so long as the tenancy subsists and his tenant remains in exclusive possession of the demised premises. In such a case the owner has parted with the physical possession to his tenant for the period of his tenancy, and the tenant alone is the person who has physical possession. It appears to us that it would be straining the English language and going contrary to the obvious intention of the Legislature to hold otherwise. In this particular case article 10 cannot apply, because the whole of the property sold is not capable of physical possession within the meaning of that article, and no instrument of sale has been registered. The result is that, article 10 not applying, article 120 must apply in this case. As article 120 applies, we have got to see when the right to sue accrued to the pre-emptor. That point is concluded by the Full Bench ruling of this Court in *Ali Abbas v. Kalka Prasad* (2) which in our opinion was rightly decided, but which must always be regarded as deciding merely the point referred to the Full Bench and not the question of limitation. This suit was barred by limitation when brought, and we dismiss this appeal with costs. The costs of translating and printing must be borne by the appellant.

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Appeal dismissed.

(1) I. L. R., 4 All., 24.

(2) I. L. R., 14 All., 405.