

by the proper court, it rendered the appeal liable to be dismissed, but the objection was withdrawn. In *Hardeo Bax v. Jawahir Singh* (1), where a similar objection was taken, the dismissal of the appeal was avoided by the Judicial Committee granting special leave to appeal and the case proceeded. The objection here is taken as a ground of appeal by the appellant. Act No. XIII of 1879 (the Oudh Civil Courts Act, 1879), sections 17 and 18, as amended by Act No. XX of 1890 (the N.-W. P. and Oudh Act, 1890) sections 39 and 40, was referred to.

Mr. *J. D. Mayne* for the respondents, admitted that the case appeared to be wrongly before the Judicial Committee, the respondents had themselves taken this very point at a former stage of the case.

1901, June 20th.—The judgment of their Lordships was delivered by LORD HOBHOUSE :—

In this case their Lordships will humbly advise His Majesty to discharge the decree of the Additional Judicial Commissioner of Oudh of the 17th of August, 1896, to allow the appeal, and to remand the case to the Court of the Judicial Commissioner of Oudh, to be tried by the Judicial Commissioner and the Additional Judicial Commissioner sitting together, as provided by law.

Their Lordships give no costs of the present proceedings.

Appeal allowed; case remanded.

Solicitors for the appellant :—Messrs. *Watkins and Lempiere*.

Solicitors for the respondents :—Messrs. *T. L. Wilson and Co.*

J. V. W.

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

[Appeal from the High Court, North-Western Provinces, Allahabad.]

Act No. XV of 1877 (Indian Limitation Act), schedule ii., articles 10, 120, 144.—*Suit for pre-emption against heir of mortgagee by conditional sale—“Physical possession,” meaning of—Accrual of cause of action in suit for pre-emption of property mortgaged by conditional sale—Expiration of year of grace.*

A suit brought to declare a right of pre-emption against the heir of a mortgagee by conditional sale, who has foreclosed, is governed, where the

Present :—LORD HOBHOUSE, LORD DAVEY, LORD ROBERTSON and
SIR RICHARD COUCH.

(1) (1877) L. R., 4 I. A. 178 : I. L. R., 3 Calc., 522.

1901

GANGA
BAKSHI
SINGH
v.
DALIP
SINGH.

P. C.

1901

June 19.

July 13.

1901

BATUL
BEGAM
v.
MANSUR ALI
KHAN.

subject of the sale does not admit of physical possession and there is no registered instrument of sale, not by article 10 but by article 120 of schedule II of the Indian Limitation Act (No. XV of 1877), and limitation in such a suit runs from the expiration of the year of grace, that being the period when the right of the mortgagee has become mature: the mere fact that he has not enforced that right by a suit for possession is immaterial. *Ali Abbas v. Thakur Prasad* (1) followed.

Where the property sold was an undivided share in certain villages, *Melda*, that the "subject of the sale" did not admit of "physical possession" within the meaning of article 10 of the Indian Limitation Act. The expression used by Stuart, C. J., in *Jageshar Singh v. Jawahir Singh* (2), in regard to the words "actual possession," is applicable with still more certainty to the words "physical possession," by which is meant a "personal and immediate" possession. In the present case such possession could not have been taken by the mortgagee without enforcing partition: article 10 therefore did not apply.

Nor was article 144 applicable. Claims to pre-emption are specially considered in article 10, and although the particular claim in the present case did not (for the reasons above stated) fall within it, that did not affect the construction of article 144 as illustrated by article 10. A claim to enforce a right of pre-emption is, as the latter article shows, a claim impeaching another's right, and its primary object is to set aside the competing right. The circumstance that the plaintiff in the present suit inverted the proper order and, instead of first asking for the setting aside and then asking possession as the consequence, had asked for possession "by setting aside" could not alter the nature of the action.

APPEAL from a judgment and decree (16th February, 1898) of the High Court at Allahabad (3) confirming a decree (28th November, 1894) of the Subordinate Judge of Gorakhpur, by which a suit brought by the present appellant was dismissed as being barred by lapse of time.

The suit was brought to enforce a right of pre-emption in respect of certain shares in four villages named Patringwa, Sandhuria, Pipra, and Parsa. Of the three first-named villages the defendant Mansur Ali Khan and one Zahur Ali Khan, who were brothers, owned two-thirds in equal shares, and they owned the whole of the fourth village also in equal shares.

On the 14th of March, 1868, Zahur Ali Khan made a mortgage by conditional sale of his shares in the four villages in favour of one Sarju Prasad, represented in this appeal by the respondent Bhagvati Prasad. The possession of the mortgaged properties,

(1) (1892) I. L. R., 14 All., 405. (2) (1876) I. L. R., 1 All., 311.
(3) I. L. R., 20 All., 315.

however, remained with the mortgagor. This mortgage was foreclosed, and the period of grace of one year given by Regulation XVII of 1806 expired on the 20th of January, 1881.

Zahur Ali Khan died in 1876, and after his death his brother Mansur Ali Khan brought a suit in 1881 for redemption of the mortgaged property. That suit and the appeal to Her Majesty in Council made therein from a decree of the High Court were eventually dismissed by an order of Her Majesty in Council dated the 13th of July, 1886, on the ground that the mortgagor had not done what was necessary by the terms of Regulation XVII of 1806 to entitle him to redemption (1). Afterwards Bhagwati Prasad, the son of Sarju Prasad, the original mortgagee, brought a suit for possession of the mortgaged property and for meane profits. That suit was decreed on the 4th of August, 1891, by the then Subordinate Judge of Gorakhpur, and on the 6th of July, 1893, the High Court on appeal confirmed his decree. Bhagwati Prasad was thereupon put into formal possession of the shares in the four villages, and on the 27th of November, 1893, executed a dakhlanama (receipt of possession) in the usual manner.

On these proceedings coming to her notice, the plaintiff, Batul Begam, the wife of the defendant Mansur Ali Khan, on the 4th of July, 1894, filed the suit out of which the present appeal arose, praying (*inter alia*) for possession of the mortgaged shares in the four villages on the basis of pre-emption, the condition of the wajib-ul-arz, the custom of the village, and the right of pre-emption under Muhammadan Law, by setting aside all the proceedings and the foreclosure decree on payment of Rs. 35,000, the consideration money, or of any other sum which the Court might determine. The plaintiff based her right to sue on a gift made to her by her husband of a six-pie share of his original interest in the four villages, and she described herself as "a near co-sharer" of the vendor in the conditional sale and so entitled to pre-emption. The only defendant who filed a written statement was Bhagwati Prasad, and the only defence material, so far as the present appeal is concerned was that the suit was barred by limitation.

1901

BATUL
BEGAM

v.

MANSUR ALI
KHAN.

(1) See *Mansur Khan v. Sarju Prasad*, L. R., 13 I. A., 113; I. L. R., 9 All., 20.

1901

BATUL
BEGAM
v.
MANSUR ALI
KHAN.

On the 28th of November, 1894, the Subordinate Judge of Gorakhpur dismissed the suit as being barred by limitation. He referred to the case of *Ali Abbas v. Kalka Prasad* (1), in which it was held that where a mortgage by conditional sale has been duly foreclosed in accordance with the procedure laid down in Regulation XVII of 1806, and at the expiration of the year of grace the mortgage money, or a portion thereof, remains unpaid, the title of the conditional vendee becomes absolute on the expiration of the year of grace, and the six years' period of limitation prescribed by article 120 of schedule II of the Limitation Act for a suit for pre-emption of the mortgaged property begins to run against the pre-emptor from the expiration of the year of grace, and held that there was no reason for not applying the law so laid down to the present case.

The plaintiff appealed to the High Court, and on the 12th of November, 1896, a Division Bench of that Court (BANERJI and AIKMAN, JJ.) at the first hearing of the appeal made an order referring to the Court below the following issue:—"Does the property in suit admit of physical possession?" On that issue the Subordinate Judge held on the oral and documentary evidence adduced with reference to it, and having regard to the cases of *Unkar Das v. Narain* (2) and *Bholi v. Imam Ali* (3) that the property in suit did not admit of physical possession. Objections to this finding were filed by the plaintiff in the High Court, and the appeal was referred by the Division Bench to a Full Bench of the Court for disposal.

On the 16th of February 1898 the Full Bench (EDGE, C.J. and BLAIR, BANERJI, BURKITT, and AIKMAN, JJ.) dismissed the suit, holding that it was barred by article 120, schedule II of the Limitation Act. The case before the High Court is reported in I. L. R., 20 All., 315.

The plaintiff appealed to His Majesty in Council.

Mr. G. E. A. Ross for the appellant contended that the Courts below were wrong in holding that the suit was barred by lapse of time. The article applicable to suits for pre-emption is article 10 of schedule II of the Indian Limitation Act, and under that article limitation runs from the date of the purchaser's getting "physical

(1) (1892) I. L. R., 14 All., 405. (2) (1881) I. L. R., 4 All., 24.

(3) (1881) I. L. R., 4 All., 179.

possession," or, in a case where physical possession is not practicable then from the date of registration of the instrument of sale." Here there is no instrument of sale registered. The question then is whether "physical possession" is practicable in this case, and that depends on the meaning given to those words. It is submitted that they mean the same as "actual possession," and according to a ruling of the majority of a Full Bench of the Allahabad High Court in *Jageshar Singh v. Jawahir Singh* (1) "actual possession" was the same thing as the "possession" of Act XIV of 1859, the earlier Limitation Act, and included constructive possession. If so, the property the subject of sale in this case admitted of "physical possession," and the High Court in the judgment now under appeal says that if the property allows of physical possession being taken, article 10 of the Limitation Act applies. Stuart, C.J., in the above case differed from the majority of the Full Bench and was of opinion that "actual possession" meant visible and tangible possession; but even if that interpretation be put on the words, limitation would not commence until such possession were taken, assuming that article 10 is applicable. No such possession has been taken or had by the vendee. As to the meaning of physical possession the case of *Unkar Das v. Narain* (2) and *Starling on Limitation* commenting on article 10 of schedule II, were referred to.

If article 10 does not apply, article 144 should govern the case, and not article 120. Article 120 is not to be applied unless in a case where no other article is applicable. Article 144 applies to suits for possession of immovable property; and this is a suit for possession. The prayer of the plaint is for possession by setting aside the foreclosure proceedings.

Even if the case is held to be governed by article 120, it is submitted that the cause of action does not accrue from the expiration of the year of grace as held by the High Court, but from the time the final decree for possession was passed in favour of the mortgagee; that would be in November 1893, so that, the period of limitation being six years, the suit would not be barred. As to the accrual of the cause of action and the time from which

1901

 BATUL
 BEGAM
 v.
 MANSUB ALI
 KHAN.

(1) (1876) I. L. B., 1 All., 311.

(2) (1881) I. L. R., 4 All., 24.

1901

BATUL
BEGAM
v.
MANSUR ALI
KHAN.

limitation began to run, *Forbes v. Ameeroonissa* (1) and *Ali Abbas v. Thakur Prasad* (2), were referred to.

The respondent did not appear.

The judgment of their Lordships was delivered by LORD ROBERTSON.

The sole question in this appeal is whether the suit, brought to declare a right of pre-emption against the heir of a mortgagee by conditional sale, who has foreclosed, is time-barred, six years having elapsed from the expiry of the year of grace after foreclosure; and the main controversy comes to be whether the 120th article of the second schedule to the Limitation Act of 1877 applies to the case. Admittedly it does apply, unless either article 10 or article 144 applies; and the real question is whether the appellant is right in affirming that the case falls under article 10. There is, however, a subordinate question as to the period from which the six years run, assuming article 120 to apply.

The appellant is the wife of the nominal respondent, Mansur Ali Khan, and she derives from him by gift a six-pie share of his original interest in the villages now in dispute, the remainder of his interest being still vested in him. This Mansur Ali Khan and his brother, Zahur Ali Khan, at the date of the mortgage owned two-thirds of each of the villages of Pathringwa, Senduria, and Pipra Kalan, each brother holding shares of 5 annas 4 pies; and the two owned the whole of the village of Parsa, each brother holding an eight-anna share. The brothers were Muhammadans. Two of the villages were of pure zamindari tenure, the others were imperfect pattidari.

On the 14th of March, 1868, Zahur Ali Khan, in consideration of money lent, executed a deed of conditional sale to Sarju Prasad, now deceased (whose heir is the respondent Bhagwati Prasad), of the whole of his shares in the four villages. It is unnecessary to set out this sale deed, as nothing turns on its particular terms. No change of possession took place on the execution of the mortgage. Zahur Ali Khan died in January 1876. In 1880 the mortgagee having also died, the respondent, Bhagwati Prasad, his heir, foreclosed (by proceedings taken under Regulation XVII of 1806), and the money was not paid within the year of grace,

(1) (1865) 10 Moo., I. A. 340 (349). (2) (1892) I. L. R., 14 All., 405.

which expired on the 20th of January, 1881. Some litigation ensued which is immaterial to the present question and the rehearsal of which would only obscure the narrative. In 1890, Bhagwati sued in the Court of the Subordinate Judge of Gorakhpur that he might "be put in proprietary possession of a 5 anna 4 pie share in each of Senduria, Pathringwa, and Pipra Kālan and an eight-anna share of mauza Parsa by ejecting and dispossessing the defendants or any of them who may be found in possession thereof and by declaring their right of ownership to be extinct," and he obtained a decree which on appeal was affirmed by the High Court on the 6th of July, 1893. The terms of the decree were *inter alia*:—"It is decreed and ordered that the claim of the plaintiff for possession of the shares of the villages mentioned in the relief be decreed." On the 27th of November, 1893, Bhagwati executed a dakhnama, declaring that under the order of the Judge "Munshi Jamiat Rai, the Amin of the Court, has given formal possession to me, the decreeholder, through my karinda (agent) over the shares of the villages detailed below," and the names of the villages and number of the shares are duly set out. Mutation of names was also obtained in respect to the shares. Bhagwati then attempted to take physical possession of the estate, but he was successfully resisted by Mansur Ali Khan. Bhagwati therefore never had possession at all, unless the possession of Mansur Ali Khan or the possession of the tenants, or his own "formal possession" will suffice; and it has not been suggested that his legal rights entitled him to anything more, in the way of possession, than he actually obtained, unless and until he had enforced a partition, which in fact never took place.

On the 4th of July, 1894, the appellant filed her plaint. She narrated the conditional sale, the foreclosure, the decree of possession, and the "delivery of possession." She described herself as a near co-sharer of the vendor (in the conditional sale), and asserted that under the condition of the *wajib-ul-arz* the usage and right of pre-emption under the Muhammadan law she possesses a preferential right of purchase. Her prayer, so far as material, was that a decree awarding possession over the mortgaged shares of the villages might be passed in her favour on the basis

1901

 BATUL
 BEGAM
 v.
 MANSUR ALI
 KHAN.

1901

BATUL
BEGAM
v.
MANSUR ALI
KHAN.

of pre-emption, the condition of the *wajib-ul-arz*, the custom of the village, and the right of pre-emption under the Muhammadan law, by setting aside all the proceedings and the foreclosure decree, on payment of Rs. 35,000, the consideration money, or of any other sum which might be determined by the Court. A written statement was filed by the respondent, Bhagwati, in which various grounds of defence were stated:—*inter alia*, limitation was pleaded, the validity of the gift to the appellant which constitutes her title to claim pre-emption was challenged, and her alleged right of pre-emption was denied. Issues were settled on the 19th of September, 1894, but of those the only one which has been tried and decided, and requires present notice, is that of limitation. For the purposes of the present question, therefore, the appellant is to be assumed to have had a right of pre-emption, and the question is whether she had lost it by limitation before her plaint was filed.

On the 28th of November, 1894, the Subordinate Judge dismissed the suit on the ground of limitation, with costs. He held that the title of the conditional vendee became absolute on the expiration of the year of grace, and that the six years' period of limitation prescribed by article 120, schedule II of the Limitation Act begins to run against the pre-emptor from the expiration of the year of grace.

The appellant appealed to the High Court, who on the 12th of November, 1896, remanded the case for the trial of the following issue:—"Does the property in suit admit of physical possession?" Evidence was taken, and the Subordinate Judge on the 11th of January, 1897, held that the property in suit does not admit of physical possession. On appeal the High Court, on the 16th of February, 1898, dismissed the appeal with costs; and it is against that judgment that the present appeal has been taken.

The view of both Courts is that the appellant's claim falls under the 120th article of the second schedule of the Limitation Act, 1877, which is the final and residuary article including all suits not specially provided for, and fixing for all such suits the limitation of six years. It is for the appellant to show which other article fits her claim; she points first to the 10th article:—to this article most of the discussion has been directed, and this

occasioned the remand. The 10th article purports to apply to suits "to enforce a claim of pre-emption whether the right is founded on law or general usage or on special contract." One year is the period of limitation; and the time from which this period begins is "when the purchaser takes, under the sale sought to be impeached, physical possession of the whole of the property sold, or, where the subject of the sale does not admit of physical possession, when the instrument of sale has been registered." The interest of the appellant to maintain the application of the 10th article is that, if the subject is susceptible of possession, then possession has yet to be taken, for none has as yet been had.

The "property sold," "the subject of the sale," was in this case the 5 anna 4 pie share of each of the three villages and the eight-anna share of the fourth. Various questions of more or less subtlety suggest themselves as to the relation of the holder of such a right to the possession of the estate. All those questions are, however, superseded by the extreme absoluteness of the language of the tenth article of the Limitation Act. What has to be considered is, as the High Court accurately formulated, the question, Does the property admit of physical possession? The word "physical" is of itself a strong word, highly restrictive of the kind of possession indicated; and when it is found, as is pointed out by the High Court, that the Legislature has in successive enactments about the limitation of such suits gone on strengthening the language used,—first in 1859 prescribing "possession," then in 1871 requiring "actual possession," and finally in 1877 substituting the word "physical" for "actual," it is seen that that word has been very deliberately chosen and for a restrictive purpose. Their Lordships are of opinion that the High Court are right in the conclusion they have stated. Their Lordships consider that the expression used by Stuart, C.J., in regard to the words "actual possession" is applicable with still more certainty to the words "physical possession" and that what is meant is a "personal and immediate" possession.

This being the sound construction of the tenth article of the second schedule to the Act of 1877, the facts completely fail the appellant, for the mortgagee's heir had no semblance of physical

1901

 BATUL
 BEGAM
 v.
 MANSUR ALI
 KHAN.

1901

BATUL
BEGAM
v.
MANSUR ALI
KHAN.

possession in the true and natural sense of the term. All that he had directly was the "formal possession" constituted by the dakhlanama, which was ceremonial and on paper. The physical possession of the villages was with others, and Bhagwati, not having enforced a partition, could not get physical possession of any definite portion of those lands and had no right to oust the existing occupiers. Accordingly their Lordships consider that the case does not come within the tenth article, in so far as possession is concerned. This being so, the alternative, stated in the third column relating to registration arises, but the appellant did not argue upon it and no suggestion has been made that it affects the argument. The tenth article accordingly disappears from the case.

The alternative suggestion that article 144 applies cannot be supported. It applies to suits "for possession of immovable property or any interest therein not hereby otherwise specially provided for," and the 12 years of limitation are to begin "when the possession of the defendant becomes adverse to the plaintiff." Now it is perfectly clear that claims of pre-emption are specially considered in article 10, and although this particular claim of pre-emption does not (for the reasons already stated) fall within it, that does not affect the construction of article 144, as illustrated by article 10. A claim to enforce a right of pre-emption is, as article 10 shows, a claim impeaching another's right; and its primary object is to set aside the competing right. The circumstance that this plaint has inverted the proper order and, instead of first asking the setting aside and then asking possession as the consequence, has asked for possession "by setting aside" cannot alter the nature of the action.

If neither article 10 nor article 144 applies, then admittedly the 120th article does; and the only remaining question is at what date does the period of six years begin? or, to apply the words of the Act, when did the right to sue accrue to the appellant? It seems to their Lordships to be clear that the expiry of the year of grace is the time at which the pre-emptor's right arises. The mortgagee's right of property had then become mature, and the mere fact that he had not enforced that right by a suit of possession does not affect the question. Their

Lordships are satisfied of the soundness of the decision of the High Court of the North-West Provinces in *Ali Abbas v. Thakur Prasad* (1).

Their Lordships will humbly advise His Majesty that the appeal ought to be dismissed.

Appeal dismissed.

Solicitors for the appellant:—Messrs. *Barrow, Rogers and Nevill.* J. V. W.

1901

BATHUR
BEGALv.
MANSUR ALI
KHAN.

P. C.

1901.

June 21

July 2, 3, 4,
5, and 27.

• ASGHAR ALI KHAN (PLAINTIFF) v. KHURSHED ALI KHAN AND ANOTHER (DEFENDANTS) AND TWO OTHER APPEALS.

[On appeal from the High Court of Judicature for the North-Western Provinces, Allahabad.]

Act No. XV of 1877 (Indian Limitation Act), schedule II, article 89—Suit for account between principal and agent—Termination of agency—“Movable property”—Money—Evidence as to account stated.

The appellant and respondent, two brothers, were agents the one for the other in dealing with their joint estate, and the agency was found on the evidence to have continued until the 22nd of December, 1885, when the appellant brought a suit against the respondent for his share of money received by the respondent on the joint account. *Held* by the Judicial Committee (upholding the judgment of the High Court) that a cross suit brought by the respondent against the appellant for an account was governed by article 89 of schedule II of the Limitation Act, and, having been brought within three years of the termination of the agency, it was not barred.

“Movable property” in article 89 includes money.

The appellant put forward a *rukka* and list evidencing a settlement of accounts supported by a substantial body of evidence of persons apparently of good repute, but which the respondent alleged to be fabricated. *Held* that the High Court rightly rejected the positive evidence in favour of the settlement when it appeared that the facts ascertained on other evidence in the case as to certain items in the list were conclusive to the contrary of what was there set out, and inconsistent with the existence of the alleged settlement.

• CONSOLIDATED appeal against three decrees (9th March, 1897) of the High Court at Allahabad, whereby decrees (15th and 16th September, 1893) of the Subordinate Judge of Saharanpur in two suits brought against each other by the appellant and first respondent, respectively, were reversed.

Present:—LORD HOBHOUSE, LORD DAVY, LORD ROBERTSON, and SIR RICHARD COUCH.

(1) (1892) I. L. R., 14 All., 405.