

SRINATH DAS (PLAINTIFF) v. KHETTER MOHUN SINGH AND OTHERS
(DEFENDANTS).

P. C.*
1888

November
16th and 17th,
1889

February 5.

[On appeal from the High Court at Calcutta.]

Limitation Act 1877, Art. 135—Suit by mortgagee against mortgagor and purchasers from him—Regulation XVII of 1806—Transfer of Property Act (IV of 1882).

A mortgage by conditional sale, before the operation of the Transfer of Property Act, 1882, on default made in payment, proceedings having been taken by the mortgagee under Regulation XVII of 1806, entitled the mortgagee to possession after the year of grace. On the mortgagor's right of possession being thus brought to an end without a suit for foreclosure, a right of entry accrued to the mortgagee whose suit for possession, unless brought within twelve years from the date "when the mortgagor's right to possession determined," was barred by Art. 135 of Sched. II of Act XV of 1877.

This Regulation foreclosure was applied to a mortgage, dated 17th November 1865, between Hindus, with power of entry and sale, in the English form, of land in the 24-Pergunnahs District (which mortgage, therefore, received the same effect as a mortgage by conditional sale), and the proceedings were perfect, on or before 31st March 1873, as against the mortgagor, whose right of possession determined on the 17th February 1866. Parcels of the mortgaged land had been sold by the mortgagor, down to August 1866, and the purchasers, not having been served with notice of the above proceedings under the Regulation, were not parties thereto, so that the relation of mortgagee and mortgagor continued to subsist, as between them and the mortgagee, notwithstanding the determination of the mortgagor's right of possession.

In a suit brought in 1882 against these purchasers, as also against the mortgagor, for foreclosure and possession, by a transferee who had acquired the mortgagee's interest in 1879: *Held*, that the mortgagor's right of possession determined on the above date, and that the mortgagee's right of suing for possession having been extinguished on the expiration of twelve years from that time, *vis.*, on the 17th February 1878, such right was not revived by the subsequent creation of suits for foreclosure, on the coming into operation of the Transfer of Property Act, 1882; and that the title of the plaintiff, made through the mortgagee, to sue the purchasers for possession of the mortgaged land, was barred by time under Art. 135, as against them.

The suit therefore was dismissed as against the purchasers; but as against the mortgagor, who made no defence, the right of possession in the mortgagee consequent on the proceedings under the Regulation in force till its repeal in 1882 supported the decree made against him by the Courts below, from which he had not appealed.

* *Present:* LORD FITZGERALD, LORD HOBHOUSE, SIR R. COUCH and MR. STEPHEN WOLFE FLANAGAN.

1889

SRINATH
DAS
v.
KHETTER
MOHUN
SINGH.

APPEAL from a decree [18th November 1885 (1)] of the High Court, reversing a decree [17th June 1883] of the Second Subordinate Judge of the 24-Pergunnahs District.

This suit was brought by the appellant, the transferee of a mortgagee, against the mortgagor and twenty-eight other defendants, the latter holding distinct plots of the mortgaged property under purchases from the mortgagor. And the question was whether the suit as against these purchasers, now respondents, was barred, as being a suit brought for possession more than twelve years after the mortgagor's right to possession determined, under Art. 135 of Sched. ii of Act XV of 1877; or fell within Art. 147, allowing sixty years from the time when the mortgage money became due for the mortgagee's suit.

The plaint was filed on the 6th September 1882, after the Code of Civil Procedure of that year, and the Transfer of Property Act, 1882, had come into force; s. 2 of the latter Act repealing Regulations I of 1798 and XVII of 1806, relating to mortgages, their foreclosure and redemption, and the Act substituting its own provisions.

The mortgage deed, which was in the English form, was executed, on the 17th November 1865, by Huri Narain Dey to Shama Sundari Debi, of five holdings of land in the 24-Pergunnahs District, to secure Rs. 15,705, to be repaid with interest at 18 per cent. on 17th February 1866. Besides the usual powers to the mortgagee to enter upon default and to sell, there was a provision enabling Huri Narain Dey "to sell such portions of the mortgaged premises as he might be able to sell to such purchasers, and at such prices as he shall deem advantageous," with an agreement for "the release of the piece or pieces of land so sold from this mortgage." The deed was registered on the 23rd January 1866. Sales of portions of the mortgaged property then took place.

Shama Sundari, as mortgagee, on the 15th February 1872, petitioned the District Court, under Regulation XVII of 1806, ss. 7 and 8, to issue a notice of foreclosure to Huri Narain Dey, alleging that there was then due the sum of Rs. 28,777 on the mortgage. On the same day, the order was made "that the usual notice of one year, together with the copy of the petition

(1) *Shurnomoyes Dasi v. Sreenath Dass*, I. L. R., 12 Cal., 614.

be served on the opposite party." No notice of these proceedings was served on any of the defendants in this suit, other than Huri Narain Dey, although they, with the exception of No. 29, purchased before the proceedings were taken. On the 31st March 1873, the Judge ordered as follows: "Whereas one year has elapsed from the date of the service of notice, ordered that this be struck off the file." And no further step was taken by the mortgagee to obtain possession of the mortgaged land, or to enforce any rights against the purchasers. But Shama Sundari, on 10th May 1879, by a conveyance in the English form, duly registered, sold and assigned to this appellant, for Rs. 11,000, all her interest in the mortgage debt and interest due from Huri Narain Dey, and in the mortgaged lands, confirming this by a subsequent deed of 1st April 1880. The prayer of the plaint was that the defendant be ordered to pay, within a time to be specified by the Court, Rs. 63,212, or the sum that might be found due on the taking of accounts and interest for the period of the suit; also a declaration was asked that in default of such payment, the defendants were not entitled to redeem, and that the plaintiff should have possession.

Huri Narain Dey and eight of the twenty-nine defendants made no defence. The others alleged title, each to their several portion of the mortgaged land, under kobalas from the mortgagor; some of them admitting notice of the mortgage, and alleging payment of the purchase-money on account of the mortgagee, Shama Sundari, others denying all knowledge of the mortgage. Some alleged title through mesue or intermediate transfers, others claimed directly through Huri Narain Dey. The latest purchase had taken place in August 1866. All those who defended relied on limitation, alleging that the mortgagor's right to possession having determined on the 17th February 1866, and twelve years from that date having expired in 1878, the suit was barred in the latter year.

On the issue of limitation, as also in other respects, the judgment of the Subordinate Judge was in favour of the plaintiff, to whom he decreed possession. He held Art. 147 to be applicable, and not Art. 135 of Act XV of 1877.

From this decree sixteen of the defendants appealed to the High Court, which reversed it as to all the defendants except the first,

1889

SRINATH
DAS
v.
KHETTER
MOHUN
SINGH.

1889
 SRINATH
 DAS
 v.
 KHETTER
 MOHUN
 SINGH.

the mortgagor. The judgment of a Divisional Bench [PIGOT and O'KINEALY, JJ.] (1) was that as against all the defendants except the first, the plaintiff's suit should have been dismissed, as he had failed to prove his title as against them, and had also failed to prove the identity of the parcels occupied by them with those that he claimed. The only ground however of dismissal that need be stated is limitation, as to which the judgment of the High Court will be found reported in I. L. R., 12 Calc., 616.

On this appeal, which included all the defendants as respondents,

Mr. R. V. Doyne and Mr. J. D. Mayne, for the appellant, argued that the period of limitation was given by Art. 147 of Sched. ii of Act XV of 1877, and not by Art. 135, the latter having been wrongly applied by the High Court, which had failed to see the distinction between a claim to possession by the mortgagee, as against the mortgagor, made in the character of mortgagee, and a claim for an account for foreclosure and sale brought by the mortgagee, or as here by his transferee. A mortgagee, after taking proceedings under Regulation XVII of 1806, if entitled by the terms of his mortgage to possession, still had to sue for it, if out of possession, or for a declaration that he was entitled to it, if he was in possession, there being no decree upon proceedings under the Regulation—See the judgment in *Forbes v. Ameeroonissa Begum* (2). And it followed that such a suit brought by the mortgagee must be brought within twelve years from the date when the mortgagor's right of possession determined, that being the case to which Art. 135 was applicable. But when a suit, as in this instance, aimed at bringing the mortgage to an end, Art. 147 was applicable.

The frame and prayer of the present suit were justified by, and maintainable under, the Transfer of Property Act, 1882, which repealed Regulation XVII of 1806. They were also in accordance with s. 16, cl. c, of the Code of Civil Procedure (Act XIV of 1882). The Transfer of Property Act came into force on the 1st July 1882, establishing for mortgagees the suit for

(1) *Shurnomoyee Dasi v. Sreenath Dass*, I. L. R., 12 Calc., 616

(2) 10 Moore's I. A., 340.

foreclosure; so that the appellant obtained thereunder the right to maintain this suit for foreclosure. It was under this Act that his rights were enforceable against the purchasers, who were no parties to the previous proceedings against the mortgagor. There was nothing in the state of things existing between 1878 and 1882 which excluded the appellant from obtaining the benefit of the law which in the latter year he found in his favour. Referring to the development of the law of mortgage in Bengal, originally land mortgaged by way of conditional sale became the lender's property on non-payment of the money lent; but Regulation XVII of 1806 controlled the mortgagee's right until he should have taken proceedings as the Regulation directed to terminate relations according to his contract. The mortgage in the English form of land, outside the local jurisdiction of the Supreme Court and of the High Court which had succeeded it, was dealt with by the Courts in the same way. And these proceedings being ministerial, and not judicial, and the so-called foreclosure not resulting in any decree, the mortgagee had, nevertheless, in any case, to sue for possession—See the judgment in *Forbes v. Ameeroonissa* (1) at page 350 of the report. The provisions of the three successive Limitation Acts were then referred to, the conclusion being drawn that Art. 135 applied where the relation of mortgagor and mortgagee subsisted, and did not apply where the suit was to change the character of the relation of mortgage to that of absolute ownership.

Reference was made to *Bhowani Charn Mitre v. Joykishen Mitre* (2), *Forbes v. Ameeroonissa Begum* (1), *Brojonath Ooondoo Chowdhry v. Khelat Chunder Ghose* (3), *Huro Chunder Gooho v. Gudadhur Koonadoo* (4), *Sarasibala Debi v. Nand Lal Sen* (5), *Denonath Gangooly v. Nursing Prosad Dass* (6), *Ghina Ram Dobey v. Monaruth Ram Dobey* (7), *Burramoye Dasi v.*

1889

 SRINATH
DAS
v.
KHETER
MOHUN
SINGH.

(1) 10 Moore's I. A., 340.

(2) S. D. A., 1848, p. 354.

(3) 6 W. R., 269; and, on appeal, 14 Moore's I. A., 144, and 8 B. L. R., 104.

(4) 6 W. R., 184.

(5) 5 B. L. R., 389.

(6) 14 B. L. R., 87.

(7) 7 C. L. R., 580; I. L. R., 6 Calc., 666 (note).

1889

Dinobundhoo Ghose (1), Gokuldass v. Kripa Ram (2), Mankee

SRINATH

DAS

v.

KHEETTER

MOHUN

SINGH,

Kooer v. Munnoo (3).

None of the respondents appeared.

On a subsequent day, 5th February 1889, their Lordships' judgment was delivered by

LORD HOBHOUSE.—The appellant, who was the plaintiff below, is the transferee of a mortgage effected by the first defendant Huri Narain Dey in favour of Shama Sundari Debi. The mortgage bears date the 17th November 1865. It is in the English form, providing for the payment of the debt on the 17th of February 1866, and giving to the mortgagor the right of possession until default in payment, and to the mortgagee the right of entry after default. The property mortgaged is in the district of the 24-Pergunnahs.

On the 15th February 1872, Shama Sundari applied to the District Judge of the 24-Pergunnahs to issue as usual a notice of foreclosure to the opposite party, under Regulation XVII of 1806. The opposite party was Huri Narain. The notice was served on him, and, on the 31st March 1873, a year having elapsed from the date of the service, the case was struck off the file. It is clear, therefore, that Huri Narain's right to redeem was foreclosed, and that as against him Shama Sundari became absolute owner, on or shortly before the 31st March 1873.

In the year 1879 the plaintiff acquired Shama Sundari's interest in the mortgaged property, and on the 6th September 1882, he brought a suit against Huri Narain and twenty-eight other defendants whom he alleged to have been holding possession of several plots of the property, claiming by purchase and otherwise from Huri Narain. He stated that they ought to have been made parties to the foreclosure case, but Shama Sundari had not done that; that the defendants knew of the mortgage; that nothing had been paid on account of the mortgage debt; and that the defendants refused to pay. He prayed an order for payment, and, in default, a declaration that

(1) I. L. R., 6 Calc., 584; 7 C. L. R., 583.

(2) 13 B. L. R., 205.

(3) 14 B. L. R., 315.

the defendants would be unable to redeem the mortgaged properties, and an order for possession.

Huri Narain has not made any defence at any stage of the suit. Of the other defendants, some either did not appear or did not put in any statement; one pleaded a mistake of personal identity, and eighteen, besides other pleas, contended that the suit was barred by time. Seventeen of them stated that they held plots purchased of Huri Narain at various dates, ranging from November 1865 to August 1866. Some of them stated as to their own plots, that Shama Sundari was privy to the purchases, and that the price was paid to her agent in reduction of the mortgage debt. But as the latest of these alleged transactions was in August 1866, the difference between the cases of these defendants need not be considered. One defendant, No. 29, stated that he had purchased two plots of Huri Narain's land, one in February 1873 at a revenue sale, the other in December 1876 at an execution sale. This defendant stands in a different position from the others as regards both time and the effect of the foreclosure proceedings. But if his title is impeachable at all, which their Lordships are far from suggesting, it must be in a suit properly framed and conducted for that purpose.

With this exception of No. 29, for whose case no issue was framed, their Lordships do not intend to discuss any other plea than that of limitation. Whether the plaintiff really acquired Shama Sundari's interest; whether the defendants' plots are or are not included in the mortgage; whether Shama Sundari was privy to the sale by Huri Narain; whether the purchase-money was paid on account of the mortgage; whether the purchasers knew of the mortgage; whether their possession was adverse or non-adverse: all these questions have been discussed, but are immaterial, some in any case, and the others if the suit is barred by time.

The ruling Act is No. XV of 1877, and the question is whether the case falls within Art. 135 or 147. Article 135 provides that a suit by a mortgagee for possession of immoveable property mortgaged, shall be dismissed if instituted after twelve years from the time when the mortgagor's right to possession determines.

1889

 SHINATH
 DAS
 v.
 KHETTER
 MOHUN
 SINGH.

1889

 SRINATH
 DAS
 v.
 KHETTER
 MOHUN
 SINGH.

Article 147 provides that a suit by a mortgagee for foreclosure or sale shall be dismissed, if instituted after 60 years from the time when the money secured by the mortgage becomes due.

The Subordinate Judge made a decree against all the defendants without distinction, for payment, and on default for foreclosure. As regards the question of limitation, his grounds were as follows: that if the foreclosure proceedings were regular, a new starting-point of time was gained in February or March 1873; but if they were irregular, the mortgagee possessed only an inchoate right of possession, and so the mortgagor's right had not determined; that suits for foreclosure were, under the Codes of 1859 and 1877, allowed in the Bengal Mofussil; and that the plaintiff had a right to bring this suit quite independently of the Transfer of Property Act of 1882. These reasons lead up to the conclusion that the case falls within Art. 147, which allows 60 years to sue.

From this decree, sixteen of the defendants appealed to the High Court. The Court was of opinion that the mortgagor's right to possession determined on the 17th of February 1866; that the mortgagee's right to bring a suit for possession was barred on the 17th February 1873; that, with the right to possession, was lost the right to take foreclosure proceedings under the Regulation of 1806; and that suits for foreclosure were then unknown in the Bengal Mofussil. They therefore concluded that the suit was barred by force of Art. 135, and they dismissed it against all the defendants except Huri Narain. They do not assign their reason for not dismissing it against Huri Narain, but their Lordships presume the reason to be that as against him they took the suit to be one for possession, founded on the title acquired in February or March 1873 under the Regulation. From that decree the plaintiff appeals.

All the defendants, except Huri Narain and another, are made parties respondent to the appeal. No one has appeared, and their Lordships have not had the advantage of hearing argument in support of the decree; but after taking time to consider, their Lordships find themselves in agreement with the High Court.

The inferences of fact which the Court is bound to draw from the evidence or the omission of evidence in the case appear to

their Lordships to be as follows: the foreclosure was, as against Huri Narain, perfect on or before the 31st March 1873; the purchasers from him were not served with notice as required by the Regulation; they therefore remained unaffected by the proceedings, and the relationship of mortgagee and person entitled to redeem continued to subsist between Shama Sundari and them; the purchasers have continued in undisturbed possession since the time of their respective purchases; no interest has ever been paid on account of the mortgage debt; if any part of the principal has been paid in respect of any of the plots, the latest payment was made in August 1866; therefore, if Art. 135 is the one applicable to the case, the twelve years there allowed ran out in the month of August 1878 at the latest.

1889

 SRINATH
 DAS
 v.
 KHETTER
 MOHUN
 SINGH.

In order to succeed then the plaintiff must show that Art. 135 is wholly inapplicable to his case. To do that, it is contended that Art. 135 applies only to those cases in which a mortgagee desires to take possession in that character; that if he wishes to foreclose he may do so within the time limited by Art. 147; that on the 1st July 1882, the right to maintain foreclosure suits was conferred on Bengal mortgagees; and that the Limitation Act immediately fastened on those suits, and provided 60 years as the limit for them.

To this argument it is sufficient for the present case to answer that in the year 1878, when no suit for foreclosure could be brought, the right of Shama Sundari to possession was wholly extinguished, and the title of the purchasers under Huri Narain freed from the mortgage. The subsequent creation of suits for foreclosure could not, except by clear enactment, revive the extinct right, and in effect the clear enactment is the other way, for s. 2, cl. (c), of the Transfer Act says that nothing therein shall affect "any right or liability arising out of legal relation constituted before this Act comes into force, or any relief in respect of such right or liability" Their Lordships consider that, within the meaning of this section, the rights of the purchasers to unencumbered ownership of their plots have arisen out of the legal relations between them and Huri Narain and Shama Sundari.

1889.

SRINATH
DAS
v.
KHETTER
MOHUN
SINGH.

It is therefore unnecessary to discuss what has been so much urged at the bar, *viz.*, the effect to be attributed to Art. 147, a provision which appeared for the first time in the Act of 1877.

The result is that the High Court decree is right, and should be affirmed, and the appeal dismissed. Their Lordships will humbly advise Her Majesty to this effect.

Appeal dismissed.

Solicitors for the appellant: Messrs. T. L. Wilson & Co.

C. B.

SMALL CAUSE COURT REFERENCE.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Trevelyan.

MACKENZIE LYALL & CO. v. OHAMROO SINGH & CO.

Sale by auction—Auctioneers—Agent bidding “kutchapucca”—Usage of trade—Custom—Condition of sale.

1889
June 15.

An agent of the defendants made, at an auction sale, a bid for certain goods: this bid was not at the time accepted by the auctioneers, but was referred to the owners of the goods for approval and sanction, the agent agreeing to such reference. The conditions of sale contained no clause stipulating for such procedure.

Previous to any reply being received by the auctioneers from their principals, the principals of the agent bidding refused to acknowledge the bid of their agent.

In a suit brought by the auctioneers to recover a loss on a re-sale of the goods, the plaintiffs set up a usage of trade, whereby it was alleged that the bidder at such a sale was not at liberty to withdraw his bid until a reasonable time had been allowed for the auctioneers to refer the bid to the owner of the goods. The only evidence on this point was that of an assistant to the firm of the plaintiffs, who stated “that such an arrangement had never been repudiated.” *Held*, that the conditions of sale containing no clause to the effect of the usage claimed, and there being no sufficient evidence that the usage was so universal as to become part of the contract by operation of law, there was no contract between the parties, and therefore that no suit would lie.

On the 5th November 1888, Messrs. Mackenzie, Lyall and Co., auctioneers, put up for sale, under their usual conditions of sale, certain cases of zanella cloth.

* Small Cause Court Reference No. 3 of 1889, made by G. O. Sconce, Esq., Chief Judge of the Court of Small Causes, Calcutta, dated the 9th of April 1889.