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judgement-debtor to sale, therefore this decree is not a decree for payment of money but must be regarded as a mortgage decree. It has no doubt been held by this Court that section 230 does not apply to a mortgage decree, but in our opinion, the compromise decree in the present case was a simple money decree as against the first three defendants, and only became a mortgage decree against the fourth defendant after default was made. It was a conditional decree for the sale of his property. We have already pointed out that it was being executed as a simple money decree, and that it could never have been executed against the first three defendants as anything else except a simple money decree. It comes within the very words of section 230, clause (iii). The case of *Pahalwan Singh v. Narain Das* (1) has been referred to. In that case the compromise decree was against a single defendant. It only differed from an ordinary mortgage decree under section 88 of the Transfer of Property Act by substituting certain instalments for the usual six months allowed for payment of the mortgage money. The application to execute such decree was an application to execute a mortgage decree by sale of the mortgaged property. Therefore, it is quite clear that that case has no application to the present case. In our opinion the decree appealed against was correct, and this appeal should be dismissed. We accordingly dismiss the appeal with costs.

Appeal dismissed.

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June 24.

Before Mr. Justice Sir George Knox and Mr. Justice Karamat Husain.

NANDAN SINGH (PLAINTIFF) v. JUMMAN AND OTHERS (DEFENDANTS).*

Mortgage—Estoppel—Power of representatives of mortgagor to question validity of mortgage—Adverse possession—Possession adverse to mortgagor not necessarily adverse to mortgagee.

Held that, although the representatives of a mortgagor cannot as such question the validity of the mortgage, it may be open to them as *mutawallis* to plead that the property was waqf and that the mortgage of it was void. *Gulzar Ali v. Fida Ali* (2) distinguished.

Held, also, that a simple mortgage being not merely a security for a debt but a transfer of an interest in the property mortgaged, a trespasser who ousts the mortgagor and holds the property adversely to him may by prescription become

* Second Appeal No. 985 of 1911 from a decree of G. A. Paterson, District Judge of Benares, dated the 8th of August, 1911, confirming a decree of Srish Chandra Basu, Subordinate Judge of Benares, dated the 21st of June, 1911.

(1) (1900) I. L. R., 22 All., 401. (2) (1883) I. L. R., 6 All., 24.

the owner of the limited estate which the mortgagor had in the property, but such adverse possession cannot extinguish the right of the mortgagee. *Agency Company v. Shori* (1), *Smith v. Lloyd* (2), *Secretary of State for India v. Krishnamoni Gupta* (3) and *Ismdar Khan v. Ahmad Husain* (4) referred to. *Ramaswami Chetty v. Ponna Padayachi* (5) and *Pratap Bahadur Singh v. Maheshwar Bakhsh Singh* (6) not approved. *Aimadar Mandal v. Makhan Lal Day* (7) and *Parthasarathi Naikan v. Lakshmana Naikan* (8) approved and followed. *Karan Singh v. Bakar Ali, Khan* (9) discussed.

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THE facts of this case were as follows :—

Kudrat Shah and others, the predecessors in title of defendants, 2 and 3, made a simple mortgage of two plots of land with houses and trees, one of which was near Taksal and the other near Kabir Chaura, in favour of the plaintiff, on the 5th of July, 1875. They again mortgaged the same property to the same mortgagee on the 12th of March, 1878. One Subhan, alleging himself to be the son-in-law of Kudrat Shah, on the 15th of September, 1893, sold the land near Taksal to Musammat Biraiya, who made a mortgage of it to Babu Sital Prasad and Bisheshar Prasad on the 22nd of December, 1893. They obtained a decree on their mortgage on the 7th of November, 1900, in execution of which the land was purchased by Ram Dei, who built on it a house with a cost of about Rs. 6,000. The plaintiff sued on his two mortgages on the 4th of May, 1910, claiming Rs. 1,628-6-3. The defendants 1, 2 and 3, as *mutawallis*, pleaded that the property near Kabir Chaura was waqf and that the mortgage of it was void. Ram Dei pleaded that the suit relating to the land near Taksal was barred by limitation.

The first court dismissed the suit. Regarding the property near Kabir Chaura the dismissal was based on the unlawfulness of the mortgage of waqf property. Regarding the property near Taksal it was based on limitation. The lower appellate court affirmed the decree of the first court.

The plaintiff appealed to the High Court.

Mr. B. E. O'Connor and Munshi Gokul Prasad, for the appellant.

Dr. Satish Chandra Banerji and Dr. Tej Bahadur Sapru, for the respondents.

(1) (1888) L. R. 13 A. C., 793.

(5) (1911) 21 M. L. J., 397.

(2) (1854) 9 Ex., 562.

(6) (1908) 12 O. C., 45.

(3) (1902) I. L. R., 29 Calc., 518.

(7) (1906) I. L. R., 33 Calc., 1015.

(4) (1907) I. L. R., 30 All., 119.

(8) (1911) 21 M. L. J., 467.

(9) (1882) I. L. R., 5 All., 1.

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KARAMAT HUSAIN, J.—The facts of the case are these:—Kudrat Shah and others, the predecessors in title of defendants, 2 and 3, made a simple mortgage of two plots of land with houses and trees, one of which is near Taksal and other near Kabir Chaura in favour of the plaintiff, on the 5th of July, 1875. They again mortgaged the same property to the same mortgagee on the 12th of March, 1878. One Subhan, alleging himself to be the son-in-law of Kudrat Shah, on the 15th of September, 1893, sold the land near Taksal to Musammat Biraiya, who made a mortgage of it to Babu Sital Prasad and Bisheshar Prasad on the 22nd of December, 1893. They obtained a decree on their mortgagee on the 7th of November, 1900, in execution of which the land was purchased by Ram Dei, who built on it a house with a cost of about Rs. 6,000.

The plaintiff sued on his two mortgages on the 4th of May, 1910, claiming Rs. 1,628-6-3. Defendants 1, 2 and 3, as mutawallis, pleaded that the property near Kabir Chaura was waqf and that the mortgage of it was void. Ram Dei pleaded that the suit relating to the land near Taksal was barred by limitation.

The first court dismissed the suit. Regarding the property near Kabir Chaura the dismissal was based on the unlawfulness of the mortgage of waqf property. Regarding the property near Taksal it was based on limitation. The lower appellate court affirmed the decree of the first court.

In second appeal two points are taken:—

(1) The representatives of the mortgagors cannot question the validity of the mortgage, and (2) the adverse possession of a trespasser against a mortgagor is not, in every case, adverse to his simple mortgagee. On the first point I am of opinion that it is open to the representatives of the mortgagors as mutawallis to plead that the property was waqf, and that the mortgage of it was void. They could be estopped from raising such a plea as representatives of the mortgagors, but as mutawallis they cannot be regarded as the representatives of the mortgagors. When the law renders the mortgage of waqf property void, the mortgagee of such property is presumed to know the law, and if he takes a mortgage of such property he does so at his own risk. *Gulzar Ali v. Fida Ali* (1) has no application. There a trustee

(1) (1883) I. L. R., 6 All., 24.

representing the property as his own mortgaged it, and when the mortgagee had got a decree, the trustee sued to recover the property. In these circumstances the trustee was held to be estopped.

There is a conflict of authority on the second point, and before going into the case-law on the subject I deem it fit to set forth the conclusion to which the legal principles lead. Adverse possession in the nature of things is impossible against a person who has no right to possession and hence the legal maxim "*Contra non volentem nulla currit prescriptio*" (Prescription does not run against a person who is unable to act). On the same foundation rests the exposition of law by PARKE, B., quoted by the Lords of the Privy Council in the *Trustees, Executors and Agency Company v. Short* (1) as follows:—"In the latter case, *Smith v. Lloyd* (2), which was decided in 1854, PARKE, B., in giving the judgement of the Court, says:—"We are clearly of opinion that the Statute applies not to cases of want of actual possession by the plaintiff but to cases where he has been out of and another in possession for the prescribed time. There must be both absence of possession by the person who has the right and actual possession by another, whether adverse or not, to be protected, to bring the case within the Statute."

Their Lordships reaffirm the opinion of PARKE, B., in *Secretary of State for India v. Krishnamoni Gupta* (3). They remark:—

"In the case of *The Trustees, Executors and Agency Company v. Short* (4) it was laid down by this Board that 'if a person enters upon the land of another and holds possession for a time and then without having acquired a title under the statute abandons possession, the rightful owner on the abandonment is in the same position in all respects as he was before the intrusion took place,' and the opinion of PARKE, B., is there quoted that there must be both absence of possession by the person who has the right and actual possession by another to bring the case within the Statute."

On the same principle proceeds *Ismdar Khan v. Ahmad Husain* (5). The portion of the judgement bearing on the point is as follows:—

"As the defendants wrongfully dispossessed the mortgagees and themselves took possession, their possession was undoubtedly

(1) (1888) L. R., 13 A. C., 793.

(3) (1854) 9 Exch., 562.

(2) (1902) I. L. R., 29 Calc., 518, 535.

(4) (1888) L. R., 13 A. C., 793.

(5) (1907) I. L. R., 30 All., 119.

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adverse to the mortgagees, and as their adverse possession has continued for a longer period than twelve years, the right of the mortgagees has, under section 28 of the Limitation Act, become extinct and has vested in the defendants. The possession of the mortgagees was not full proprietary possession, but was possession of a limited nature. It is this possession of which they were deprived by the defendants; so that the adverse possession of the defendants was also of the limited character and had the effect of extinguishing the limited interests of the mortgagees and vesting those interests in the defendants. The possession of the defendants was not therefore adverse to the plaintiff. There may be cases in which adverse possession against the mortgagee would also be adverse against the mortgagor, for example, where the mortgagor is entitled to immediate possession or where the possession of the trespasser is coupled with a denial of the title of the mortgagor. But, as held in *Muhammad Husain v. Mul Chand* (1), following *Chinto v. Janaki* (2), possession obtained by the ouster of a mortgagee in possession is not necessarily adverse to the mortgagor also. In the present case it has been found that the title of the plaintiff was never denied by the defendants. It is also an admitted fact that when the defendants took possession the persons entitled to remain in possession were the mortgagees and not the mortgagors and that the mortgage was unsatisfied. As the plaintiff had therefore no right to immediate possession, the defendants cannot be held to have been in possession adversely to plaintiff. As observed by Mr. Justice MARKBY in *Bejoy Chunder Banerjee v. Kally Prosonno Mukerjee* (3), by adverse possession is meant possession by a person holding the land on his own behalf or on behalf of some person other than the true owner, the true owner having a right to immediate possession. We are, therefore, unable to accept the defendants' contention that their possession is adverse to the plaintiff and that the claim is time-barred."

A mortgage under the Transfer of the Property Act (Act No. IV of 1882) is "the transfer of an interest in specific immovable property for the purpose of securing the payment of money." In a simple mortgage therefore an *interest in the property* mortgaged is carved out of the aggregate interests symbolized by the

(1) (1904) I. L. R., 27 All., 395. (2) (1892) I. L. R., 18 Bom., 51.

(3) (1878) I. L. R., 4 Calc., 327.

legal term "ownership" and vested in the mortgagee and the residue of those interests remains in the mortgagor. This residue may be called "the equity of redemption with possession." A mortgagee under a simple mortgage by virtue of the interest in the property mortgaged which he acquires has the right to bring it to sale for the realization of the mortgage debt. (Section 67, Transfer of Property Act.) Such a mortgage gives him no right to take possession of the property mortgaged. The legal position of the parties to a simple mortgage is as follows. The mortgagor owns the equity of redemption with possession and is in possession of the property as a limited owner. The mortgagee owns an interest in the property which entitles him to have the property sold by court for the satisfaction of the mortgage debt but has no right to enter into possession of the property. In these circumstances if a trespasser ousts the mortgagor *after the execution of the simple mortgage*, he can take possession of what belongs to the mortgagor and can hold adversely to him to the extent of his limited interest. In other words, he can hold the property adversely subject to the liability of its being sold for the satisfaction of the mortgage debt. His adverse possession cannot in any way affect the right of the mortgagee to bring the property to sale. Adverse possession of the limited ownership in the property which is all that remains in the mortgagor is not recognised by law as one of the causes which extinguish the mortgagee's right to bring the property to sale. Adverse possession affects rightful possession and such rights as go with it and cannot destroy such rights as are independent of it. A necessary corollary of the above mentioned principles is that a trespasser who ousts a mortgagor under a simple mortgage and holds the property adversely to him may by prescription become the owner of the limited estate which the mortgagor had in the property, but such adverse possession cannot extinguish the right of the mortgagee. This of course happens when adverse possession begins after the simple mortgage. If adverse possession precedes the simple mortgage it will run against the mortgagor and the mortgagee both. Similarly, if the mortgagee is entitled to the possession of the property mortgaged, adverse possession will run against him from the date of his right to

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possession. In two reported cases it has, however, been held that adverse possession against the mortgagor extinguishes the security of the mortgagee.

ABDUL RAHIM, J., in *Ramaswami Chetty v. Ponna Padayachi* (1) took that view. The reasons which led him to it are that the mortgage is only a security for the debt; that the interest in the land remains with the mortgagor; that a decree for sale in favour of the mortgagee cannot bind the trespasser, and that *Karan Singh v. Bakar Ali Khan* (2) covers the point. With due respect to the learned Judge, a simple mortgage is not *merely a security for the debt*, it is the *transfer of an interest in the property mortgaged*, which interest cannot be affected by the adverse possession of a trespasser over the *limited interest of the mortgagor*. No one can doubt the correctness of the proposition that a decree for sale against a mortgagor cannot bind a trespasser who is no party to the decree; but it must not be forgotten that the property which the trespasser acquires is the property which is liable to sale at the instance of the mortgagee, and the adverse possession of the limited estate of the mortgagor is not sufficient to free it from that liability. If a simple mortgage did not create *an interest in the property* in favour of the mortgagee, adverse possession against the mortgagor who would have been the full owner of the property would have extinguished the security. In the case before us the law gave the mortgagee sixty years to enforce his remedy and the ouster of the mortgagor by the trespasser in the absence of statutory provisions to that effect cannot cut it down to twelve years, and force the mortgagee to sue the trespasser in ejectment, who may well plead that no suit for ejectment lies and that there is no cause of action for sale against him. *Karan Singh v. Barkat Ali Khan* has no application to the case of adverse possession, which begins *after the execution* of a simple mortgage against the mortgagor. In that case the village Khard Khera was in dispute between Karan Singh on one hand and Kharag Singh and Rudar Singh on the other. The Collector took possession of it as *kurk tahsil* in April 1861. The guardian of Kharag Singh and Rudar Singh mortgaged it on the 7th of January and the 6th of October, 1862. Karan Singh obtained a decree

(1) (1911) 21 M. L. J. 397.

(2) (1882) L. L. R., 5 All., 1.

for the village, and the Collector delivered possession of it to Karan Singh in October, 1863, making over to him the surplus profits too. In 1874, the mortgagee sued on the mortgages of 1862. Karan Singh pleaded limitation, attempting to tack on the Collector's possession which began in April, 1861, to his own. Their Lordships ruled that the Collector's possession was not adverse to the owner and could not be tacked on to that of Karan Singh. From this ruling it is sought to be inferred that their Lordships were of opinion that the adverse possession against a mortgagor which begins *after a simple mortgage* is adverse to the mortgagee. They have not expressly so ruled, and to rely on an inference is very dangerous. Moreover, the possession of the Collector in that case began *before the mortgage* and it had been adverse to the mortgagee also inasmuch as the mortgagor at the commencement of adverse possession was not the mortgagor but the absolute owner of the property. In that case the Collector's possession *began before the mortgage*, and the rule that his possession if adverse to the mortgagor was also adverse to the mortgagee, would have been sound law but could not have governed cases in which adverse possession *began after a simple mortgage*. The distinction has been noticed by MUNRO, J., in *Parthasarathi Naikan v. Lakshmana Naikan* (1). He says:—"Had the Collector's possession which began before the mortgage been adverse to the mortgagors and had the defendant claimed through the Collector, then the mortgagee's suit would have been barred as in *Nallamuttu Pillai v. Betha Naikan* (2). This supplies a reason why it was considered necessary to consider the question of tacking."

ABDUL RAHIM, J., is also of opinion that the result of holding that adverse possession against a mortgagor does not extinguish the security of his mortgagee "would be that when a property is under mortgage and the mortgagor or his successor in interest goes on paying interest on the debt or otherwise acknowledges his liability, persons in peaceable and unchanged possession and enjoyment of such property in assertion of their own rights whatever the length of the time during which their possession and enjoyment might have lasted would not be secured in the title." This in his opinion is monstrous. With due respect I am unable to agree with him. I see no reason why the invader of the possession and

(1) (1911) 21 M. L. J., 467.

(2) (1900) I. L. R., 23 Mad., 37.

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the limited rights the mortgagor should be so favoured by law as to acquire the right of the mortgagee also.

The other case which is against the view I take is that of *Pratap Bahadur Singh v. Maheshwar Balhsh Singh* (1). In it one of the learned Judges based his decision on what appeared to him to be the view of their Lordships of the Privy Council in the case of *Karan Singh v. Bakar Ali Khan* (2). He said:—

“ And it appears to me that in the case of a simple mortgage when the mortgagee is not entitled to possession twelve years’ adverse possession against the mortgagor must be held to extinguish the security as far as regards the property held adversely to the mortgagor. This appears to have been the view of their Lordships of the Privy Council in the case of *Karan Singh v. Bakar Ali Khan*. ”

I have already explained that the inference sought to be drawn from the case of *Karan Singh* would apply to those cases in which adverse possession against the mortgagor commenced before the mortgage. That ruling does not, therefore, cover those cases in which adverse possession begins after a simple mortgage. The learned Judge gave no other reason for the view he took and no principle favours it. The other learned Judge says:—

“ It will be seen that practically the rulings under both heads are concurrent upon the general principles that the person who is in possession of mortgaged property when there is no priority between him and the mortgagor (like the respondents in the present case) can assert his title as against the mortgagee from the date on which the mortgagee was entitled to take action on his mortgagee deed by suing for possession *for sale of the property in case of default*. ”

With due respect, no ruling, so far as I have been able to understand it, lays down that a mortgagee under a simple mortgage who is not entitled to take possession of the property mortgaged is *bound* to sue the trespasser. The following cases are in favour of the view I take. *Aimadar Mandal v. Makhan Lal Day* (3) and *Parthasarathi Naikan v. Lakshmana Naikan* (4). MUNRO, J., in the last named case has with great ability distinguished all the rulings which seem to be in conflict with that

(1) (1908) 12 O. C., 45.

(3) (1906) I. L. R., 33 Calc., 1015.

(2) (1882) I. L. R., 5 All., 1.

(4) (1911) 21 M. L. J., 467.

view. I fully agree with him and need not repeat what he has so well set out in his judgement.

For the above reasons I would hold that the suit for the enforcement of the two mortgages against the property near Taksal, which is in possession of Ram Dei, is not barred by twelve years' limitation.

KNOX, J.—On the former of the two questions raised in this appeal I never had any doubt. I quite agree with what my brother has said on the question.

The second question raised is of more difficulty, but after reading the various authorities and after giving full consideration to the question I agree with my brother in holding that limitation does not bar the claim.

The result is that the decree of the lower appellate court is so far modified that the plaintiff will get a decree for sale of the property situate at muhalla Taksal in the city of Benares, with costs in proportion to his success and failure.

BY THE COURT.—The decree of the lower appellate court is modified and the plaintiff will get a decree for sale of the property situate at muhalla Taksal in the city of Benares, with costs in proportion to his success and failure.

Decree modified.

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July, 16.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Tudball.

NAWAB KHAN (PLAINTIFF) v. MUHAMMAD ZAMIN (DEPENDANT).*

Municipality—Election—Practice—Petition against elected member on ground of personation of voters—Limitation—Fresh instances of personation allowed to be pleaded after expiry of time for filing petition.

An elector on the roll of a municipality filed a petition under the rules framed in that behalf by the Local Government against a successful candidate in a municipal election alleging various instances of personation of voters for which the opposite party was stated to be legally responsible. The petition was filed within the time limited by law. *Held*, that it was competent to the court in which such petition was presented to allow the petition to be amended by the addition of fresh instances of personation.

This was a petition by an elector on the electoral roll of the municipality to set aside the election of the opposite party as a municipal commissioner of Allahabad under rule 42 of the

* Second Appeal No. 354 of 1912 from a decree of H. E. Holme, District Judge of Allahabad, dated the 26th of February, 1912, reversing a decree of Tufail Ahmad, Second Additional Munsif of Allahabad, dated the 22nd of December, 1911.