

aside a decree of the Small Cause Court at Calcutta on the allegation that it had been obtained against the plaintiff by fraud. This Court held that the suit could not be maintained at Agra.

In my opinion the decision of the court below was correct and ought to be confirmed.

TUDBALL, J.—I fully agree with everything that the learned Chief Justice has said. I would like to add that an attempt was made to distinguish the case which is now before us from the case of *Umrao Singh v. Hardeo* (1). It is pointed out that in the present case the plaintiff asked not only to have the decree set aside on the ground of fraud; but also that an injunction might be issued against the defendant restraining him from putting it into execution. I fail to see how the addition of this relief in any way differentiates the two cases. No court which granted the first relief, that is, the setting aside of the decree, would also issue an injunction against the defendant restraining him from executing the decree which it had already set aside. In my opinion the addition of this unnecessary relief does not alter the case at all. The court below had no jurisdiction whatsoever to entertain the suit and its order is perfectly correct.

By THE COURT.—The order of the Court is that the appeal be dismissed with costs.

*Appeal dismissed.*

## FULL BENCH.

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

RAJ NATH AND OTHERS (DEFENDANTS) v. NARAIN DAS (PLAINTIFF) AND DARSİ AND OTHERS (DEFENDANTS)\*

*Act No. IX of 1908 (Indian Limitation Act), schedule I, articles 132 and 144—Limitation—Mortgage—Suit for sale on a mortgage impleading defendants alleged to be in adverse possession of the mortgaged property.*

Held that a suit for sale on a mortgage can always be brought under article 132 of the first schedule to the Indian Limitation Act, 1908, against all persons in possession whose possession is subsequent to the date of the mortgage, provided that the suit is brought within twelve years from the time at which

\*Second Appeal No. 427 of 1913 from a decree of H. W. Lysis, District Judge of Agra, dated the 28th of January, 1913, confirming a decree of Shekhar Nath Banerji, Second Additional Subordinate Judge of Agra, dated the 12th of March, 1912.

(1) (1907) I. L. R., 29 All., 418.

1914

DAN DAYAL  
v  
MUNNA LAL.

1914  
June, 23.

1914

RAJ NATH  
v.  
NARAIN DAS.

the money became due. Such a suit does not become a suit for possession governed by article 144 because it may be necessary to implead persons who are in possession and claim a title by possession adverse to the mortgagor. *Karan Singh v Bakar Ali Khan* (1) distinguished. *Nandan Singh v. Jumman* (2) and *Aimadar Mandal v. Makhani Lal Day* (3) referred to.

THE facts of this case were as follows :—

The plaintiff sued for sale upon a simple mortgage executed in 1874. He impleaded as defendants the heirs of the mortgagor, and certain other persons (the present appellants) who were in possession of the mortgaged property. The heirs of the mortgagor did not defend the suit. The other set of defendants pleaded they were in adverse possession of the property for over 12 years and had thus acquired an absolute title to it and that accordingly the suit was barred by limitation. The court of first instance held that adverse possession for over 12 years as against the heirs of the mortgagor was established, but that it had commenced in 1891, after the mortgage, and so did not affect the rights of the plaintiff as a simple mortgagee. The suit was decreed and the decision was upheld by the District Judge on appeal by the contesting defendants. The contesting defendants appealed to the High Court.

On the appeal coming on for hearing before CHAMIER and RAFIQ, JJ., their Lordships made the following referring order :—

“ This was a suit upon a simple mortgage made in 1874. The appellants were impleaded because they were in possession of the property. They pleaded that the suit was barred by limitation as against them as they did not claim under the mortgagor and had been in adverse possession of the property for more than 12 years before the suit. ”

“ According to an unreported decision of the learned Chief Justice in S. A. No. 368 of 1910, *Bairjnath v. Bhudanjan*, this was a good defence to the suit. To the same effect is an Oudh decision, *Pratap Bahadur Singh v. Mahashwar Baksh Singh* (4), in which one of us took part, and in which the opinion was expressed that the point was covered by the decision of their Lordships of the Privy Council in *Karan Singh v. Bakar Ali Khan* (1). In the Madras High Court there have been recently two conflicting decisions on the point. See *Ramaswami Chetty v. Ponna Padayachi* (5) and *Parthasarathi Nairan v. Lalshmana Naikan* (6) and the point was referred to a Full Bench but no decision was arrived at. See *Peria Aiya Ambalam v. Shunmugasundaram* (7). The latest

(1) (1883) I. L. R., 5 All., 1. (4) (1908) 12 Oudh Cases, 45.

(2) (1912) I. L. R., 34 All., 640. (5) (1910) 21 M. L. J., 397.

(3) (1906) I. L. R., 33 Calc., 1015. (6) (1911) 21 M. L. J., 467.

(7) (1914) 26 M. L. J., 140.

case in this Court is that of *Nandan Singh v. Jumman* (1), in which KNOX and KARAMAT HUSAIN, JJ., approved the decision in *Parthasarathi Naikan v. Lakshmana Naikan* (2) and disapproved that in *Ramaswami Chetty v. Ponna Padayachi* (3) and the Oudh decision.

1914

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 RAJ NATH  
 v.  
 NARAIN DAS.

"As much difference of opinion exists regarding the effect of the decision in I. L. R., 5 All., page 1, we got out the original record, and we find that all the five Judges of this Court who had to do with the case seem to have been of opinion that 12 years' adverse possession of the mortgaged property by a stranger would bar a suit for sale upon a simple mortgage. They seem to have attached no importance whatever to the fact that the mortgagee had not been entitled to possession of the property. Both this Court and the Judicial Committee seem to have thought that article 145, schedule II of the Limitation Act was relevant to the case, though, viewed as a suit for sale on the mortgage, it seems to have been governed by article 132 of the same schedule. Apart from the decision of the Judicial Committee we should be disposed to dismiss the appeal, but in the circumstances we think that this appeal should be heard by a larger Bench and we direct that the file be laid before the learned Chief Justice for orders."

The appeal then came up before a Full Bench.

Pandit *Shiam Krishna Das*, for the appellants:—

The question is whether article 132 of the Limitation Act (in this case read with section 31 of the Act) applies only to a suit against the mortgagor and persons claiming under him, or applies also to a suit against a mortgagor and a trespasser. The appellants who claim by adverse possession cannot be said to claim through the mortgagor; they are trespassers. As between them and the mortgagee there is no privity of contract. In a suit for sale upon a simple mortgage what is the cause of action of the mortgagee against a trespasser? The mortgagee has no cause of action other than his mortgage, and cannot bring a suit for sale against a stranger. A suit for sale against a mortgagor and a trespasser is really not a pure and simple suit for sale upon a mortgage, but is a mixture of two suits. As against the mortgagor it is a suit for sale upon the mortgage. But as against the trespasser it involves something like a declaration of right or title. Article 144 and not article 132 of the Limitation Act applies to a suit like the present one. As against a trespasser the mortgagee is bound to come within 12 years of the commencement of the adverse possession to vindicate his title to

(1) (1912) I. L. R., 34 All., 640. (2) (1911) 21 M. L. J., 467.

(3) (1910) 21 M. L. J., 897.

1914

RAJ NATH  
v.  
NABAIN DAS.

the mortgaged property; *Sheoumber Sahoo v. Bhowaneedeen Kulwar* (1), *Ram Coomar Sein v. Prosunno Coomar Sein* (2).

The case of *Ramaswami Chetty v. Ponna Padayachi* (3) was a case of a simple mortgage like the present case. There the question arose in a slightly different form. The mortgagee obtained against the mortgagors a decree for sale, without impleading the trespassers. Thereupon the trespassers sued for a declaration that they had become the owners of the property and that it could not be sold in execution of the decree. It was held that where the mortgagor is dispossessed and his title disputed, and another person obtains possession, such possession becomes adverse to both mortgagor and mortgagee and the latter must come within 12 years of the commencement of the adverse possession. Similarly, in the case of *Pratap Bahadur Singh v. Maheshwar Baksh Singh* (4), it was held that adverse possession begins against a mortgagee from the date on which he is entitled to take action on his mortgage by suing for possession or sale and that in the case of a simple mortgage where the mortgagee is not entitled to possession 12 years' adverse possession against the mortgagor extinguished the security. Another case, also of a simple mortgage, is that of *Ram Lal v. Masum Ali Khan* (5).

The Privy Council case of *Karan Singh v. Bakar Ali Khan* (6) supports my contention. There the suit was for sale on the basis of a simple mortgage. At the time when the suit was brought one Karan Singh was in possession of the mortgaged property adversely to the heirs of the mortgagor. Both the Full Bench of the High Court and the Judicial Committee of the Privy Council, who dealt with the case, went at great length into the question as to whether the adverse possession had or had not been for over 12 years. If in the case of simple mortgage adverse possession against the mortgagor could not be adverse possession against the mortgagee then it would not have been at all necessary in that case to go into the length of the period of the adverse possession.

(1) N. W. P., H. C. Rep., 1870, 228. (4) (1908) 12 Oudh Cases, 45.

(2) (1864) W. R., Gap. Number, 375. (5) (1902) I. L. R., 25 All., 35, (38).

(3) (1910) 21 M. L. J., 397.

(6) (1862) I. L. R., 5 All., 1.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the respondents, was not called upon.

1914

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RAJ NATH  
v.  
NARAIN DAS.

RICHARDS, C. J.—This appeal arises out of a suit upon a mortgage, dated the 8th of January, 1874. The suit was not instituted until the 13th of May, 1911. Both the courts below have granted a decree for sale of the mortgaged property. The defendants 6—11 have appealed. Their case is that they had acquired title by adverse possession as against the mortgagor and that, therefore, the present suit as against them is barred by limitation. Article 132 of the first schedule to the Limitation Act provides that a suit to “enforce payment of money charged upon immovable property may be brought within 12 years from the time when the money sued for became due.” It is admitted here that, having regard to section 31 of Act No. IX of 1908, the present suit, as a suit under article 132, is within time. The appellants contend that so far as they are concerned the suit must be governed by article 144, which provides that a suit for possession of immovable property must be brought within 12 years from the time when the possession of the defendant becomes adverse to the plaintiff. I may point out at the commencement that the suit is not a suit for possession of immovable property. It is precisely the suit that is mentioned in article 132. I may also point out that the plaintiffs, on the admitted facts, could never have brought a suit for possession of the property against any one under article 144 until after a suit under article 132 had been first brought. In my opinion a suit can always be brought under article 132 against all persons in possession whose possession is subsequent to the date of the mortgage, provided that the suit itself is brought within 12 years from the time upon which the money became due. The question would, I think, be free from all difficulty were it not for views taken by some of the courts of the decision of their Lordships of the Privy Council in the case of *Karan Singh v. Bakar Ali Khan* (1). In that case a suit was brought upon mortgage bonds made in the months of January and October, 1862. Some of the defendants pleaded adverse possession. The High Court in Allahabad held that they had not been in adverse possession

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

1914

RAJ NATH  
v.  
NARAIN DAS.

for more than 12 years and this decision was confirmed by their Lordships of the Privy Council, with the result that the plaintiffs got a decree for sale of mortgaged property. The curious part of the case is that it would appear that both in India and also before their Lordships of the Privy Council the suit was treated as a suit for possession, whereas in truth and in fact it was a suit for sale just like the present case. This may possibly have been due to the fact that the defendant's case was that his adverse possession had commenced before the mortgage was made. This was the argument which was put forward by the learned counsel for the appellant when arguing the case before their Lordships of the Privy Council, and their Lordships held on the facts of the case as proved that adverse possession did not commence until after the date of the mortgage. It, therefore, became quite unnecessary for their Lordships to decide what was the article of the Limitation Act which applied to the circumstances of the case. The case was decided against the defendants on the case they tried to substantiate. This decision of their Lordships of the Privy Council was cited in the case of *Aimadar Mandal v. Makhan Lal Day* (1). The learned Chief Justice held that the case did not apply. There seems to have been a division of opinion in Madras. As mentioned before, my only difficulty is the decision of their Lordships of the Privy Council; but having regard to the fact that no argument on the question ever took place before their Lordships and that it was quite unnecessary to decide the point, I do not think that the case can be regarded as in any way a binding authority upon this Court on the point in issue. I accordingly would dismiss the appeal.

TUDBALL J.—I concur. The question now before us is discussed at considerable length in the case of *Nandan Singh v. Jumman* (2). I fully agree with all that has been said there and have no reason to add anything further.

CHAMIER, J.—I had to decide this question some years ago, and I then thought it was in reality governed by the decision of their Lordships of the Privy Council in *Karan Singh v. Bakar Ali Khan* (3). Both this Court and their Lordships of the

(1) (1906) I. L. R., 33 Calc., 1015. (2) (1912) I. L. R., 34 All., 640.

(3) (1882) I. L. R., 5 All., 1.

Privy Council seemed to me to have held that time began to run against the plaintiff under article 145 of the second schedule to the Limitation Act of 1871, from the date on which the possession of Karan Singh began, because that possession was adverse to the plaintiff. What has since been put forward, as an explanation of the decision of this Court and of their Lordships of the Privy Council, does not seem to have occurred to any of the five Judges who dealt with the case in this Court, or to any of their Lordships who heard the appeal, and I must say that to my mind the explanation is neither sufficient nor satisfactory. But as some learned Judges of this Court and of the Madras High Court have recently expressed the opinion that the decision of their Lordships should not be regarded as covering a case of this kind, I defer to their opinion with a view to secure uniformity of decision. If the decision of the Privy Council is not applicable to the case then in my opinion the case is clear. On this ground I agree with the learned Chief Justice in dismissing the appeal.

By THE COURT.—The order of the Court is that the appeal be dismissed with costs.

*Appeal dismissed.*

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## APPELLATE CIVIL.

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*Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Tudball.*  
 ABDUL HAMID (PLAINTIFF) v. MASIT-ULLAH AND OTHERS (DEFENDANTS).  
*Pre-emption—Pleadings—Muhammadan law—Custom—Amendment of plaint—Discretion of Court.*

1914  
 June, 24.

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The plaintiff in a suit for pre-emption based his claim upon the Muhammadan law. At a somewhat late stage in the case the plaintiff asked leave to amend his plaint by adding an alternative claim based on custom as evidenced by the wajib-ul-arz; but this was refused, and the Court, notwithstanding that it found that, according to the wajib-ul-arz, a custom of pre-emption existed, dismissed the suit. *Held* that the Court ought to have permitted the plaint to be amended, and, even without amending the plaint, was competent to decree the claim on the basis of the wajib-ul-arz.

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\* Second Appeal No. 1195 of 1913, from a decree of C. E. Gitterman, Additional Judge of Moradabad, dated the 21st of August, 1913, confirming a decree of Kunwar Sen, Additional Subordinate Judge of Moradabad, dated the 19th of May, 1913.