

1881

HAZARI RA  
v.  
SHANKAR  
DIAL.

session. When such a suit is brought the mortgagor may contest the validity of the conditional sale, the regularity of the foreclosure proceedings, and may show that nothing was due. But the issue will be, so far as the right of redemption is affected, whether at the end of the year of grace any thing was due to the mortgagee, and if so, whether the necessary deposit had been made. If the mortgagor fails to establish this case, the right of redemption is gone. But a decree in favour of the mortgagee does not create his title as owner. It establishes as a matter beyond all further question that as between the mortgagor and mortgagee the ownership has passed absolutely from the former to the latter. But the title of the mortgagee was created by the failure of the mortgagor to redeem within the year of grace, and dates from the end of that year. In this case the mortgagee acquired his title as owner on the 3rd August, 1878, on which day the right of redemption was gone, and the plaintiff was in a position to bring a suit from the day that the title as owner was vested in the mortgagee. It was not necessary that he should wait until the mortgagee obtained physical possession. But if he had waited until that had happened, then by the law of limitation he was bound to sue within one year from the date on which the mortgagee acquired such physical possession. Under this view of the case the Judge should have disposed of the case on its merits. We therefore decree the appeal, reverse his decree, and remand the appeal to his Court in order that he may do so ; costs of this appeal will abide the result.

*Cause remanded.*


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## APPELLATE CRIMINAL

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*Before Mr. Justice Spankie*

EMPRESS OF INDIA v. RAM DAYAL

1881

May 6.

*Previous conviction—Attempt to commit offence—Act XLV of 1860 (Penal Code), ss. 75, 457, 511.*

A person, having been convicted of an offence punishable under s. 457 (Ch. XVII) of the Indian Penal Code, was subsequently guilty of an attempt to commit such an offence. *Held* that the provisions of s. 75 of the Indian Penal Code were not applicable to such person.

THIS was an appeal from a conviction on a trial held by Mr. H. D. Willock, Sessions Judge of Azamgarh, dated the 21st

1881  
 PRESS OF  
 INDIA  
 BY  
 ANU DAYAL.

January, 1881. The appellant was convicted by the Sessions Judge of attempting to commit house-breaking by night with intent to commit theft. He was sentenced by the Sessions Judge to the enhanced punishment of transportation for fourteen years, with reference to the provisions of ss. 511, 457 and 75 of the Indian Penal Code, and to the fact that he had been previously convicted of an offence under s. 457 (Ch. XVII) of the Code.

Mr. *Niblett*, for the appellant, contended that the provisions of s. 75 of the Code were not applicable in this case, the offence of which the appellant had been convicted not being one punishable under chapter XVII of the Code.

The *Junior Government Pleader* (*Babu Dwarka Nath Banarji*), for the Crown.

SPANKIE, J.—There is no doubt of the guilt of the prisoner upon the evidence on the record. But the offence of which the prisoner was convicted is one punishable under ss. 511 and 457. On the 12th March, 1873, the prisoner was convicted of an offence punishable under Chapter XVII of the Penal Code, s. 457, and a previous conviction is said to have been proved then against him. The prisoner states that he was whipped the year before for being in possession of spurious coin. But the date and nature of the offence is not known; under the offence punishable under s. 457 he was sentenced to four years rigorous imprisonment. This previous conviction and sentence was taken into consideration in the present trial, and under ss. 511, 457 and s. 75 the prisoner was sentenced to fourteen years transportation. But an attempt to commit an offence punishable under s. 511 is an offence under s. 40 of the Penal Code. It is not an offence punishable under Chapter XVII of the Code. It is an offence punishable under s. 511 of the Code; s. 75 therefore cannot apply to this case. The offence of which the prisoner has now been convicted is an attempt at house-breaking by night with intent to commit theft, and the longest term of imprisonment for the substantial offence is fourteen years, and the punishment provided by s. 511 is half that term of imprisonment. I am therefore under the necessity of modifying the sentence passed by the Sessions Judge, and I therefore sentence the prisoner to seven years rigorous imprisonment.