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option of either party. This part of the claim of plaintiff has been brought prematurely; and the claim for arrears of rent is not cognizable in a Civil Court. The plaint should have been rejected; and I concur with the Chief Justice that the order of the lower Court should so far be corrected, by directing that the plaint be rejected with costs. The appeal is dismissed with costs.

Appeal dismissed.

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May 3.

Before Mr. Justice Spinkis and Mr. Justice Straight.

HAZARI RAM (PLAINTIFF) v. SHANKAR DIAL (DEFENDANT).*

Mortgage—Conditional sale—Pre-emption—Cause of action.

The cause of action of a person claiming a right of pre-emption in respect of a mortgage by way of conditional sale arises on foreclosure of such mortgage, that is to say, on the expiration of the year of grace without payment by the mortgagor of the mortgage-money, inasmuch as on the expiration of such period the mortgagee acquires a proprietary title to the mortgaged property. Such person can therefore sue to enforce his right of pre-emption on the expiration of such period, and need not wait to do so until the mortgagee has obtained proprietary possession of the mortgaged property.

THE plaintiff in this claimed to enforce a right of pre-emption in respect of a share of a certain village, such right being founded on the terms of the village administration-paper. This share had been mortgaged, by way of conditional sale, by its proprietor to the defendant Shankar Dial. The latter applied for foreclosure of the mortgage on the 14th July, 1877. The notice required by Regulation XVII of 1806 was issued on the 30th July, 1877, and was served on the mortgagor on the 4th August, 1877. After the expiration of the year of grace the defendant Shankar Dial sued the mortgagor for possession of the share, and obtained a decree, in execution of which he obtained possession of the share on the 20th September, 1878. In the meantime, on the 7th August, 1878, the present suit to enforce a right of pre-emption in respect of the share was instituted by the plaintiff. The defendant Shankar Dial set up as a defence to the suit that it had been instituted before the plaintiff had acquired a right to sue, and it was therefore not maintainable,

* Second Appeal, No. 444 of 1880, from a decree of J. W. Power, Esq., Judge of Gházipur, dated the 18th February, 1880, reversing a decree of Maulvi Abdul Majid Khan, Subordinate Judge of Gházipur, dated the 30th September, 1879.

contending that the plaintiff acquired a right to sue, not on the expiration of the year of grace, but when he (the defendant) obtained possession of the share, inasmuch as when he obtained possession of the share his title thereto became absolute and not before. The Court of first instance decided that the plaintiff acquired the right to sue on the expiration of the year of grace, and the suit had not been instituted prematurely, holding that the defendant's title to the share became absolute on the expiration of the year of grace. On appeal by the defendant the lower appellate Court held that the defendant's title did not become absolute until he had obtained a decree for possession of the share and obtained possession thereof, and until that time the plaintiff had no right to sue, and the suit was therefore prematurely brought; and it dismissed the suit. The plaintiff appealed to the High Court, contending that he acquired a right to sue on the expiration of the year of grace.

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Mr. Conlan, Pandit *Ajudhia Nath*, and Babu *Jogindro Nath Chaudhri*, for the appellant.

Mr. Colvin, Munshis *Hanuman Prasad* and *Sukh Ram*, and Pandit *Bishambhar Nath*, for the respondent.

The judgment of the Court (SPANKIE, J., and STRAIGHT, J.), so far as it is material for the purposes of this report, was as follows:

SPANKIE, J., (STRAIGHT, J. concurring)—The Judge considered before the other pleas the objection contained in the sixth plea that according to art. 10, sch. ii of Act XV of 1877, the cause of action in a pre-emption suit arises on the date of the delivery of actual possession: the defendant got proprietary possession on the 20th September, 1878, and therefore no cause of action had accrued to the plaintiff on the 7th August, 1878, when the suit was instituted. The lower appellate Court observes that on this plea two questions arose, (i) when did the conditional sale become absolute; (ii) when did the plaintiff's cause of action arise. Application for foreclosure was made on the 14th July, 1877. Notice was issued to the conditional vendor on the 30th July, 1877, but service was not effected until the 4th August, 1877. The year of grace ran from that date and expired on the 3rd August, 1878. The defendant was obliged to bring a regular suit for possession. He obtained

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a decree and was put into possession by the Court on the 20th September, 1878. On the authority of the decision of the Privy Council in *Forbes v. Ameeroonissa Begum* (1) the Judge held that the mortgagee's title was not complete at the end of the year of grace, but he had to bring a regular suit for possession, if out of possession, or to obtain a declaration of his title, if in possession. The title of the defendant therefore was not complete until the 20th September, 1878. Art 10, sch. ii, provides a period of one year from the time when the purchaser takes physical possession of the whole property sold. The defendant could not give this physical possession until the 20th September, 1878, when he got it himself. The Judge therefore held the suit to be premature, and dismissed it, decreeing the appeal.

It is now contended in second appeal that the ruling of the lower appellate Court is erroneous, as the purchaser's title becomes complete on the expiration of the year of grace. The vendee may be obliged to sue his vendor for possession of the property, but he is not required to sue for the completion of his title. The lower appellate Court appears to be wrong in considering that the suit is premature. It is right in saying that the year of grace expired at the close of one year from the date of service. In the decision of the Privy Council cited by the Judge—*Norender Narain Singh v. Dwarka Lal Mundur* (2)—their Lordships adopt the decision of the Full Bench of the High Court of Bengal in *Mohesh Chunder Sein v. Tarinee* (3) on the point. But the lower appellate Court has not shown satisfactory grounds for holding that the suit was premature, and must therefore be dismissed, because physical possession was not given until the 20th September following the 3rd of August the date of the expiration of the year of grace. The right of the mortgagor was gone, and the title of the mortgagee as owner was acquired. The Judge has misapprehended the decision of the Privy Council in the case of *Forbes v. Ameeroonissa Begum* (1). The proceedings under the Regulation in regard to these mortgages are purely ministerial, it is true, and the mortgagee is left to a regular suit, if out of possession, to recover possession, or to obtain a declaration of his absolute title if he is in pos-

(1) 10 Moo. A., 340.

(2) I. L. R., Calc. 397.

(3) 10 W. R., F. B., 27; S. C., 1 B. L. R., F. B., 14.

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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.

APPELLATE CRIMINAL

Before Mr. Justice Spankie

EMPRESS OF INDIA *v.* RAM DAYAL

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

1881
May 6.

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