which was relied upon as a bar was held to be not proved upon the facts and the learned Judges took the view that the indications of the agreement were that the claim petition was allowed to succeed on the understanding that the plaintiff was to institute a suit under Order XXI, rule 63. I respectfully adopt the following observations of the learned Judges to be found at page 537: "In the present case, it is because the order on the claim petition is binding on the plaintiff that he can institute a suit to get rid of the effects of the order (Order XXI, rule 63, of the Code of Civil Procedure). This is also an answer to the objection that there was no order against the plaintiff, an objection which we have some difficulty in understanding. It is quite clear that when it was decided that the plaintiff was not entitled to attach the property which he had purported to attach, there was an order against him. The fallacy of the argument is caused by assuming that because a party does not object to an order being passed against him, therefore, the order that is passed is not against him". In the case before us the agreement is not only not proved but is not even alleged in the pleadings.

For these reasons I agree that the appeal fails and should be dismissed with costs.

Appeal dismissed.

K. D.

APPELLATE CIVIL.

Before Agarwala and Rowland, JJ.

1940,

Jan. 23, 24.

MAKSUDAN LAL SAHU

v.

NIRANJAN NATH DAS.*

Chota Nagpur Tenancy Act, 1908 (*Beng. Act VI of* 1908), *sections* 46 *and* 47—*mortgage in contravention of section* 46—

* Appeal from Appellate Decree no. 745 of 1938, from a decision of Mr. Kshetra Mohan Kunar, Additional Judicial Commissioner of Chota Nagpur, dated the 1st June, 1938, confirming a decision of Babu Shib Chandra Prashad, Munsif at Ranchi, dated the 30th March, 1937.

1940.

MAKSUDAN LAL SAHU v. NIRANJAN NATH DAS.

decree for sale of mortgaged property, whether can be passed —subsequent change in character of land, whether can affect the previous transaction of mortgage—suit for money on personal covenant—limitation—receipt of usufruct by mortgagee after statutory period, whether gives a fresh start to limitation—Limitation Act, 1908 (*Act IX of* 1908), *section* 20(2)*—amendment of plaint altering the character of suit, whether should be allowed.*

In 1911 ancestor of defendants first party executed a mortgage bond in respect of a house, situated in a raiyati plot, in favour of *M*. *M* was to remain in possession of the hypothecated property for three years after which the mortgagor was entitled to redeem. It was further stipulated that *M* was to continue in possession until redemption and in case of dispossession there was a covenant to repay the money with interest to the father of the plaintiff. The plaintiff remained in possession until 1930 when the defendants first party dispossessed him. In 1936 the plaintiff instituted the suit to recover the principal and interest due on the mortgage bond. The lower courts held that sections 46 and 47, Chota Nagpur Tenancy Act, 1908, were a bar to the plaintiff obtaining a mortgage decree for sale of the property, that the six years' limitation commencing from 1916 was a bar to the relief on the basis of the personal covenant, and that the plaintiff could not take advantage of his subsequent possession which was that of a trespasser;

Held, (*i*) that the enjoyment of the usufruct of the property by the plaintiff year by year after 1916 did not give a fresh start to limitation for a suit to recover the money within the meaning of section 20(2), Limitation Act, 1908.

Krishnaji Sakharan Deshpande v. *Kashim*(1), *Pichandi* v. *Kandasami*(2) and *Venkaji Babaji Naik* v. *Shidramapa Balapa Desai*(3), followed.

Abdul Jabbar Khan v. *Gulab Khan*(4), *Sontayana Gopala Dasu* v. *Inapatalupula Rami*(5), *Ramachandra Venkaji Naik* v. *Kallo Devji Deshpande*(6), *Sheikh Bhukhan Mian* v.

(1) (1919) I. L. R. 44 Bom. 500.
(2) (1884) I. L. R. 7 Mad. 539.
(3) (1894) I. L. R. 19 Bom. 663.
(4) (1933) 14 Pat. L. T. 294.
(5) (1921) I. L. R. 44 Mad. 946.
(6) (1915) I. L. R. 39 Bom. 587.

Srimati Radhika Kumari Debi(1), *Madhavrao Waman Saunralgekha* v. *Raghunath Venkatesh Despande*(2) and *Srimath Daivasikhamani Ponnambala Desikar* v. *Periyanan Chetti*(3), distinguished.

(*ii*) that the mortgage, having been entered into in violation of section 46, could not, under that section or section 47, form the basis of a valid decree for sale;

(*iii*) that though it was true that the land (and house) had ceased to be raiyati and that its status was *chhaparbandi* now, the change would not validate the transaction which was previously invalid; and

(*iv*) that the prayer for amendment of the pleading allowing the plaintiff to be treated as a person who by prescription had acquired an absolute title as owner altered the character of the suit and it could not, therefore, be allowed at such a late stage.

Appeal by the plaintiff.

The facts of the case material to this report are set out in the judgment of Rowland, J.

K. K. Banarji, for the appellant.

A. C. Sinha and *S. C. Chakravarty*, for the respondents.

ROWLAND, J.—This is an appeal by the plaintiff who brought on 25th of April, 1936, a suit to recover principal Rs. 250 and interest Rs. 225 due on a mortgage bond secured on a house situated in cadastral survey plot no. 1055, in khata no. 82 in village Lohardaga, district Ranchi. The mortgage bond was executed on the 22nd December, 1911, by Sheotahal Ram, ancestor of the defendants 1 to 9 in favour of Banshi Sahu, the father of defendants 10 and 11. The mortgagee was put in possession of the property hypothecated of which he was under the document to remain in possession for three years after which the mortgagor was to be entitled to redeem.

(1) (1938) 19 Pat. L. T. 489.
(2) (1923) I. L. R. 47 Bom. 798, P. C.
(3) (1936) I. L. R. 59 Mad. 809, P. C.

1940.

MAKSUDAN LAL SAHU v. NIRANJAN NATH DAS.

ROWLAND, J.

It was further stipulated that the mortgagee would continue in possession until redemption and in case of dispossession there was a covenant to repay the money with interest at 15 per cent. per annum. The mortgagee assigned his interest by sale deed, dated the 10th February, 1916, to Mohan Lal, the father of the plaintiff. Thereafter the plaintiff remained in possession of the house until 1930 when the defendants 1st party dispossessed him. The sons of Bansi Sahu have not contested the suit but the other defendants raised various objections to the claim, one was that by oral agreement the plaintiff was allowed to remain in possession and the usufruct of the property was to be set off against both principal and interest as a result of which the debt has been extinguished. This defence was negatived by the Courts. Another defence taken was that the plaintiff was dispossessed in 1917 or 1918 and that the suit was barred by time whether regarded as a mortgage suit or as a suit for recovery of money on the personal covenant to repay. The courts have found the facts otherwise holding that dispossession of the plaintiff by the defendants took place in 1930, that is, just within the period of six years before the institution of the suit. A third objection was that the mortgage was a transaction contrary to section 46 of the Chota Nagpur Tenancy Act and as such was void either at the outset or, at any rate, after five years. Therefore it was said that limitation to recover the money ran from either 1914, the date on which the mortgage money was made repayable by the bond, or from 1916 if it be assumed that the possession of the plaintiff as mortgagee was valid for five years. Sections 46 and 47 are a bar to the plaintiff obtaining a mortgage decree for sale of the property and the period of six years' limitation calculated either from 1914 or 1916 bars the relief of the money decree on the basis of the personal covenant. This defence was accepted by the Courts below who have dismissed the suit, the view taken being that the suit should have been brought within

six years from 22nd December, 1916, and that the plaintiff could not take advantage of his subsequent possession of the property because it was that of a trespasser. The Additional Judicial Commissioner thought that section 20(2) of the Limitation Act could not avail the appellant because the receipt by him of the usufruct of the property was not as mortgagee in possession but as a trespasser. It is this finding of the Courts below which is assailed on appeal.

Assuming, it is said, that the plaintiff was a trespasser in possession it is contended that by holding possession for 12 years adversely to the true owner he acquired a title as claimed by him, namely, the status of a lawful mortgagee. In support of the contention reliance is placed on some observations of Macpherson, J. in *Abdul Jabbar Khan* v. *Gulab Khan*(1). It was there said that the mortgagee begins to prescribe from the date of the mortgage and if he holds adverse possession as such for the statutory period, the raiyat can only recover possession by redeeming him. That observation was in the nature of an obiter dictum, for in the case before him which was resisted by the defendant on the ground that he had been in possession not as a mortgagee but as a raiyat it was held that in fact the defendant had been in adverse possession of an interest as raiyat. There are decisions of other High Courts in which a person in possession as a mortgagee under a mortgage invalid by statute has been held to have prescribed and obtained by lapse of time the limited right of a mortgagee. It was so held in *Sontayana Gopala Dasu* v. *Inapatalupula Rami*(2), and in *Ramachandra Venkaji Naik* v. *Kallo Devji Deshpande*(3), in a suit to redeem where the defendant held under an invalid mortgage for over 12 years and set up an absolute title, it was held that he could prescribe only for the limited interest of a mortgagee

(1) (1933) 14 Pat. L. T. 294.
(2) (1921) I. L. R. 44 Mad. 946.
(3) (1915) I. L. R. 39 Bom. 587.

1940.

MAKSUDAN LAL SAHU v. NIRANJAN NATH DAS.

ROWLAND, J.

in possession. On the other hand, doubt has been expressed in this Court whether such a limited interest as the relation of mortgagor and mortgagee can be created by prescription. In *Sheikh Bhukhan Mian* v. *Srimati Radhika Kumari Debi*(1) the question was not expressly decided but both Wort, A. C.J. and Manohar Lall, J. inclined to the opinion that this limited interest could not accrue by adverse possession. In *Madhavrao Waman Saundalgekar* v. *Raghunath Venkatesh Despande*(2) the question arose whether tenants claiming a permanent tenancy in service watan lands on the strength of a lease contrary to the prohibition in Bombay Act III of 1874 against alienation by a watandar had, by adverse possession, established a right to a permanent tenancy. Sir John Edge in delivering the judgment of their Lordships said, without expressly deciding the point, that "They are constrained to say that it is somewhat difficult to see how a stranger to a watan can acquire a title by adverse possession for 12 years of lands, the alienation of which was, in the interests of the State, prohibited". Again in *Srimath Daivasikhamani Ponnambala Desikar* v. *Periyanan Chetti*(3) the question was raised but not decided. But the decided cases mainly deal with the positions in which the true owner seeks to redeem or to eject a person in possession under an invalid mortgage. In the present case the position is changed because the defendants who are the true owners have succeeded in recovering possession of the mortgaged property. Hence it is not necessary for us to decide what would have been the position had the present plaintiff been in possession and in the situation of a defendant to a suit of that nature. The point which we have to decide is whether limitation for the suit instituted by him which is to recover his mortgage money is to run from 1916 at latest or from 1930, the date on

(1) (1938) 19 Pat. L. T. 489.
(2) (1923) I. L. R. 47 Bom. 798, P. C.
(3) (1936) I. L. R. 59 Mad. 809, P. C.

which he lost possession. The position seems analogous to that in *Krishnaji Sakharam Deshpande* v. *Kashim*(1). Here a mortgage of watan lands was by statute permissible so far as it affected the life interest of the grantor but beyond that it was not valid so as to affect the interest of his successor. A suit was brought by the successor to recover possession of the property and he succeeded on the finding that the mortgagee was, since the death of his mortgagor, a trespasser. The latter then sued to recover his money and he sought to date limitation for the suit from the date when he was dispossessed of the land treating the receipt of the rent or produce of the land as a payment within the meaning of section 20(*2*) of the Indian Limitation Act giving a fresh start to limitation. It was held that time ran against him from the date of the death of his mortgagor on which date the mortgage as such came to an end. His possession thereafter " was the possession of a trespasser claiming a limited interest in the property as a mortgagee, but not the possession of a mortgagee ". A similar view was taken in *Pichandi* v. *Kandasami*(2) and in *Venkaji Babaji Naik* v. *Shidramapa Balapa Desai*(3). That being so, we are unable to hold that the enjoyment of the usufruct of the property by the plaintiff year by year gave him a fresh start for limitation for a suit to recover the money. On that finding the claim to a money decree fails.

As to the alternative claim for a mortgage decree Mr. K. K. Banarji for the appellant did not feel himself in a position to press it and said he would be content if his client got a money decree but it may be pointed out that the mortgage having been entered into in violation of section 46 of the Chota Nagpur Tenancy Act could not, under that section or section 47, form the basis of a valid decree for sale. It is true that the land (and house) now in suit has ceased

(1) (1919) I. L. R. 44 Bom. 500.
(2) (1884) I. L. R. 7 Mad. 539.
(3) (1894) I. L. R. 19 Bom. 663.

1940.

MAKSUDAN LAL SAHU v. NIRANJAN NATH DAS.

ROWLAND, J.

to be raiyati land and its status is *chhaparbandi*. But the change took place apparently about 1928 and will not validate a transaction regarding the land which was previously invalid. It was faintly contended that if relief under the bond could not be given to the plaintiff he might be permitted to amend his pleading and asked to be treated as a person who has by prescription acquired an absolute title as owner. For this purpose he might be permitted to amend his plaint by adding a prayer to be restored to possession of the house. I do not think that at this late stage the plaintiff can be allowed to make such an amendment which would alter the character of the suit to a degree which does not seem to be permissible.

In the result I would dismiss the appeal with costs.

AGARWALA, J.—I agree.

Appeal dismissed.

K. D.

1940.

Feb., 12.

CIVIL REFERENCE.

Before Harries, C. J. and Chatterji, J.

BECHARAM MALLIK

v.

THE KHAS JOYRAMPUR COLLIERY.*

Workmen's Compensation Act, 1923 (*Act VIII of* 1923), *section* 3—*workman injured by accident while travelling in a motor omnibus—vehicle provided by employers being the only practical and reasonable means of access to colliery—absence of contractual obligation to use the vehicle—workman, whether entitled to compensation.*

* Civil Reference no. 3 of 1939, made by C. S. Jha, Esq., I.C.S., Commissioner under the Workmen's Compensation Act, Dhanbad, in his letter no. 3034-R., dated the 27th September, 1939.