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this case? Whether the omission to give this power to the Indian Courts was due to the existence of Act XXVII of 1841, is a point on which I offer no opinion. It has been suggested, I believe, that that Act is no longer in force. It is clear that the Government of India is not of that opinion, for in the volume for 1887 of the "Unrepealed Acts", recently published, I find this Act included.

I hold that I have no power to expunge the names of any of the creditors in this schedule, and I discharge the rule.

Rule discharged.

Attorneys for the applicant:—Messrs. *Payne, Gilbert, and Sayáni.*

Attorneys for the Official Assignee:—Messrs. *Craigie, Lynch, and Owen.*

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Birdwood.

1887. *May* 3.

VISHNU CHINTÁMA'N, (ORIGINAL DEFENDANT), APPLICANT, *v.* BA'LA'JI BIN RA'GHUJI, (ORIGINAL PLAINTIFF), OPPONENT.*

Mortgage—Clause of conditional sale in mortgage—Suit by mortgagee for declaration of title—Decree ordering delivery of property to mortgagee in default of payment of mortgage-debt by mortgagors within one month—Default of payment by mortgagors—Effect of such default—Mortgaged property taken by mortgagee in execution of such decree not as mortgagee but absolutely—Subsequent suit for redemption barred—Res judicata—Limitation Act XV of 1877, Sched. II, Art. 134—Landlord and tenant—Tenant denying landlord's title—Right of landlord to evict.

In 1863 Báláji and Gyanu mortgaged certain land to one Gopál under a mortgage-deed, which provided that, if the mortgage-debt was not paid at the stipulated time, the land should become the absolute property of Gopál, the mortgagee.

In 1871 Gopál filed an ejectment suit against Báláji and Gyanu and one Hari, alleging that he had become owner of the land by operation of the above clause, and that he had subsequently let it to Hari, who now in collusion with the other two defendants, (the mortgagors), denied his title. The ejectment suit was subsequently converted into one for a declaration of Gopál's title as owner as against

* Application, No. 80 of 1886.

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the mortgagors, Báláji and Gyann, who claimed a right to redeem. A decree was passed in 1872 ordering Báláji and Gyanu to pay Rs. 100 to Gopál within one month, or, in default, to deliver up to him possession of the land. The money was not paid, and Vishnu, as purchaser from Gopál, got possession in execution of the above decree in August, 1873.

In September, 1885, the plaintiff, as Báláji's heir and legal representative, filed a suit against Gopál and Vishnu to redeem the property. The Court of first instance dismissed the suit, holding that the plaintiff's claim was *res judicata* by virtue of the decree passed in 1872, and that the right to redeem was lost. In appeal, the Court reversed this decision and passed a decree for redemption on payment of Rs. 100 by the plaintiff within six months. The defendant Vishnu then applied to the High Court under its extraordinary jurisdiction.

Held, that the plaintiff's claim was *res judicata*. In the suit brought by Gopál, (the mortgagee), in 1871 he had claimed the land as owner through the forfeiture clause in the mortgage-deed, and the mortgagors insisting in that suit on a right still to redeem, the decree plainly meant to give them, by way of indulgence, one month within which to regain the land by payment of Rs. 100 to Gopál. It renewed the mortgage, but with a condition, which was a material part of the decree. They having failed to pay, the mortgage was extinguished. After the lapse of the month Gopál could not have recovered the Rs. 100. Had he sought to recover that money he would have been met by the terms of the decree. He was entitled to the land, and nothing else. So, too, was Vishnu as his vendee. As, then, there was no debt that could be recovered, there was, and could be, no subsisting mortgage that could be redeemed.

Held, also, that the suit was barred under article 134 of Schedule II of the Limitation Act (XV of 1877)—Vishnu having purchased the land for value from Gopál, the ostensible owner, more than twelve years before suit.

A tenant, repudiating the title under which he entered, becomes liable to immediate eviction at the option of the landlord.

THIS was an application under the extraordinary jurisdiction of the High Court.

In 1863 Báláji and Gyanu mortgaged the lands in dispute to one Gopál by a mortgage-deed, which provided that, if the mortgage-debt was not paid off at the stipulated time, the mortgagee should become the absolute owner of the property.

In 1871 Gopál sued to eject one Hari from the lands, alleging that having become owner of the property by operation of the *gahán-lahán* clause in the mortgage-deed, he had let the lands to Hari, and that Hari, acting in collusion with Báláji and Gyanu, denied his title. In this suit Báláji and Gyanu were joined as co-defendants with Hari. This ejectment suit was subsequently

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converted into one for a declaration of Gopál's proprietary title to the property, as against the mortgagors Bálāji and Gyanu.

In 1872 a decree was passed in the above suit, directing Bálāji and Gyanu to pay to Gopál Rs. 100 within one month, and, in default, to deliver up to him possession of the mortgaged property. The money was not paid, and Vishnu as a purchaser from Gopál took possession of the property in August, 1873.

In September, 1885, the present suit was filed by Mahádu, the son and legal representative of Bálāji, (now deceased), against Gopál and Vishnu, to redeem the lands from the mortgage of 1863.

The defendants contended that the right to redeem had been foreclosed by the decree passed in 1872; that the plaintiff's claim was *res judicata* under section 13 of the Code of Civil Procedure (Act XIV of 1882); and that it was also barred by the law of limitation.

The Subordinate Judge, on the authority of the ruling in *Gan Sávant Bál Sávant* v. *Nárāyan Dhond Sávant*[1], held that the plaintiff's claim was *res judicata* by virtue of the decree passed in 1872, and that his right to redeem was lost. He, therefore, dismissed the suit with costs.

This decision was reversed, on revision, by the Acting Special Judge appointed under the Dekkhan Agriculturists' Relief Act (XVII of 1879), who held, on the authority of the ruling in *Rávji Shivrám Joshi* v. *Káluvám*[2], that the plaintiff's suit was not barred by the decree of 1872. He accordingly passed a decree that the plaintiff should recover possession of the lands in dispute on payment of Rs. 100 within six months, or, in default, his right to redeem should be for ever foreclosed.

Against this decision the defendant Vishnu applied to the High Court under its extraordinary jurisdiction.

A rule *nisi* was granted, calling upon the plaintiff to show cause why the decision of the Acting Special Judge should not be reversed.

Nárāyan Ganesh Chandávárkar, for the plaintiff, showed cause:—This is not a case for the exercise of the extraordinary jurisdiction

(1) I. L. R., 7 Bom., 467. (2) 12 Bom. H. C. Rep., 161.

of this Court. There is no complaint of excess or declining of jurisdiction. Even if the lower Court be wrong in its decision upon the question of *res judicata*, that error cannot be rectified by this Court, under section 622 of the Code of Civil Procedure. But its decision is not erroneous. The decree in the former suit is not a foreclosure decree. It is a decree which directs payment of the mortgage money within one month, and, in default, the property is to be put in the possession of the mortgagee. It does not provide for foreclosure at all. It does not, therefore, put an end to the relation of mortgagor and mortgagee. *Senhouse* v. *Earl*(1) and *Thompson* v. *Grant*(2) show that a mortgage subsists until the final order for foreclosure is made. Until, therefore, it is proved that the mortgage was distinctly foreclosed, Gopál continues to be a mortgagee. The possession given under the former decree to Vishnu, as Gopál's assignee, was given to him not as owner but as mortgagee. If the mortgage still subsists, we have a right to redeem. Refers to *Periandi* v. *Angappa*(3) and *Karuthasámi* v. *Jaganatha*(4).

Shántárám Náráyan, for the defendant, *contra* :—The right to redeem has become absolutely foreclosed. When a decree specifies a particular time for payment, with a direction for possession, in default, to be given to the mortgagee, the mere lapse of time works as a foreclosure; *Gan Sávant Bál Sávant* v. *Náráyan Dhond Sávant*(5). Under the English law the final decree for foreclosure is given on an application at the expiration of the specified time. Here no such application need be made. The decree itself operates as a foreclosure. In the former suit, Gopál did not sue as a mortgagee. He sued as an owner. The decree in that suit was substantially a decree for foreclosure. That decree is, therefore, a good defence to the present suit for redemption. The Special Judge has entirely omitted to consider the question of limitation. Even assuming the mortgage to be still subsisting, Vishnu as a *bonâ-fide* purchaser for value from the mortgagee will be protected after more than

(1) 2 Ves. Sen., 449.
(2) 4 Madd., 438.
(3) I. L. R., 7 Mad., 423.
(4) I. L. R., 8 Mad., 478.
(5) I. L., R., 7 Bom., 467.

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twelve years' possession. He purchased in 1872 and the present suit was filed in 1885. Article 134 of Schedule II of the Limitation Act XV of 1877 applies to the present case. The suit is, therefore, barred by limitation.

WEST, J. :—The Special Judge in the present case raised the two issues of *res judicata*, on which the first defendant Gopál relied, and, further, an issue of limitation, on which, as well as *res judicata*, the second defendant Vishnu relied. On this second issue no judgment has been recorded, and as a judgment was on the Special Judge's decision on the first issue absolutely necessary to the right adjudication of the case as regards Vishnu, the present applicant and the person really interested, we shall have to reverse the decision of the Court below, and send the case back for a fresh disposal by the Special Judge. As we have, then, to take this course, we may properly point out that the Subordinate Judge was right and the Special Judge wrong on the point of *res judicata*.

In 1871 Gopál sued Báláji, Gyanu, and Hari, averring that he had formerly taken certain land in mortgage from the first two, which land had become his property by the operation of a clause of conditional sale *(lahán gahán)*. He had let the land to Hari, who now with the support of the other two denied Gopál's title. In such a suit, the only proper question for the Court was whether, as he alleged, Gopál had given possession to Hari as tenant. A tenant repudiating the title under which he entered, becomes liable to immediate eviction at the option of the landlord. Nor can other persons by coming in behind the tenant put themselves in the position of possessors, and force the landlord to prove his title. This seems to have been allowed, however, in the instance in question. The suit was changed into one against Báláji and Gyanu on the conditional sale, and the decree given in January, 1872, ordered that Báláji and Gyanu were to pay to Gopál Rs. 100 within a month, or else all three defendants to give him the property sought in the plaint.

By what precise steps this complete transformation of the suit took place we cannot now tell, as the judgment has perished ; but the plaint shows that Gopál sued as owner, and the decree directs

delivery of possession to him according to the plaint, unless the Rs. 100 be paid in a month. In the case of *Robinson* v. *Duleep-singh*[1], James, L. J., says: "The issues are only a proceeding in a cause for the purpose of ascertaining a fact for the guidance of the Court in dealing with the right; and what determines the right between the parties is the decree, and in order to determine what the decree really decides it is essential to see what were the rights which were in dispute between the parties and which were alleged between them." The plaintiff Gopál having then set up a right as owner through the forfeiture clause, and the defendants insisting on a right still to recover, the decree plainly meant only to give them, by way of indulgence, one month within which to regain the land by payment. It renewed the mortgage, but with a condition which was as material a part of the decree as the advantage to follow on its fulfilment.

The money was not paid, and the property was given to Vishnu, who had purchased from Gopál. The Special Judge has held that Vishnu thus taking in execution in default of payment took as mortgagee, and that the right to redeem still subsisted in 1885, when this suit was brought. But it is plain that had Gopál sought to recover the Rs. 100, or any part of it, he would have been met by the terms of the decree. After the lapse of a month he was entitled to the land, and nothing else. So, too, was Vishnu as his vendee. As, then, there was no debt that could be recovered, there was, and could be, no subsisting mortgage that could be redeemed. The presumption that arises where possession only is sought by a mortgagee, and possession only is awarded, has no application where the plaintiff sues as owner, and the possession is on such a claim awarded to him subject only to a condition in favour of the defendant which the defendant fails to fulfil. No terms were added such as "to hold until payment" or "as security for the sum awarded." The decree, at any rate, when executed by the Court completely transferred the mortgagor's rights to Vishnu.

On this point, therefore, we think the Special Judge was wrong in reversing the decree of the Subordinate Judge. But in the

(1) L. R., 11 Ch. Div., 798, at p. 813.

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exercise of the revisional power of this Court we should not have interfered with his judgment on this account, he having acted within his jurisdiction; but that Vishnu has another ground on which to rely, and one that should have been fully considered before judgment was given against him. He purchased from Gopál more than twelve years before the institution of the present suit. Gopál was the ostensible owner, and if Vishnu bought from him for value, he thus acquired a right, which under Schedule II of article 134 of the Limitation Act (XV of 1877) would become unassailable by the mortgagor after twelve years—*Baivákhán Dáudkhán* v. *Bhiku Sázbá*[1]. We have not Gopál before us, nor have we the materials for determining whether Vishnu really purchased from him or not. We will send the case back that the Special Judge may determine on the fact whether Vishnu's purchase is proved, and decide the case accordingly. The rule is made absolute. Costs of this application to be borne by the opponent.

Rule made absolute.

(1) I. L. R., 9 Bom., 475.

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Birdwood.

1887. *July* 4.

GOPI MAHA'BLESVAR BHAT, (ORIGINAL PLAINTIFF), APPELLANT, *v.* SHESO MANJU, (ORIGINAL DEFENDANT), RESPONDENT.*

Jurisdiction—Malicious prosecution—Prosecution when official—Bombay Civil Courts Act (XIV of 1869), Sec. 32—Bombay Act X of 1876, Sec. 15—Prosecution instituted by order of superior officer.

An officer of Government who prosecutes for an injury personal to himself is not generally acting in his official capacity as prosecutor. If any particular class of interest is placed specifically under his tutelage, with a direction to guard them by the appropriate legal proceedings, suits instituted in the fulfilment of the duty thus assigned to the functionary are of course instituted in his official capacity. A similar remark applies to criminal proceedings. A prosecution by a functionary is official when in carrying it on he is discharging a duty expressly or impliedly assigned to him by law. If the duty of prosecuting in any particular case is not

* Appeal from Order, No. 14 of 1887.