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Code which required correcting. Consequently, in my opinion, section 375A refers to applications in suits other than those under Chapter XXII, and enacts that the provisions of that chapter, and especially of sections 373 and 374, shall not apply to such applications, but that it does not prevent the provisions of section 375 being brought into operation after the Court has passed a decretal order referring a suit to the Commissioner.

It is worthy of note that the case of *Fakir Ullah v. Thakur Prasad*<sup>(1)</sup> was taken up to the Privy Council, and that Court held that, independently of Act VI of 1892, section 647 did not apply to applications for execution, but only to original matters in the nature of suits, thus overruling all the Allahabad cases. The report will be found under the name of *Thakur Pershad v. Sheikh Fakir Ullah* in 22 I. A. 44.<sup>(2)</sup> This decision, if it had been passed three years earlier, would have rendered section 2 of Act VI of 1892 unnecessary.

Under these circumstances I am of opinion that there was no objection to the present suit being treated under section 375 as adjusted by the submission and award proved herein, and a decree being passed in terms of the award. The appeal should therefore be dismissed with costs.

*Appeal dismissed.*

Attorneys for the appellant—*Messrs. Edgelow, Gulabchand and Wadia.*

Attorneys for respondents—*Messrs. Malvi, Hiralal and Modi.*

(1) (1890) 12 All. 179.

(2) (1894) 17 All. 106.

## ORIGINAL CIVIL.

*Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Starling.*

CHABILDAS LALLUBHOY, PLAINTIFF, v. MOWJI DAYAL, DEFENDANT.\*

*Small Cause Courts Act (XV of 1882), section 41—Mortgage—Mortgage sale—Ejectment—Suit brought by purchaser at mortgage sale to eject mortgagor—Right of purchaser to possession not derived from mortgagee.*

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\* Small Cause Court Reference No. 2887 of 1901.

The defendant, Mowji Dayal, mortgaged the house in question to one Lalji Doongersey in 1896. The defendant (mortgagor) remained in occupation of a part of the house, the rest of it being occupied by his tenants who paid him rent. In October, 1900, Lalji Doongersey, the mortgagee, sold the house by auction under his power of sale, and the plaintiff purchased it and obtained a conveyance on the 20th April, 1901. Subsequently the plaintiff (purchaser) brought this suit in the Small Cause Court under section 41 of the Small Cause Courts Act (XV of 1882) to eject the defendant (mortgagor), contending that he held as tenant-at-will or by permission of the plaintiff or of the mortgagee through whom he (the plaintiff) claimed.

*Held*, that the case did not come within section 41 and that the Small Cause Court had no jurisdiction to try the suit.

A purchaser at a mortgage sale does not claim through the mortgagee for the purpose of section 41 of the Small Cause Courts Act (XV of 1882). That section deals with the right to recover possession rather than with title, and consequently the derivative claimant must establish that his right to possession is the same as that which was vested in his predecessor (the mortgagee). But the purchaser's right to recover possession is one which came into existence for the first time when he became absolute owner of the property. It is one which was not vested in the mortgagee, so that though his present right to recover possession came into existence by virtue of something done by the mortgagee, it cannot be said that it passed from the mortgagee to him. Therefore, so far as relates to the purchaser's present right to recover possession, the mortgagee is not a person through whom the purchaser claims.

CASE stated for the opinion of the High Court under section 617 of the Civil Procedure Code (XIV of 1882) by R. M. Patel, Acting Chief Judge of the Small Cause Court, Bombay :

1. This was an action in ejectment under section 41 of the Presidency Small Cause Courts Act (XV of 1882) to recover possession of the upper floor of a house in Cowasji Patel Tank Road from the defendant, who was alleged to be in occupation as a tenant-at-will of the plaintiff. The annual value of the portion so occupied was assessed by the plaintiff at Rs. 600.

2. The facts of the case are undisputed. The defendant is a mortgagor and the plaintiff the purchaser at an auction-sale from the mortgagee. The house was mortgaged to one Laljee Doongersey on 8th April, 1896, and was sold, by auction by the mortgagee on the 8th October, 1900, for Rs. 20,500 to the plaintiff. The sale was disputed by the mortgagor, but the conveyance was executed on the 20th idem. Plaintiff gave notice to quit on the 15th of January last and asked defendant to give up possession in eight days. Defendant replied on the 18th denying the validity of the sale and threatening to file a suit in the High Court to set aside the sale. He also denied the plaintiff's right to demand possession of the property. It was admitted that the mortgagor was always in possession, and that though he was in actual occupation of a portion of the house the rest was in the

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occupation of his own tenants who paid him rent. No notice had been given by the mortgagee to these tenants asking them to attend or to pay rent to him during the subsistence of the mortgage.

3. The defences were (1) that defendant was not a tenant-at-will of the plaintiff, but held in his own right, (2) that defendant was in occupation of the whole house and not only a portion assumed by the plaintiff in the summons, (3) that the alleged sale was invalid and irregular, (4) that the Court had no jurisdiction to try the suit under section 41 of the Act.

4. The third defence was withdrawn as it was likely to be investigated by the High Court in a suit to be filed by the defendant.

5. As regards the question whether the mortgagor was a tenant-at-will of the purchaser, in the same sense as he was of the mortgagee, I was of opinion that the jural relationship, which was held to be established both at law as well as in equity to be that of a tenant-at-will (*Heath v. Pugh*<sup>(1)</sup>), ceased and determined on the sale of the security by the mortgagee: that the purchaser was not the assignee of a subsisting mortgage, but he took under the power of sale which the mortgagee exercised, and the estate that passed to him by the exercise of that power was "such title as the mortgagor possessed as the owner of the property at the time the mortgage was made" (*Purmananddas Jivandas v. Jannabai*<sup>(2)</sup>). The effect of the sale was to destroy the equity of redemption, and the estate, if purchased by a stranger, passed into his hands free from all incumbrances (*Rajah Kishundatt v. Rajah Mumtaz Ali Khan*<sup>(3)</sup>). The mortgagee was a mere incumbrancer, while the purchaser took the estate free from all incumbrances. I was also of opinion that if after foreclosure, which in law was equivalent to a new purchase of the property mortgaged, a mortgagee foreclosing took under a "title newly accrued" (*Heath v. Pugh*<sup>(4)</sup>) a purchaser at a sale under the mortgage acquired ownership under a similar "title newly accrued," and took the same estate as the mortgagor had at the time of the mortgage. Under that circumstance there was no relationship of a tenant-at-will, nor any of permissive occupation as between the mortgagee and the purchaser. If anything, there was certainly adverse ownership, and consequently the case of the plaintiff did not fall within the purview of section 41.

6. It was contended by the plaintiff's pleader that in terms of the first part of section 41 the purchaser claimed through the mortgagee, and consequently he should be allowed the same rights in ejectment that the mortgagee had. I was of opinion that that contention could not be allowed. The purchaser did not claim through the mortgagee but under the mortgage: *Doodem Baldeley v. Mussey*<sup>(5)</sup>. In *Purmananddas v. Jannabai*<sup>(6)</sup> it was held that as the purchaser took under the power of sale, he, in a certain sense, took under the mortgagee who exercised the power.

(1) (1881) 6 Q. B. D. 345.

(2) (1885) 10 Bom. 49.

(3) (1879) L. R. 6 I. A. 115 at p. 160.

(4) (1881) 6 Q. B. D. 345, 361.

(5) (1851) 17 Q. B. 373 at p. 382.

(6) (1885) 10 Bom. 49 p. 55.

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7. The question raised by the second defence was, on the facts stated in paragraph 2, decided by me in favour of the defendant. The plaintiff had for the purposes of this suit assessed the annual value at Rs. 500, but that was only for the upper portion of the house in the actual possession. I held that the defendant was in occupation of the whole house by himself and through his tenants, and that the annual value of the whole house at a rack rent, as required by section 41, should be taken as the value for which the suit should have been filed. That value was admittedly Rs. 2,112 and far exceeded the pecuniary jurisdiction of Rs. 1,000 fixed under section 41. I was of opinion that section 41 was restricted to cases of express tenancy and cases of permissive occupation or of tenancies implied at law, and that in either event the section contemplated that the annual value of the property from which the defendant was sought to be evicted should not exceed Rs. 1,000.

8. For the reasons stated in paragraphs 5 and 7 I held that the Court had no jurisdiction to try this suit. The suit was therefore dismissed with professional costs to defendant's attorney, Rs. 51.

9. At the request of the plaintiff, who has deposited Rs. 50 as costs of this reference, my judgment was given contingent on the opinion of the High Court. I now respectfully submit the following questions for the opinion of their Lordships:

(1) Whether the relationship that existed between the mortgagor and the mortgagee, as that of a tenant-at-will during the subsistence of a mortgage, continued to exist after the sale of the security, and could the mortgagor be held a tenant-at-will of the purchaser who buys from the mortgagee selling the property mortgaged in exercise of the power of sale under the mortgage?

(2) Whether such a purchaser can be said in terms of section 41 of the Small Causes Court Act to claim through the mortgagee, and is the purchaser entitled under that section to recover possession from the mortgagor treating him as a tenant-at-will?

(3) Whether under the circumstances of the case the Court was right in treating the occupation by the mortgagor through his tenant as his own, and in estimating the annual value at a rack rent of the whole property mortgaged, when the real object of the suit was to evict the mortgagor from the whole of the property mortgaged?

(4) In all suits for the recovery of possession of immoveable property, where the tenancy is either express or implied, is not the jurisdiction of the Court restricted to cases where the annual value at a rack rent does not exceed Rs. 1,000?

This reference was heard by Jenkins, C.J., and Starling, J.

*Robertson* for the plaintiff.

*Scott* (Acting Advocate General) for the defendant.

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The following cases were referred to: *Purmananddas v. Jamnabai*,<sup>(1)</sup> *Heath v. Pugh*,<sup>(2)</sup> *Raghaoji v. Narandas*.<sup>(3)</sup>

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JENKINS, C. J.:—Though under an English mortgage the mortgagor may be said to be in possession of the mortgage property with the permission of the mortgagee, it is clear that, (apart from the special circumstances) if the mortgagee conveys the property under his power of sale, it cannot be said that the mortgagor is in possession with the permission of the mortgagee's purchaser. So far the question submitted is simple, but it is more difficult matter to determine, whether by virtue of the title he derives from the mortgagee the purchaser cannot claim the benefit of section 41 of the Presidency Small Cause Courts Act (XV of 1882): for that section speaks of possession "by permission of another person or of some person through whom such other person claims"; so that, according to the words of the section, any one would be entitled to apply under it, if the occupant was in possession by the permission either of the applicant or of some person through whom he claims.

We therefore have to determine whether a mortgagee who has exercised his power of sale is a person through whom the purchaser from him claims. In a sense he is; but is he so for the purposes of section 41? Now this section is concerned with the right to recover possession rather than with title, so that the derivative claim to which the section alludes is, in my opinion, confined to the right to recover possession: and as a consequence the derivative claimant must establish that his right to recover possession is the same as that which was vested in his predecessor. But can a purchaser from a mortgagee predicate this of himself? I think not. The position is covered by the opinion of Earl Cairns in *Pugh v. Heath*,<sup>(4)</sup> where he thus expresses himself (p. 238): "I should have little doubt that the present action, being not an action of ejectment by a legal mortgagee to put himself in possession of land which he is to hold as a pledge subject to account and to all the infirmities of a mortgagee's title, but being an action by one who has become absolute owner of the land under a decree of the Court, is an action as

(1) (1885) 10 Bom. 49.

(2) (1881) 6 Q. B. D. 345 at p. 361.

(3) (1899) 1 Bom. Law Reporter 800.

(4) (1882) 7 A. C. 235.

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to which the right to bring it must be taken to have accrued within the meaning of section 2 of 3 & 4 Will. 4, c. 27, at the date of that decree of the Court." It makes no difference that the plaintiff here became absolute owner by purchase and not by foreclosure, so that he precisely falls within the principle enunciated. The right then to recover possession which he seeks to enforce in this suit is one which came into existence for the first time when he became absolute owner of the property; it is one which was not vested in the mortgagee, so that, though his present right to recover possession came into existence by virtue of something done by the mortgagee, it cannot be said that it passed from the mortgagee to him. Therefore, so far as relates to the plaintiff's present right to recover possession, the mortgagee is not a person through whom the plaintiff claims.

In my opinion, therefore, the present suit will not lie in the Small Cause Court. Under these circumstances the objection on the score of annual value does not arise. The costs of this reference will be costs in the suit.

STARLING, J.:—Looking to *Heath v. Pugh*<sup>(1)</sup> and *Parmananddas v. Jannabai*<sup>(2)</sup> it appears that if a mortgaged estate which is in the possession of the mortgagor is sold under the power of sale contained in the mortgage deed, the mortgagor is in possession adverse to the purchaser from the time of the sale; consequently the mortgagor cannot be said to be the tenant of, or in possession by permission of, the purchaser, unless the purchaser has done some act to indicate his permission having been granted subsequent to the sale,—and the purchaser does not claim through the mortgagee in the sense intended under section 41, because the effect of the sale is to convey to him a new and larger estate which the mortgagee did not possess; in fact, it is the same as if a full owner had conveyed to the purchaser, in which case it would be impossible to suggest that the owner remaining in possession after the sale was converted into a tenant, or anything of the kind, without some act on the part of the purchaser.

Attorneys for plaintiff—*Messrs. Wadia and Gandhi.*

Attorneys for defendant—*Messrs. Kanga and Patel.*

(1) (1881) 6 Q. B. D. 361; (1882) 7 Ap. Ca. 235.

(2) (1885) 10 Bom. 49.