

1871
 RANI
 KHAJURUNISSA
 v.
 SYAD AHMED
 REZA.

The plaintiff did not therefore in the Court below, make out the proper proof to his right to any balance at all as due to him, and the suit in the Court below ought to have been dismissed,—their Lordships agreeing in the result with the High Court, although compelled to dissent from their grounds of decision.

The one suit is thus disposed of, and the plaintiff in the other suit is satisfied with things remaining as they are, and does not seek to have any further accounts, or to proceed with his appeal. Under the circumstances of the case, and both appeals having come on together, their Lordships do not think it right to give any costs of either appeal.

Their Lordships therefore agree humbly to report to Her Majesty, as their opinion, that both the decrees of the High Court should be affirmed, and that both appeals should be dismissed, each party bearing his own costs therein.

Both appeals dismissed without costs.

Agents for Rani Khajurunissa: Messrs. J. H. and H. R. Henderson.

Agents for Syad Ahmed Reza: Mr. Wilson.

P. C. •
 1871
 July 4, 17.

BRAJANATH KUNDU CHOWDHRY AND OTHERS
 (PLAINTIFFS) v. KHILATCHANDRA GHOSE
 (DEFENDANT.)

ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT
 FORT WILLIAM IN BENGAL.

*Mortgage—Foreclosure—Purchases from Mortgagor—Adverse Possession—
 Limitation.*

See also
 14 B.L.R. 93
 14 B.L.R. 318

Where a party *bonâ fide* purchased from another, as his own property, land in fact mortgaged, and obtained possession and mutation of names, his title was held to be adverse to that of the mortgagee.

Foreclosure proceedings in the Supreme Court as to *mofussil* property, to which a purchaser from the mortgagor is not made a party, cannot affect that purchaser.

After a *bonâ fide* purchaser had been in open possession more than twelve years, and after the lapse of more than twelve years from the accrual to the mortgagee of the right of entry under the mortgage deed (which was in the English form),

Present:—THE RIGHT HON'BLE SIR JAMES COLVILLE, LORD JUSTICE JAMES, LORD JUSTICE MELLISH, AND SIR LAWRENCE PEARL,

the mortgagor sued the purchaser to obtain possession of the property, held, the suit was barred.

1871

Quere.— Whether in cases in the mofussil where the mortgagor continues in possession paying rent to the mortgagee, the Law of Limitation begins to run from the date of the right of entry.

BRAJANATH
KUNDU
CHOWDHRY
v.

KHILATCHAN-
DRA GHOSE.

ANNADA PRASAD ROY, being the owner of 6-16ths of the Sulkea zemindari, mortgaged that share and “ the lands thereto attached ” to Srikrishna Sing on the 4th October 1845. In this mortgage the “ Chur Shalika ” was not expressly mentioned, and proceedings were then pending between the Government and Annada as to that chur, which in March 1846 resulted in a decree for resumption, but the Government having subsequently in April 1848 made a settlement of the chur with Annada, the Courts in India held that, as between him and his mortgagees, the chur passed though not expressly named. The mortgage deed was in the usual English form drawn up by an English attorney, containing a covenant with a British subject to submit to the jurisdiction of the Supreme Court ; and having the usual clauses for redemption and for the mortgagor continuing in possession until default, the time for payment of the mortgage money being 4th April 1848. The mortgage was duly registered.

On the 21st September 1849, Annada Prasad sold the “ chur ” to Guru Charan Sen, and there was no evidence that Guru Charan knew of this chur being comprised in the mortgage. On the 15th January 1850, Guru Charan Sen got possession, and obtained an order for mutation of names from Annada to himself of the chur land.

Srikrishna Sing, having filed a bill in the Supreme Court against Annada Prasad to foreclose the mortgage, on the 11th December 1850, obtained a decree *nisi*, and on the 9th February 1852, a decree absolute for foreclosure. No steps were taken to enforce that, and on the 29th April 1854, Annada filed a bill to open the foreclosure, and on the 24th September 1858, Srikrishna Sing sold his interest in the mortgage to the Kundu Chowdhrys (the appellants).

In August 1859, the chur land was sold at auction by the assignee of Guru Charan Sen (who had become insolvent) to the respondent Khilatchandra Ghose, who took possession.

1871

BRAJANATH
 KUNDU
 CHOWDARY
 v.
 KHILATCHAN-
 DRA GHOSE.

On the 15th July 1862, the appellants obtained a final decree of foreclosure in the Supreme Court against Annada Prasad, but to that suit neither the respondent nor Guru Charan Sen had been made parties.

On the 27th August 1863, the appellants brought the present suit to obtain possession of the chur, alleging the conveyance to Guru Charan Sen to have been fraudulent, and alleging that they had only knowledge of the sale in August 1862.

The respondent relied, amongst other defences, on possession for more than twelve years.

It is unnecessary to state the proceedings of the Court below (a remand having been ordered), or the points which were argued on appeal in the High Court (1) as to the difference of opinion of two Judges not being such as to entitle other Judges to hear the appeal; it is sufficient to say that the High Court (Sir Barnes Peacock, C. J., and Mr. Justice L. S. Jackson) on the 29th September 1866 held that the claim was barred by Act XIV of 1859, section 1, clause 12, and it was on this point only that the case was argued before the Judicial Committee.

Sir. R. Palmer Q. C., and Mr. Doyne, for the appellants.— There has been no such adverse possession as to bar the appellants' rights. It is clear that Guru Charan Sen had notice of the mortgage, and that he was buying the equity of redemption only, and neither he nor those claiming under him can be in a better position than the mortgagee. Until the foreclosure proceedings were complete, the mortgagor or his assigns were in possession, not adversely, but by permission of the mortgagees. It may not come within the particular exception in Act XIV of 1859, section 6, but no limitation begins to run until the possession is adverse. This is not like the case of *Srimati Anand Mayi Dasi v. Dharendra Chandra Mookerjee* (2) decided here a few days ago, and that case seems to distinguish the position of a purchaser from a mortgagor direct, from that of a purchaser under an execution. It was right to proceed in the Supreme Court to foreclose before bringing a suit for possession; a right of entry

(1) 6 W. R., 269.

(2) See *post*, p. 122.

then accrued. The decision in question is one likely to affect seriously the value of mortgage securities in India.

Mr. *Bell* for the respondent.

Their LORDSHIPS said that they would not call on the respondent's Counsel unless on consideration they thought it necessary to do so, but at present their opinion was that the decision was right.

Their LORDSHIPS, having taken time to consider their judgment, delivered it as follows :—

In this case the only question to be decided is, whether the High Court was justified in holding that the suit was barred by the Statute of Limitations.

The plaintiff was a mortgagee, originally a puisne mortgagee, but who had acquired the rights of the first mortgagee, as afterwards stated. The defendant was the purchaser from the assignee in insolvency of a person who had purchased the property in question from the mortgagor. The original purchase from the mortgagor was upwards of twelve years before the commencement of this suit, and for upwards of twelve years had been followed by registration and mutation of names in the Collector's book, the order for which was made on the 15th January 1850. At the time of the sale the property was subject to mortgages, made in the form of English mortgage, with the usual proviso for redemption, and a proviso that the mortgagor should continue in possession until default; and on default, an express right of entry was given to the mortgagee. Much more than twelve years before the commencement of this suit, such default was made.

After the sale, under which the defendant claims, the first mortgagee instituted a suit for foreclosure in the Supreme Court of Fort William. This suit proceeded to a foreclosure *nisi* on the 11th December 1850, which was made absolute on the 9th February 1852. The plaintiff, however, procured that foreclosure to be opened, paid off the first mortgagee, took a transfer of his mortgage, and then proceeded himself to foreclose the mortgagor, and obtained his final decree for foreclosure on the 15th day of July 1862. To these foreclosure proceedings, the purchaser of the property in question was not

1871

BRAJANATH
KUNDU
CHOWDHRYv
KHILATCHAN-
DRA GHOSE.

1871

BRAJANATH
KUNDU
CHOWDHRY
v.
KHALATCHAN-
DRA GHOSE.

made a party, and it was of course held by the High Court that he was in no wise affected by those proceedings.

Having foreclosed his mortgage, the plaintiff commenced this suit against the defendant, who pleaded his twelve years' possession in bar. The plaint was filed on the 27th August 1863.

The High Court has held that bar to be sufficient. Their Lordships do not doubt that such decision was correct. It was contended before them that, so long as the mortgage security was a subsisting security, and dealt with as such, time did not run as between the mortgagee, who was content to rest on his security, and the mortgagor, who was permitted to remain in possession, and persons claiming under him; and it was contended that, until the foreclosure put an end to the security as a security, it was a subsisting security, and that it was then, and not till then, that time began to run. It was further contended that the defendant, who derived his title under a purchase from the mortgagor, could not be in a more favorable position than the mortgagor himself.

The foreclosure proceedings did not affect the defendant or the property in question, and it is difficult to see how a right of entry or cause of action against one man in respect of his property could be either lost or gained by proceedings against another man in respect of his property.

As against the defendant, the plaintiff has acquired no right, except that which was conveyed to him by his securities.

The right under the mortgage-deed was to obtain possession of the land, and the cause of action accrued when default was made.

The words of the Indian law are:—"To suits for the recovery of immoveable property, or of any interest in immoveable property, to which no other provision of this Act applies, the period of twelve years from the time the cause of action arose." To this there is one exception in respect of mortgages, which is this:—"In suits in the Courts established by Royal Charter by a mortgagee to recover from the mortgagor the possession of the immoveable property mortgaged, the cause of action shall be deemed to have arisen from the latest date at which any portion of principal money or interest was paid on account

of such mortgage debt." This exception does not apply to the present case, and where there is an express exception so limited to one special case of mortgage, it might plausibly be argued that it cannot be extended to any other case, even to the case of the original mortgagor himself continuing in possession, and paying interest to the mortgagee. The judgment of the High Court appears to be that the bar extends even to such a case where not provided for by that section. The ruling, however was not necessary for the determination of this suit.

It may however, have been deemed necessary to introduce the exception stated above, in order to put mortgages in the English form, when put in suit in the Supreme Court, which was generally governed by English law, upon the same footing as that on which English mortgages are under the existing Statutes of Limitation, and their Lordships, dealing with suits upon mortgages in the ordinary Courts of India, might, in the simple case of a mortgagee and his mortgagor permitted to remain in possession so long as he paid interest, have found ground for considering that there was a permissive possession, and that a new cause of action and right of entry accrued when that permission ceased. No such question, however, arises in the present case, for it is impossible to hold that the defendant, the purchaser, was holding or supposed that he was holding by the permission of the mortgagee; and when both things concur,—possession by such a holder for more than twelve years, and the right of entry under the mortgage-deed more than twelve years' old,—it is impossible to say that such a possession is not protected by the law of Limitations.

Therefore, without passing an opinion whether the broader and more general rule laid down in the judgment of the High Court can be supported, their Lordships have no doubt that the decision in the particular case is correct.

It has been pressed on their Lordships that the decision will destroy the value of mortgage securities in India. Their Lordships do not share in that apprehension. It may be and probably is better that mortgagees keeping their securities locked up in their strong box, and allowing the mortgagor to be the visible owner in possession for a long series of years, should occasionally

1871

BRAJANATH
KUNDU
CHOWDHRY
v.
KHALATCHAN-
DRA GHOSE

1871
 BRAJANATH KUNDU CHOWDHRY
 v.
 KHILATCHANDRA GHOSE.

as in this case, find themselves deprived of portions, more or less small, of the mortgaged property, than that *boná fide* purchasers and persons claiming under them after many years' possession, and perhaps much expenditure, should be evicted under a mortgage title, perhaps half a century old, because somebody has been paying interest on the mortgage-money. In the present case an actual mutation of names took place, and a very slight degree of vigilance would have enabled the mortgagee to assert his title earlier.

Their Lordships will recommend that the judgment be affirmed and the appeal dismissed with costs.

Appeal dismissed.

Agent for appellant : Mr. *Barrow*.

Agent for respondent : Mr. *Barton*.

P. C.*
 1871
 June 30.

LUCHMESWAR SING BAHADUR, MAHARAJA OF DARBHANGA, AN INFANT UNDER THE COURT OF WARDS (DEFENDANT)
 v. SYAD LUTF ALI KHAN (PLAINTIFF).

ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

Bond Debt—Payments—Mode of calculating—Interest Regulation XV of 1793.

Where payment was made upon a bond, the amount paid being less than the interest due, *held* the payment ought to go to reduce the amount of interest due, and the creditor in a suit upon the bond was entitled to a decree for the principal and balance of interest up to date of decree.

THE late Maharaja of Durbhanga, on the 21st July 1849, executed a bond for Rs. 334, 812-14 annas and interest at 12 per cent in favour of the respondent and three other persons as heirs of Syad Abdulla.

On the 25th December 1856, Rs. 200,000 being paid, a receipt was endorsed on the bond, stating the payment to be "out of the sum stated in this bond."

On the 27th April 1861, the respondent alone sued the

Present:—THE RIGHT HON SIR JAMES COLVILF, LORD JUSTICE JAMES, LORD JUSTICE MELLISH AND SIR LAWRENCE PEEL.