

*Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of Srinath Das v. Khetter Mohun Singh and others, from the High Court of Judicature at Fort William in Bengal, delivered 5th February 1889.*

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Present :

LORD FITZGERALD.

LORD HOBHOUSE.

SIR RICHARD COUCH.

MR. STEPHEN WOULFE FLANAGAN.

[*Delivered by Lord Hobhouse.*]

The Appellant, who was the Plaintiff below, is the transferee of a mortgage effected by the first Defendant Hurri Narain Dey in favour of Shama Soondari Debi. The mortgage bears date the 17th November 1865. It is in the English form, providing for the payment of the debt on the 17th of February 1866, and giving to the mortgagor the right of possession until default in payment, and to the mortgagee the right of entry after default. The property mortgaged is in the district of the 24-Per-gunnahs.

On the 15th February 1872, Shama Soondari applied to the District Judge of the 24-Per-gunnahs to issue as usual a notice of foreclosure to the opposite party under Regulation XVII. of 1806. The opposite party was Hurri Narain. The notice was served on him ; and on the 31st March 1873, a year having elapsed from the

date of the service, the case was struck off the file. It is clear therefore that Hurri Narain's right to redeem was foreclosed, and that as against him Shama Soondari became absolute owner, on or shortly before the 31st March 1873.

In the year 1879 the Plaintiff acquired Shama Soondari's interest in the mortgaged property, and on the 6th September 1882 he brought a suit against Hurri Narain and 28 other Defendants whom he alleged to have been holding possession of several plots of the property, claiming by purchase and otherwise from Hurri Narain. He stated that they ought to have been made parties to the foreclosure case, but Shama Soondari had not done that; that the Defendants knew of the mortgage; that nothing had been paid on account of the mortgage debt, and that the Defendants refused to pay. He prayed an order for payment, and in default, a declaration that the Defendants would be unable to redeem the mortgaged properties, and an order for possession.

Hurri Narain has not made any defence at any stage of the suit. Of the other Defendants, some either did not appear or did not put in any statement; one pleaded a mistake of personal identity; and eighteen, besides other pleas, contended that the suit was barred by time. Seventeen of them stated that they held plots purchased of Hurri Narain at various dates, ranging from November 1865 to August 1866. Some of them stated, as to their own plots, that Shama Soondari was privy to the purchases, and that the price was paid to her agent in reduction of the mortgage debt. But as the latest of these alleged transactions was in August 1866, the difference between the cases of these Defendants need not be considered. One Defendant, No. 29, stated that he had purchased two plots

of Hurri Narain's land, one in February 1873 at a revenue sale, the other in December 1876 at an execution sale. This Defendant stands in a different position from the others as regards both time and the effect of the foreclosure proceedings. But if his title is impeachable at all, which their Lordships are far from suggesting, it must be in a suit properly framed and conducted for that purpose.

With this exception of No. 29, for whose case no issue was framed, their Lordships do not intend to discuss any other plea than that of limitation. Whether the Plaintiff really acquired Shama Soondari's interest; whether the Defendants' plots are or are not included in the mortgage; whether Shama Soondari was privy to the sale by Hurri Narain; whether the purchase money was paid on account of the mortgage; whether the purchasers knew of the mortgage; whether their possession was adverse or non-adverse; all these questions have been discussed, but are immaterial, some in any case, and the others if the suit is barred by time.

The ruling Act is No. XV. of 1877, and the question is whether the case falls within Article 135 or 147. Article 135 provides that a suit by a mortgagee for possession of immoveable property mortgaged shall be dismissed if instituted after twelve years from the time when the mortgagor's right to possession determines. Article 147 provides that a suit by a mortgagee for foreclosure or sale shall be dismissed, if instituted after 60 years from the time when the money secured by the mortgage becomes due.

The Subordinate Judge made a decree against all the Defendants without distinction, for payment, and on default for foreclosure. As regards the question of limitation his grounds were as follows,—that if the foreclosure proceedings were regular, a new starting point of

time was gained in February or March 1873; but if they were irregular, the mortgagee possessed only an inchoate right of possession, and so the mortgagor's right had not determined; that suits for foreclosure were under the Codes of 1859 and 1877 allowed in the Bengal Mofussil; and that the Plaintiff had a right to bring this suit quite independently of the Transfer of Property Act of 1882. These reasons lead up to the conclusion that the case falls within Article 147, which allows 60 years to sue.

From this decree 16 of the Defendants appealed to the High Court. That Court was of opinion that the mortgagor's right to possession determined on the 17th of February 1866; that the mortgagee's right to bring a suit for possession was barred on the 17th February 1878; that, with the right to possession, was lost the right to take foreclosure proceedings under the Regulation of 1806; and that suits for foreclosure were then unknown in the Bengal Mofussil. They therefore concluded that the suit was barred by force of Article 135, and they dismissed it against all the Defendants except Hurri Narain. They do not assign their reason for not dismissing it against Hurri Narain; but their Lordships presume the reason to be that as against him they took the suit to be one for possession, founded on the title acquired in February or March 1873 under the Regulation. From that decree the Plaintiff appeals.

All the Defendants except Hurri Narain and one other are made parties respondent to the appeal. No one has appeared, and their Lordships have not had the advantage of hearing argument in support of the decree; but after taking time to consider, their Lordships find themselves in agreement with the High Court.

The inferences of fact which the Court is bound to draw from the evidence or the omission

of evidence in the case appear to their Lordships to be as follows : the foreclosure was, as against Hurri Narain, perfect on or before the 31st March 1873 ; the purchasers from him were not served with notice as required by the Regulation ; they therefore remained unaffected by the proceedings, and the relationship of mortgagee and person entitled to redeem continued to subsist between Shama Soondari and them ; the purchasers have continued in undisturbed possession since the time of their respective purchases ; no interest has ever been paid on account of the mortgage debt ; if any part of the principal has been paid in respect of any of the plots, the latest payment was made in August 1866 ; therefore if Article 135 is the one applicable to the case, the 12 years there allowed ran out in the month of August 1878 at the latest.

In order to succeed them the Plaintiff must show that Article 135 is wholly inapplicable to his case. To do that, it is contended that Article 135 applies only to those cases in which a mortgagee desires to take possession in that character ; that if he wishes to foreclose he may do so within the time limited by Article 147 ; that on the 1st July 1882 the right to maintain foreclosure suits was conferred on Bengal mortgagees ; and that the Limitation Act immediately fastened on those suits, and provided 60 years as the limit for them.

To this argument it is sufficient for the present case to answer that in the year 1878, when no suit for foreclosure could be brought, the right of Shama Soondari to possession was wholly extinguished, and the title of the purchasers under Hurri Narain freed from the mortgage. The subsequent creation of suits for foreclosure could not, except by clear enactment, revive the extinct right. And in effect the

clear enactment is the other way, for Section 2 (c) of the Transfer Act says that nothing therein shall affect "any right or liability arising out of a legal relation constituted before this Act comes into force, or any relief in respect of such right or liability." Their Lordships consider that, within the meaning of this section, the rights of the purchasers to unencumbered ownership of their plots have arisen out of the legal relations between them and Hurri Narain and Shama Soondari.

It is therefore unnecessary to discuss what has been so much urged at the bar, viz., the effect to be attributed to Article 147, a provision which appeared for the first time in the Act of 1877.

The result is that the High Court decree is right, and should be affirmed, and the appeal dismissed. Their Lordships will humbly advise Her Majesty to this effect.

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