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of registration would come in, and that point has been virtually decided by the previous litigation, and cannot be re-opened."

[50] *Mahadeo Chimnaji Apte*, for the appellant.—We seek to recover the unpaid purchase-money from the land itself. Unpaid purchase-money being a charge upon the property, the claim to recover it is governed by art. 132, sch. II of the Limitation Act (XV of 1877) and not by art. 111 of the same schedule, which would have applied if we had sought to make the respondents personally liable.

We do not rely upon the bonds for the recovery of the money. It is the charge upon the property that we seek to enforce.

There was no appearance for the respondents.

JUDGMENT.

SARGENT, C. J.—The vendor was under no necessity, as the District Judge would appear to think, to rely on the bonds in order to establish a charge on the property sold in respect of the unpaid purchase-money. It is a well-established rule of an English Court of Equity, and which is equally applicable to the circumstances of this country, that the unpaid purchase-money is a charge on the property in the hands of the vendee, and the claim to enforce it would, therefore, fall under art. 132 of the Limitation Act (XV of 1877).

The present suit, which the Subordinate Judge has found was within twelve years of the defendants going into possession, is, therefore, in time, and the decree must be reversed, and the case sent back for disposal having regard to the above remarks. Costs to follow the result.

Decree reversed.

18 B. 51.

[51] APPELLATE CIVIL.

Before Mr. Justice Telang and Mr. Justice Fulton.

CHINTO (*Original Plaintiff*), *Appellant v. JANKI AND OTHERS*
(*Original Defendants*), *Respondents*.* [23rd December, 1892.]

Adverse possession—Mortgage—Mortgagee in possession—Dispossession of mortgagee by trespasser—Adverse possession as against mortgagee when good also as against the mortgagor—Evidence—Burden of proof—Limitation Act (XV of 1877), sch. II, art. 144.

Land was mortgaged with possession to A, the father-in-law of defendant No. 1, in 1828. In 1856 A was ousted from possession by B, a trespasser (defendant No. 2), who subsequently held the land and dealt with it as his own for forty years. The mortgagor sued both A and B for redemption. In appeal, it was contended by B that his possession had been adverse not merely to A (the mortgagee), but also to the plaintiff (the mortgagor), and that the suit was barred by limitation. The plaintiff contended that B's possession was not adverse to him, because he as mortgagor had no right to possession during the term of the mortgage.

Held, that the suit fell under art. 144 of sch. 2 of the Limitation Act (XV of 1877), and that it lay upon B to prove that his possession for twelve years prior to the suit was adverse to the plaintiff (the mortgagor). There may be a possession adverse to the interest of a mortgagee which nevertheless is not adverse to the interest of the mortgagor. In such a case a suit by the mortgagor, or those claiming under him, will not be barred, although one by the mortgagee

* Second Appeal No. 215 of 1891.

may be. The case was remanded for a finding on the question of when B's possession became adverse to the plaintiff.

[F., 27 A. 395 (397) = 1 A.L.J. 725 = 25 A.W.N. 4; U.B.R. (1906) Lim. 9 (11); R., 30 A. 119 (122) = 5 A.L.J. 85 = 23 A.W.N. 25; 34 A. 640 = 10 A.L.J. 278 = 17 Ind. Cas. 632; 19 B. 138 (139); 35 B. 438 = 13 Bom. L.R. 867 = 12 Ind. Cas. 362; 21 M. 153 (165) = 8 M.L.J. 92; 25 M. 507 (512); 5 Bom. L.R. 186 (189); 6 Bom. L.R. 638 (639); 14 C.L.J. 292 = 16 C.W.N. 351 = 11 Ind. Cas. 465; 16 C.P.L.R. 154 (155); 15 Ind. Cas. 146 = (1912) M.W.N. 669; 26 M.L.J. 140 = 1914 M.W.N. 417 (423); 12 O.C. 45 (55); U.B.R. (1897—1901) 469; Con., 27 B. 43 = 4 Bom. L.R. 721; 6 C.W.N. 601; 23 T.L.R. 92; D., 26 C. 460 (464).]

SECOND appeal from the decision of J. FitzMaurice, Acting District Judge of Ratnagiri, in appeal No. 204 of 1889.

Suit for redemption. In 1828 the land in dispute was mortgaged with possession by plaintiff's father to one Pundlik, the father-in-law of the first defendant. The mortgagee remained in possession till 1856, when he was ousted by defendant No. 2 and his brother. In 1867 defendant No. 2 mortgaged the land to defendants Nos. 3 to 6. In 1869 defendant No. 2 got the land entered in his name in the revenue records. In 1887 the revenue authorities entered the land in the names of both plaintiff and defendant No. 2.

In 1888 the present suit was filed for redemption of the land in question. The plaintiff alleged that the mortgagee Pundlik had assigned his interest to defendant No. 2, who in his turn [52] has sub-mortgaged the property to defendants Nos. 3—6. The suit was dismissed by the Court of first instance, on the ground that the mortgage sought to be redeemed was not proved.

On appeal, the District Judge found that the mortgage was proved. He, however, rejected the plaintiff's claim, holding that the sub-mortgage to defendant No. 2 was not proved, but that defendant No. 2 had been in possession and had dealt with the land as his own for nearly forty years. The decree of the first Court dismissing the suit was, therefore, confirmed.

Against this decision the plaintiff preferred a second appeal to the High Court.

Ganesh Krishna Deshmukh, for appellant.—The lower Court has not recorded a distinct finding that the suit is barred by limitation. But assuming that to be the effect of the conclusion to which the Judge has come, then I contend that the suit is not time-barred. The defendant No. 2 may have held adversely to the mortgagee, but such adverse possession does not and cannot affect the mortgagee during the continuance of the mortgage term. Until the term is expired, the mortgagee is not entitled to possession. Till then he has no cause of action. The trespasser can only acquire such estate as the mortgagee possessed. His adverse possession cannot curtail the period of sixty years prescribed for a redemption suit—*Vithoba v. Gangaram* (1). So, too, in the case of a lease, it has been held that the lessor's title is not affected by the possession of a trespasser during the period of the lease—*Sharat Sundari Dabia v. Bhob Pershad Khan* (2). In *Bejoy Chunder Banerjee v. Kally Prosonno Mookerjee* (3), Mr. Justice Markby explains what is meant by adverse possession. Unless the true owner has a right to immediate possession, the possession of a stranger cannot become adverse to him, nor can limitation begin to run against him. But assuming that art. 144 of the Limitation Act (XV

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(1) 12 B.H.C.R.A.C.J. 180.

(2) 13 C. 101.

(3) 4 C. 327.

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of 1877) applies, it lies upon the defendant to show when his adverse possession commenced. This has not been shown in the present case.

[53] *Daji Abaji Khare*, for respondent.—The principle laid down in *Vithoba v. Gangaram* (1) is no longer good law. It is dissented from, and disapproved by the Madras High Court in the case of *Ammu v. Ramakishna* (2). It is, moreover, inconsistent with a recent ruling of this Court in *Puttappa v. Timmaji* (3). That case shows that the possession of a trespasser can be adverse to the mortgagor as well as to the mortgagee. In the present case it is found by the lower Court that defendant No. 2 and his brother have held and dealt with the property in dispute as owners for nearly forty years. During that period their possession has been clearly adverse to the mortgagor. The suit is, therefore, barred by limitation.

JUDGMENT.

FULTON, J.—The District Judge has found that in 1828 the plaintiff mortgaged the land in dispute to Pundlik, from whom the defendant No. 1 derives her title. He has also found that for the last forty years it has been in the possession of defendant No. 2 and his brother, who have mortgaged it to defendants Nos. 3 to 6.

On these facts, holding the allegation that defendant No. 2 was the sub-mortgagee of defendant No. 1 not to be proved, he rejected the claim. He does not expressly state that he considers the claim time-barred, but finding that the sub-mortgage to No. 2 was not proved, and apparently considering it to be the sole ground on which the plaintiff based his claim against him, he dismissed the suit. Both Courts seem to have avoided finding on the question of limitation, which was not raised in the issues framed in the District Court, and they decided against the plaintiff merely because he had failed to prove the existence of the sub-mortgage. This, however, was, in my opinion, too narrow a ground to proceed on, for, remembering the want of accuracy with which plaints are often drawn up, I think that it should have been held that, in case of failure to prove the sub-mortgage, the plaintiff intended to sue defendants Nos. 2 to 6 as trespassers relying on his own title.

The question then directly arises whether the claim against defendants Nos. 2 to 6 is time-barred. In argument it was, I think, [54] not disputed that art. 144 of sch. II of the Limitation Act (XV of 1877) is the one to be applied, but on behalf of the plaintiff it was contended that, although the second defendant and those claiming under him had held for more than twelve years, their possession was not adverse to the plaintiff, who was himself not entitled to possession without redeeming the property from defendant No. 1. The case of *Vithoba v. Gangaram* (1) is an authority for holding that, in the circumstances described, the possession of a trespasser though adverse to the mortgagee is not adverse to the mortgagor. In that case the Court remarked that it was difficult to understand how there could be any trespass on the mortgagor's possession so long as he had only the equitable estate. But this view has been dissented from in the case of *Ammu v. Ramkishan* (2) in which it has been held that the rights of the mortgagor are liable to invasion equally with those of the mortgagee. Again, in *Puttappa v. Timmaji* (3), it was held that there can be an invasion of the rights of the mortgagor of such a nature as to render the possession of a trespasser on the property adverse to him. But I think that although the possession of a trespasser may undoubtedly be

(1) 12 B.H.C.R.A.C.J. 180.

(2) 2 M. 226.

(3) 14 B. 176.

adverse to the mortgagor, the burden of proving when it became so rests on the former. *Prima facie*, by his act of possession he merely ousts the mortgagee who is entitled to hold the property. Such ouster unaccompanied by any further act of aggression on the mortgagor's rights cannot give any cause of action to the latter. During the continuance of the mortgage the mortgagor cannot sue to recover possession of the land. In the case of *Scott v. Newington* (1), Tindal, C. J., held that where the pledgee of certain goods had, in his turn, pledged them, and they had been found ultimately in the hand of a stranger, the original pledgor was entitled to recover possession, on the ground that the owner's right revived because the person having the lien had abused it by pledging the goods. But I do not think similar reasoning will apply to land mortgages in India, or that it can be held that the mere fact of a mortgagee's allowing the mortgaged property to pass into the hands of a trespasser revives the mortgagor's right to possession. In the [55] language of s. 58 of the Transfer of Property Act, he has transferred to the mortgagee an interest which comprises the right to possession until redemption, and he cannot sue to recover what does not belong to him. Consequently I agree with the view expressed in *Vithoba v. Gangaram* in so far as it is held that the possession of a trespasser is not necessarily adverse to the mortgagor. In *Womesh Chunder Goopto v. Raj Narain Roy* (2) the Calcutta High Court (Peacock, C. J., and Jackson, J.) held that a zemindar was not barred by the adverse possession of a trespasser on his land during the period of the lease, and the decision was followed in *Sharat Sundari Dabia v. Bobo Pershad Khan* (3). Similarly, in the case of a mortgage, I think it is clear that the mere fact of possession by a stranger is not necessarily an invasion of the mortgagor's right. It may, however, become so, but it is for the defendant to show when it became adverse. In the Madras case above referred to it will be observed that the defendant had many years before got her name entered in the Government records and had since then purported to hold directly from the Government. In the present case the second defendant alleges that proceedings have been taken to remove plaintiff's name from the survey records, but there has been no finding as to when they took place, whether they were successful, and whether the plaintiff had any notice of them. Excepting this statement of proceedings to remove the plaintiff's name it does not appear in what way the second defendant's possession was adverse to him. It is true that he now states that he holds not as mortgagee but as owner, but it is for him to show when he assumed that attitude. The rule which requires a plaintiff who has been dispossessed to prove that he has been in possession within the period of limitation, does not apply to a case of this sort in which the plaintiff's mortgage is found to have been in possession in 1856 and the plaintiff himself was not entitled to immediate possession.

Under the circumstances, I think the following issues should be sent to the District Judge for finding on the evidence on record :—

[56] (1) When did the defendant No. 2's possession become adverse to the plaintiff?

(2) Has plaintiff proved his title to the land as against defendant No. 2 and his assignees?

The findings should be returned within two months.

(1) 1 Moo. and R. 253.

(2) 10 W.R. C.R. 15.

(3) 13 C. 101.

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TELANG, J.—In this case I have, on the whole, come to the conclusion, that looking to the issues settled in the Court of appeal, and also to the judgment of the Subordinate Judge, (which shows that *Vithoba v. Gangaram* (1) was relied on before him) it is open to the appellant to raise the main question which was argued before us on his behalf. That question is whether, when a mortgage is effected, and the mortgagee is put in possession, a stranger to the mortgage can by twelve years' possession obtain a title against the mortgagor. In *Vithoba v. Gangaram* (1), it appears to have been broadly laid down that he cannot do so. In *Ammu v. Ramakishan* (2), on the other hand, the High Court of Madras has held that such a possession is capable of ripening into a title even as against the mortgagor by virtue of the Limitation Act. And in *Puttappa v. Timmaji* (3) this Court has pointed out that *Cholmondely v. Clinton* (4), to which I referred during the argument, has laid down the doctrine inconsistent with the broad proposition enunciated in *Vithoba v. Gangaram* (1) that there may be a possession adverse to an equity of redemption during the currency of a mortgage.

It seems to me that the question is one not capable of an answer in the abstract without reference to the circumstances of each case. It is well established in this Court, that there may be a possession adverse to the interest of a mortgagee, which is nevertheless not adverse to the interest of the mortgagor. The case of *Purmananddas v. Jannabai* (5) affords an illustration of that kind. In such a case a suit for possession by the mortgagor, or those claiming under him, will not be barred, although one by the mortgagee may be. In the present case, however, we have not such an admission of the title of the mortgagor by the party in possession, as the Court had to deal [57] with it in that case. Here, on the findings of the Court below, we must take it that there was a mortgage by the plaintiff purporting to be one with possession in 1828; that the mortgagee was in possession under such mortgage in 1856, but that the defendants have been in possession of the property "as their own for some forty years past" without having ever "attorned to the plaintiff in any way or made any admission of his right." And the question arises, what is the effect of the law of limitation in such a case? In this aspect of it, it is obviously not a suit coming within art. 148 of the Schedule to the Limitation Act, as was faintly suggested in argument for the appellant. The case must fall within the purview of art. 144. And according to the decision of the Privy Council, in cases falling within that article, it lies on the defendant to prove that his adverse possession commenced more than twelve years prior to the institution of the suit. Now, no doubt, a person who by trespass or without title is in possession of property as his own may, in one sense, be said to hold a possession adverse to every one including the true owner. For, as said in quaint language in an old English case, "wrong is unlimited, and ravens all that can be gotten" (see 2 Smith's Leading Cases (9th Ed.), p. 736). But, on the other hand, Mr. Justice Markby's definition of adverse possession does not apply to a possession of this character, if the true owner is not at the time himself entitled to possession. The words "immediately entitled to possession," which form part of that definition, are in such a

(1) 12 B. H. C. R. A. C. J. 180.

(2) 2 M. 226.

(3) 14 B. 176.

(4) 2 J. and W. 1.

(5) 10 B. 49.

case inapplicable. I think, too, on the whole, that Mr. J. W. Smith's definition also is not satisfied by such a possession, as the "incompatibility" required by it does not necessarily exist in such a case. And this construction of the phrase "adverse possession" would be in harmony with the general principle that *contra non valentem agere nulla currit præscriptio*. Compare also *Dalton v. Angus* (1) per Lord Blackburn.

The question then resolves itself into this. Has a mortgagor a right to possession of mortgaged property, if the mortgagee, having been placed in possession, should thereafter lose such possession by trespass or otherwise on the part of a stranger? [58] By English law, apparently, the mortgagor would have no such right. In *Cole on Ejectment* it is said that ejectment against a stranger "cannot be maintained in the name of the mortgagor, except, perhaps, under circumstances similar to those in which the action might be maintained against the mortgagee himself,"—that is, apart from special cases, except after payment of the mortgage money. And although, no doubt, the rule there laid down is due to the fact that the legal title is under English law conveyed to the mortgagee, still it would seem that the same rule ought to be applied in India also. For the mortgagor, having once put the mortgagee in possession, ordinarily has no right to possession himself until the mortgage is paid off. The mere fact of the mortgagee's letting the property go out of his possession cannot give the mortgagor such a right before payment. And the party in possession, though he may be a trespasser, would ordinarily be able to defend an action of ejectment at the suit of the mortgagor by setting up the *jus tertii* (2).

In England, before the Act of William IV, the rule in the somewhat analogous case of limitation against a landlord was, as stated by the Real Property Commissioners quoted in *Smith's Leading Cases*, p. 643, that "in the case of a lease adverse possession so as to bar the reversioner does not commence till the expiration of the term where rent is reserved on a lease." The Commissioners recommended a change, and the statute enacted one to the extent that where rent was wrongfully received by another, and the landlord received none at all, limitation should run against the landlord from the time of such wrongful receipt. But this would rest on the principle which the Commissioners indicate, that refusal to pay rent to the rightful owner coupled with a payment to another is a virtual dispossession of the rightful owner. There would not, however, be necessarily any such "virtual dispossession" of a mortgagor, where the mortgagee having taken possession, a trespasser subsequently entered upon the mortgaged property.

The result of these considerations in the present case is that it lies upon the defendant before he can succeed to make out that [59] his possession for twelve years prior to the suit was adverse to the plaintiff. The plaintiff says it was not adverse, because he had no right to possession during all these years. In order to decide on that contention it is necessary to have the finding of the Court below on the various questions of fact involved in it, and for that purpose I concur in sending down to that Court the issues framed by Mr. Justice Fulton, which are wide enough to embrace all considerations of fact relevant to the questions of law raised in the case.

Case remanded.

(1) 6 Ap. Ca. 818.

(2) 2 *Smith's Leading Cases*, 602—3; *Woodfall's Landlord and Tenant*, p. 885.