

APPELLATE CIVIL.

Before Mr. Justice Batty and Mr. Justice Aston.

TARUBAI AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, v.
VENKATRAO AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

1902.

September 12.

Adverse possession—Mortgage—Redemption—Adverse possession as against mortgagor—Possession obtained under an agreement with mortgagee—Notice to mortgagor of such possession—Limitation Act (XV of 1877), schedule II, article 144.

The plaintiff filed this suit to redeem a mortgage with possession of certain land dated 18th October, 1866. The plaintiffs were the daughters and grandson of the mortgagor Khutubsha (the widow of one Kondi Aga). The first defendant was the grandson and heir of the mortgagee (Nagesh Rao). The second and third defendants were nephews of Kondi Aga. They denied that the plaintiff being female had any right to the property, and they alleged that they themselves had been in possession since 1885 under an agreement with Nagesh Rao, the original mortgagee, and they contended that the plaintiff's claim was therefore now barred by limitation. It appeared that in 1885 defendants 2 and 3 had claimed to be the heirs of Kondi Aga, the husband of the mortgagor, and had entered upon the land. The mortgagee thereupon filed a suit against them under section 39 of the Dekkhan Agriculturists' Relief Act (XVII of 1879), which, however, was settled by an agreement before the conciliator on the 31st August, 1885, whereby defendants 2 and 3 undertook to pay off the mortgage and it was agreed that they should remain in possession of the land. This agreement was filed as a decree on the 27th November, 1885, under section 44 of the Act. The last instalment of the mortgage-debt was paid to the first defendant by defendants 2 and 3 in September, 1897. The plaintiffs had no notice or knowledge of any of the abovementioned proceedings. On the 5th October, 1897, the plaintiffs filed this suit to redeem the mortgage of 1866 and to recover possession of the lands. The lower Courts held that the plaintiffs were the heirs, but that the suit was barred by limitation under article 144 of schedule II of the Limitation Act (XV of 1877), inasmuch as defendants 2 and 3 had been in adverse possession for more than twelve years. On appeal to the High Court,

Held, (reversing the decree of the lower Court and remanding the case) that the suit was not barred. The possession of the defendants was not adverse to the plaintiffs, inasmuch as there was no notice or knowledge, or circumstance that could have given notice or knowledge, to the plaintiffs (mortgagors) that the defendants' possession was in displacement of their rights. They had no reason to know that their rights were invaded, and until they had such reason there could be no necessity for them to take action.

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SECOND appeal from the decision of R. Knight, District Judge of Sátára, confirming the decree passed by Ráo Sáheb N. V. Samant, Subordinate Judge of Khatáv.

Suit for redemption. On 18th October, 1866, the widow of one Kondi Aga mortgaged the land in suit to one Nageshrao with possession.

Plaintiffs 1 and 2 were the daughters of the mortgagor and Kondi Aga and plaintiff 3 was a grandson (a son of a deceased daughter) and they now sued to redeem the mortgage. This suit was filed on the 5th October, 1897.

Defendant 1 was the grandson and heir of the mortgagee (Nageshrao). Defendants 2 and 3 were nephews of Kondi Aga. They denied the plaintiffs' right to the property, alleging that being females they (the plaintiffs) could not succeed to it as it was Fakiri Vatan. They also alleged that they (defendants 2 and 3) had been in possession since 1885 under an agreement with Nageshrao, the mortgagee, and they contended that the claim of the plaintiffs was now barred by limitation.

It appeared that prior to 1885 defendants 2 and 3, claiming to be the heirs of Kondi Aga, entered and took possession of the land. Nageshrao, the mortgagee, thereupon filed a suit under the provisions of section 39 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) to recover the money due on his mortgage. On 31st August, 1885, however, the parties arrived at an agreement before a conciliator, whereby defendants 2 and 3 undertook to pay off the mortgage by instalments, and they were to remain in possession of the land. This agreement was filed as a decree on the 27th November, 1885, under section 44 of the Act.⁽¹⁾ The last instalment of the mortgage-debt was

⁽¹⁾ Sections 39, 43 and 44 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) run as follows :

39. When any dispute arises as to, or there is prospect of litigation regarding, any matter within the cognizance of a Civil Court between two or more parties, one of whom is an agriculturist residing within any local area for which a conciliator has been appointed, or when application for execution of any decree in any suit to which any such agriculturist is a party, and which was passed before the date on which this Act comes into force, is contemplated, any of the parties may apply to such conciliator to effect an amicable settlement between them.

43. If on the day on which the case is first heard by the conciliator, or on

paid to the first defendant by defendants 2 and 3 in September, 1897.

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The plaintiffs had no notice or knowledge of any of these proceedings.

The Court of first instance rejected the plaintiffs' claim for redemption and dismissed this suit. It found that the mortgage was proved and that the plaintiffs were entitled to succeed to the property as heirs of the mortgagor, but it held that this suit not having been filed until the 5th October, 1897, their claim was time-barred, inasmuch as the defendants 2 and 3 had been in adverse possession of the property since August, 1885, the date of the abovementioned agreement before the conciliator. In its judgment the Court said :

The defendants 2 and 3 urge that the plaintiffs' claim is time-barred as they have been holding the lands adversely to the plaintiffs for over twelve years previous to the suit. It is contended for the plaintiffs that article 148 of the Limitation Act applies to the case, and not article 144, and that even if it did, the defendants' possession has not been adverse to them. The defendants 2 and 3 have been in possession as strangers, and thus, I think, article 144 of the Limitation Act applies. According to that article, the defendants must show that they have been holding the property adversely to the plaintiffs for over twelve years previous to the institution of the suit. The plaintiffs' pleader relies on the case of *Chinto v. Janki*(1) as an authority to show that an

any subsequent day to which he may adjourn the hearing, the parties come to any agreement, either finally disposing of the matter or for referring it to arbitration, such agreement shall be forthwith reduced to writing, and shall be read and explained to the parties, and shall be signed or otherwise authenticated by the conciliator and the parties respectively.

44. When the agreement is one finally disposing of the matter, the conciliator shall forward the same in original to the Court of the Subordinate Judge of lowest grade having jurisdiction in the place where the agriculturist who is a party thereto resides ;

and shall at the same time deliver to each of the parties a written notice to show cause before such Judge, within one month from the date of such delivery, why such agreement ought not to be filed in such Court.

The Court which receives the agreement shall, after the expiry of the said period of one month, unless cause has been shown as aforesaid, order such agreement to be filed ; and it shall then take effect as if it were a decree of the said Court passed on the day on which it is ordered to be filed and from which no appeal lies.

(1) (1892) 18 Bom, 51.

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adverse possession to the mortgagee is not necessarily so to the interest of the mortgagor, while the defendants' pleader relies on *Puttappa v. Timmaji*.⁽¹⁾ It appears from the cases cited that there may be an adverse possession even to the mortgagor and those claiming under him, but it is for the defendants to prove it. The question therefore is, when did the possession of defendants 2 and 3 become adverse to the plaintiffs? The case of *Cholmondeley v. Clinton*⁽²⁾ relied on in the case of *Puttappa v. Timmaji* shows that when a person claiming to be entitled to the equity of redemption enters on the mortgaged property and pays the interest on the mortgage, his possession is adverse to the true owner. In this case the defendants 2 and 3 were in possession already. They retained the possession as being entitled to the equity of redemption and passed a *kabulayat* before the conciliator to pay the mortgage debt in that capacity and did pay money accordingly. In the case of *Chinto v. Janki* it was laid down, "mere ouster unaccompanied by any further act of aggression on the mortgagor's rights cannot give any cause of action to the latter." But in the present case, the defendants 2 and 3 not only retained possession as being entitled to the equity of redemption as heirs of Khutubshahi, but passed a *kabulayat* agreement to pay the mortgage debt as such heirs and have made payments accordingly. The defendant 1 admits that he has received payments from the defendants 2 and 3 according to the *kabulayat*. The *kabulayat* shows that on the day it was passed the defendants 2 and 3 asserted that they were entitled to the equity of redemption. It appears to me on that day they assumed an attitude of being the owners of the lands as heirs, and by entering into a *kabulayat* agreement as if they were the owners, I consider they did aggress upon the mortgagor's rights. I think, therefore, that since 31st August, 1885, the possession of defendants 2 and 3 has been adverse to the plaintiffs. The plaintiffs filed their suit on 27th November, 1897. They applied to the conciliator for a certificate on 5th October, 1897, and got it on 27th November, 1897 (*vide* Exhibit 3). Excluding the said period, the plaintiffs are found to have instituted their suit more than twelve years after the possession of defendants 2 and 3 became adverse to them. I, therefore, find the fifth issue in the affirmative.

On appeal the District Judge confirmed the decree. In his judgment he said :

In my opinion defendants have held adverse possession, at least since the date of the agreement. The property really in suit between themselves and the plaintiffs is not the land itself, but the equity of redemption ; and it is clear that defendants have claimed to hold this as owners and to the exclusion of plaintiffs since that date. Article 144 supplies the limitation applicable, viz., twelve years from the time when the possession of the defendant becomes adverse

(1) (1889) 14 Bom. 176.

(2) (1820) 2 J. & W. at pp. 186, 187.

to that of the plaintiff, and it is plain that in this case that time must be deemed to be 21st August, 1885. I do not think that the recognition of the agreement by the Court has any effect upon the question.

It is argued (1) that possession cannot be adverse unless the rightful owner is aware that he is excluded, and (2) that the possession of defendants was really that of tenants of the mortgagor, through whom plaintiffs were enjoying constructive possession, at all events until the loan was repaid. As for (1), it is true that in the present case plaintiffs had no notice that defendants had usurped the equity of redemption; but I can find no authority for the proposition that knowledge on the part of the person whose rights are invaded is an essential element of adverse possession. Neither Wharton's nor Starling's definition of the term includes any such ingredient; and it is clear that if article 144 were intended to mean twelve years from the date on which "plaintiff becomes aware" of the adverse possession, there is no reason why the Legislature should not have used those words, as in so many other articles in the schedule. As for (2), the argument is specious, but unsound. The rulings quoted in its support (I. L. R. 18 Bom. 51 and 12 Bom. H. C. R. page 180) impugn rather than support it. The second is hardly relevant to this case, and the first, while recognizing that possession by parties other than the mortgagee is not necessarily adverse to the mortgagor's rights, avowedly contemplates the possibility of cases of an opposite character. The argument is really based upon a confusion that I have already endeavoured to avoid. It is not the possession of the land that is adverse, but that of the equity of redemption. If some person other than the true owner claims to hold this right as owner himself, his possession is obviously adverse. Apart from this, it cannot fairly be said that the defendants were on the land as tenants of the mortgagee, although it is true that the agreement gives the latter the right of re-entry upon the land in the event of default in the payment of the instalments. I think that they were on the land as owners subject to a certain liability to the mortgagee, for whom a certain remedy was provided if they failed to discharge the liability.

The plaintiffs preferred a second appeal to the High Court, contending that the lower Courts erred in holding that the claim was barred by limitation, and that the possession of defendants 2 and 3 was adverse to the plaintiffs from the date of the agreement of 31st August, 1885; they contended that the defendants 2 and 3 could at most only claim contribution from the plaintiffs.

Narayan M. Samarth for the appellants (plaintiffs):—The possession of defendants 2 and 3 was not adverse to the plaintiffs and therefore the suit is not barred by limitation. The lower Appellate Court has found that the plaintiffs had no

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notice or knowledge of the agreement of the 31st August, 1885, between the first defendant as mortgagee and defendants 2 and 3. The fact that as a result of a dispute between them the first defendant agreed to give possession to defendants 2 and 3 cannot affect the plaintiffs, who know nothing of the matter and were not parties to that agreement. Their rights as mortgagors remained untouched. Possession secretly obtained cannot in law be adverse: article 144 of the Limitation Act (XV of 1877) does not make time run from the date of the defendants' wrongful possession, but from the date at which the defendants' possession becomes adverse to the plaintiff. We submit it cannot become adverse unless it comes to the plaintiff's knowledge: *Bejoy Chunder v. Kally Prosonno*⁽¹⁾; *Puttappa v. Timmaji*.⁽²⁾ *Cholmondeley v. Clinton*⁽³⁾ cited by the lower Court deals with acquiescence, but acquiescence implies knowledge: *Vithoba v. Gangaram*⁽⁴⁾; *Ammu v. Ramakrishna*⁽⁵⁾; *Chinto v. Janki*⁽⁶⁾; *Moidin v. Oothumanganni*⁽⁷⁾; *Vasudev v. Balaji*.⁽⁸⁾ In any event, the date of the decree in terms of the agreement, viz., 27th November, 1885, is the date which should be taken as the starting point of the period of limitation; and in that case the present suit is in time. Again, the possession of defendants 2 and 3 cannot be said to be adverse to the mortgagor or his representative so long as the mortgage was subsisting. By the agreement defendants 2 and 3 undertook to pay defendant 1 the mortgage-debt by instalments. The last instalment was not paid off until September, 1897, so the mortgage was in existence until then.

B. A. Bhagwat for respondents (defendants):—The finding of the lower Court that defendants 2 and 3 have been in adverse possession for more than twelve years is a finding of fact, that cannot be questioned in second appeal. That finding is correct. An adverse possession is possession inconsistent with the title of the rightful owner, and it is immaterial whether the rightful

(1) (1878) 4 Cal. 327.

(2) (1889) 14 Bom. 176.

(3) (1820) 2 Jac. and W. 1.

(4) (1875) 12 Bom. H. C. R. 180.

(5) (1879) 2 Mad. 226.

(6) (1892) 18 Bom. 51.

(7) (1888) 11 Mad. 416.

(8) (1902) 26 Bom. 500.

owner has notice of such possession or not. His knowledge does not affect the character of the possession. It is nowhere laid down that notice to the rightful owner is required: see *Bhavrao v. Rakhmin* ⁽¹⁾; *Puttapa v. Timmaji* ⁽²⁾; *Ammu v. Ramakrishna*. ⁽³⁾

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BARRY, J.—In this case the plaintiffs sued to redeem certain property by payment of such amount as on account taken might be found due from them, in respect of a mortgage executed by the father of one Kondi Aga (the father of two of the plaintiffs and grandfather of the third) to the deceased grandfather of defendant No. 1, with possession, for Rs. 170, about thirty years before suit. The plaintiffs allege that the mortgage had been satisfied by the produce received, but defendant 1 has, on demand, refused to render an account on 1st March, 1897. The other defendants were joined (the plaint stated), as they had been in enjoyment on behalf of defendant 1.

The first defendant admitted that the land had been mortgaged with possession, but alleged that the defendants 2 and 3 had been in possession since 1885 by virtue of an agreement entered into by them with the grandfather of the first defendant. Of the other defendants, Nos. 2 and 3 denied the rights of the plaintiffs, alleging that the plaintiffs being females could not succeed to the property which is Fakiri Vatan, and as such, defendants alleged, incapable of being managed by females. The defendants also alleged that they had enjoyed possession throughout and that the claim of the plaintiffs was time-barred.

The Court of first instance found the mortgages alleged proved and held that the plaintiffs were not disentitled by family usage, but were entitled to succeed as heirs of the mortgagor. It held, however, that their claim was time-barréd by reason of the fact that the defendants had been in possession as entitled to the equity of redemption and had on 31st August, 1885, by a *kabulayat* passed before a conciliator, undertaken to pay the amount of the mortgage, and had paid money accordingly, and that the defendants having assumed an adverse attitude from 31st August, 1885, the plaintiffs' suit, not having been filed until

(1) (1898) 23 Bom. 137 at p. 140.

(2) (1889) 14 Bom. 176.

(3) (1879) 2 Mad. 226.

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5th October, 1897, was time-barred. On these grounds the suit was dismissed by the Court of first instance.

The lower Appellate Court took the same view, holding the possession of the defendants to have been adverse from the date on which they arrived at an agreement with the conciliator in 1885 to pay off the mortgage by annual instalments of Rs. 8, whereby they extinguished their lien in 1897. The lower Appellate Court held that in the present case plaintiffs had no notice that the defendants had usurped the equity of redemption, but that there was no authority for the proposition that knowledge on the part of the person whose rights are invaded would be essential to adverse possession, that there had been adverse possession of the equity of redemption as well as possession of the land and that therefore the case of *Chinto v. Janki* ⁽¹⁾ was inapplicable, and that though the agreement gave the mortgagee a right of re-entry on default in payment of instalments, yet the position of the defendants 2 and 3 under that agreement was that of owners subject to a liability, and not that of tenants.

The view of the lower Appellate Court and of the Court of first instance, that article 144 of schedule II of the Indian Limitation Act, 1877, "supplied the limitation applicable," is not contested on appeal. The only question, therefore, that arises in this appeal is whether the possession of the defendants 2 and 3 became adverse to the plaintiffs at the date of the agreement and by reason of the agreement which was entered into by those defendants with the mortgagee, and of which the plaintiffs, according to the finding of the lower Appellate Court, had no notice.

The grounds on which the lower Appellate Court held the possession of the defendants adverse, appear to be that there is no authority for holding that "knowledge on the part of the person whose rights are invaded is an essential element of adverse possession"; that article 144 does not make time run from the time when the plaintiff becomes aware of the interference with his rights; that the ruling in *Chinto v. Janki* ⁽¹⁾ "avowedly

(1) (1892) 13 Bom. 51.

contemplates the possibility of cases" in which possession by parties other than the mortgagee may be adverse to the rights of the mortgagor; and that the possession of the defendants in this case which was adverse was not possession of the land itself, but the possession of the equity of redemption. The lower Appellate Court considered that the arguments advanced to show that the possession of the defendants was not adverse were based on a confusion of the notion of possession of the land with the notion of possession of the equity of redemption. The passage which follows this remark in the judgment runs: "If some person other than the true owner claims to hold this right as owner himself, his possession is obviously adverse."

From the passages above referred to, it would seem that what the lower Appellate Court regarded as the possession of the right 'was the claim to hold the right.' But possession means something more than a mere claim to hold. And the possession of a right, *juris quasi possessio*, if that much questioned phrase be permissible at all⁽¹⁾ and if it means anything at all, consists in the *exercise* of a right, *jus in re*.⁽²⁾ And unless and until there be an *exercise* of rights in excess of that which is involved in the possession of the land itself, if the possession of the land be not adverse, there can be no possession that is adverse. The definition of adverse possession by Markby, J., to which the District Judge refers as Mr. Justice Starling's, is to be found in *Bejoy Chunder v. Kally Prosonno*.⁽³⁾ It was accepted by the Full Bench decision of this Court in *Bhavrao v. Rakhmin*⁽⁴⁾ and runs as follows:—"By adverse possession I understand to be meant possession by a person holding the land, on his own behalf, of some person other than the true owner, the true owner having *the right to immediate possession*." The last five words of this passage are essential. For if the true owner has no right to immediate possession, it is practically immaterial to him who is in possession. Having no right himself to possession he cannot eject the person in possession: *contra*

(1) See Savigny on Possession, Book I, ss. ix and xii.

(2) Savigny, Book I, xii; Sir E. Perry's Translation, p. 131.

(3) (1878) 4 Cal. 329.

(4) (1898) 23 Bom. 137 p. 141.

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non valentem agere non currit prescriptio. A claim, not divulged or communicated or manifested by overt acts affecting existing rights, gives no apparent cause of action, and no article of the Limitation Act appears to apply before a right to sue accrues.

The adverse possession of a right then, as seems indeed to be indicated or implied by articles 124, 125, 126, 129, 131 and other provisions of the schedule, must consist of some exercise of that right. And if the exercise of the right consists solely in the possession of land, then the possession of the right cannot be adverse unless the possession of the land be adverse. Under the Roman Law, "possession was not lost in land until the possessor had notice of his physical power to deal with it having been destroyed."⁽¹⁾ This doctrine was of special importance in connection with the peculiarity of Roman Law, which denied possession to the tenant and to the fructuary.⁽²⁾ When the possessor is himself prevented from dealing with the land, *i. e.*, when there is *dejectio*, there can be no doubt about his knowledge of its loss. But actual knowledge is not necessarily in all cases material if there be the means of such knowledge: *Womesh Chunder Goopto v. Raj Narain Roy*⁽³⁾ and *Bejoy Chunder Banerjee v. Kally Prosonna Mookerjee*.⁽⁴⁾ As stated by Mitra,⁽⁵⁾ "actual knowledge is not necessary. Knowledge may be *presumed from an open and notorious act of taking possession*: see Angell on Limitation, 292." But although there may be adverse possession notwithstanding the fact that the owner discontinuing possession is unaware of the possession taken by another, yet the possession must have been used *openly* and, "without any effort made or step taken to produce concealment": *Rains v. Buxton*.⁽⁶⁾ There must be an adverse act—*Searly v. Tottenham Railway Co.*⁽⁷⁾—and nothing that would lead the owner to suppose that his rights remain intact: *Adnam v. Earl of*

(1) Savigny on Possession Book III, s. xxxv; Sir E. Perry's Translation, pp. 151, 227, 261, 262, 266, 268, 275, 277, 281.

(2) Savigny, Book II, xxv, p. 206, note (d), and pp. 207, 209,

(3) (1868) 10 Cal. W. R. 15, pp. 16 & 17.

(4) (1878) 4 Cal. 327.

(5) Tagore Law Lectures, Law of Limitation and Prescription, p. 135, note (6).

(6) (1880) 14 Ch. D. 533 pp. 540, 541.

(7) (1868) L. R. 5 Eq. 409 p. 412.

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Sandwich.⁽¹⁾ The possession taken must not be clandestine. For possession, in order to ripen into a prescriptive title, must be juridical and have none of the *vitia possessionis* as *clam vi aut precario*. And if in its inception it is vitiated by its clandestine, violent or permissive character, it must lose that character and become open, peaceable and as of right, before it can cause time to run. And it is fully established that when there is no act of taking possession, something more than a mere adverse claim is necessary to make possession adverse. Thus "one who holds possession on behalf of another does not, by a mere denial of that other's title, make his possession adverse, so as to give himself the benefit of the Statute of Limitations": *Bejoy Chunder Banerjee v. Kally Prosonno*.⁽²⁾ There must be some "adverse act," so that if the possession has commenced and continued in accordance with "any contract, express or implied, between the parties in and out of possession, to which the possession may be referred as legal and proper, it cannot be presumed adverse.....So also in cases between mortgagor and mortgagee": *Dadoba v. Krishna*.⁽³⁾ That is to say, if there be no adverse act, nothing overt and no unmistakeable ouster, or taking of possession, and all that is done is referable to, or consistent with and susceptible of explanation by, some title which does not impugn but recognise the right of the person seeking to recover possession, then there can be no possession adverse to that person without notice or intimation to him of some kind, that an adverse claim has been set up in opposition to his right theretofore recognised: *Ittappan v. Manavikrama*.⁽⁴⁾ "The party claiming to hold adversely must at least go on to prove that it was in denial of the other's title that he excluded him from enjoyment of the property. According to the English cases there must be something amounting to ouster of the person against whom adverse possession is claimed." The case of *Ramchandra Yeshwant v. Sadashiv Abaji*⁽⁵⁾ is to similar effect: "As long as possession can be referred to a right consistent with the subsistence of ownership in being at its commencement, so long

(1) (1877) 2 Q. B. D. 485 v. p. 490.

(3) (1879) 7 Bom. 34 v. p. 39.

(2) (1878) 4 Cal. p. 329.

(4) (1897) 21 Mad. 153 v. p. 159.

(5) (1886) 11 Bom. 423.

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must the possession be referred to that right, rather than to a right which contradicts the ownership." And as shown by the cases of *Womesh Chunder Gopto v. Raj Narain Roy*⁽¹⁾ and *Bejoy Chunder Banerjee v. Kally Prosonno Mookerjee*⁽²⁾ and in *Sharat Sundari v. Bhubo Pershad*,⁽³⁾ *Vinayak Janardan v. Mainai*,⁽⁴⁾ and *Krishna Gobind v. Hari Churn*,⁽⁵⁾ even where there is an act of taking possession, the possession will not be adverse as against any person who is not for the time being entitled to possession and who is therefore neither interested in, nor capable of, ejecting the person who has taken possession. There must be some adverse act sufficient to give the person to be affected by it an opportunity of knowing that his rights are being infringed and that occasion has arisen for action by him to protect them: *Dewan Manwar Ali v. Unnoda Pershad Roy*⁽⁶⁾; *Mussummat Bebea Sahodra v. Roy Jung Bahadur*.⁽⁷⁾ Thus, a tenant or lessee does not, merely by ceasing to continue possession on behalf of the owner, necessarily create a possession adverse to the latter.

On the other hand, "if the case be of such a nature that the possession would be lost even if no agent had interfered with it, in such case it would be always lost."⁽⁸⁾ "If the act of a wrong-doer *dispossess* the agent, undoubtedly the possession is lost, and the knowledge of the prior possessor is immaterial."⁽⁹⁾ This applied equally when the tenant was dispossessed: "*Quod servus vel procurator vel colonus tenent, dominus videtur possidere et ideo his dejectis ipse dejici de possessione videtur etiam si ignoret eos dejectos per quos possidebat.*"

Thus the agent, tenant or other person holding on behalf of the owner, is a means of securing and continuing his possession (*i.e.*, the power of dealing at will with the subject-matter) and may for convenience of illustration be regarded in the same light as any other agency or arrangement such as a safe or other receptacle performing the same protective functions. As long as the subject-matter is so protected and the means of protection is still within the control of the owner, it is obvious that his

(1) (1869) 10 Cal. W. R. 15.

(2) (1878) 4 Cal. 327.

(3) (1886) 13 Cal. 101.

(4) (1894) 19 Bom. 138.

(5) (1882) 9 Cal. 367.

(6) (1879) L. R. 7 I. A. 1.

(7) (1881) L. R. 8 I. A. 210.

(8) Savigny, Book III, s. 35; Sir E. Perry, 277-278.

power of dealing with the subject-matter can no more be lost by the mere addition of any subordinate possessor, than a document would be lost merely by its being placed in an enclosure within the owner's safe. The owner would still have the power of reproducing at will his enjoyment of the subject-matter, unless and until on his having occasion to make use of it he found that he was resisted by the protecting agency itself. The same might occur with property in a safe which it was found necessary to force open to get at the property. And if a stranger removed the subject-matter from the safe or other means of protection, but made no attempt to remove it from the owner's possession and control, the owner would not lose his power of using it and would be under no necessity of taking steps to recover possession until the subject-matter was taken, not merely out of the safe, but entirely out of his own possession and control, in which latter case his loss would be as complete and unmistakeable as if no means of protection had ever been employed. In the same way, the person intended to secure and continue possession may lose it without the possession of the owner being necessarily affected. But if the property is removed not only from the control of such person but also from the control of the owner, the possession is a much lost in that case, and the necessity for action by the owner arises as immediately, as if there had never been any protecting agency at all. This very obvious distinction between a loss affecting only the agent or means of protection, and a loss affecting also the owner, seems to lie at the root of those cases in which it has been held that while there may be possession adverse to the mortgagee, which is not adverse to the interest of the mortgagor, yet it does not follow that so long as the mortgagor is entitled only to the equity of redemption, there can be no invasion of his interest.

The cases of *Chinto v. Janki*⁽¹⁾ and *Vithoba v. Gangaram*⁽²⁾ suggest instances in which the mortgagor's interest is not assailed.

The case of *Ammu v. Ramakrishna Sastri*⁽³⁾ is an instance and cites instances in which the interest of the mortgagor is assailed.

(1) (1892) 18 Bom. 51.

(2) (1875) 12 Bom. H. C. 190.

(3) (1879) 2 Mad. 226.

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The essential difference in the circumstances of the two sets of cases is that in the first set of cases the mortgagors had no apparent reason to suppose that their rights must have been infringed, while in the second set the mortgagors must necessarily have known that they as well as the mortgagees had been deprived of the power of exercising their rights and that some one else was exercising them. In the cases *Chinto v. Janki*⁽¹⁾ and *Vithoba v. Gangaram*, which represent the first set of cases, the mortgagees while in possession were ousted by a stranger. In both these cases it may be noted that the disseisor was held by the Court of first instance to have been let into possession by the mortgagee: in *Vithoba v. Gangaram* as tenant, in *Chinto v. Janki* as sub-mortgagee. The lower Appellate Court, however, in both cases held that this point was not proved. In *Chinto v. Janki* the plaintiff's name was entered as well as that of the original disseisor in the revenue records. It was alleged that proceedings had been taken for the removal of plaintiff's name from that record, but it was not proved that they were successful or that plaintiff had notice of them (I. L. R. 18 Bom., page 55), and there was nothing else to show in what way the possession had been adverse to the plaintiff, the mortgagor, or in other words, that there had been from the first an attempt to dispute his power of resuming possession and control on occasion arising.

In *Vithoba v. Gangaram* there was nothing beyond the bare ouster of the mortgagee to show that the mortgagor had any reason to suppose a possession hostile to him had commenced.

On the other hand, in the case of *Ammu v. Ramakishna*,⁽²⁾ which represents the second set of cases where the mortgagor's rights were held to have been assailed, the defendants had originally been let into possession as tenants. But in 1861, fifteen years before suit, an enquiry was instituted by the Deputy Collector (in which enquiry the mortgagor was represented by his mother) as to the right of the mortgagor, as against Government, to the lands in question; and in 1862 (fourteen years before suit), the Deputy Collector held the lands to be the property of Government and assessed the lands and granted them to the defendants on *pattas*. The plaintiff, the mortgagor, did not sue the alleged

(1) (1892) 18 Bom. 51.

(2) (1875) 12 Bom. H. C. 180.

(3) (1879) 2 Mad. 226.

trespassers till 1876. Now, in these circumstances, it is clear that the defendants did not obtain the possession under the mortgagee, or even against him alone, but by virtue of a decision in proceedings of which plaintiff, the mortgagor, had notice; so that the dispossession did not affect the mortgagee alone, but was avowedly intended to deprive the mortgagor of all control, so that his rights would have been equally infringed thereby if there had been no mortgagee in the case at all.

The judgment in *Chinto v. Janki*⁽¹⁾ alludes to the fact that the plaintiff was not entitled to immediate possession at date of the defendant's taking possession. The judgment of Telang, J., in the same case refers specially to the definition by Markby, J., in *Bejoy Chunder v. Kally Prosonno*⁽²⁾ as showing that possession could not be adverse to the mortgagor as long as he was not entitled to immediate possession (vide *Chinto v. Janki*, page 57). That is to say, if the plaintiff was not entitled to immediate possession, then the defendant's act in taking possession would not infringe any right of plaintiff's to possession and would not be adverse to plaintiff. The question, therefore, arose whether the plaintiff was entitled to immediate possession. And the answer to this question, arrived at after considering the analogous case of the effect of dispossession upon a landlord during the currency of a tenant's lease was, that the mortgagor would be entitled to claim immediate possession if the ouster of the mortgagee were such as to operate as a "virtual dispossession" of the mortgagor. This it could not be, unless it operated in some way to affect the mortgagor immediately by invading some right then necessarily exercisable by him. For, in the case of landlord and tenant, the mere ouster of the tenant was shown to be insufficient so to affect the landlord as to put him to the necessity of vindicating his position. But when the landlord was entitled to rent and the rent was not merely left unpaid (a fact which would give the real owner no unmistakeable notice of his rights being infringed), but was actually refused and paid to another person, then there would be such virtual dispossession of the rightful owner as to put him to his remedy. So in the case of the mortgagor, when his mortgagee is dispossessed, he is at liberty to say, "Whoever is in possession, it does

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(1) (1892) 18 Bom. 51.

(2) (1878) 4 Cal. 327.

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not matter to me, for I am not entitled to it: the mortgagee is: and he alone is concerned, as his rights only are infringed and he is only losing his own possession, not mine, and whoever is in possession is only taking the place of the mortgagee and thus representing and continuing my possession." But he cannot continue to say this when the person who has taken possession by his acts shows, or by his open declaration avows, that he does not pretend to represent either the mortgagee or the mortgagor, but is exercising a right claimed entirely on his own account. In such a case the disseisor affects not the mortgagee's interest alone, but the mortgagor's, and the mortgagor, having no one in his place professing to hold for him, is entitled to seek recovery and is under the necessity of taking action as much as if he had been personally ousted. It was, therefore, in the case of *Chinto v. Janki*⁽¹⁾ held necessary to remand the case for a finding on the question whether the defendant had thus openly acted so as to deprive the mortgagor by assailing his rights, and if so, when the possession of the defendant had thus become adverse to the mortgagor.

The Madras High Court, in *Ammu v. Ramakishna Sastri*,⁽²⁾ did not rely upon the ouster of the mortgagee as proof of adverse possession of the mortgagor, but upon the fact that the mortgagee's possession ceased altogether, and the mortgagor's possession was not continued constructively, but disappeared by reason of the very act of ouster which to the plaintiff's knowledge challenged his own title. Thus the adverse possession alleged against the mortgagor did not consist of a mere undivulged claim of the equity of redemption, but of an actual ouster coupled with an avowed claim, entirely independent of the mortgagee, going to the root of the plaintiff's title.

In the case of *Puttappa v. Timmaji*⁽³⁾ there was a similarly open taking of possession on purchase, not from the mortgagee or in recognition of any right in him, but on purchase from a person (Narsubai) who sold also in the assertion of a right not derived from the mortgagee, and the possession of the purchaser had continued from 1856 to 1884. And in that case what appears to have been regarded as the most conclusive evidence of the

(1) (1892) 18 Bom. 51.

(2) (1879) 2 Mad. 226.

(3) (1889) 14 Bom. 176.

adverse nature of the possession was indicated in that passage of the judgment which states that, in 1856, Narsubai was "in possession of the equity of redemption adversely to the rightful heirs and acting as if she were the owner of the property and receiving the rent which the mortgagee had agreed to pay by the mortgage-bond. Ramappa derived his title as purchaser from Narsubai, and although possession was probably given him directly by the mortgagee, it must be deemed to have been at the desire of Narsubai on his discharging the mortgage-debt." The above passage shows that there was not only a bare claim of the equity, but an active exercise of the rights attaching to a holder thereof. It was not merely that Narsubai paid off the mortgage (for that is not the exercise of a right so much as the discharge of an obligation), but that she took what plaintiff, if in possession of the equity, would have been entitled to, viz., the rent agreed to by the mortgagee in the bond, a right which plaintiff must have known he was deprived of. The passage cited further shows that the possession of the purchaser Ramappa was virtually derived not from the mortgagee but from Narsubai, and the conclusion was that "the Subordinate Judge was right in considering Ramappa as deriving his possession from Narsubai and his possession as being adverse to the plaintiff from that time."

In *Ittappan v. Manavikrama*⁽¹⁾ a passage is quoted from the judgment of Telang, J., in *Chinto v. Janki*,⁽²⁾ which stated that "the mortgagor having once put the mortgagee in possession ordinarily has no right to the possession until the mortgage is paid off." And it was observed, that "notwithstanding *Puttappa v. Timmaji*,⁽³⁾ it would be seen from the later case of *Vinayak Janardan v. Mainai*⁽⁴⁾ that the opinion of Telang, J., commended itself as sound to Sargent, C. J., and Candy, J. In this state of the authorities, I would say that Mr. Justice Telang's view appears to be the better view. If, however, that in *Ammu v. Ramakishna Sastri*⁽⁵⁾ be the correct one, still the possession of the person taking it from the mortgagee would not be adverse unless and until the mortgagor has notice of it: *Massad v. The Collector*

(1) (1897) 21 Mad. 153 v. p. 165.

(3) (1889) 14 Bom. 176.

(2) (1892) 18 Bom. 51.

(4) (1894) 19 Bom. 138.

(5) (1879) 2 Mad. 226.

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of *Malabar*.⁽¹⁾” This last-mentioned case, it may be noted, is the converse of *Ammu v. Ramakishna*⁽²⁾ as being an instance in which the mortgagor, having *no notice* of the proceedings of Government declaring his lands to have escheated and transferring them to another, was not affected thereby, while in *Ammu v. Ramakishna* the mortgagor was held to have been affected by similar proceedings because he had notice thereof. Thus notice is essential where there is otherwise no circumstance from which the plaintiff could become aware that his rights had been disputed. The case of *Vasudev v. Balaji*⁽³⁾ appears, therefore, to have no application here. For that case was one in which a consent decree had been passed against co-owners in a mortgage suit, and one of the co-owners subsequently redeemed and having obtained and held possession for over twelve years, set up adverse possession against the heirs of the other co-owners. It was held that the possession so set up was adverse. It was argued that to hold article 148 not applicable would be to prejudice the plaintiff by an act to which he was no party. But the Court held that argument had no force in that case, inasmuch as the redemption was under a decree passed against both mortgagors. This fact gave the mortgagor who did not redeem, full notice that, if he did not redeem, either the other co-owner must have done so, or that the right was lost for ever. And the Court gave a note of warning as to the importance of this distinguishing circumstance by adding, “what considerations would apply if the redemption were without the mortgagor’s knowledge, we need not now discuss.” The effect of absence of such knowledge appears to have been sufficiently illustrated by the other cases hereinbefore cited, and is distinctly shown in a case more pertinent to the present question — *Moidin v. Oothumanganni*⁽⁴⁾ — where one of the co-mortgagors redeemed and thereafter dealt with the land for twenty-two years from 1864 to 1886. When the sons of the co-mortgagor sued in respect of their moiety, it was held that, in the absence of proof that the land was held with an assertion of adverse title, the plaintiff was entitled to a decree. The mere assertion of title in the recital of a deed was held insufficient, and the case of *Ramchandra*

(1) (1886) 10 Mad. 198.

(3) (1902) 26 Bom. 500.

(2) (1879) 2 Mad. 226.

(4) (1888) 11 Mad. 416.

Yeshvant v. Sadashiv Abaji⁽¹⁾ was referred to, in which the principle for computing limitation in such cases was said to be analogous to that of the provision which bars an excluded co-sharer generally by the lapse of twelve years from the time when he becomes aware of his exclusion. It is true these were cases of redemption by co-mortgagors. But the main principle involved in them is the same as that which must apply here, viz., that possession must be in some way or other ostensibly adverse before it can cause limitation to run, and when there is no actual ouster, or deprivation of any right, there must be a manifest and known assertion of a title incompatible with that of the disseisee. The nature of the requisite assertion of title may be gathered from the case of *Gangabai v. Kalapa*,⁽²⁾ where it was held that mere assertion would not avail in the case of a permanent lessee claiming to be owner, unless made to the knowledge of the owner. So also in *Mulji Bhulabhai v. Manohar Ganesh*,⁽³⁾ "persons having come in as mere servants or agents cannot by a wish or a volition change the nature of their possession." There must be something more than an undivulged claim of right.

In the present case, the Subordinate Judge seems to regard the defendants' action as adverse because they passed a *kabulayat* to pay the mortgage-debt, and made payments accordingly. But this was not action which could in itself cause any loss or deprivation of plaintiff's rights apart from the claim in pursuance of which it purported to have been taken and of which the plaintiff is not found to have known anything at all. The Subordinate Judge referred, however, to the case of *Cholmondeley v. Clinton*,⁽⁴⁾ as showing that when a person claiming to be entitled to the equity of redemption enters on the mortgaged property and pays the interest on the mortgage, his possession is adverse to the true owner. This statement, as to the effect of the decision in *Cholmondeley v. Clinton*, appears to be due to a misconception which a reference to the case itself might have corrected. The misconception is that, for the purpose of showing adverse possession of the equity, an agreement to

(1) (1886) 11 Bom. 422.

(3) (1897) 12 Bom. 322.

(2) (1885) 9 Bom. 419.

(4) (1820) 2 J. & W. at pp. 186, 187.

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redeem and payment of the money to redeem, stand on the same footing as payment of interest due from year to year by the mortgagor to the mortgagee under the bond. But the distinction between the two payments is this. As stated in *Cholmondeley v. Clinton*,⁽¹⁾ "payment of the interest operates..... to keep alive the mortgage-debt." It is a continued mutual recognition of his (the payer's) title as mortgagor and that of the person to whom the payment is made as mortgagee." "If no interest upon the mortgage had been paid by any one.....(i.e. for the statutory period), possession in the mortgagee would have decided the question of title in favour of that possession," because "the actual possession of the mortgagee, continued...for such period without any payment of interest by the mortgagor, or anything done or said, during that period to recognise the existence of the mortgage, or to acknowledge it on the part of the mortgagee, would clearly operate as a bar to redemption by the mortgagor." Thus the mortgagor, Mrs. Damer, must have known that if she were not paying interest all that period, either somebody else must have been doing so, or, if the mortgagee were in actual possession, then her right to redeem would be barred. But for the necessity for the payment of interest, the judgment shows (page 187) "actual possession by the mortgagee might have had a different effect, because that would have been consistent with her (Mrs. Damer's) title, and not adverse to it."

But, in the present case, there was nothing to show the plaintiffs that any one else was assuming the character of the mortgagor, for as plaintiffs were under no necessity to redeem at any one particular moment within the statutory period, they had no reason to suppose that if they did not redeem, either somebody else must be doing so, or that redemption would be barred. In a case such as *Cholmondeley v. Clinton* "payment of the interest of the mortgage by the person claiming to be mortgagor to the mortgagee, is a recognition of the right and title of the mortgagor, and preserves it unbarred; but it cannot be deemed a recognition of the right or title of any other person to be the mortgagor. It is an act of directly contrary import. By making the payment in his own name, and on his own

(1) (1820) 2 J. & W. v. pp. 186, 187.

account, he (the person claiming to be the mortgagor) takes upon himself to do an act that belongs to the mortgagor, and thereby virtually declares that character to belong to himself" (2 J. & W., page 180). It is further to be borne in mind that in *Cholmondeley v. Clinton*⁽¹⁾ "the mortgagee having declined the possession, left it as it was before the mortgage, in the mortgagor, who continued in the actual possession and enjoyment of the rents and profits for his own absolute use and benefit, as the equitable owner of the estate," and therefore in a later passage (page 185) "the interest of the mortgage money" is spoken of as "tendered from year to year by the person who, claiming to have succeeded to the original mortgagor in the title to the equity of redemption, is, by the *acquiescence* of the rightful owner of it, allowed to remain in the quiet and uninterrupted enjoyment of the estate *as the sole and admitted owner*." So in an earlier passage (page 143) it was said: "So long as the incumbrance continues, the *interest must be paid* by whoever is the owner of the estate, as much as the taxes or any other outgoing payment. Payment thereof is an admission of the debt and of the title of the mortgagor, but it is no admission of any right existing in any other person to the estate, much less of the right of any person alleged to be the rightful mortgagor. It is, on the contrary, in respect to him, in itself the strongest exercise of adverse possession. It is a *public* usurpation of the character of the mortgagor, from year to year doing the acts which belonged to it The mortgagee recognised him as such by receiving the interest from him. Horace, Earl of Wimpole, and those who claimed under him, *knew this, but never interfered* to offer payment themselves, or question its being made by Lord Clinton. They forbore in this respect, as well as every other, to act as the owners of the estate, because they considered that character to belong to the Lord Clinton, and not to themselves. They therefore in so doing *recognised and acquiesced* in his title, but he did nothing to recognise theirs. On the contrary, his acts were uniformly adverse to it. The laches and non-claim of the one party, and the adverse possession of the other, are as

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strongly exemplified in this instance as in every other." So in another passage (page 142) : "The fact of the possession taken by the late Lord Clinton, the exercise of *every act of ownership and dominion* by the late and present Lord Clinton, the receipt of the rents and profits, the payment of the outgoings, the interest of the old mortgage, the new settlements made..... creating long terms of years for a jointure and raising portions, and for borrowing large sums upon new mortgages, and settling the estate permanently in its family : all this the bill states to have been made known to Horace, Earl of Orford ; that he *was acquainted with the ground upon which Lord Clinton founded his title, and that he took legal advice upon it* ; and afterwards deliberately, again consulting his legal advisers, executed the deed of confirmation, expressly recognising the title of Lord Clinton and the acts done by him under it. Upon the death of Horace, Earl of Orford, neither his devisee or heir, though each now sets up a claim to the estate, ever took any steps to prosecute the claim till the present suit when the twenty years had elapsed."

"No doubt," as observed in *Dalton v. Angus*,⁽¹⁾ "a failure to interrupt, when there is a power to do so, may well be called laches," and in *Cholmondeley v. Clinton*⁽²⁾ "the same claim might have been preferred in a Court of Equity at any time during the twenty years suffered to elapse (J. & W. 145). There was no pretence of any disability" (page 142).

But this bar to equitable relief on the ground of laches and non-claim could not apply where there was neither knowledge of the assertion of an adverse claim to the equity, nor any act done by another which it was necessary for the claimant to do to preserve his title, and which if not done by him must have been done by and for the benefit of an adverse claimant, unless the equity itself were altogether lost. The adverse possession of the equity was therefore due not to the bare claim as mortgagor, but to the exercise of rights and the doing of acts which amounted to a "public usurpation of the character of the mortgagor," a usurpation of which other persons claiming that character could not, if they professed to retain it, have remained

(1) (1881) 6 App. Ca. 818.

(2) (1820) 2 J & W. v. pp. 186, 187.

ignorant. That was acquiescence with knowledge. And according to "the case put by Lord Redesdale in *Hovenden v. Lord Annesley* (1) of a tenant disavowing the landlord's title and attorning to another, if the landlord, *being apprised of it, acquiesces*, the possession of his tenant becomes adverse and the Statute of Limitation will run against him." This, however, would not, under the rulings which follow *Womesh Chunder's case* (2) above cited, apply in India apparently in the case of a suit for possession against a trespasser when the owner is not entitled to immediate possession. Thus the owner could have no power to sue for possession, during the currency of an *ijara*, and time would run against him, therefore, only on its termination, though prior to that he "might possibly have a right to bring a suit for declaration of title" (*Krishna Gobind Dhur v. Hari Churn Dhur* (3)) which it would be discretionary with the Court to give or refuse (see *Mussamat Doolhun v. Lal Beharee* (4); *Raiak Nilmoney Singh v. Kally Churn* (5)). And laches when the law of limitation has determined the period for suit would be no ground for diminishing that period: *Juggernath Sahoo v. Syud Shah*. (6)

Thus the adverse possession of a right may be entirely distinct from the adverse possession of tangible immoveable property; a right to sue in respect of the former arising possibly on open and avowed assertion or manifest adverse exercise of such right, while, on the other hand, the right to sue in respect of the possession and the consequent running of time under article 144 of the Indian Limitation Act in respect thereof can commence only when the possession itself (and not a mere claim to some minor right) becomes adverse to the rights of the person alleging title, which it cannot be as long as that person is not entitled to claim possession. And *Chinto v. Janki* (7) shows that for a mortgagor to be entitled to claim immediate possession on the ouster of the mortgagee, there must be "virtual dispossession" of the mortgagor as well as of the mortgagee. In other words, there must be something done or declared, excluding his power to resume possession at will, as unmistakeably as physical ouster would.

(1) (1806) 2 Sch. & Lef. 624 quoted in 2 J. & W. p. 18.

(2) (1869) 10 Cal. W. R. 15.

(5) (1874) 23 W. R. 150 P. N.

(3) (1882) 9 Cal. 367 v. p. 369.

(6) (1874) 23 W. R. 99 P. C.

(4) (1872) 19 W. R. 32.

(7) (1892) 18 Bom. 51.

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The Privy Council case of *Karan Singh v. Bakar Ali Khan* ⁽¹⁾ shows that whereas under section 1, clause 12, of Act XIV of 1859 a suit for possession of immoveable property must be brought within twelve years from the time when the cause of action arose, under article 145 of schedule II of Act IX of 1871 (and therefore under article 144 of Act XV of 1877), suits for possession must be brought within twelve years from the time when the possession of the defendant, or some person through whom he claims, has become adverse to the plaintiff. This decision, as explained in *Faki Abdula v. Babaji Gangaji*, ⁽²⁾ means, when taken with that of *Mohima Chunder v. Mohesh Chunder*, ⁽³⁾ that where a plaintiff has been in possession, and has been dispossessed, he must show possession and dispossession within twelve years, but where there is no allegation of original possession in the plaintiff lost by dispossession or discontinuance of possession, then the party relying on adverse possession to displace a proved or admitted title must show such adverse possession to have commenced and continued from twelve years prior to suit. In the first-mentioned case the plaintiff admits adverse possession at least to have commenced. In the second he does not. In the first case, therefore, having admitted ouster, he has to show that the adverse possession, which he admits has begun to run against him, dates from a time too recent to allow of its ripening into a statutory title. In the second, when there has been no such ouster as to give notice of the adverse nature of the possession, it is incumbent on the person alleging that the title set up against him is barred by twelve years of adverse possession, to show, not only that his possession has lasted for twelve years, but that it has all the time been in open conflict with the title on which the plaintiff relies. The result is, as above indicated, if there has been no ouster or "open and notorious act of taking possession," then the person relying on his possession to defeat title, must show that it was of such a nature, and involved the exercise of rights so irreconcilable with those claimable by the plaintiff, as to give the plaintiff

(1) (1882) 5 All. 1.

(2) (1890) 14 Bom. 458.

(3) (1888) 16 Cal. 473. s. c., L. R. 16 I. A. 23.

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occasion to dispute that possession (or, in other words, that it was such as to give a cause of action or right to sue for *possession*) throughout the twelve years next preceding the suit. The mere existence of the claim without possession, actual or constructive, will not suffice as a bar to a title proved or admitted: *Secretary of State for India v. Krishnanomi Gupta*.⁽¹⁾ And even where there is possession, if it has commenced without any act of dis-possession, and is susceptible of explanation by reference to a title not inconsistent with the rights of the person against whom it is set up, or of one holding on behalf of such person or temporarily entitled to exercise his rights, there can be no necessity to call that possession in question, unless and until interference with the right of the person against whom it is alleged has been manifested by acts affecting his existing right, or has otherwise been brought to his knowledge. Viewed from this standpoint, there seems to be nothing irreconcilable in the decisions of *Ammu v. Ramakrishna Sastri*,⁽²⁾ *Puttappa v. Timmaji*⁽³⁾ and *Cholmondeley v. Clinton*,⁽⁴⁾ on the one hand, and those in *Chinto v. Janki*⁽⁵⁾ and *Vithoba v. Gangaram*⁽⁶⁾ on the other. For, in the first three cases, not only was the mortgagee (the person who represented the claimant and was entitled by his possession to exclude that of the claimant) out of possession, but the possession was taken by a third party who had, to the knowledge of the claimant, the mortgagor, done things which could leave the mortgagor no room for doubting that his rights and position had been usurped. In *Ammu v. Ramakrishna*, a third party had ousted the mortgagee by contesting the title with the mortgagor face to face. In *Puttappa v. Timmaji*, a third party had taken the rent which was periodically payable to the mortgagor, and had handed on possession to the defendant. And in *Cholmondeley v. Clinton* every act of ownership had been exercised to the knowledge and with the acquiescence of his rival. And in all these three cases, the mortgagee's possession ceased, not in favour of a person acting in exercise of the mortgagee's rights, but in favour of a person acting in open opposition to the rights which any one represent-

(1) (1902) L. R. 29 I. A. 104.

(2) (1879) 2 Mad. 226.

(3) (1889) 14 Bom. 176.

(4) (1820) 2 J. & W. v. pp. 186, 187.

(5) (1892) 18 Bom. 51.

(6) (1875) 12 Bom. H. C. R. 180.

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ing the mortgagor must have had occasion to exercise. And, therefore, as neither the mortgagee nor any one on his behalf was in possession, any person claiming to represent the mortgagor knew that no one but the mortgagor or his representative had any right to be in possession. In *Cholmondeley v. Clinton*,⁽¹⁾ if the mortgagee had been in possession, the lapse of time without recognition of the existence of the mortgage would have barred redemption by the person claiming to be mortgagor.⁽¹⁾ And the claimant who had done nothing whatever to keep the equity of redemption from becoming barred, could not claim that equity which had been preserved by some one else, who had preserved it for his own benefit alone, openly asserting and exercising the right to do so as against that claimant.

And limitation does not begin to run against a plaintiff until he is under some necessity or duty to assert his title: *Dewan Manwar Ali v. Unnoda Pershad Roy*⁽²⁾; *Mussumat Bebea Sahodra v. Roy Jung Bahadur*.⁽³⁾

No doubt, as long as the mortgagee is in possession, he and all claiming under him represent the mortgagor's possession. If the mortgagee in possession is dispossessed on grounds affecting only his right, as for instance, his right as heir to represent the original mortgagee, or his right, as in *Parmanandas v. Jamnabai*,⁽⁴⁾ to possession in spite of a third party's lien on the property, then the dispossession of the mortgagee obviously does not imperil or call in question any right of the mortgagor, and the mortgagor is not concerned or entitled to insist on being immediately restored to possession: and the possession taken is not adverse to him and cannot cause time to run against him. To give the mortgagor a right to insist on immediate possession, there must be an unequivocal ouster preventing the possession of the mortgagor from continuing altogether by leaving no room for doubt that the person taking possession does not profess to represent the mortgagor, but to hold in spite of him. In such a case, the mortgagor is as effectually and unmistakeably displaced

(1) (1820) 2 J. & W. 187; Story's Equity Jurisprudence, 9th Edn., s. 1028a, Vol. II, p. 215.

(2) (1579) L. R. 7 I. A. 1.

(3) (1886) L. R. 8 I. A. 210.

(4) (1885) 10 Bom. 49.

as if there had been no mortgage at all. When an ouster takes place in that manner the mortgagor knows that no one is in possession who can represent or continue his possession, or who is entitled preferentially to possession, and, therefore, he becomes entitled (and it is necessary and his duty, if he does not want his right to be barred) to claim possession immediately.

In the present case there was admittedly on the finding of the lower Appellate Court no notice or knowledge, or circumstance that could have given notice or knowledge to the mortgagor, that the defendants' possession was either commenced or continued in opposition to, or displacement of, his rights, or that it would prevent him, on occasion arising, from resuming his power to deal with the subject-matter. He had no reason to suppose that his rights were invaded. And until he had such reason, he could not be under any necessity to take action for recovery. The possession of defendants, therefore, was not adverse to the plaintiffs from the first, and it has not been found that anything has occurred which could have made it so, for a period sufficient to bar this suit.

The decision of the lower Appellate Court is based on a mistaken notion of the law as to what constitutes adverse possession and must, therefore, be set aside, and as unfortunately that Court has failed to decide the further issue arising in the case as to the right of the plaintiffs to redeem, the decree must be reversed and the case remanded for a decision on the merits. Costs will abide event.

ASTON, J.:—The facts as held established by the lower Appellate Court are as follows.

Plaintiffs 1 and 2 are the daughters, and plaintiff 3 the grandson, of the mortgagor Khutubsha, wife of Kondi. Defendants 2 and 3 are the sons of Kondi's brothers. Defendant 1 is the mortgagee. The mortgage was created in 1866. At some time prior to 1885 defendants 2 and 3 entered on the land as the mortgagee's tenants, and presently asserted themselves as mortgagors. They took the mortgagee before a conciliator in 1885 and arrived at an agreement (Exhibit 114) whereby they affirmed this right, and agreed that the mortgage-debt was to be paid off in annual instalments of Rs. 8, the defendant

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retaining possession of the land. It is said that these payments were duly made, so that the lien was extinguished in 1897.

The agreement is dated 21st August, 1885. It was filed as a decree on 27th November, 1885. Plaintiffs commenced the present proceedings on 5th October, 1897, *i.e.*, more than twelve years after the date of the agreement, but less than twelve since it was filed.

On these facts the District Judge has apparently held that the defendants 2 and 3 have not been in adverse possession of the mortgaged property, but that they have been in adverse possession of "the equity of redemption" from 21st August, 1885, because "it is clear that defendants have claimed to hold this as owners and to the exclusion of the plaintiff since that date."

The District Judge further held that it is true that in the present case the plaintiffs had no notice that the defendants had usurped the equity of redemption, but considered that the plaintiff's suit for redemption is governed by article 144, schedule II to the Limitation Act, XV of 1877, and was barred by twelve years' adverse possession of defendants 2 and 3.

Taking the facts as found by the lower Appellate Court, if the defendants 2 and 3 had in fact no right to redeem the plaintiff land mortgaged to defendant 1, their possession is no better as regards adverse possession than if they had taken from the mortgagee, defendant 1, a transfer or assignment of his mortgage.

The decree must, therefore, be reversed and the case remanded for a decision on the merits.

Decree reversed. Case remanded.
