

# ALLAHABAD HIGH COURT

Batul Begam

Vs

Mansur Ali Khan

(Hobhouse, C.J. Davey, J. Robertson and R Couch, JJ.)

13.07.1901

## JUDGMENT

### **Robertson, J.**

1. The sole question in this appeal is whether the suit, brought to declare a right of pre-emption against the heir of a mortgagee by conditional sale, who has foreclosed, is time-barred, six years having elapsed from the expiry of the year of grace after foreclosure; and the main controversy comes to be whether the 120th article of the second schedule to the Limitation Act of 1877 applies to the case. Admittedly it does apply, unless either Article 10 or Article 144 applies; and the real question is whether the appellant is right in affirming that the case falls under Article 10. There is, however, a subordinate question as to the period from which the six years run, assuming Article 120 to apply.

2. The appellant is the wife of the nominal respondent, Mansur Ali Khan, and she derives from him by gift a six-pie share of his original interest in the villages now in dispute, the remainder of his interest being still vested in him. This Mansur Ali Khan and his brother, Zahur Ali Khan, at the date of the mortgage owned two-thirds of each of the villages of Pathringwa, Senduria, and Pipra Kalan, each brother holding shares of 5 annas 4 pies; and the two owned the whole of the village of Parsa, each brother holding an eight-anna share. The brothers were Muhammadans. Two of the villages were of pure zamindari tenure, the others were imperfect pattidari.

3. On the 14th of March, 1868, Zahur Ali Khan, in consideration of money lent, executed a deed of conditional sale to Sarju Prasad, now deceased (whose heir is the respondent Bhagwati Prasad), of the whole of his shares in the four villages. It is unnecessary to set out this sale deed, as nothing turns on its particular terms. No change of possession took place on the execution of the mortgage. Zahur Ali Khan died in January 1876. In 1889 the mortgagee having also died, the respondent, Bhagwati Prasad, his heir, foreclosed (by proceedings taken under Regulation XVII of 1806), and the money was not paid within the year of grace, which expired on the 20th of

January, 1881. Some litigation ensued which is immaterial to the present question and the rehearsal of which would only obscure the narrative. In 1890, Bhagwati sued in the Court of the Subordinate Judge of Gorakhpur that he might "be put in proprietary possession of a 5 anna 4 pie share in each of Senduria, Pathringwa, and Pipra Kalan and an eight-anna share of mauza Parsa by ejecting and dispossessing the defendants or any of them who may be found in possession thereof and by declaring their right of ownership to be extinct," and he obtained a decree which on appeal was affirmed by the High Court on the 6th of July, 1893. The terms of the decree were inter alia: "It is decreed and ordered that the claim of the plaintiff for possession of the shares of the villages mentioned in the relief be decreed." On the 27th of November, 1893, Bhagwati executed a dakhnama, declaring that under the order of the Judge "Munshi Jamiat Rai, the Amin of the Court, has given formal possession to me, the decree-holder, through my karinda (agent) over the shares of the villages detailed below," and the names of the villages and number of the shares are duly set out. Mutation of names was also obtained in respect to the shares. Bhagwati then attempted to take physical possession of the estate, but he was successfully resisted by Mansur Ali Khan. Bhagwati therefore never had possession at all, unless the possession of Mansur Ali Khan or the possession of the tenants, or his own "formal possession" will suffice; and it has not been suggested that his legal rights entitled him to anything more, in the way of possession, than he actually obtained, unless and until he had enforced a partition, which in fact never took place.

4. On the 4th of July, 1894, the appellant filed her plaint. She narrated the conditional sale, the foreclosure, the decree of possession, and the "delivery of possession." She described herself as a near co-sharer of the vendor (in the conditional sale), and asserted that under the condition of the wajib-ul-arz the usage and right of pre-emption under the Muhammadan law she possesses a preferential right of purchase. Her prayer, so far as material, was that a decree awarding possession over the mortgaged shares of the villages might be passed in her favour on the basis of pre-emption, the condition of the wajib-ul-arz, the custom of the village, and the right of pre-emption under the Muhammadan law, by setting aside all the proceedings and the foreclosure decree, on payment of Rs. 35,000, the consideration money, or of any other sum which might be determined by the Court. A written statement was filed by the respondent, Bhagwati, in which various grounds of defence were stated: inter alia, limitation was pleaded, the validity of the gift to the appellant which constitutes her title to claim pre-emption was challenged, and her alleged right of pre-emption was denied. Issues were settled on the 19th of September, 1894, but of those the only one which has been tried and decided, and requires present notice, is that of limitation. For the purposes of the present question, therefore, the appellant is to be assumed to have had a right of pre-emption, and the question is whether she had lost it by limitation before her plaint was filed.

5. On the 28th of November, 1894, the Subordinate Judge dismissed the suit on the ground of limitation, with costs. He held that the title of the conditional vendee became absolute on the expiration of the year of grace, and that the six years' period of limitation prescribed by Article

120, schedule II of the Limitation Act begins to run against the pre-emptor from the expiration of the year of grace.

6. The appellant appealed to the High Court, who on the 12th of November, 1896, remanded the case for the trial of the following issue: "Does the property in suit admit of physical possession?" Evidence was taken, and the Subordinate Judge on the 11th of January, 1897, held that the property in suit does not admit of physical possession. On appeal the High Court, on the 16th of February, 1898, dismissed the appeal with costs; and it is against that judgment that the present appeal has been taken.

7. The view of both Courts is that the appellant's claim falls under the 120th article of the second schedule of the Limitation Act, 1877, which is the final and residuary article including all suits not specially provided for, and fixing for all such suits the limitation of six years. It is for the appellant to show which other article fits her claim; she points first to the 10th article: to this article most of the discussion has been directed, and, this occasioned the remand. The 10th article purports to apply to suits "to enforce a claim of pre-emption whether the right is founded on law or general usage or on special contract." One year is the period of limitation; and the time from which this period begins is "when the purchaser takes, under the sale sought to be impeached, physical possession of the whole of the property sold, or, where the subject of the sale does not admit of physical possession, when the instrument of sale has been registered." The interest of the appellant to maintain the application of the 10th article is that, if the subject is susceptible of possession, then possession has yet to be taken, for none has as yet been had.

8. The "property sold," "the subject of the sale," was in this case the 5 anna 4 pie share of each of the three villages and the eight-anna share of the fourth. Various questions of more or less subtlety suggest themselves as to the relation of the holder of such a right to the possession of the estate. All those questions are, however, superseded by the extreme absoluteness of the language of the tenth article of the Limitation Act. What has to be considered is, as the High Court accurately formulated, the question, Does the property admit of physical possession? The word "physical" is of itself a strong word, highly restrictive of the kind of possession indicated; and when it is found, as is pointed out by the High Court, that the Legislature has in successive enactments about the limitation of such suits gone on strengthening the language used,—first in 1859 prescribing "possession," then in 1871 requiring "actual possession," and finally in 1877 substituting the word "physical" for "actual," it is seen that that word has been very deliberately chosen and for a restrictive purpose. Their Lordships are of opinion that the High Court are right in the conclusion they have stated. Their Lordships consider that the expression used by Stuart, C.J., in regard to the words "actual possession" is applicable with still more certainty to the words "physical possession" and that what is meant is a "personal and immediate" possession.

9. This being the sound construction of the tenth article of the second schedule to the Act of 1877, the facts completely fail the appellant, for the mortgagee's heir had no semblance of

physical possession in the true and natural sense of the term. All that he had directly was the "formal possession" constituted by the dakhnama, which was ceremonial and on paper. The physical possession of the villages was with others, and Bhagwati, not having enforced a partition, could not get physical possession' of any definite portion of those lands and had no right to oust the existing occupiers. Accordingly their Lordships consider that the case does not come within the tenth article, in so far as possession is concerned. This being so, the alternative stated in the third column relating to registration arises, but the appellant did not argue upon it and no suggestion has been made that it affects the argument. The tenth article accordingly disappears from the case.

10. The alternative suggestion that Article 144 applies cannot be supported. It applies to suits "for possession of immovable property or any interest therein not hereby otherwise specially provided for," and the 12 years of limitation are to begin "when the possession of the defendant becomes adverse to the plaintiff." Now it is perfectly clear that claims of pre-emption are specially considered in Article 10, and although this particular claim of pre-emption does not (for the reasons already stated) fall within it, that does not affect the construction of Article 144, as illustrated by Article 10. A claim to enforce a right of pre-emption' is, as Article 10 shows, a claim impeaching another's right; and its primary object is to set aside the competing right. The circumstance that this plaintiff has inverted the proper order and, instead of first asking the setting aside and then asking possession as the consequence, has asked for possession "by setting aside" cannot alter the nature of the action.

11. If neither Article 10 nor Article 144 applies, then admittedly the 120th article does; and the only remaining question is at what date does the period of six years begin or, to apply the words of the Act, when did the right to sue accrue to the appellant? It seems to their Lordships to be clear that the expiry of the year of grace is the time at which the pre-emptor's right arises. The mortgagee's right of property had then become mature, and the mere fact that he had not enforced that right by a suit of possession does not affect the question. Their Lordships are satisfied of the soundness of the decision of the High Court of the North-West Provinces in *Ali Abbas v. Thahur Prasad* (1892) I.L.R. 14 All. 405.

12. Their Lordships will humbly advise His Majesty that the appeal ought to be dismissed.

