

## ALLAHABAD HIGH COURT

Sohan Lal

Vs

Mohan Lal

(Mukerji, J.)

20.06.1928

### JUDGMENT

#### **Mukerji, J.**

1. This case has been referred to a Bench of three Judges for the decision of points of law which will be presently stated. It will be necessary to state briefly the facts of the case in order to see how the law applies and what rule of law will be applicable.

2. The facts that have been found by the lower appellate Court and which, therefore, have been accepted for purposes of the determination of the points of law, are these: There was an usufructuary mortgage of a certain house property made in the year 1873. It was made for the sum of Rs. 1,000. In course of time the property came to be owned by one Damodar who, therefore, represented the original mortgagor. In course of time the mortgagee's interest came to be owned by the defendant, Ragha Mal. Ragha Mal was defendant 1 in the suit. He has since died and is represented on the record by his successors in-title. Damodar executed on 28th February 1901, a deed of sale in favour of Ragha Mal in respect of the mortgaged property for a sum of Rs. 90. The sale-deed was never registered. The mortgagees and, after them, their successors-in-interest, continued to be in possession of the mortgaged property and are still in possession. Damodar died in 1914. His brother and heir, Krishna Ram, by a sale-deed dated 28th January 1919, professed to sell, the properties in suit to the plaintiffs who are the respondents in this appeal. They brought the suit, out of which this appeal has arisen, for redemption.

3. The suit has been met with the plea that the mortgagor sold his rights to the mortgagee by the deed of 1901 and, therefore, no right is left in Krishna Ram or his transferee to sue for redemption. The plaintiffs urge that the sale-deed, being unregistered, was not admissible in evidence and did not transfer any title of Damodar to Ragha Mal and that, therefore, the plea of Ragha Mal that he had become the owner of the property is unmaintainable. On behalf of Ragha Mal it was contended that, conceding that the deed of 1901 did not transfer any title to him, he, at least, began to hold the property, from 1901, adversely to the mortgagor and that, therefore, by 12

years adverse possession, he acquired the mortgagor's interest in the property, so that nothing was left in 1919, which could be transferred by Krishna Ram to the plaintiffs.

4. These contentions of the parties have led to the framing of the following points for determination by the Bench of three Judges.

5. Whether the document of 28th February 1901 is admissible in evidence for the purpose of showing a change in the character of the possession of the mortgagee?

6. Whether after what happened in 1901, the possession of the mortgagee became adverse and the claim is barred by limitation?

Point No. I.

7. This point involves several subsidiary points. These are:

(a) Whether the interest of Damodar in the mortgaged property was a 'tangible immovable property' or 'intangible property' within the meaning of Section 54, T.P. Act?

(b) If it was 'tangible immovable property', whether the transfer of it by an unregistered document is valid?

(c) Whether, if the interest of Damodar be 'intangible property' and could be transferred only by means of a registered document, the document was inadmissible in evidence, having regard to the provisions of Section 49, Registration Act?

8. If Damodar's interest in the mortgaged property be tangible immovable property the transfer could be effected either by a registered instrument or by delivery of property. As there was no registered document to effect a transfer, the transfer would be effective, if there was a "delivery of property". But the property professed to be sold, was already in the possession of the proposed transferee; it follows that, in the circumstances, there could be no delivery of the property. If a party be already in possession of the property, you cannot deliver the property to him again, without first asking him to vacate the property. This was the view taken in the Calcutta case of *Sibendrapada Banerji v. Secy. of State*<sup>1</sup>. The contrary view was taken in the case of *Muthukaruppan Samban v. Muthu Samban*,<sup>2</sup> As there is no case decided in this Court, I am free to, express my opinion and it is that the Calcutta case lays down the better law. If we look into the reason of the rule we shall see at once that for the publicity of the fact that title has passed, it was essential that possession should change. It was this change in possession that was accepted as a criterion of transfer. It must, therefore, be taken that, when the legislature said that a transfer of tangible immovable property of the value of less than Rs. 100 could be made by delivery of the property, it meant actual delivery and not a constructive delivery. It follows that the document executed by Damodar did not effect a change in the title and there being no delivery of the property, no title passed to Ragha Mal. It further follows that, under Section 54, T.P. Act, the document which purported to be a sale-deed of tangible immovable property, already in the

possession of the vendee, of the value of less than Rs. 100, was compulsorily registrable.

9. Again, if the interest of Damodar was an 'intangible property', the transfer could be made only by a registered document and in that case the registration of the document in question was compulsory under Section 54, T.P. Act. Whatever, therefore, may be the character of the property, which Damodar purported to sell, it could be effectually sold only by a registered deed. In this view it is not necessary to determine the nature of the property.

10. The question namely, whether a mortgagor's estate is a tangible immovable property or whether it is an intangible property, has been debated at the bar and it is but proper that something were said on that point.

11. When the owner of, say, a house, which is free from encumbrance (encumbrance in a large sense of the word, including leases etc.) sells it, there can be no doubt that he sells a 'tangible immovable property' within the meaning of Section 54, T.P. Act. But if we express the transaction as "a transfer of the interest of the owner" or "as the transfer of the proprietary rights" we can easily suggest that the transfer is only of an interest' or 'rights' and that, therefore, the transfer is of an 'intangible property'. But this would not be a correct view. We must therefore guard ourselves against looseness of expressions and must not lose sight of essential truth. The transfer of a house by the owner, therefore, must be a transfer of tangible immovable property. Now, when the owner makes a mortgage of it, he "transfers an 'interest' in that property (in this case a house) to the mortgagee for the purpose of securing the payment of money advanced etc.": see Section 58 (a), T.P. Act. The question now is, what is left with the mortgagor after the transfer of an 'interest' in favour of the mortgagee? Is the owner still an 'owner' or is he in any way less than an 'owner' a man possessing something short of ownership? If he is still the owner, what he will transfer by way of sale (after the mortgage) will be the house itself and not a mere 'interest' or 'right' that is left in him.

12. It is the clearest opinion of jurists that the owner of immovable property who has parted with some of his rights in the shape of mortgage or lease, remains still the owner. Holland in his "Elements of Jurisprudence", Edn. 13, 1924, at p. 209 says:It (ownership) may... continue to subsist although stripped of almost every attribute which makes it valuable....

13. Again at p 223, he says:One or more of the subordinate elements of ownership, such as a right of possession or user, may be granted out, while the residuary right or ownership... remains unimpaired.

14. The same author, further, at p. 233, talking of pledge, says:Probably the rudest method is that which involves an actual transfer of ownership in the thing from the debtor to the creditor... and such is the English mortgage of lands or goods... except in so far as its theory has been modified by the determination of the Court of Chancery and of the legislature to continue, as long as possible, to regard the mortgagor as the owner of the property.

15. Similarly, Salmond in his *Jurisprudence* (Edn. 7, 1924) at p. 280 says: The right of the owner of a thing may be all but eaten up by the dominant rights of lessees, mortgagees and other encumbrances. His ownership may be reduced to a mere name rather than a reality. Yet, he, nonetheless remains the owner of the thing, while all others own nothing more than "rights" over it.... He, then, is the owner of a material object, who owns a right to the general or residuary uses of it, after the deduction of all special and limited rights of use vested by way of encumbrance in other persons.

16. That eminent writer of treatises of law, Pollock, in his *"First Book of Jurisprudence"* (Edn. 5 1923, at pp. 179 and 180) says:

We must not suppose that all the powers of an owner need be exercisable at once or immediately; he may remain owner though he has parted with some of them for a time. He may for a time even part with his whole powers of use and enjoyment and suspend his power of disposal, provided that he reserves for himself or his successors the right of ultimately reclaiming the thing and being restored to his power.

17. Enough has been said to establish, on authority, that the mortgagor, in spite of executing a mortgage, whether it be a simple mortgage or an usufructuary mortgage, is, still the owner of the property so mortgaged. If then, he makes a transfer of "his interest," he makes a transfer of the property itself and not merely of an abstract right or of "certain rights out of his total bundle of rights" originally owned by him.

18. If this were not the case, let us see to what consequences we are landed. A mortgage, as I have pointed out, is by the very definition, a transfer of an "interest" in a specific immovable property, in favour of the mortgagee irrespective of whether the mortgage is simple or usufructuary. In the case of a simple mortgage, the mortgagor retains possession, in the case of an usufructuary mortgage, he parts with possession. In either case, he is the mortgagor and, one would expect, his interest is the same. We cannot therefore say that in the case of a simple mortgage, the mortgagor being in possession, his interest is a tangible immovable property, while in the case of an usufructuary mortgage, the mortgagor's interest is an intangible property because he is out of possession. Yet, in some cases it has been decided that such is the case. In my opinion on principle, there can be no distinction made between the two cases of simple and usufructuary mortgage. No authority has been cited to us as to the interest of the mortgagee, but if the cases which deal with the mortgagor's interest have been correctly decided, it would follow that the interest of a simple mortgagee would be an intangible property while the interest of the usufructuary mortgagee would be a tangible immovable property. As I have already stated, there is no room for this distinction, In each case the mortgagee possesses nothing but an interest in the immovable property and the mortgagor is the owner of the property.

19. In the case of a mortgage in England, as pointed out by that erudite jurist, Holland, (see the

quotation from p. 233 above) the mortgagee, from the date of the mortgage, becomes the "legal" owner of the property and nothing is left on the mortgagor except what has been called "a bare equity of redemption." Indian Legislature has intentionally refused to import the expression "equity of redemption" and for ample good reasons. It had however to use the expression "right to redeem" (see Section 60, T.P. Act). But the expression has been used in an entirely different sense. A "right to redeem" is not the same thing as "an equity of redemption in England." In India a host of people, besides the mortgagor himself, are allowed to exercise the right of redemption. See Section 91, T.P. Act. One of these persons is a judgment-creditor of the mortgagor. Certainly, the interest of a judgment-creditor of the mortgagor and the interest of the mortgagor himself in the property mortgaged are not identical. It would, therefore, be very very wrong to substitute the expression "right to redeem" for the English expression "equity of redemption," and, then, to say that the "right to redeem" possessed by a mortgagor is an intangible property.

20. The admissibility of the document in question has to be determined only if the document is one of the description referred to in Section 49, Registration Act. The Registration Act, Section 49, makes documents which are compulsorily registrable under the provisions of Section 17, Registration Act, inadmissible in evidence, for certain purposes. By Section 4, T.P. Act, the provision of Section 54 of the same Act has been made "supplemental" to the Registration Act. Under the provisions of Section 51, a sale-deed of the value of less than Rs. 100 is compulsorily registrable, it being immaterial whether the property sold is tangible immovable property or intangible property. In the former case, if there be delivery of possession, that may pass title, but then an unregistered sale-deed would be of no use. Section 54, therefore, to some extent, modifies the provisions of Section 17, Registration Act. It is therefore argued that Section 4, T.P. Act, should be so read as to embody Section 54 into Section 17, T.P. Act, not only for purposes of amending Section 17 but also for purposes of reading Section 49, Registration Act, as applicable to Section 54, T.P. Act. This contention has been considered by the Courts of Madras and Bombay and different answers have been given. The Full Bench case of *Rama Sahu v. Gowra Ratho*<sup>3</sup> decided that Section 49, Registration Act applied only to the documents mentioned in Section 17, Registration Act, and not to documents which did not come within the purview of the provisions of that section. In my opinion the Madras view is preferable to the view expressed by one of the learned Judges in the case of *Dawal Piranshah v. Dharma Raja Ram*<sup>4</sup> There can be no doubt that the legislature did mean to incorporate the provisions of the Transfer of Property Act, relating to registration, into Section 17, Registration Act; but it does not follow that, when framing Section 4, T.P. Act, they had in their view the provisions of Section 49, Registration Act. It is no doubt illogical to apply Section 49, Registration Act, to the documents mentioned in Section 17 of the same Act and to make the former inapplicable to the documents which are compulsorily registrable under the Transfer of Property Act. But the question is not what the law should be but what the law has been declared to be. A Court cannot legislate but can only interpret the law. It will be for the legislature to remedy the defects that may be pointed out by the Courts. By making the provisions of the Transfer of Property Act relating to registration supplemental to the Registration Act, the legislature simply declared that Section 4,

T.P. Act, might be read, say, as "S. 17-A", Registration Act. But something more than this would be necessary for the Courts to hold that the legislature expressed themselves clearly, in their intention, if any, that the provisions of Section 49 would apply to the said "S. 17-A", Registration Act. I would, therefore, hold that Section 49 does not apply to the document of 28th February 1901. Further, it follows that there being no bar to the admissibility into evidence of the document of 1901 (the only bar alleged was Section 4.9, Registration Act) the document is admissible in evidence.

21. Point No. 2.-The contentions of the parties have been set forth above. Ragma Mal was in possession till the execution of the sale-deed, in his favour, as a mortgagee. His possession was therefore permissive and derivative. When Damodar, by execution of the document of 1901, told him that from the date of the execution of the document, he (Ragma Mal) became the owner of the property, Ragma Mal's possession ceased to be permissive and derivative. He began expressly to claim under a proprietary title, although, as a matter of law, no title, as owner, accrued to him under the document. There is no room to doubt that the intention of the parties was that, from the date of the execution of the document in 1901, Ragma Mal should become the proprietor of the property and Damodar should cease to have anything to do with it. In the circumstances, the possession of Ragma Mal must be, without any difficulty, treated as becoming adverse to Damodar, from the date of the execution of the document.

22. It is, however, contented that on the date of the execution of the sale-deed, Damodar was not entitled to possession and that, therefore, from that date Ragma Mal could not begin to start to prescribe for a full estate. It is, no doubt, a true proposition of law that you cannot be in adverse possession of a property against a man who is not entitled to the possession of that property. But the present case is exceptional. The mortgagor and the mortgagee, by agreement (if valid) could put an end to the mortgage. They could agree that the mortgage would cease and Damodar would get possession at once. If that had been the agreement, and if, in spite of that agreement, Ragma Mal had continued to be in possession of the property, Ragma Mal's possession would have become adverse, because Damodar would be entitled to possession. Again, the parties could agree that the mortgagee's estate and the mortgagors' estate would vest in the same person. In that case Damodar would cease to have any interest in the property and the possession of Ragma Mal, ceasing to be that of a mortgagee, would start, as adverse to Damodar. Where in an intended sale, which can be effected, in law, only by a registered document, no such document is executed and yet the intending purchaser gets possession, he gets possession, with the consent of the intending vendor; but, nonetheless, the purchaser's possession begins, adversely, to the vendor. If the intending purchaser be fortunate enough to continue, undisturbed by the vendor, in possession for 12 years, he would acquire a perfect title as against the former owner, the vendor. The principle applicable to this case is the same. The fact that the mortgagor, on 28th February 1901 was not entitled to possession, does not create any difference, in principle. As I have already stated, the parties, by common agreement attempted to put an end to the mortgagee's estate. If the mortgagee's estate could come to an end, the mortgagor would be at once entitled to possession.

If the mortgagor does not enter into possession, the mortgagee's possession would become adverse to the mortgagor, although the original estate, as a mortgagee, was not adverse to the mortgagor. As the result of the agreement between Damodar and Raghya Mal, therefore, the possession of Raghya Mal became adverse to Damodar from the date of the execution of the sale-deed, and after the lapse of 12 years neither Damodar nor his successor-in-title could claim the property.

23. For the reasons given above, I would answer the second question also in the affirmative.

**Kendall, J.**

24. I have had the advantage of reading the judgment of my learned brother Mukerji and I am in agreement with the answers which he has given to the two questions referred to us for decision. In the view that we have taken of the effect of Section 4, T.P. Act, read with Sections 17 and 49, Registration Act, the document is admissible in evidence for the purpose of showing a change in the character of the possession of the mortgagee. I would observe specially that the wording of Section 4, T.P. Act, shows that the legislature intended to distinguish the relation of the Transfer of Property Act to the Indian Contract Act, from the relation of the specified sections of the Transfer of Property Act to the Indian Registration Act. The specified sections are not to be "taken as part of" the Indian Registration Act but are merely to be "read as supplemental to" the Registration Act. The result of this distinction must, in my opinion, be that the specified sections of the Transfer of Property Act, viz.: 54, paras. 2 and 3, 59, 107 and 123 are not to be deemed to be embodied in the Registration Act. They set forth the methods in which sales, mortgages, leases and gifts are to be effected, and as in some cases the transfer may be effected by delivery of property and not by a registered instrument at all, it is clear that these sections could not be embodied in the Registration Act. They do, however, provide that certain deeds, which are not compulsorily registrable under the Registration Act, shall be registered, and the effect of Section 4, therefore, in making these sections supplemental to the Registration Act, is merely to add certain documents to those which must be registered under the Registration Act.

25. The effect of this decision is that Section 49, Registration Act, does not affect the deed with which we are concerned in the present appeal and it is admissible in evidence. It is not necessary for the purposes of the present case to decide the question whether the property which it was intended to transfer by it was "tangible immovable property" or not. But this point was argued at some length, and it was pressed upon us by the learned Counsel on behalf of the appellant that the property was intangible. I venture to make some observations on this point, because if it had been necessary for us to decide it I should myself have had some hesitation in following the authority which has been undoubtedly laid down in this Court on the subject. In the case of *Rahmat Ali v. Muhammad Mazhar Husain*<sup>5</sup> it has been held by a Bench of this Court that the right to redeem a mortgage comes within the meaning of the expression "other intangible thing" in the second clause of Section 54, T.P. Act. A similar opinion was expressed by a Bench of the

Madras High Court in the case of *Ramasami Pattar v. Chinnan Asari*<sup>6</sup> in which it is remarked: The equity of redemption in a usufructuary mortgage is only an intangible thing like a reversion... and it can be transferred by sale only by a registered instrument and not by delivery of the property.

26. This view is supported by a reference to Williams on "Real Property." With all respect to the learned Judges who expressed this opinion I would remark that in English Law: what is generally understood by the term mortgage is a conveyance of land or other property as security for the payment of money and the mortgagee has been held to be in law the owner of the mortgaged property. (See Williams on "Real Property," 24th edn., at p. 653 and the following pages.) In Section 58, T.P. Act, however, a mortgage is defined as: A transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan.

27. In Salmond's Jurisprudence, 6th edn., Chap. 12, the author points out that although strictly nothing can be owned except abstract rights, yet a very common form of speech enables us to speak of the ownership of a material thing and that (on p. 22): The ownership of a material thing means the ownership of a *jus in re propria* in respect of that thing.... The ownership of a *jus in re aliena* is always incorporeal, even though the object of that right is a corporeal thing.... In its full and normal compass a *jus in re propria* over a material object is a right to the entirety of the lawful uses of that object. It is a general right of use and disposal, all *jus in re aliena* being merely special and limited rights derogating from it in special respects. It is only this absolute and comprehensive right—this *universum jus*—that is identified with its object.... This compass, however, may be limited to any extent by the adverse of *jura in re aliena*, vested in other persons. The right of the owner of a thing may be all but eaten up by the dominant rights of lessees, mortgagees, and other encumbrances. His ownership may be reduced to a mere name rather than a reality. Yet he nonetheless remains the owner of the thing, while all the others own nothing more than rights over it.

28. Bearing in mind these principles of jurisprudence, I find great difficulty in persuading myself that a mortgagor when he executes a mortgage and "transfers an interest" in a house or land or other tangible property of his own, transfers the *universum jus* in that property. It appears to me that it is just this which the mortgagor retains, whether he executes a simple or a usufructuary mortgage, in any territory to which the Transfer of Property Act applies. It must follow then that in selling what is popularly called his "equity of redemption" he is in reality selling the property itself, and in the present case this was undoubtedly tangible property. It would follow from this that he could sell it by placing the buyer in possession of the property (provided that the property was of less value than Rs. 100) without executing a registered instrument.

29. I am entirely in agreement with my learned brother that there was no delivery of possession in the present case. It is true that there is more than one decision of the Madras High Court which

would support an opposite view. But we have the authority of the Calcutta High Court that there must be actual and not constructive delivery of possession, and, as my learned brother has pointed out, the reason for this is that there must be publicity of the fact that title has passed. In spite, therefore, of the fact that when the mortgagor executed this deed in 1901, his intention was to transfer what, in my opinion, was tangible immovable property, nevertheless as he actually did not deliver possession to the mortgagee in his new capacity of owner and there was no registered deed, the transfer was not valid.

30. We have held the document to be admissible in evidence to prove the intention of the parties, that is to say, that Ragha Mal, who had hitherto been a mortgagee in possession, should become the full proprietor. It is true that their Lordships of the Privy Council have held that possession is never considered adverse if it can be referred to a lawful title, and it may therefore be argued that if Ragha Mal's position had ever been called in question before his death it would have been necessary to hold that his possession was that of a mortgagee and not of a trespasser. In the case of *Corea v. Appuhamy*<sup>7</sup> however, in which the above proposition is quoted with approval, their Lordships have remarked that even where such a lawful title exists, possession might be held to be adverse if there were a definite statement of ouster in the first place. I do not think that in the present case there can be any difficulty in regarding the unregistered sale-deed as a definite statement of ouster as between the parties to it, for it clearly sets forth that from the date of the deed Ragha Mal is to be the owner. It is true that we have held that there was no actual delivery of possession such as would transfer tangible property under Section 54, T.P. Act. It might therefore be difficult, if not impossible, to hold that the possession of Ragha Mal became from that moment adverse to the whole world, or indeed to anyone else except the other party to the document against whom the statement of ouster had effect. But as regards Damodar himself. I believe that the document is sufficient to change the nature of Ragha Mal's possession from that of a mortgagee to that of a trespasser, as the deed is held to be in sufficient effect a valid transfer. If Damodar had died before Ragha Mal's title had matured by 12 years' adverse possession against him into that of a full owner, it might have been very difficult to hold that the possession of Ragha Mal continued to be adverse to Damodar's heirs. But this point does not arise, because Damodar did not die until 1914, and before that Ragha Mal had completed 12 years' possession since the nature of his possession had changed.

31. I agree therefore in holding that the plaintiffs' suit was barred by limitation, and that the appeal ought to be allowed.

**Sulaiman, Ag. C.J.**

32. I agree with my learned brethren in their answers to the questions referred, and would only add a few words.

33. The first question is whether the interest of the mortgagor in a property usufructually

mortgaged is tangible or intangible immovable property. There is no doubt that the ownership in the property remains vested in the mortgagor however heavily the property may be mortgaged. But in a case of a usufructuary mortgage, as distinct from a simple mortgage, the mortgagor has no right to immediate enjoyment of the profits of the property. His right to redeem it, that is to say, to recover possession on payment of the mortgage money. According to its literal meaning "tangible" property would be one which is capable of being touched, and therefore capable of being possessed. It must accordingly be property which is capable of delivery of possession from one person to another. A mortgaged property itself is undoubtedly "tangible," but the interest of the mortgagor in the property, when the mortgage is usufructuary, is not identical with the property itself, as some interest has already passed to the mortgagee including the right to remain in possession and appropriate the profits. The interest which the mortgagor possesses is not itself capable of being touched, nor is it such that an actual delivery of its possession can be effected by the mortgagor to the mortgagee. It seems difficult to conceive of a thing as being tangible when it is not capable of actual delivery of possession. Although therefore the mortgagor is the legal owner of the usufructuarily mortgaged property, whatever rights he possesses, so long as the mortgage subsists, cannot be treated as "tangible." The subject matter of ownership is "tangible" but the interest which the mortgagor can transfer is "intangible."

34. No case has been cited before us where it has ever been suggested that the interest of a mortgagor in the case of a usufructuary mortgage is "tangible" immovable property. On the other hand there are numerous authorities to the effect that such an interest is "intangible." I may refer to the following cases: *Rahmat Ali v. Muhammad Mazhar Hussain*<sup>8</sup> *Ramasami Pattar v. Chinnan Asari*<sup>9</sup> *Mahendra Bahadur Singh v. Chandrapal Singh*<sup>10</sup> and *Sheikh Husmat v. Sheikh Jamir*<sup>11</sup> Nothing has been brought to my notice in argument which would justify me in dissenting from such a consensus of view.

35. The second point is whether, even if the interest were "tangible" immovable property, constructive delivery of possession would be sufficient to bring it within Section 54, T.P. Act.

36. I agree with the Calcutta view that delivery is the essence of the transaction and must be of a nature capable of being proved in case of dispute. There cannot be delivery of a property by the mortgagor to the mortgagee when the property is already in the possession of the latter. A surrender of the right to redeem, or a transfer of the legal ownership, is not by any means the same thing as the delivery of the property itself. Thus the registration of the sale-deed in question was compulsory.

37. The third point is whether for want of registration the sale-deed was inadmissible in evidence under Section 49, Registration Act. Its registration was compulsory under Section 54, T.P. Act. Section 4, T.P. Act, provides that Section 54, para. 2 "shall be read as supplemental to the Indian Registration Act of 1877 ". The chapter and sections of the Act, which relate to contracts, are to be taken "as part of" the Indian Contract Act. But Section 54, para. 2 is "supplemental" to the

Registration Act. Even if it was the intention of the legislature to incorporate this provision of the Transfer of Property Act into Section 17, Registration Act, the language used falls short of carrying that into effect. There is no justification for holding that the provisions of Section 54 are not only "supplemental" to the Registration Act, but a "part and parcel" of a particular section of that Act. It follows that the reference in Section 49, Registration Act, to Section 17 cannot be deemed to be applicable to the provisions of Section 54, T.P. Act. However illogical it may look, I am constrained to hold that Section 49 does not make the document inadmissible in evidence. I prefer the view expressed by Macleod. J. in the case of *Dawal Piranshah v. Dharma Rajaram* [1917] 41 Bom. 550(Supra) and followed in the case of *Rama Sahu v. Gouro Ratho* A.I.R. 1921 Mad. 3(SIC)7(Supra).

38. Even if Section 49 were applicable, the document cannot be received as evidence of any transaction affecting immovable property. It is inadmissible for the purpose of showing that a transfer was effected, but there is no prohibition against its use for the collateral purpose of showing the nature or character of possession. If instead of the word "affecting," the words "purporting to affect" had been used, the conclusion might have been different; but as the section stands, an attempt to show the nature of possession is not giving evidence of a "transaction" of transfer. Proof of possession is not proof of the transaction of sale.

39. On this point the authorities are overwhelming. I may only refer to the cases of our own High Court: *Jamphu v. Kutramani*<sup>12</sup> and other cases cited hereafter.

40. The last question is whether in spite of the ineffectual sale the mortgagee has acquired adverse possession over the property. This point is not free from difficulty. If we consider the position of the mortgagee a day after the unregistered sale-deed, it must be conceded that the mortgage was not then extinguished but was still subsisting. Under the mortgage-deed, the mortgagee was entitled to retain possession as mortgagee. The mortgagor's only remedy was to redeem the property by suing for redemption. If the mortgagor had brought such a suit soon after, it could not have been a suit for possession as against a trespasser. It was bound to be a suit for redemption. Such a suit would have been governed by Article 148 and not Article 142 or Article 144, Lim. Act. This being the true position then, could it be altered by a mere lapse of 12 years? When the mortgagor's right was to recover possession only on payment of the mortgage money, for which he had 60 years to wait, could his right be extinguished because he could not pay the amount within 12 years?

41. In the case of *Thomas v. Thomas*<sup>13</sup> Wood, V.C. recognized the principle that possession is never considered adverse if it can be referred to a lawful title, and approved of a previous authority where a party, who had taken possession of copyholds, on the death of his wife by an adverse title, lived more than 20 years afterwards, and it was then found that there was an old custom of the manor by which he had a right to courtesy, and; therefore, his possession was referred to that title which was consistent with the title of the other party,

42. In the case of *Corea v. Appuhamy* [1912] A.C. 230(Supra) their Lordships of the Privy Council approved of the principle that possession is never considered adverse if it can be referred to a lawful title.

43. In the case of *Khairajmal v. Daim*<sup>14</sup> their Lordships of the Privy Council remarked that as between the mortgagor and mortgagee neither exclusive possession by the mortgagee for any length of time short of the statutory period of 60 years nor acquiescence by the mortgagor not amounting to a release of the equity of redemption will be a bar or a defence to a suit for redemption if the parties are otherwise entitled to redeem.

44. But these observations of their Lordships must be considered with reference to the facts of those cases. I do not think that their meaning can be stretched so as to lay down that a person who has a legal right to retain possession of the property can never acquire adverse possession as against the owner. If such were the law, then it would be absolutely impossible for a cosharer, who has the legal right to retain possession, to acquire adverse possession against a cosharer. The case of *Corea v. Corea* [1912] A.C. 230 (supra) itself shows that an ouster or something equivalent to ouster can put an end to possession which in law is deemed to be the possession of his co-owners also.

45. What the dicta quoted above means is that a mortgagee or a cosharer cannot by his own act, however, clear and unambiguous, alter the character of his own possession. As their Lordships put it in *Corea v. Corea* [1912] A.C. 230;(Supra) It was not possible for him to put an end to that possession by any secret intention in his mind.

46. Mere exclusive possession would not be sufficient to raise "the presumption of ouster."

47. The case however is different where a change in the character of the possession is brought about by an agreement between the parties or with their express consent, as distinguished from a mere acquiescence. I do not see why if both parties agree and intend that from a particular date the possession of the mortgagee over the property should cease to be that of a mortgagee and be adverse as against the mortgagor, such a change cannot be recognized or be effectual. As a result of the act of both the parties, a person may have adverse possession even though he also has a legal title as a co-sharer or mortgagee.

48. I am, therefore, of opinion that there is nothing in the observations of their Lordships of the Privy Council which preclude our holding that a change in the character of the mortgagee's possession was brought about and had become adverse to the mortgagor, though the mortgage itself was not in the eye of the law extinguished.

49. There is plenty of authority in support of this view. *Lalman Pande v. Sheo Narain Pande*<sup>15</sup>

*Mahendra Bahadur Singh v. Chandrapal Singh*<sup>16</sup> and *Khedu Rai v. Sheo Parsan Rai*<sup>17</sup>

50. The facts of all these three cases were similar to the facts before us, and the Courts held that the right of redemption was extinguished after a lapse of 12 years.

51. I would accordingly answer both the questions in the affirmative.

#### Cases Referred.

1[1907] 34 Cal. 207

2[1914] 38 Mad. 1158

3A.I.R. 1921 Mad. 3(SIC)7

4[1917] 41 Bom. 550

5[1913] 11 A.L.J. 407

6[1901] 24 Mad. 449

7[1912] A.C. 230

8[1913] 11 A.L.J. 407

9[1901] 24 Mad. 449

10A.I.R. 1921 Oudh 124

11[1919] 23 C.W.N. 513

12[1917] 19 All. 693

13[1856] 2 K. & J. 79

14[1905] 32 Cal. 296

15[1919J 17 A.L.J. 737

16A.I.R. 1921 Oudh 124

17[1917] 39 All. 423