

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Anando Moyee Dossee and others v. Dhonendra Chunder Mookerjee and others, from the High Court of Judicature at Fort William in Bengal; delivered 29th June, 1871.*

---

Present:—

SIR JAMES W. COLVILLE.

LORD JUSTICE JAMES.

LORD JUSTICE MELLISH.

---

SIR LAWRENCE PEELE.

IN this case their Lordships are of opinion that the Judgment and Decree of the Court in India must be affirmed.

The case has been argued at some length, and several important questions of law and of practice have been discussed before their Lordships. The suit itself, when one looks at the plaint, scarcely seems to raise any of those questions. The suit is based entirely upon the title of a person who says he purchased under a Decree for sale, which Decree was made on the 15th of November, 1852. The contention before their Lordships at first was that that sale was made in a suit for foreclosure of a mortgage, and that that suit for foreclosure, having been instituted prior to a sale under which the Defendants claimed, the Defendants are bound by that Decree for sale in exactly the same manner as if they were parties to the foreclosure suit.

Their Lordships are of opinion that there is no foundation whatever for the claim so put, that the case to which they have been referred, of the *Bishop of Winchester v. Payne*, has really no re-

lation to any case of this kind. That case merely determines this,—that where there is a suit for foreclosure and a Defendant to that suit makes a voluntary alienation, pending the suit, of any part of his interest in the equity of redemption, the purchaser will not be allowed himself afterwards to institute a new suit for a new foreclosure, the ground being, that if that were permitted, proceedings in a foreclosure suit would be endless, because every day a fresh alienation might be made in some parts of the proceedings. But that is simply a foreclosure, that is to say that the person would be barred and foreclosed from instituting any new suit in the court for the purpose of enforcing the equity of redemption. But no suit of foreclosure ever proceeded actively, or ever was made to work actively, against a party who was not before the Court. It simply says, you shall not institute a fresh suit for redemption. This was not a foreclosure decree. It was a decree for sale, and a decree for sale made in the Court of Calcutta, had no effect whatever *in rem*; it had no effect whatever over the property in the Mofussil. The Decree for sale was merely a Decree in substance that the parties to the suit should concur in conveying and selling the property to a purchaser, and no such decree for sale could have any operation whatever upon the title of persons in the country who were no parties to the suit. Therefore, it appears to their Lordships that the view of the case presented to them based upon that case of the Bishop of Winchester *v.* Payne, has really no application to the subject matter of this suit.

But the Courts below did go into the title anterior to the sale, and upon an investigation of that title the Supreme Court came to a conclusion in favour of the Respondents. Their Lordships think it right, therefore, to some extent to go into the matters which were so discussed in the Court below.

Now one of the questions, and the most important question in their Lordships' Judgment, conclusive with regard to the matter which was raised, was this: whether the title of the Defendants was anterior to the title of the mortgagee and was anterior to his mortgage? Their Lordships are satisfied upon the evidence that before the mortgage was made, which is the foundation of the Plaintiff's

title, whether it was made in October, 1841, or whether it came into existence some time between that and the date of the registration, which is the only thing before them, that is to say, the registration in May, 1842 (whichever date be taken), at that time when that Deed was executed, the property in question was actually attached under a Decree of the Court, and that it was under a sale in pursuance of that original Decree, and of that execution that the title of the Defendants accrued; and their Lordships are of opinion that the title of the Defendants, independently of the Statute of Limitations, is paramount and superior to the title of the mortgage.

As a great deal of argument has been addressed to their Lordships upon that question of the Statute of Limitations, their Lordships think it right to add that, in their judgment, if the attachment under which the title of the Defendants was derived, had been posterior to the mortgage, still the Statute of Limitations would have been a conclusive bar. Their Lordships think that the title of a Judgment creditor, or a purchaser under a Judgment Decree, cannot be put on the same footing as the title of a mortgagor, or of a person claiming under a voluntary alienation from the mortgagor. They are of opinion that the possession of a purchaser under such circumstances is really not the possession of a person holding in priority with the mortgagor, or holding so as to be an acknowledgment of the continuance of the title of the mortgagor. The possession, which the man supposed he acquired, was a possession as owner. He thought he was acquiring the absolute title to the property, and that he was in possession as absolute owner. Their Lordships are assuming that no notice was proved of the existence of the mortgage title given to, or acquired by the purchaser; and there being no such notice, they are of opinion that the possession of the purchaser was the possession of a person claiming to be owner. Under these circumstances they are of opinion that if the title of the mortgagor to enter by reason of a default having occurred before had accrued, and if the purchaser under such a title had been in possession for twelve years, believing himself to be owner *bonâ fide*, under a claim to the ownership of the property, and not being in

possession in any way as mortgagor or under the mortgagor, then in accordance with the cases, several of which have been cited to their Lordships, and probably were cited in India, according to the principles of those cases which their Lordships adopt, they are of opinion that the suit to disturb the possession of such a purchaser ought to be brought within the twelve years after the commencement of his possession.

Their Lordships, on the whole, are of opinion that the Judgment of the Court below is correct, and they will humbly recommend Her Majesty that the Appeal be dismissed, and dismissed with costs.