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With this issue the Journal enters upon its twenty-sixth year. We take this opportunity to thank our subscribers—both those on the bench and those at the bar—for the support they have so far given us and to express the hope that the same may be continued, if possible in an even larger measure. We may be permitted also to express our sense of gratitude to the Honorable the Judges of the Madras High Court for all the facilities and encouragement that they have been pleased to afford to us. And in this connection there is only one word that we would beg leave to say, in respect of certain observations that have occasionally fallen from the bench as to the selection of cases for reporting. We certainly do not pretend to have made no mistakes but we may assure their Lordships and the profession as well, that every effort is being made to report in these pages only such decisions as may fairly be described as 'considered Judgments' and are found to do more than merely follow existing precedents. As to the complaint, that one frequently hears, against there being a multitude of legal Journals, it behoves us not to speak except to repeat the following words of the eminent founders of this Journal (with reference to the 'Indian Jurist'):—'The field of law is so wide and there are so many questions which admit of being discussed from different points of view that we think there is ample room for the existence of both the Journals'. We leave it to our readers to see whether the stress of competition has in any degree deflected us from the course or standard hitherto associated with this Journal. Except for the substitution of the weekly for the monthly issue and of two volumes a year for one —both of them, changes necessitated by the natural expansion of work—the main lines of the Journal still remain as they were laid down by the founders; and if the help and guidance of those great men are unfortunately no longer available to us, we have

at least the benefit of their labours and the lessons of their work; and it will be our constant endeavour to make the Journal continue worthy of that high parentage.

Vaiyapuri *v.* **Sonamma Bai** (29 M. L. J. 645 F. B.)

Apropos the above decision, we have great pleasure in publishing the following notes—in the form of query and answer—which, we trust, our readers will find instructive.

Querist :—

In *Vaiyapuri* v. *Sonamma Bai* a Full Bench has decided that in the case of a simple mortgage possession of a trespasser adverse to the mortgagor is not adverse to the mortgagee.

That may be right in principle, though the rule may in practice work more injustice than it will remedy, for as Abdur Rahim, J. points out in *Ramasami Chetti* v. *Ponna Padayachi* [1] the trespasser who has peacefully and openly held possession for 12 years and more may for an indefinite period be uncertain whether he is liable to be sold up by a mortgagee whose mortgage has been kept alive by payments of interest or acknowledgements of which the trespasser in possession my have no knowledge. Whereas, on the other hand, if the mortgagee remains awake he must know who is in possession of the mortgaged property and can, except possibly in a few rare cases, realize his security before the mortgagor's title is lost, or if he is anxious to retain the investment, can require the mortgagor to recover possession from the trespasser financing the suit, if he is very anxious not to realize.

This by the way: accepting the decision of the Full Bench the result in the particular case does not seem altogether clear. The Division Bench giving no reasons, beyond stating that they follow the decision of the Full Bench, confirm the decree.

The decree was a decree for possession without mesne profits, the plaintiff being the mortgagee's representative suing in the capacity of purchaser at the sale in execution of the decree in the suit on the mortgage.

The possession of the trespasser began in 1890; the suit on the mortgage was in 1900: the decree was in the same year but

1. (1910) I. L. R., 36 M. 97=21 M. L. J. 397.

the sale was not until 1906. The trespasser was not a party to the suit on the mortgage: he had twelve years adverse possession in 1902: and he was sued by the purchaser in 1910. The result seems to be that he gained nothing by his adverse possession except the right to resist the mortgagor if he tried to enter into possession himself. How is this?

The mortgagee never had even so much as a contingent right to possession and the mortgagor's right to possession was extinguished in 1902: how then did the purchaser obtain a right to possession?

Did the filing of the suit on the mortgage operate to stop the running of time in favour of the trespasser who was no party to the suit and probably never heard of it?

If not, what did the purchaser buy? apparently the mortgagee's right *plus* the extinguished right of the mortgagor, *i. e.*, *plus* nothing: and he would seem to have acquired nothing more than the right to ask the court to sell the property if the owner of the right to redeem failed to do so when called upon by the court. In other words he would have to sue the trespasser on the mortgage for sale giving him an opportunity to redeem. The mortgagee had already had the property sold once but choosing to ignore the man in possession had sold an extinguished right instead of the possessor's right; and whatever may be theoretically the correct position of a person who without title or permission remains in possession for more than 12 years, his possession must practically be held to give him the right to redeem the mortgage; for, if as the Full Bench holds the mortgage remains alive, the right to redeem it must remain alive in some one; the extinction of the mortgagor's title can hardly confer on the mortgagee a title to take possession of the mortgaged property without further ado; can it convert the right of sale into a right of possession? It seems easier to hold that the trespasser's possession for more than twelve years gives him the right to redeem, whether the mortgagor has lost that right or not; at any rate no one has the right to turn him out of possession, not the mortgagor for he has lost his right to possession; not the mortgagee, for he never had that right; not the purchaser for he could buy only the rights of the parties to the suit.

It would seem that the purchaser must have a suit for sale on the mortgage against the man in possession, in spite of the

former sale. But he has been allowed a suit for possession. How?

Is it as a suit on the judgment in the mortgage suit: the purchaser was in fact the decree holder but the judgment did not decide that any one had a right to possession; the transfer of the right to possession is the effect of the sale not of the judgment.

Or is the trespasser a transferee pendente lite?

On the theory that on the expiry of the period of 12 years' adverse possession, the trespasser acquires the title lost by the person or persons entitled to possession during that period, it might possibly be so held, provided that in 1902 there was an appeal or an application for execution pending in respect of the decree of 1900. How matters stood in those respects does not appear from the papers in the case.

Is the matter so clear that the learned Judges of the Division Bench would have wasted time had they given reasons for their decision?

If we take the case where the trespasser has before the suit on the mortgage been in possession adverse to the mortgagor for more than 12 years, it would seem clear that he cannot in that case be ousted by the purchaser if he was not a party to the suit, unless it be held that the existence of a simple mortgage on the property nullifies altogether the effect of adverse possession, and not only keeps alive the mortgagee's right to sell the property, but also causes the right of redemption to remain unimpaired in the mortgagor, and in no one also. It is bad enough for the trespasser if long peaceful possession is to be no protection against simple mortgagees; but if the mere existence of some old mortgage kept alive by acknowledgments or payments (to him unknown,) is to have the effect that the purchaser in some suit on the mortgage (to him unknown) is to be entitled to turn him out without any opportunity to redeem, hardship is veritably piled upon hardship.

There is a third case, where the trespasser's possession reaches its duration of 12 years after the sale, but before the purchaser's suit or attempt to take possession. In that case the purchaser has no doubt bought the right of the mortgagor as well as that of the mortgagee and consequently his suit could not be a suit for sale but for possession. But still there would seem to be a bar: if articles 136 and 137 be held to apply only where the

person whose title is transferred is *not* entitled to possession at the date of the sale, still 142 or 144 would seem to bar the suit.

The mortgagee can apparently avoid all these difficulties by making the man in possession a party to the suit on the mortgage. *Vigilantibus non dormientibus.*

Answer :—

The principle of the decision of the Full Bench is analogous to a case where adverse possession is acquired against the widow in possession. It is now settled law that that possession should not affect the rights of the reversioner. The mortgagor in possession had only a limited right when adverse possession commenced. The right to bring the property to sale is outstanding in the mortgagee. Consequently the mortgagor had only a limited right in the property ; and the adverse acquirer can possess himself of that right.

This still leaves open the important question whether the mortgagee can recover possession without giving the trespasser an opportunity to redeem. It must be allowed that this right subsisted in the mortgagor and passed on to the stranger. The mortgagee having purchased the property behind the back of the person who had a subsisting right to redeem, it was open to the trespasser in a suit for possession to claim to redeem. There are cases where a first mortgagee purchases the property without bringing in the second mortgagee, and the latter in a suit for possession has been allowed to plead that he has a right to redeem. The converse case of a second mortgagee getting the property sold over the head of the first mortgagee has also occurred. In this case, in a suit for possession the first mortgagee will have the right to say that the property should be sold. Or again where the members of a joint Hindu family are not impleaded in a suit on the mortgage and the property is sold, it is open to the sons to claim if they fail to show that the mortgage is not binding on them, that they should be given an opportunity to redeem. For all these reasons, the trespasser who acquired a limited right, if he puts forward the plea is entitled to ask that he should be allowed to redeem. The sale behind his back should not bind him. The decisions of the High Courts have also settled on what footing the rights of the purchaser should be adjusted.

It does not however seem necessary that the purchaser should be driven to a fresh suit for sale on the mortgage. The second

suit for possession ignores no doubt the right of the person who acquired the limited right of the mortgagor. It is not a suit on the judgment. It is a suit as purchaser against one whom the purchaser regards as a trespasser. Suppose that in a Court auction under a money decree, properties are purchased and there is on them a person who had acquired by adverse possession an occupancy right against the original owner. The purchaser would take the property subject to this tenant right. Similarly, the mortgagee purchaser would recover possession subject to the stranger setting up a right to redeem. This would work out the equities more satisfactorily than driving the purchaser to a fresh suit on the mortgage.

It may be that if adverse possession was completed only when the suit on the mortgage was pending, the acquisition by the trespasser would be *pendente lite*. Even then the rights acquired will remain subject to the right litigated. That would be the only consequence.