

Narain Das Vs. Kazi Abdur Rahim Mutwalli of Salkia Mirpara Mosque and ors.

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Court : Kolkata

Decided On : Mar-26-1920

Reported in : 58Ind.Cas.705

Judge : Richardson and ;Syed Shamsul Huda, JJ.

Appellant : Narain Das

Respondent : Kazi Abdur Rahim Mutwalli of Salkia Mirpara Mosque and ors.

Judgement :

Richardson, J.

1. The appellant is the defendant No. 1 in a suit brought by the plaintiff as Mutwalli of a religious and charitable endowment to recover possession of certain landed property mortgaged by the former Mutwalli (the defendant No. 2) to the predecessor in-title of the defendant No. 1. The defendants, other than the defendant No. 1, are formal parties.

2. The story is a not uncommon one. A wakf was created by Abdul Rahim by a registered deed, dated the 25th February 1894. By that document he dedicated certain property, valued at Rs. 2,000, to pious uses, appointed himself the first Mutwalli, laid down a rule of succession to the office and prescribed the mode in

which the rents and profits were to be expended. On his death, some month's later, without issue the office devolved or should have devolved on his sister, Nazirannessa (defendant No. 2), after whom it was to go to his younger brother, Abdul Alim, and the male descendants of the latter. It was not long before the founder's intentions were frustrated. His sister and brother joined in executing a registered deed of mortgage, dated 7th February 1899, to secure a loan of Rs. 2,500 with interest. The recitals and covenants of title show that the mortgagors represented themselves to be the secular heirs of their father and Abdur Rahim. The form of the transaction combined a mortgage by conditional sale with a usufructuary mortgage, possession being expressed to be rendered to the mortgagee for the realization of his dues on account of interest. It is in dispute whether possession was actually given and taken. The mortgagee, Kedar Nath Gourseisa, having died, his relative Sheo Prosad, who had established in the High Court his title by survivorship to Kedar Nath's estate, brought a suit for foreclosure in 1904 and the mortgage was finally foreclosed in January 1906. In March 1906, possession was delivered by the Court to the defendant No. 1 to whose father the mortgage-deed had been assigned, (Exhibit D, dated 4th February 1905).

3. In 1911, the local Muhammadans bestirred themselves and a suit was instituted under Section 92 of the Civil Procedure Code with the result that the District Judge removed Naziramiessa from the office of Mutwalli and appointed the present plaintiff, a stranger to the founder's family, in her place.

4. The present suit was commenced on the 2nd May 1913, and more than five years elapsed before a decision was arrived at in the Court below on the 23rd December 1918. The delay is in part explained by stay orders made by superior Courts, but the conduct of the suits by the parties and by the Subordinate Judges before whom it came was very dilatory. The decree eventually made declares the properties in suit to be wakf properties appertaining to the Salkia Mirpara mosque and awards possession to the plaintiff as Mutwalli of the endowment with mesne profits.

5. On the appellant's behalf it was first contended that the plaintiff has no right of suit inasmuch as he is an outsider, not in the line of succession designated by the

founder of the trust, and the District Judge had no jurisdiction to appoint him Mutwalli. In answer to this contention it is sufficient to refer to the observations of the Privy Council in *Mahomed Ismail v. Ahmed Moolla* 35 Ind. Cas. 3 C : 43 I.A. 127 at p. 134 : 43 C. 1085 at p. 1100 : 14 A.L.J. 74 : (1916) 1 M.W.N. 460 : 20 C.W.N. 1118 : 20 M.L.T. 110 : 18. Bom. L.R. 611 : 31 M.L.J. 290 : 24 C.L.J. 198 : 4 L.W. 269 : 9 Bur. L.T. 141 : 8 L.B.R. 517 (P.C.).

6. In the present case, before appointing the plaintiff, the District Judge published a call for nomination to the office. No response was received. Neither Abdul Alim nor any of his descendants came forward, the plaintiff being the only candidate. The appointment was entirely within the discretion of the District Judge as Kazi.

7. It was next contended that the wakf itself was invalid as being illusory. A perusal of the deed of endowment is, in my opinion, a sufficient answer to this argument. I see no reason to doubt the pious intentions of the founder. He deprived himself of the power to dispose of the corpus and if he reserved to himself during his own lifetime an absolute discretion over the disposal of the income he left no such discretion to his successors. The income in the hands of his successors was to be employed, in the first instance, in meeting necessary outgoings, rent, taxes and repairs. Of the balance, one-half was to be devoted to named charitable and religious purposes, and the other half was to be distributed to the heirs of each degrees or in each generation according to the shares due to them under the Muhammadan Law of succession. There was, as it seems to me, a substantial dedication of the corpus and income to charitable uses within the test laid down by the Privy Council in *Mujib unnissa v. Abdur Rahim* 28 I.A. 15 : 23 A. 233 : 5 C.W.N. 177 : 11 M.L.J. 58 : 3 Bom. L.R. 104 : 7 Sar P.C.J. 829, and repeated in *Ramanadan Chettiar v. Vava Levvai Marakayar* 39 Ind. Cas. 235 : 44 I.A. 21 : 32 M.L.J. 101 : 15 A.L.J. 139 : 5 L.W. 293 : (1917) M.W.N. 180 : 25 C.L.J. 224 : 21 M.L.T. 215 : 21 C.W.N. 521 : 40 M. 116 : 1 P.L.W. 394 : 19 Bom. L.R. 401 (P.C.). Reference may also be made to *Mahomed Ahsanulla Chowdhry v. Amarchand Kundu* 17 I.A. 28 at p. 37 : 17 C. 498 : 5 Sar. P.C.J. 476 : 8 Ind. Dec. (N.S.) 871 where the decision of this Court in *Muzhurool Huq v. Puhraj Ditarye* 13 W.R. 285 is approved.

8. Then a point was taken that the plaintiff was precluded by the doctrine of res judicata from raising the question that, the mortgage to Kedar Nath was invalid. It was said that Nazirannesaa, who was a defendant in the suit on the mortgage, might and ought to have pleaded her own breach of trust as a defence and, therefore, that the plaintiff as her successor was bound by the result of the suit. If the plea was open to her, as no doubt it was, she committed a breach of trust in not taking it just as she had committed a breach of trust in the original mortgage transaction. It would be a strange result if the trust which the plaintiff now represents were bound by the decree against her. In the mortgage suit, however, Nazirannessa was not, in the language of Section 11 of the Civil Procedure Code, litigating under the same title as that under which the plaintiff is now litigating. She was sued in her secular -capacity, not as trustee.

9. On these three points with which I have dealt we did not think it necessary to call for a reply from the learned Vakil for the plaintiff. There still remain two questions to be dealt with.

10. In his written statement the defendant No. 1 asserted that he and his predecessors-in-interest were bona fide purchasers for value without notice of the trust. An issue was framed raising the question of notice, The learned Subordinate Judge dismissed the issue with the remark that it did not arise, It was contended that he was wrong and that, if either the original mortgagee, Kedar Nath, or the assignee of the mortgage decree, were transferees for value without notice, the suit must fail. It is well-settled that trusts may be created in India in various ways *Jatindra Mohan Tagore v. Ganendra Mohan Tagore* I.A. Sup. Vol. 47 at p. 72 : 9 B.L.R. 377 (P.C.) : 18 W.R. 359 : 2 Suth. P.C.J. 692 : 3 Sar. P.C.J. 82. The nature of the trustee's possession may, therefore, vary with varying consequences. The trustee may be the ostensible owner, as in the case of secret and resulting trusts and benami transactions. In such case s he may be in a position to confer title on a transferee for value without notice under the provisions of Section 41 of the Transfer of Property Act, or by way of estoppel, but when the possession of the trustee is that of a mere manager, under a duly constituted trust, it is immaterial under the present law whether the transferee takes with notice or without notice of the trust. I say under the present law, because under the older Acts of Limitation

the transferee with notice was not protested by the twelve years' rule corresponding to Article 134 of the present Act. Consequently, under those Act s the question of notice might become relevant twelve years after the date of the transaction *Radanath Doss v. Gisborne & Co.* 14 M.I.A. 1 at p. 14 : 15 W.R.P.C. 24 : 6 B.L.R. 530 : 2 Suth. P.C.J. 397 : 2 Sar. P.C.J. 636 : 20 E.R. 687; *Luteefun v. Bego* Jan 5 W.R. 120. Under Article 134, the transferee without notice and the transferee with notice are on the same footing. Where the trustee is a mere manager, he is not the ostensible owner nor has the transferee anything corresponding to the English 'legal estate' to set over against the prior equity of the beneficial owner: the legal ownership and the prior equity are, genet ally speaking, both in the beneficiary cf. *Varden Seth Sam v. Luckpathy Royjee* 9 M.I.A. 303 at p. 323 : Marsh. 461 : 1 Suth. P.C.J. 480 : 1 Sar. P.C.J. 857 : 19 E.R. 756; *Gokul Dass v. Eastern Mortgage and Agency Co.* 33 C. 410 at p. 422 : 10 C.W.N. 276 : 4 C.L.J. 102. The element of hardship, so far as the transferee without notice is concerned, is minimized, by the system of registration. The system of registration in a public registry office and the protection it affords to the intending purchase r are now well-understood by the people. The registers are generally searched and ought always to be searched. I think I may say on behalf of us both that we regret the Bengal rule, if it is still the role, according to which registration does not itself amount to notice. It opens the door to a great deal of chicane and a great deal of idle argument. The change in the Law of Limitation above referred to seems to indicate an intention on the part of the Legislature that registration should be accepted as equivalent to notice. But, however that may be, there is no doubt that the Mutwalli of a wakf estate is not the ostensible owner of the estate. A Mutwalli is a mere manager and in the case of a public charitable endowment, such as the present, the legal ownership of the property dedicate-, ed is in the Divine Being or in the charity orated in His name. A transfer by a Mutwalli, who assumes to deal with the trust property as if he were the true owner, in breach of his duty and in fraud of the trust reposed in him, is ultra vires and may be avoided by timely proceedings properly taken for the purpose. The vice in the transferee's title, whether he takes with or without notice, coin only be cured by lapse of time. For these reasons, the learned Subordinate Judge is, in my opinion, right in holding that the question of notice in the present case is immaterial.

11. There remains the question whether Article 134 of the Limitation Act operates to bar the suit, a question which has been discussed mainly as a question of construction. The Article in its present form applies to suits 'to recover possession of immoveable property conveyed or bequeathed in trust and afterwards transferred by the trustee or mortgagee for a valuable consideration.' The period of limitation is twelve years from 'the date of the transfer.',

12. The term 'transfer', which was substituted in the Act of 1908 for the term 'purchase used in previous Act, put an end to the long dissuasions which had taken place whether property mortgaged or leased was property 'purchased' within the meaning of the Article. The case s are collected by Mookerjee, J., in *Ram Kanai Ghosh v. Raja Sri Sri Hari Narayan Singh Deo Bahadur* 2 C.L.J. 546. The term 'transfer' appears in the title of the Transfer of Property Act and seems to have been selected as the widest and most general term which could be found. The change, therefore, settled the law in the sense in which it had been generally understood in India *Ishwar Shyam Chand Jiu v. Ram Kanai Ghose* 10 Ind. Cas. 683 : 38 I.A. 76 : 15 C.W.N. 417 : 9 M.L.T. 448 : 8 A.L.J. 528 : 13 Bom. L.R. 421 : 14 C.L.J. 238 : (1911) 2 M.W.N. 281 : 21 M.L.J. 1145 : 88 C. 626 (P.C.)]. It is not disputed that a mortgage is a transfer.

13. A suit to which the Article applies must be a suit to recover possession. The plaintiff must be out of possession and the defendant in possession. The transfers chiefly contemplated are apparently transfers for value in excess of the limited powers of the trustee or mortgagee. In farms, the Article would apply to a transfer within those powers, but in such a case the true defence to a suit to recover possession would be title and not limitation, though in some case s limitation might be useful as an alternative defence. The underlying idea may be that the creator of the trust or the original mortgagor put the trustee or mortgagee in a position to deal with the property wrongly as well as rightly, and that after a limited time neither the cestui que trust nor the mortgagor shall be permitted to question those dealings. The creator of a trust or the mortgagor should, therefore, be careful to whom he entrusts or mortgages his property. The utility of such an Article lies in this, that it relieves the Courts of the necessity of deciding disputed questions of fact relating to transactions long past and prevents the hard swearing and chicane to which

such disputes are apt to give rise. With every year that passes, the chance that the Courts may be led into a wrong conclusion on a question of fact increases.

14. The question we have to decide is, what is meant by 'the date of the transfer' as the time from which limitation has to be reckoned? The rival contentions are, for the defendant No. 1, that the suit is out of time because it was instituted more than twelve years 'from the mortgage of 1889, and, for the plaintiff, as the Sub ordinate Judge has held, that the suit is in time because possession of the mortgaged premises was Brat taken in March 1906 under the foreclosure decree and the suit was instituted within twelve years of that date.

15. Apart from authorities which, though not binding on us, are entitled to our respectful attention, I should have thought that the language of the Article was plain and unambiguous and that the plaintiff was out of Court. To my mind, the date of the transfer is the date on which the property or the title was transferred by the transferor to the transferee. Where, as here, the transfer was effected by a registered instrument, that date is the date of the instrument. It is hardly disputed that such is the literal and natural meaning of the words and in my humble judgment, there is no justification for departing from that natural and intelligible meaning. To construe the date of the transfer as the date on which the transfer is followed by possession is to import into the Article words which are not there. So far as I am aware, the Article has always been understood in its natural sense in Bengal see for instance Nilmony Singh v. Jagabandhu Roy 23 C. 536 at p. 543 : 12 Ind. Dec. (N.S.) 357 and Ram Kanai Ghosh v. Raja Sri Sri Hari Narayan Singh Deo Bahadur 2 C.L.J. 546. It was so understood in Behari Lall v. Muhammad Muttaki 20 A. 482 at pp. 485, 489 (F.B.) : A.W.N. (1898) 123 : 9 Ind. Dec. (N.S.) 669 and in Manavikraman Ettan Tamburan v. Ammu 24 M. 471 at p. 482. It is so interpreted by the learned Judges of the Fall Bench who were in the minority in the recent case in Madras of Mulla Yittil Seeti Kutti v. Kunhi Pathumma 43 Ind. Cas. 31 : 40 M. 1040 : 33 M.L.J. 320 : (1917) M.W.N. 609 : 22 M.L.T. 236 : 6 L.W. 464 (F.B.).

16. To make limitation under Article 134 dependent on possession is not merely to amend the Article by judicial legislation but to go very near repealing it and leaving

Article 141 in sole possession of the Seld cf. Behari Lal v. Muhammad Muttaki 20 A. 482 at pp. 485, 489 (F.B.) : A.W.N. (1898) 123 : 9 Ind. Dec. (N.S.) 669.

17. I turn to the case s on which reliance is planed for the plaintiff.

18. In Ramchandra Vithal Rajadhiksha v. Sheikh Mohidin 23 B. 614 : 1 Bom. L.R. 102 : 12 Ind. Dec. (N.S.) 410 the property had been mortgaged and then transferred by the mortgagee also by way of mortgage, The learned Judges say,--

Both on principle and precedent, it is thus clear that the purchase r from a mortgagee of what is represented and believed to be absolute right must be a purchase with possession. His possession is an essential element of this purchase sub modo which alone can make the purchase valid as against the true owner after twelve years' enjoyment.

19. The learned Judges go on to say that the point becomes clearer when considered with reference to alienations by trustees, but the argument is the same, that the transfer or purchase is incomplete without a transfer of possession.

20. As to principle, the observations of the learned Judges seem to savor of an old heresy Baisuraj v. Dalpatram 6 B. 380 : 3 Ind. Dec. (N.S.) 709 which, after the decision of the Privy Council in Kalidas Mullick v. Kanhaya Lal Pundit 11 I.A. 218 : 11 C. 121 : 4 Sar. P.C.J. 578 : 8 Ind. Jur. 638 : 5 Ind. Dec. (N.S.) 839, was discarded Ugarchand Manackchand v. Madapa Somana 9 B. 324 : 5 Ind. Dec. (N.S.) 215. See also Trikam Madhav Shet v. Hirji Harjivan Shet 18 B. 332 : 9 Ind. Dec. (N.S.) 729; Narayan v. Laxuman 29 B. 42 : 6 Bom. L.R. 687 and Ramasami Ayyangar v. Marimuttu Bhattan 6 M. 404 : Ind. Jur. 523 : 2 Ind. Dec. (N.S.) 561. The question whether possession is necessary to complete a title is now concluded, for most purposes, by the provisions of the Transfer of Property Act. No doubt, when a trustee or mortgagee assumes to Act as full owner the title he passes is invalid in the first instance as against the cestui que trust or original mortgagor. But I conceive that the pretended or false title imitates in its mode of certain and incidents the true title passed by a full owner. When possession is not required to complete the title in the one case it is not required in the other.

21. As to the precedents cited, what seems true is that in suits for possession to which Article 134 is a bar the defendant will probably or in most cases have had possession for upwards of twelve years. The cases do not decide that the defendant must have had possession for twelve years ; his possession for twelve years is merely mentioned as a fact.

22. For instance, in the subsequent case of Dattagiri v. Dattatraya 27 B. 363 : 4 Bom. L.R. 743 the judgment refers to the fact of possession (page 339) but the conclusion is that the suit 'is barred against the present defendant inasmuch as he holds under a purchase for valuable consideration dated more than twelve years prior to the commencement of the suit' (page 372).

23. So, the case of Maluji v. Fakirchand 22 B. 225 : 11 Ind. Dec. (N.S.) 732 on which the learned Judges particularly relied, amounted to no more than the application of Article 134 to the facts of the case. The judgment was delivered by Farran, C.J., and, simply stated, the case was as follows:-- A mortgage was taken from a mortgagee assuming to Act as full owner. The transferee, or Second mortgagee, enforced his mortgage by suit against the original mortgagee and in execution purchased the property. The original mortgagor then sued to redeem the original mortgage. The twelve years' period prescribed by Article 134 having elapsed, it was held that the plaintiff was bound to redeem the Second mortgage. It was further held that the plaintiff was not bound to recognize the absolute title which the Second mortgagee set up under the execution sale because twelve years had not elapsed from its date at the time of suit brought. In other words, the date of the transfer of the full title being within twelve years of the suit, the plaintiff was held, in regard to that title, not to be barred by Article 134. The position would have been much the same in the present case if the plaintiff here had sued to redeem the mortgage created by Nazirannessa. To such a suit, brought within the twelve years of the foreclosure decree, the foreclosure would probably have been no defense, This, however, is not a suit for redemption and I express no final opinion on the point.

24. Reference was also made for the plaintiff to certain observations in the judgment delivered by Stanley, C.J., in Huseni Khanam v. Ali Husain Khan 29 A.

471 : A.W.N. (1907) 133 : 4 A.L.J. 375. But those observations were obiter, and when the case came before the Privy Council it was decided that the whole suit was barred under Article 148. *Bakhtawar Begam v. Husaini Khanam* 28 Ind. Cas. 355 : 36 A. 195 : 18 C.W.N. 586 : 26 M.L.J. 474 : 12 A.L.J. 473 : 19 C.L.J. 477 : (1914) M.W.N. 411 : 15 M.L.T. 389 : 16 Bom. L.R. 844 : 1 L.W. 813 : 411, A, 84 (P.C).

25. Lastly, there is the Madras Full Bench case *Mulla Vittil Seeti Kutti v. Kunhi Pathumma* 43 Ind. Cas. 31 : 40 M. 1040 : 33 M.L.J. 320 : (1917) M.W.N. 609 : 22 M.L.T. 236 : 6 L.W. 464 (F.B.) already referred to. The facts resembled the facts in the present case except that the property was transferred by a mortgagee. Opinion there was much divided. Wallis, C.J., and Coutts-Trotter, J., felt themselves bound, by the language of Article 134, to hold that the suit was barred. The three learned Judges who formed the majority were only united in holding the contrary. As stated in the head note, Abdur Rahim, J., and Seshagiri Aiyar, J., held that Article 134 applied to the suit but that time began to run 'not from the date of transfer but from the date of taking possession.' Srinivasa Ayyangar, J, expressly dissented from such a construction, but held that the Article was, in the circumstances, inapplicable and that it only applied in cases 'where the transferee takes possession on the date of transfer and when the mortgagor is entitled even on the date of transfer to give the transferee for possession,' As Wallis, C.J., points out, that view 'would practically exclude nearly all the cases which would otherwise come within the Article, as possession is rarely taken by the transferee on the date of the transfer.' The difference of opinion among the majority seems to me to illustrate the difficulty of trying to force plain words into a mould, for which they are not fitted. I can only say with great respect to all the learned Judges that I concur in the conclusion arrived at by the minority.

26. In the case before us, there is no particular hardship. There was no concealment. A suit was brought on the mortgage in 1904. Possession was taken by the transferee at latest in 1906. The present suit was not brought till 1913. There is nothing to show what was done with the money borrowed by the trustee. For all we know, it may have been applied in whole or in part to purposes connected with the trust.

27. The fact that Ramchandra's case 23 B. 614 : 1 Bom. L.R. 102 : 12 Ind. Dec. (N.S.) 410 was decided in 1899 and that, so far as we are aware, the question it raises has not hitherto been discussed in Bengal, would seem to indicate that the question is not one of much import- once in this province. I am not sure whether I fully appreciate the difficulties which seem to have been felt in Madras in the application of Article 131 to mortgages for long terms. But, apart from that, suits to recover possession are not the only remedy which the law provides. There is Section 18 of the Act which is intended to meet cases of collusion. There are also declaratory suits. If, moreover, limitation were made to depend on possession it would still be possible for dishonest persons to leave the property apparently in the possession of the trustee or mortgagee. This could be done, for instance, by means of a sub-lease.

28. Before concluding, I ought to add that if it be relevant to consider at what point of time Kedar Nath or any person claiming under or through him first obtained possession, I see no good ground for differing on, that issue of fact from the conclusion arrived at by the trial Court. There is no satisfactory evidence that either Kedar Nath or any successor of his entered into possession before possession was delivered by the Court to the assignee of the mortgage decree in March 1906. It is said that the probabilities are that Kedar Nath took possession under an instrument which entitled him to possession and purported to give him possession. But Kedar Nath died. His immediate successor was compelled to take legal proceedings to establish his title as such after which he foreclosed the mortgage by suit. As I have said, I do not feel justified in differing from the Subordinate Judge's finding. That being so, the suit was brought within twelve years of the date on which possession was taken by the mortgagee from the trustee.

29. It seems to me quite possible, however, that if this question of possession had been agitated some years ago, it might have been decided differently.

30. In the result, I would allow the appeal on the ground of limitation and dismiss the suit with costs throughout.

Shamsul Huda, J.

31. I agree with my learned brother in holding that this appeal must be decreed, and that the suit must be held to have been barred by limitation under Article 134 of the Limitation Act. If upon the evidence I had come to the conclusion, as my learned brother has, that the transfer in this case under the deed of mortgage, dated the 7th February 1899, was not accompanied by possession, I would have, perhaps, preferred to follow the decision of the majority of the Judges composing the Full Bench of the Madras High Court in the case of *Mulla Vittil Seeti Kutti v. Kunhi Pathumma* 43 Ind. Cas. 31 : 40 M. 1040 : 33 M.L.J. 320 : (1917) M.W.N. 609 : 22 M.L.T. 236 : 6 L.W. 464 (F.B.) but upon the view I take of the facts of this case that question does not arise. The evidence on the, question of possession is meagre and unreliable on both sides. The onus to prove that the suit was within time was on the plaintiff. In my opinion, he has failed to discharge that onus. The probabilities are all in favour of the defendant. As a transferee of the foreclosure decree the defendant was not in a position of advantage to prove whether the mortgagee had obtained possession under his mortgage. The deed of mortgage recites that the mortgagee was put in possession of the mortgaged properties. There is no reason to suppose that this part of the agreement was not acted upon. There was no question of any khas possession being delivered to the mortgagee. The question of possession revolves itself into a question as to who was in receipt of the rents and the profits. By the terms of the mortgage-deed the mortgagee was to account, for the rents and profits so far as he was able to realise them and, after deducting certain expenses, any balance that might have been left was to be credited towards the interest on the mortgage-money, it is possible that the mortgagee thought that he need not be too assiduous in realising the rents as any deficiency in the realizations will have ultimately to be borne by the mortgagor and that he did not show any great vigour in pursuing his rights as a mortgagee in possession. It is also not unlikely that the mortgagee released the defects in his title and did not venture to press his rights too far. The recital in the preliminary decree upon the mortgage which shows that the plaintiff had asked for being put into possession is, in my opinion, not of any great value. It may be that the object was to obtain from Court a confirmation of the possession obtained under the mortgage-deed. In the absence of the pleadings in that suit, I can attach very little

weight to the recital. The other circumstances relied upon by the Court below are equally inconclusive.

32. On the whole, I am of opinion that the balance of probability is on the side of the defendant and that the plaintiff has failed to show that the mortgage deed was not followed by possession. On all other points I agree with my learned brother.

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