

1875. of 1866, Section 18. The Court of first instance dismissed the suit on the ground that defendant's claim was stronger than that of the plaintiff. In appeal, however, the Assistant Judge reversed that decree, and awarded the plaintiff claim on the ground that his purchase was prior to that of the defendant, and that, therefore, at the time of the sale to the latter, Poshā Aba had no title left in the property sold.

The special appeal was argued before KEMBALL and NĀ'NĀ' BHĀ'Ī HARĪDĀ's, JJ.

Dhirajlāl Mathurādās (Government Pleader) for the appellant.

Shāntārām Nārāyan for the respondent.

KEMBALL, J. :—We must reverse the decree of the lower Court and restore that of the Court of first instance. We have a contest between two auction purchasers. The defendant, though his purchase was subsequent, is in possession, and his certificate of sale, which, under Section 259 of the Civil Procedure Code, is his title-deed, is registered. Whereas, the plaintiff, though his purchase was prior, failed to have his certificate registered. Registration was optional in both cases; therefore, as each of the parties must depend on his certificate, it follows, under Section 50 of the Registration Act, that defendant's title must prevail. Decree of the lower Court reversed with costs on respondent.

[APPELLATE CIVIL JURISDICTION.]

June 14.

Special Appeal No. 263 of 1874.

VITHOBA' BIN CHABU (Original Plaintiff) ... *Appellant.*
 GANGA'RA'M BIN BIRAMJI (Defendant No. 6) *Respondent.*

Mortgage—Redemption—Adverse possession—Limitation, Act XIV. of 1859, Section 1, Clause 15.

A mortgagor sued his mortgagee to redeem, joining as defendant the person in possession of the mortgaged land, who claimed to hold adversely to both the mortgagor and the mortgagee.

Held that the possession of the last defendant being a trespass, not on the possession of the mortgagor, who had only the equitable estate, but on the possession of the mortgagee, in whom the legal estate was vested, and the person in possession not pretending to be a *bonâ fide* purchaser from the mortgagee, he did not come within the exception in Section 5 of Act XIV. of 1859; that the trespasser could only succeed to such estate as the mortgagee possessed; and consequently that the limitation applicable to the suit as against him was sixty years, according to Section 1, Clause 15, of Act XIV. of 1859, the effect of which is not altered by any hostile possession commenced on a title independent of the mortgage.

1875.

VITHOBA'
BIN CHAERU
v.
GANGA'RAM
BIN BIRAMJI.

THIS was a special appeal from the decision of G. Druitt, Acting Assistant Judge of the District of Khandesh at Dhulia, reversing the decree of the Subordinate Judge of Jalgám in the same district.

The material facts of the case are briefly these:—The plaintiff alleged that in 1837 a piece of land was mortgaged to the ancestors of the first five defendants; that the sixth defendant was in possession of it; and prayed for redemption on payment of what might be found due. The first five defendants admitted the mortgage; the sixth denied all knowledge of it, and set up a title of his own irrespective of it.

The Court of first instance decreed redemption; that of appeal rejected the suit, holding it barred by the Limitation Act.

The special appeal was heard by KEMBALL and NÁ'NA'BHÁ'I HARIDA'S, JJ.

Dhirajlál Mathurádás, Government Pleader, for the original plaintiff (special appellant).—The lower Appellate Court was wrong in holding the suit barred. Under Section 1, Clause 15, of Act XIV. of 1859 the plaintiff as mortgagor can sue to redeem within sixty years. The only exception to the rule enacted in the provision occurs in Section 5 in favour of *bonâ fide* purchasers for valuable consideration from mortgagees.

Ganesh Hari Patwardhan for the sixth defendant, the special respondent.—The plaintiff and the first five defendants have colluded together to defraud the sixth, who has been found to be in possession for more than twenty years.

1875.

VITHOBA
BIN CHABU
v.
GANGA'RAM
BIN BIRAMJI.

KEMBALL, J. :—This is a redemption suit. The first five defendants represent the original mortgagees, and the sixth is in present possession. Both the Courts below have found that the land in dispute was the property of the plaintiff, and that he mortgaged it as a security for the loan of certain monies in A.D. 1836. The Court of the Subordinate Judge further found that the five first defendants had leased the said land to the sixth, and decreed redemption on certain conditions; whereas the Assistant Judge held that there was not sufficient evidence of this letting, and he dismissed the suit with these observations:—"The land has been in his (defendant Gangarám's) possession considerably more than twenty years. His possession is adverse both to the mortgagor and to the mortgagees, and the claim seems to me to be barred. There is no privity whatever between him and the mortgagees. Certainly no suit could be maintained against him by the mortgagees, and I do not see how the mortgagor can have a better right than they. There is equally a want of privity between the mortgagor and defendant No. 6 as between the mortgagees and him. The mortgage, therefore, does not avail the plaintiff, and the suit is barred by the law of limitation."

The sole question raised in special appeal is, whether the Assistant Judge was right in thus holding the plaintiff's right to redeem, barred.

The case at first sight is not without its difficulties, but these disappear when we come to consider the position of the mortgagor and of the mortgagees in their respective relations to the sixth defendant, whom the Assistant Judge holds to have been in adverse possession throughout as against both. It may well be that a mortgagee, in whom the legal estate is vested, may lose, by lapse of time, his right to recover possession of his security as against a trespasser; but it is difficult to understand how there can be any trespass on the mortgagor's possession so long as he has only the equitable estate. A mortgagor is allowed a period of sixty years within which he may come in to redeem; an

exception to this rule is made in favour of *bonâ fide* purchasers for valuable consideration from the mortgagee, where the term for redeeming is considerably abridged ; but in all other cases it appears to us to make no difference how the hostile possession has commenced, whether through the fraudulent connivance, or through the neglect, of the mortgagee who is bound to preserve the property. The trespasser, as the sixth defendant has been found by the Assistant Judge to be, can only succeed to such estate as the mortgagee possessed, and we fail to see how the circumstance that the hostile possession is alleged to have commenced on a title independent of the mortgage, can alter the effect of Clause 15, Section 1, of Act XIV. of 1859, which is the law applicable to the case. We must, therefore, hold that the plaintiff was not barred from establishing his claim to redeem by reason of the so-called adverse possession of the sixth defendant ; and we accordingly reverse the decree of the lower Appellate Court. We find, however, that the Court of first instance has decreed redemption on payment, to the first five defendants, of the mortgage money ; but they have parted with their security. We must, therefore, amend his decree, and we direct that the plaintiff do pay to the defendant Gangáram the sum of Rs. 58-5-3 (found to be due) within six months of this date, and that the said defendant do, on payment of the said sum within the time prescribed, remove his hut and deliver possession of the land in dispute ; and we further direct that, in the event of the plaintiff failing to pay the said sum, within the time specified, to the said defendant, he be for ever foreclosed. Costs of this appeal on the special respondent.

Decree accordingly.

1875.

VITHOBA'
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