

APPELLATE CIVIL.

Before Sir Charles Sargent, Knight, Chief Justice, and Mr. Justice Birdwood.

BAIVA' KHA'N DA'UD KHA'N (ORIGINAL PLAINTIFF), APPELLANT, v.

BHIKU SA'ZBA' (ORIGINAL DEFENDANT), RESPONDENT.*

1885.

June 18.

Limitation—Mortgage—Redemption—Suit against purchaser from mortgagee—Purchase in good faith—Limitation Act IX of 1871, Sch. II, Arts. 134 and 148—Limitation Act XV of 1877, Sch. II, Art. 134, and Sec. 2.

Under the Limitation Act IX of 1871 the period of limitation for suits to recover possession of property purchased from a mortgagee depended upon the good faith of the purchaser. A suit against a purchaser *in good faith* was barred after twelve years from the date of the purchase, under article 134 of Schedule II. In other cases a suit might be brought against the purchaser within sixty years from the date of the mortgage, under article 148 of Schedule II. Article 134 of the later Limitation Act XV of 1877, by the omission of the words "in good faith", makes twelve years from the date of the purchase the period of limitation for all such suits, without reference to the question of good faith on the part of the purchaser. The result is, that, in cases of a purchase *not in good faith* from a mortgagee, the period of limitation allowed by Act XV of 1877 for a suit to recover the property is shorter than the period allowed by Act IX of 1871; and, consequently, under the provisions of article 2 of the Limitation Act XV of 1877, the plaintiff in such a suit has two years from the 1st October, 1877.

THIS was a second appeal from the decision of M. N. Náná-vati, First Class Subordinate Judge (A. P.) at Thána, reversing the decree of the Second Class Subordinate Judge of Pen.

This suit was filed on the 1st May, 1879, for the redemption of certain property. The plaintiff alleged that his father mortgaged the said property on the 3rd of February, 1841, to Abáji Limayé, whose heirs sold it on 14th May, 1857, with other property in Rágho Bhikáji Fadke's name to Bháskar Pátkar and Báláji Pátkar; and that the Pátkars sold it again to the defendant on the 9th of June, 1862.

The defendant contended that the sale to him was not merely of the mortgagee's interest, but of the entire property, and that the plaintiff's suit was barred by the Limitation Act.

The Court of first instance held that the defendant knew of the mortgage at the time of the conveyance to him, and that the plaintiff, as representing the mortgagor, was entitled to redeem within sixty years of the date of the original mortgage.

* Second Appeal, No. 566 of 1883.

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The Appellate Court reversed the decree, holding that article 134 of Schedule II of the Limitation Act XV of 1877 applied, and that, as the suit was not brought within twelve years of the defendant's purchase, it was barred.

The plaintiff appealed to the High Court.

Máhádev Chinnáji A'pte for the appellant.—This suit is not barred. Under the Limitation Act IX of 1871, art. 134, a mortgagor's suit against a purchaser *in good faith* from a mortgagee was barred after twelve years from the date of the purchase; but against a purchaser, who did *not purchase in good faith*, a suit might be brought within sixty years from the date of the mortgage, under article 148. The question of good faith, therefore, determined the period of limitation under that Act. But the words "in good faith" are omitted from the corresponding article 134 in the later Limitation Act XV of 1877: so the question of good faith on the part of the purchaser does not arise in cases to which this Act applies; and, whether the purchase was *boná fide* or not, the suit is barred after twelve years. The result is, that in the case of a purchase *not in good faith*, to which Act IX of 1871 applies, the period of limitation, which was sixty years from the date of the mortgage under Act IX of 1871, has been shortened to twelve years from the date of the purchase by Act XV of 1877. This fact makes section 2 of Act XV of 1877 applicable to the present case, and under its provisions the plaintiff has two years from the 1st October, 1877, and, therefore, this suit, which was filed on the 1st May, 1879, is in time.

Ghanashám Nilkanth Nádkarni for the respondent.—The case is not governed by Act IX of 1871, but by Act XV of 1877. Section 2 of the latter has, therefore, no application, and the suit is barred. The sale to the defendant was of absolute property. Even if the purchase were in bad faith, article 134 of Schedule II of Act XV of 1877, which prescribes a period of twelve years, applies.

SARGENT, C. J.—Article 134 of the Limitation Act XV of 1877 would, *primá facie*, be applicable to the case; but the attention of the Subordinate Judge with appellate powers would appear

not to have been drawn to the latter part of section 2 of Act XV of 1877, which provides that when the "period of limitation prescribed by the Act is shorter than the period prescribed by the Limitation Act IX of 1871, the suit may be brought within two years after the 1st October, 1877, unless where the period prescribed for such suit by the same Act shall have expired before the completion of the said two years."

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By article 134 of Act IX of 1871 the period in the case of a *bonâ-fide* purchaser for value from a mortgagee is twelve years from the date of the purchase, and, therefore, if the respondent is to be regarded as such, the period of limitation would not be affected by article 134 of Act XV of 1877. But, assuming that the respondent cannot be treated as a *bonâ-fide* purchaser for value, article 148 of Act IX of 1871 would have been applicable before Act XV of 1877 was passed. See the remarks of the Privy Council in *Rádâvalabh Dás v. James Scott Elliott*⁽¹⁾; and the plaintiff would have had sixty years from the date of the mortgage to redeem as against the respondent; whereas, owing to the omission of the words "in good faith" from article 134 of Act XV of 1877, the period of limitation prescribed under that Act would be twelve years from Fadke's sale to Pátkar, through whom the respondent claims; Fadke having purchased, as is clear from the terms of the conveyance to him, only the rights of the original mortgagee and nothing more. The period of limitation for recovering the land would, therefore, in that case have been shortened by Act XV of 1877, and the mortgagor would be seriously prejudiced if that law were applied to him. Section 2 of Act XV of 1877 is, under these circumstances, we think, applicable,—the object of that section being, as stated by Melvill, J., in *Ichhúshankar v. Killa*⁽²⁾, "to extend for two years the benefit of the old law in cases in which a plaintiff would be prejudiced by the application to his case of the provisions of the new law, and would prevent the plaintiff's suit, which was filed on the 1st May, 1879—*i. e.*, within two years after 1st October, 1877—from being barred.

(1) 6 Beng. L. R., 543.

(2) I. L. R., 4 Bom., at 88.

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We must, therefore, (but without being supposed to express any opinion as to the relevancy of the second issue which has been asked for by both the pleaders), send the case down for the Subordinate Judge with appellate powers to find on the following issues :—

1. Whether Pátkar purchased in good faith and for value from Fadke ?

2. Whether the respondent purchased in good faith and for value from Pátkar ?

And if either of these issues be found in the negative, then to find

3. What is still due on the mortgage to Abáji ?

And to send the findings to this Court within three months. Both parties to be allowed to give fresh evidence on the above issues.

Issues sent back for trial.

APPELLATE CRIMINAL.

Before Mr. Justice Nánábhái Haridás and Sir W. Wedderburn, Bart., Justice

1885.

THE GOVERNMENT OF BOMBAY, APPELLANT, v. DODYA'MA BIN
BASA'PA', RESPONDENT.*

June 18.

*Arms—Possession of arms—Bádámi Táluka—Indian Arms Act No. XI of 1878,
Secs. 15 and 19—Act XXXI of 1860, Sec. 32, Cls. 1 and 2.*

Clause 2, section 32 of Act XXXI of 1860, relating to the manufacture, importation, and sale of arms, did not apply to the Bádámi Táluka of the Kaládgi Collectorate at the time when the Indian Arms Act No. XI of 1878 came into force ; and the notification of the Government of Bombay, No. 1112, of the 19th February 1878, which declares that the provisions of Act XXXI of 1860 as modified by Act VI of 1866 are in force in Bádámi amongst other places, is not an order of disarmament under clause 1, section 32 of Act XXXI of 1860. In the absence, therefore, of a notification, under section 15 of Act XI of 1878, extending, with the previous sanction of the Governor General in Council, the provisions of the section to Bádámi, the possession of arms without a license in that táluka is not punishable under section 19.

THIS was an appeal by the Government of Bombay, under section 417 of the Code of Criminal Procedure, Act X of 1882,

* Criminal Appeal, No. 2 of 1885.