

14 B. 279.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

BHAGVANT GOVIND (*Original Defendant No. 2*), Appellant v.  
KONDI valad MAHADU (*Original Plaintiff*), Respondent.\*

[7th October, 1889.]

1889  
OCT. 7.  
APPEL-  
LATE  
CIVIL.  
14 B. 279.

*Mortgage—Redemption—Equity of redemption, purchase of, by mortgagee—Adverse possession by mortgagee—Limitation Act (XV of 1877), arts. 44 and 142.*

The plaintiff sued to redeem certain land which he alleged had been mortgaged by his father in 1858 to one Bahirji, the grandfather of the first defendant. The defendants alleged that the mortgage was executed, not to Bahirji, but to the father of the second defendant, and that in 1863 the equity of redemption had been sold to the mortgagee by the widows of the mortgagor, the plaintiff being then a minor. The defendants contended that this suit was really to set aside the sale of 1863, and was barred by art. 44 of the Limitation Act (XV of 1877). The second defendant also pleaded adverse possession. The plaintiff contended that the second defendant and his father had possession of the land merely as the agents or trustees of the mortgagee.

*Held*, that art. 44 of the Limitation Act (XV of 1877) did not apply, and that the suit was not barred. The necessity of impugning the sale of 1863 to the second defendant arose from the second defendant's resisting the plaintiff's claim to redeem the mortgage.

*Held*, also, that the second defendant, having entered into possession as mortgagee, could not afterwards set up an adverse possession as owner so as to defeat the plaintiff's right to redeem.

[N.F., 32 M. 72=5 M. L. T. 99; F., 21 B. 793 (796); Appr., 16 B. 1 (10); 21 B. 424 (454); 4 Bur. L. T. 185=11 Ind. Cas. 853; R., 16 B. 186 (190); 17 B. 755; 25 B. 337 (341); 26 M. 291 (310); 13 C.L.J. 277=9 Ind. Cas. 377; 15 Ind. Cas. 343=37 M. 423=23 M.L.J. 339=12 M.L.T. 425=(1912) M. W.N. 854; 19 Ind. Cas. 596=24 M.L.J. 592=13 M.L.T. 469=(1913) M.W.N. 453; U. B. R. (1892—1896) 502; U. B. R. (1897—1901) 464 (466); 65 P. R. 1908=90 P.L.R. 1908=113 P.W.R. 1908.]

SECOND appeal from a decision of S. Tagore, District Judge of Sholapur- Bijapur.

This was a suit brought in 1885 to redeem certain land which had been mortgaged in 1858.

The plaintiff alleged that on the 5th March, 1858, his father had mortgaged the land to one Bahirji, the grandfather of the first defendant. The defendants alleged that the mortgage was [280] executed, not to Bahirji, but to the father of the second defendant, and that in 1863 the widows of the mortgagor—the plaintiff being then a minor—had sold the equity of redemption to the mortgagee, who obtained possession.

It was contended for the defendants that the suit was really to set aside the sale of 1863, and was barred by art. 44 of the Limitation Act. The second defendant also pleaded adverse possession. The plaintiff alleged that the second defendant and his father had possession of the land merely as the agents and trustees of the mortgagee.

The Subordinate Judge, who tried the suit, dismissed the plaintiff's suit.

The plaintiff appealed to the District Judge, who held that the land had really been mortgaged to the first defendant's grandfather Bahirji, and that the second defendant's father had got possession of it as agent or trustee for the first defendant. He further held that the sale of the

1889  
OCT. 7,  
—  
APPEL-  
LATE  
CIVIL.  
—  
14 B. 279.

equity of redemption to the second defendant's father was unauthorized and invalid as against the plaintiff, he being then a minor.

The second defendant preferred a second appeal to the High Court.

*Branson (G. R. Kirloskar with him)*, for the appellant :—The plaintiff by this suit really seeks to set aside the sale to the second defendant, but under art. 44 of the Limitation Act he ought to have sued within three years of his attaining majority.

The sale was for an ancestral debt, and was effected by the widows of the plaintiff's father as managers. The plaintiff is also barred by the adverse possession of the second defendant, who has been in possession for more than twelve years.

*Inverarity (G. N. Nadkarni with him)*, for respondent :—The possession of the defendant is that of mortgagee, and cannot be adverse to the plaintiff—*Ali Muhammad v. Lalta Baksh* (1); *Tanji v. Nagamma* (2). Article 44 of the Limitation Act does not apply. This is a suit for redemption—*Boo Jinatboo v. Sha Nagar Kalab Kanji* (3).

#### JUDGMENT.

[281] SARGENT, C. J.—In this case the District Judge has found that the mortgage of 5th March, 1858, which the plaintiff seeks to redeem, was really passed to the first defendant's grand-father Bahirji, and not *benami* for and on account of the second defendant's father Govind Atmaram, and further that the sale, dated 17th September, 1863, of the equity of redemption by Paru and Sai, the widows of plaintiff's father, to the second defendant was unauthorized and invalid as against the plaintiff, who was a minor at the time. Those findings are binding on us, but it is contended for the second defendant, first, that the plaintiff's right to impugn the sale to second defendant is barred by art. 44 of the Act of Limitation; secondly, that the plaintiff's right to recover possession is barred by his having been in adverse possession for more than twelve years before the suit.

Now it is to be remarked that this suit is to redeem this mortgage, under which, according to the finding of the District Judge, the second defendant took possession as the legal mortgagee, although, as a fact found by the Court, he was a trustee or agent for the first defendant's father. The necessity of impugning the sale of 1863 to the second defendant arises from the second defendant's resisting the plaintiff's suit to redeem the mortgage, and is, therefore, subservient to that suit, and the case is, therefore, analogous to that of *Ramausar Pandey v. Raghubar Jati* (4), where the High Court held that the setting aside the mortgage deed in that case, which was impugned by the minor, was subservient to the suit to recover the land, and that art. 142 and not 44 of the Statute of Limitations of 1877 was applicable. The same principle was acted upon with regard to art. 92 of Act IX of 1871—*Boo Jinatboo v. Sha Nagar Valab Kanji* (3).

As to the second point, the second defendant having entered into possession as mortgagee could not afterwards set up an adverse possession as owner so as to defeat the plaintiff's right to redeem—*Ali Muhammad v. Lalta Baksh* (1); *Tanji v. Nagamma* (2). We must, therefore, confirm the decree with costs.

*Decree confirmed.*

(1) 1 A. 655 (658).  
(3) 11 B. 78 (82).

(2) 3 M.H. C. R. 197.  
(4) 5 A. 491.