before his death, but the defendants never became his debtors at any time, as the amount so assigned was not received by the defendants from the Revenue authorities until after his death in 1884. For wrongfully receiving it in 1886 the defendant could either be sued in damages by the persons entitled to receive the *hak*, or treated as their debtors and sued for money had and received to their use. We are, therefore, of opinion that a certificate was not required to enable plaintiffs to sue.

Order accordingly.

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15 B. 583.

[583] APPELLATE CIVIL.

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

YESU RAMJI KALNATH, DECEASED, BY HIS SONS AND HEIRS VISHRAM YESU AND ANOTHER (*Original Plaintiff*), *Appellant v.* BALKRISHNA LAKSHMAN AND OTHERS (*Original Defendants*), *Respondents.**

[19th January, 1891.]

Mortgage by mortgagee—Suit for redemption by original mortgagor against mortgagee and sub-mortgagees—Adverse possession by sub-mortgagees—"Purchaser for value" —"Valuable consideration"—S. 5 of the Limitation Act (XIV of 1859)—Art. 134, sch. II of the Limitation Act (IX of 1871)—Art. 134, sch. II of the Limitation Act (XV of 1877).

Held, that the expression "purchaser for valuable consideration," in art. 134 of the Limitation Acts (IX of 1871 and XV of 1877), includes a mortgagee as well as a purchaser properly so called.

Semble.—The words "*bona fide*," which appeared in art. 134, sch. II of the Limitation Act (IX of 1871), were advisedly omitted from art. 134, sch. II of the Limitation Act (XV of 1877), to exclude the possible inference that absence of notice of the real owner's claim was necessary to enable a purchaser to avail himself of the article.

[**Diss.**, 6 M.L.J. 260; **N.F.**, 8 O.C. 233 (238); **F.**, 36 B. 146=13 Bom. L.R. 1057=12 Ind. Cas. 737; **Appr.**, 22 B. 225 (228); **R.**, 20 A. 482 (**F.B.**); 29 A. 471=4 A. L.J. 375=27 A.W.N. 133; 18 B. 387 (389); 19 B. 140 (143); 23 B. 614 (618); 19 C. 544 (568) (**F.B.**); 24 M. 471 (**F.B.**); 2 C.L.J. 546 (553).]

THIS was a second appeal from the decision of G. C. Whitworth, District Judge of Ratnagiri.

The suit was filed on the 14th April 1885, to redeem lands mortgaged under a mortgage-deed, dated May, 1825, by the plaintiff's grandfather, Fatji Dadji Kalnath, to the father of defendant No. 1, Ram Bable Parab, for Rs. 94-9; the plaintiff alleged that by the terms of the mortgage the property was redeemable at any time on payment of the principal amount; that he was ready and willing to pay up the amount, but that the defendants would not restore the lands.

Defendants Nos. 1 and 2, (Ram Bable Parab and Babu Lakshman Parab), denied the mortgage, and alleged (*inter alia*) that the lands belonged to them, and that they had mortgaged the land in question to defendants 15 and 18, in whose possession they had been for many years.

The Court of first instance passed a decree for the plaintiff. The District Court reversed that decision. In second appeal to the High Court

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* Second Appeal, No. 537 of 1888.

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the question arose as to whether art. 134 of the Limitation Act applied to mortgagees.

[584] *Daji Abaji Khare*, for the appellant, contended that art. 134, sch. II of the Limitation Act applies to purchasers for a valuable consideration, that is, to purchasers who have obtained an absolute right over the property, and not partial alienees, such as mortgagees—*Radanath Doss* v. *Gisborne & Co.* (1).

Ghanasham Nilkanth Nadkarni, for the respondents (original defendants Nos. 15 and 18).—The question as to *bona fides* has been found in our favour by the lower Court. We are purchasers for value without notice of plaintiff's claim, and, therefore, our rights cannot now be disturbed. Article 134, sch. II of the Limitation Act covers such a case. The words "purchaser for value" is a technical expression, and includes a mortgagee. Our mortgagors (defendants 1 and 2) treated with us as full owners of the property. Our mortgage-deeds mention them as full owners, and there was nothing to indicate that they had only a limited interest in the property. Our contention is fully supported by the Madras ruling quoted in the foot-note on p. 103; Shephard on Limitation.

JUDGMENT.

SARGENT, C. J. (after stating the facts continued).—The important question argued in this second appeal is whether art. 134 of the Limitation Act (XV of 1877) is restricted to the case of purchasers properly so called, and does not apply to mortgagees. The expressions "purchaser for value" and "valuable consideration," which are used in s. 5 of Act XIV of 1859 and art. 134 of Acts IX of 1871 and XV of 1877, are well known as technical expressions which include a mortgagee as well as a purchaser properly so called. It is true that in *Radanath Doss* v. *Gisborne & Co.* (1) the Privy Council discussing s. 5 of Act XIV of 1859 say "purchaser means purchaser according to the proper meaning of the word." But it is plain from what follows that the Privy Council mean by that expression a purchaser of the absolute title as distinguished from a mere assignee of the vendor's mortgage. Moreover, further on in their judgment the question is discussed as if it were a plea of a purchaser for value in England which it is well known may be pleaded by a mortgagee. Although the application of [585] the article in the case of purchaser in the sense of a mortgagee may not be obvious in the case of a mortgagee as in that of a trustee we agree with the Madras Court in holding (see Shephard on the Limitation Act, p. 103) that the expression "purchaser for valuable consideration" is to be read in its technical sense. The District Judge has found that the defendants Nos. 15 and 18 had no notice that the plaintiff was the owner, and that Parab, (defendant No. 1) from whom they obtained their mortgage, was only himself a mortgagee. It is, therefore, not necessary to discuss the important question as to the necessity of the absence of such notice to enable a purchaser to claim the benefit of art. 134 which is considered in *Bhagwan Sahai* v. *Bhagwan Din* (2). We may, however, draw attention (as has been frequently done in deciding difficult questions of construction arising on Acts of the Indian Legislature) to the last report of the Special Committee to whom the Bill was referred during the passing of the Act of 1887 through the Legislative Council (see Vol. XVI, p. 466, of

(1) 14 M. I. A. 1 (15). (2) 9 A. 97.

Proceedings of the Legislative Council), which points to the conclusion that the words "*bona fide*" were advisedly omitted from the article, to exclude the possible inference that absence of such notice was necessary to enable the purchaser to avail himself of the article.

Upon the whole we must confirm the decree with costs.

Decree confirmed.

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15 B. 585.

ORIGINAL CIVIL.

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

BALKRISHNA V. N. KIRTIKAR AND OTHERS (*Original Defendants 2 to 7*), *Appellants v.* THE BANK OF BENGAL (*Original Plaintiffs*), *Respondents.** [30th January and 6th and 13th February, 1891.]

Surety—Principal and surety—Guarantee—Discharge of surety—Concealment of material fact from surety—Contract Act (IX of 1872), s. 143—Further duties imposed on person for whom defendants were sureties.

In August, 1881, the defendants became sureties to the Bank of Bengal for the due discharge by one Bhau Krishnarav of the duties and liabilities of the office of *khajanchi* of the Bank in Bombay. Bhau Krishnarav was the second clerk in the Bank, and it was arranged between him and the Agent that he should [586] still continue to fill that office. He did so after his appointment as *khajanchi*, and he received the same salary as before in respect of it. In 1889 defalcations, for which as *khajanchi* he was responsible, were discovered to the extent of Rs. 1,42,142. The Bank obtained a decree against him for the total amount, and they sued the defendants as sureties. The defendants pleaded that they were not liable, inasmuch as the Bank had appointed Bhau Krishnarav to perform the duties of second clerk, in addition to those of *khajanchi*, without their knowledge and consent, and they contended that such appointment amounted to a subsequent variation of the contract which discharged them, under s. 143 of the Contract Act (IX of 1872), as to transactions subsequent to the variance.

The Court was of opinion that inasmuch as the evidence showed that Bhau Krishnarav was second clerk at the time of his appointment as *khajanchi* and continued afterwards to fill that office by arrangement between him and the Agent of the Bank, the question was not whether there had been a subsequent variation of the contract, but whether, as the surety-bond was silent as to this part of the arrangement between the Bank and Bhau Krishnarav and it was made (as the defendants alleged) without their knowledge and consent, they were discharged from liability on the ground that a material circumstance had been concealed from them.

Held, that the defendants were not discharged from liability. The expression "keeping silence" in s. 143 of the Contract Act clearly implies intentional concealment as distinguished from mere non-disclosure. The withholding must be fraudulent, as necessarily is the case when the material circumstance is intentionally concealed. In this case there was not the slightest reason to suppose that there had been any intentional concealment by the Bank of the fact that Bhau Krishnarav was to continue to fill the office of second clerk, or that, if the defendants had been informed of it, it would have in the least degree affected their readiness to make themselves liable for his faithful discharge of the duties of *khajanchi*. The evidence showed that the duties of the two offices were perfectly distinct, and, therefore, even if Bhau Krishnarav had been re-appointed to the office of second clerk after his appointment to the office of *khajanchi* (as it was contended for the defendants was the proper way of regarding what occurred), there would have been no material alteration in the

* Suit No. 700 of 1889: Appeal No. 692.