

APPELLATE CIVIL.

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

PÁNDU (ORIGINAL PLAINTIFF), APPELLANT, v. VITHU (ORIGINAL

DEFENDANT No. 2), RESPONDENT.*

1894.

January 18.

Limitation Act (XV of 1877), Art. 134—Limitation—Mortgage—Decree obtained by mortgagee for possession until payment of mortgage-debt—Possession taken by mortgagee under decree—Continuance after decree of relation of mortgagor and mortgagee—Sale by mortgagee—Vendor and purchaser—Subsequent suit for redemption by mortgagor against mortgagee and his vendee—Plea by vendee of purchase for value without notice—Bona fides, meaning of—Purchaser, meaning of, in Art. 134.

A decree on a mortgage having directed the mortgagor to give possession to the mortgagee until the payment of the mortgage-debt and costs found due, the mortgagee entered into possession and subsequently sold the property to a third party. More than twelve years after the sale, the mortgagor brought a redemption suit both as against the mortgagee and the purchaser.

Held that the suit (as against the purchaser) was barred under article 134, Schedule II of the Limitation Act (XV of 1877), and that notwithstanding the decree for possession, the relationship of mortgagor and mortgagee continued whether under the original mortgage or the decree.

Absence of *bona fides* as distinguished from actual knowledge of the vendor's title does not prevent the purchaser from claiming the benefit of article 134, Schedule II of the Limitation Act (XV of 1877).

In order to give the purchaser the benefit of article 134, the purchase need not be *bona fide* in the sense of being without "constructive notice" of the restricted nature of the vendor's title, but the term "purchaser" in that article is meant a person who purchases that which is *de facto* a mortgage upon the representation made to him and in the belief that it is an absolute title.

SECOND appeal from the decision of A. S. Moriarty, Assistant Judge of Poona, confirming the decree of Ráo Sáheb N. V. Atre, Second Class Subordinate Judge of Báraмати.

Suit for redemption. In or about the year 1862 A. D., one Pándu (the plaintiff's father) mortgaged the lands in question to the first defendant, and in 1864 the first defendant (the mortgagee) obtained a decree (No. 270 of 1864) on this mortgage against him directing him to hand over possession of the land to the first defendant (mortgagee) until payment of the mortgage-debt with costs. On the 27th July, 1864, the first defendant took possession, and on the 9th May, 1878, he sold the land to the second defendant. Pándu subsequently died, and on the 27th

* Second Appeal, No. 374 of 1892.

August, 1891, his son Nána filed the present suit for redemption of the mortgage, alleging that the mortgage-debt had been satisfied out of the rents and profits of the land.

The first defendant admitted the mortgage and alleged that he had sold the land to the second defendant with notice of the mortgage.

The second defendant pleaded that he was a purchaser for value without notice of the mortgage, and contended that the suit was barred by limitation (article 134 of the Limitation Act), being brought after the expiration of twelve years from the date of his purchase.

The Subordinate Judge found that the second defendant was a *bonâ fide* purchaser of the property for valuable consideration, and held the suit barred as to him by article 134, Schedule II of the Limitation Act (XV of 1877). He relied on the rulings in *Yesu Rámji Kálnáth v. Bálkrishna Lakshman*⁽¹⁾ and *Vishnu Chintáman v. Báláji bin Rághuji*⁽²⁾.

On appeal by the plaintiff the Judge confirmed the decree. The following is an extract from his judgment :—

“ I must agree with the lower Court and with the arguments of respondent’s pleader. Section 18 of the (Limitation) Act cannot apply, because there was no fraudulent concealment of the plaintiff’s right to sue or of some document necessary to establish that right. Time, therefore, runs from the period fixed by the Limitation Act, notwithstanding the fact that the plaintiff had not then knowledge of the invasion or curtailment of his right of redemption from a period of sixty years to twelve years, owing to the second defendant’s purchase. That purchase is by a registered document, and the property is conveyed absolutely from the first defendant, the ostensible owner, to the second defendant for a valuable consideration. Under these circumstances it seems clear that the ruling in I. L. R., 9 Bom., 475, should be followed. A reference, however, should be made to *Bhagwan Sahai v. Bhagwan Din*, I. L. R., 9 All., 97, alluded to in one of the cases quoted by the Subordinate Judge (I. L. R., 15 Bom., 585). In that case the circumstances under which the mortgagee sold his interest were found to be such that the purchaser was not allowed to take advantage of the provisions of article 134 in question. It was there found that the purchaser had not “ reasonable grounds for believing and did believe ” that his vendor had the power to convey an absolute interest. No such presumption can be drawn from the facts of the present case. The sale here was a private transaction, and if defendant No. 1 had already bought the land when it was sold for arrears of revenue (see defendant No. 2’s written statement), defendant No. 2 would certainly hold him to be the ostensible owner. In the case above mentioned (I. L. R., 9 All., 97), the property was purchased at a formal auction

(1) I. L. R., 15 Bom., 583.

(2) I. L. R., 12 Bom., 312.

1894.

PÁNDU
v.
VITHU.

1894.

PÁNDU
v.
VITHU.

sale, and the circumstances were such that the Court drew inferences that the purchaser must have known of the existence of incumbrances."

The plaintiff preferred a second appeal.

Dáji Abáji Khare for the appellant (plaintiff):—Article 134 does not apply, for the relation of mortgagor and mortgagee ceased when the first defendant got his decree against Pándu in 1864. The mortgage was then merged in the decree. The second defendant did not, therefore, purchase from a mortgagee. And even if the relation of mortgagor and mortgagee did continue after the decree, the second defendant as purchaser from a decree-holder must be held to have had constructive notice of the mortgage on which the decree was based, and, therefore, he is not protected by article 134 of the Limitation Act—*Navlu v. Rághu*⁽¹⁾; *Táni Bágaván v. Hari*⁽²⁾; *Rámchandrá Ballál v. Bábá Esgonda*⁽³⁾. He knew that he was only entitled to hold the land till the decretal amount was paid. Therefore his possession never became adverse to us. In fact, he has held the property merely as a trustee for us under the decree.

Mánekháh J. Taleyárkhán for the respondent (defendant No. 2):—The plaintiff cannot now contend that the relation of mortgagor and mortgagee does not exist. He sues for redemption, and his plaint alleges that we hold as mortgagee. The plaintiff in his plaint stated that we held the property as a mortgagee. He, therefore, cannot now be allowed to say that we purchased the property from a decree-holder. If, however, the mortgage merged in the decree (as is now argued), then the plaintiff must seek his remedy in execution of that decree. He cannot bring a new suit on the mortgage—*Rámhat v. Rágho Krishna*⁽⁴⁾. We have purchased the property for valuable consideration without notice of the mortgage, and, therefore, we are entitled to resist the claim under article 134, Schedule II of the Limitation Act—*Yesu Rámji Kalnáth v. Bálkrishna Lakshman*⁽⁵⁾.

SARGENT, C.J.:—The plaintiff in this suit seeks to redeem certain property which he alleges to have been mortgaged to

(1) I. L. R., 8 Bom., 303 at p. 306.

(2) I. L. R., 16 Bom., 659, note.

(3) 12 Bom. H. C. Rep., 163.

(4) I. L. R., 16 Bom., 656.

(5) I. L. R., 15 Bom., 533.

the first defendant in Shake 1784. The second defendant resists on the ground that he purchased the property from defendant No. 1 in 1878, and also that plaintiff's claim is barred. The lower appeal Court has held it to be barred under article 134 of Act XV of 1877.

An objection was taken by Mr. Dáji, for the plaintiff, that the article did not apply, as the first defendant was no longer a mortgagee, but only a decree-holder after the decree was passed in Suit No. 270 of 1894 in his favour directing the mortgagor to give possession to him until payment of the mortgage-debt and costs found due. But if that be so, the objection is also fatal to the plaintiff's present suit, which is based on the existence of that relationship.

Moreover, it is to be observed that the decisions of this High Court in *Rámchandrá Ballál v. Bábá Esgonda*⁽¹⁾, *Navlu v. Rághu*⁽²⁾, *Táni Bágaván v. Hari*⁽³⁾, and of the Madras High Court in *Periándi v. Angappa*⁽⁴⁾, and of the Privy Council in *Hari Rávji Chiplunkar v. Shápurji Hormusji*⁽⁵⁾, to which reference has been made, whilst they leave it in doubt, it must be admitted, what are the precise rights of the mortgagor after a decree had been passed in favour of a mortgagee, all treat the relationship of mortgagor and mortgagee as continuing between the parties, whether it be under the original mortgage or the decree.

Passing, then, to the consideration of article 134 of the Statute (Act XV) of 1877, we think that the view expressed by this High Court in *Báivá Khán Dáudkhán v. Bhiku Sázbá*⁽⁶⁾ and *Yesu Rámji Kálnáth v. Bállkrishna Lakshman*⁽⁷⁾ is the correct one, and that the absence of "bona fides" as distinguished from actual knowledge of the vendor's title does not prevent the purchaser from claiming the benefit of the article, in that respect differing from the effect of section 5 of Act XIV of 1859, which is discussed by Lord Cairns in *Rádánáth Doss v. Gisborne and*

(1) 12 Bom. H. C. Rep., 163.

(2) I. L. R., 8 Bom., 303.

(3) P. J., 1887, p. 315.

(4) I. L. R., 7 Mad., 423.

(5) L. R., 13 I. A., p. 66.

(6) I. L. R., 9 Bom., 475, at p. 477.

(7) I. L. R., 15 Bom., 583.

1894.

PÁNDU

v.
VITHU.

1894.

PANDU
v.
VITHU.

Co.⁽¹⁾ There are doubtless remarks of the learned Chief Justice of the Allahabad High Court in *Bhagwán Sáhái v. Bhagwán Din*⁽²⁾ which are perhaps scarcely reconcilable with the above view of the article; but it was sufficient for the decision in that case, as pointed out by the Chief Justice himself at page 103 of the report, to remark that the article does not apply to purchases at auction sale in execution of the mortgagor's interest, as decided by the Privy Council in *Káli Dás Mulik v. Kanhya Lál Pandit*⁽³⁾.

But although the article does not, in our opinion, require the purchase to be "*bonâ fide*" in the sense of being made without "constructive notice" of the restricted nature of the vendor's title, we agree with what is said in *Bhagwán Sáhái v. Bhagwán Din*⁽²⁾ as to the remark of Lord Cairns in construing section 5, Act XIV of 1859, in *Rádánáth Doss v. Gisborne and Co.*⁽¹⁾, being equally applicable to the article under consideration, *viz.*, that by a purchaser must be meant a person who purchases that which is *de facto* a mortgage upon the representation made to him and in the belief that it is an absolute title—a requisite, which, it is to be observed, Lord Cairns treats (see 14 Moore's I. A., p. 20) as quite distinct from what he mentions to be the second requisite to enable section 5 to be applied; *viz.*, that the purchase should be "*bonâ fide*".

In this case the Assistant Judge has found that "no presumption can be drawn from the fact of the case that the purchaser did not believe when he purchased that his vendor had not power to convey an absolute interest," and we must, therefore, confirm the decree with costs.

Decree confirmed.

(1) 14 Moore's I. A., 21.

(2) I. L. R., 9 All., 97.

(3) 11 I. A., at p. 229.