1910.

WEST END WATCH COMPANY v. BERNA WATCH COMPANY.

The plaintiffs will have their costs of suit up to and including the first day's hearing, and must pay to the defendants costs of four days' subsequent hearing. Each party must bear their own costs not otherwise provided for.

Attorneys for the plaintiffs: Messrs. *Captain* and *Vaidya*.

Attorneys for the defendants: Messrs. *Bicknell*, *Merwanjee* and *Romer*.

Suit decreed.

B. N. L.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Hayward.

1911.
June 14.

SAMBHU BIN HANMANTA KOHAL AND OTHERS (ORIGINAL DEFENDANTS NOS. 2 TO 4), APPELLANTS, *v.* NAMA BIN NARAYAN NAIKDE AND ANOTHER (ORIGINAL PLAINTIFF AND DEFENDANT NO. 1), RESPONDENTS.*

Limitation Act (XV of 1877), Articles 132, 144—Mortgage—Third person redeeming the mortgage at mortgagor's desire—Sale by mortgagor of his rights—Sale-deed unregistered—Sale-deed could be looked at for evidence of payment of money—Suit by mortgagor to redeem ignoring sale—Lienor's rights—Adverse possession by lienor—Registration Act (III of 1877), section 17—Evidence Act (I of 1872), section 91.

The plaintiff mortgaged certain property with possession with defendant No. 1 for Rs. 601, on the 4th April 1873. On the 25th November 1878, defendants Nos. 2 to 4, at the request of the plaintiff, paid off the mortgage to defendant No. 1; and for the sum so paid and for a further payment of Rs. 50, the plaintiff sold the property to defendants Nos. 2 to 4. The document as to the sale was not registered; but ever since the purchase, the defendants Nos. 2 to 4 were in possession as owners. In 1907, the plaintiff filed a suit to redeem the mortgage of 1873. The defendants Nos. 2 to 4 set up in reply the sale of 1878 and contended that the suit was barred by limitation:—

Held, that the sale-deed being unregistered could not be looked at for proving the sale, but it could be looked at as evidence of payment of money.

Mahadnappa bin Danappa v. *Dari bin Bala*(1) and *Waman Ramchandra* v. *Dhondiba Krishnaji*(2), followed.

* Second Appeal No. 950 of 1909.

(1) (1875) P. J., p. 299. (2) (1879) 4 Bom. 126.

Held, further, that the redemption having been made by the defendants for the plaintiff with his knowledge and consent, they became entitled to hold the property as lienors and the plaintiff could not recover it from them without paying the amount of Rs. 651.

Mahomed Shumsool v. *Shewukram*(1), followed.

Held, further, that the defendants' lien was alive for twelve years after 1878, that is, up to the year 1890 (Article 132 of the Limitation Act of 1877); that when that period expired, the lien was gone and their possession after that was without any right; and that their title by adverse possession was perfected in 1902.

Ramchandra Yashvant Sirpotdar v. *Sadashiv Abaji Sirpotdar*(2), explained.

Held, therefore, that the plaintiff's suit was barred by limitation.

SECOND appeal from the decision of K. Barlee, Assistant Judge of Poona, reversing the decree passed by M. G. Mehta, Subordinate Judge of Khed.

Suit for redemption.

On the 4th April 1873, the plaintiff Nama Narayan Naikde mortgaged his lands with Ramkrishna Waman Pendse (defendant No. 1) for Rs. 601. The mortgage was a usufructuary mortgage.

On the 25th November 1878, the defendants Nos. 2 to 4 redeemed the mortgage at the plaintiff's instance and paid Rs. 601 to defendant No. 1. The plaintiff further received Rs. 50 from the defendants Nos. 2 to 4 and for Rs. 651 so received sold the property to the latter. The document of sale was not registered but the defendants Nos. 2 to 4 were put in possession of the property the same day.

In 1907, the plaintiff brought this suit to redeem the mortgage of 1873.

The defendants Nos. 2—4 contended in their written statement (*inter alia*) that the suit was barred by limitation and relied on the sale-deed of 1878.

The Subordinate Judge held that the mortgage of 1873 had been extinguished; that deed of sale not having been registered was inadmissible in evidence except as evidence of possession

(1) (1874) L. R. 2 I. A. 17. (2) (1886) 11 Bom. 422.

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of defendants Nos. 2—4; that the defendants had acquired title as vendees of the plaintiff and that the plaintiff's claim was barred by limitation. He, therefore, dismissed the suit.

On appeal this decree was reversed by the District Judge. He held that the deed of sale was inadmissible in evidence for any purpose, and that the defendants had not established a title by adverse possession. He remanded the case to the Court of the Subordinate Judge for finding what amount was due on the mortgage. On remand, Rs. 676 was found due. A decree was therefore passed ordering the plaintiff to redeem the mortgage by paying Rs. 676 in six equal yearly instalments.

The defendants Nos. 2 to 4 appealed to the High Court.

Weldon, with *G. K. Dandekar*, for the appellants.

Jayakar, with *V. M. Mone*, for the respondent.

CHANDAVARKAR, J.:—The pleadings and the facts found by the Court below may be shortly stated for the purpose of the question of law, which has been very carefully argued by both the Counsel before us.

The plaintiff brought the suit to redeem, alleging that he had mortgaged the property in dispute on the 4th of April, 1873, to defendant No. 1's father and that the mortgage was with possession for Rs. 601. Defendant No. 1 in his written statement pleaded that the mortgage had been redeemed, and that, therefore, the suit did not lie as against him. He alleged further that, ever since redemption, the property had been in the possession of defendants Nos. 2 to 4. These defendants are appellants before us. The contest, therefore, came really to be between the plaintiff and defendants Nos. 2 to 4. These defendants in their written statement alleged that, on the 25th of November 1878, at the request of the plaintiff himself they had paid off the amount of the mortgage to defendant No. 1's father, and that, for the sum so paid on the plaintiff's account and a further sum of Rs. 50 paid by the defendants to the plaintiff, he had sold the land to the defendants. The defendants also alleged that ever since their purchase they had been in possession as owners.

Now, upon these pleadings, the questions which arose for determination were these: (1) whether defendants Nos. 2 to 4 had proved their title by purchase from the plaintiff; (2) whether, if that purchase were not proved, the defendants had established their title by adverse possession.

The defendants relied upon Exhibit 33 in support of their purchase. That was a document purporting to be a receipt passed by the plaintiff to the defendants, acknowledging the fact of the defendants having paid the sum of Rs. 601 to defendant No. 1's father, and having redeemed the property on his (*i. e.*, the plaintiff's) account, and also of his (*i. e.*, plaintiff's) having received a further sum of Rs. 50 from the defendants. The receipt then proceeded to state that the land had been sold by the plaintiff to the defendants for the sum of Rs. 651.

So far as the sale was concerned, the document could not be looked at, because it was not registered. Therefore, the question of sale went out of the case under the Registration Act and under section 91 of the Indian Evidence Act.

The only question that then survived was about adverse possession. The burden of proof undoubtedly lay upon defendants Nos. 2 to 4 at the outset. But they had at the start this in their favour that, their title by purchase having gone out of the case, and there being no allegation on the part of the plaintiff that the defendants had been in possession, from the year 1878 down to the time of the suit, in virtue of some title derived from him, their possession could only be regarded as that of trespassers. Under these circumstances, it was for the plaintiff to get rid of the presumption in favour of the defendants arising from the fact of possession since 1878.

Now, the learned Assistant Judge has found as a fact that the mortgage amount had been paid off by the defendants Nos. 2 to 4. He finds that upon the recitals in Exhibit 33 as to the payment of money. The receipt could be looked at as evidence of that payment: see *Mahadnappa bin Danappa* v. *Dari bin Bala*[1], *Waman Ramchandra* v. *Dhondiba Krishnaji*[2]. The redemption

(1) (1875) P. J., p. 299. (2) (1879) 4 Bom. 126.

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having been made by the defendants for the plaintiff with his knowledge and consent, as is found by the Assistant Judge on the strength of Exhibit 33, the effect of the transaction in law was this: defendants Nos. 2 to 4 became entitled to hold the property as lienors, and the plaintiff could not recover it from these defendants without paying the amount of Rs. 651. That is the law laid down by their Lordships of the Privy Council in *Mahomed Shumsool* v. *Shewukram*[1], and it has been followed by this Court in a series of cases, of which we may mention only one, *viz.*, *Lomba Gomaji* v. *Vishvanath Amrit*[2].

That having been the position of the parties at the time when the property was redeemed by the defendants for and on account of the plaintiff, the question is, what period of limitation applies to a suit of this kind, which must now be treated as a suit by the plaintiff to recover the property from the defendants who had a lien on it in respect of the amount paid for the redemption. The learned Assistant Judge holds, upon the facts he has found, that the defendants became mortgagees. The plaintiff never set up any mortgage nor did defendants Nos. 2 to 4. The District Judge should not have made out a case, which neither party had set up as part of their pleadings, unless from the facts the law warranted an inference to that effect. But plainly upon the facts the law justifies no other conclusion than that the defendants became entitled to hold the property subject to their lien, and that the plaintiff could not recover it from the defendants without paying off that lien. Therefore, the learned District Judge was wrong in applying the sixty years' limitation, on his view that the transaction was one of mortgage. It may be that the sixty years' period would have applied, if the redemption had been effected by defendants Nos. 2 to 4, without the knowledge of the plaintiff. Where a person has mortgaged his property with possession, and the mortgagee while in possession is ousted by a trespasser, the trespass cannot necessarily be regarded as one affecting the rights of the mortgagor, because the latter, having the right to redeem only on the expiry of the mortgage period, has no right of immediate entry

(1) (1874) L. R. 2 I. A. 17. (2) (1893) 18 Bom. 86.

to give him a cause of action, unless the trespass was directed against him and his rights: *Chinto* v. *Janki*[1]. That ruling cannot apply here. Defendants Nos. 2 to 4 went into possession with the plaintiff's knowledge, after having redeemed the mortgage for him. They held the property without any title except the right of lien. The plaintiff was bound to bring his suit to recover possession from them within twelve years: Article 144, Limitation Act. So long as the lien existed, there could be no adverse possession on their part. As was said by this Court in *Ramchandra Yashvant Sirpotdar* v. *Sadashiv Abaji Sirpotdar*[2], where a person holds the property of another as a lienor, such holding does not, in any way, contradict the ulterior proprietary right, "since it would be impossible for a man to hold a lien on his own property." "So long as a possession can be referred to a right consistent with the subsistence of an ownership in being at its commencement, so long must the possession be referred to that right, rather than to a right which contradicts the ownership." In the present case, the lien of defendants Nos. 2 to 4 was alive for twelve years, from the year 1878, that is, up to the year 1890, under Article 132 of the Limitation Act then in force. Defendants Nos. 2 to 4 could have enforced it within that period. When that period expired, the lien was gone and their possession after that became that of persons holding without any right. Since then they have so held for more than twelve years. At the date of the suit brought in 1907 the defendants had their title perfected by adverse possession.

This conclusion is not inconsistent with the principle of the decision of this Court in *Ramchandra Yashvant Sirpotdar* v. *Sadashiv Abaji Sirpotdar*[2], above mentioned. There certain property had been mortgaged in 1847 by three co-sharers, D, A and R. One of them, R, alone redeemed in 1853. In 1882 the heirs of D and A sued to redeem the whole of the property or their portions of it. The defence to the suit was that it was barred by limitation, as it had been brought more than twelve years after R had redeemed the property, and R's possession after such redemption had

(1) (1892) 18 Bom. 51. (2) (1886) 11 Bom. 422 at p. 424.

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become adverse. It was held that the suit was not barred and that there was no adverse possession. The ground of the decision was that, in the case of a co-sharer holding after redemption, limitation is computed only from the date when the possession becomes adverse by the assertion of an exclusive title to the knowledge of the person excluded, and by submission on his part to the title thus set up. That is also the law enunciated by this Court in *Gangadhar* v. *Parashram*[1], where Jenkins, C. J., said that "to constitute an adverse possession as between tenants-in-common there must be an exclusion or an ouster." The present is not a case of co-sharers to attract to it the application of that law. Plaintiff's suit must be held barred by limitation.

We must, therefore, reverse the decree of the lower appellate Court and restore that of the Subordinate Judge with the costs of the appeal in the lower Court and of this second appeal on the respondents.

Decree reversed.

R. R.

(1) (1905) 29 Bom. 300

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, Mr. Justice Russell and Mr. Justice Rao.

1911.
June 28.

IN RE ABDULLA HAJI DAWOOD BOWLA ORPHANAGE.*

Indian Stamp Act (II of 1899), section 2 (24), Schedule I, Article 7—Instrument declaring trust—Fund composed of two parts—Absence of previous disposition in one part—Settlement—Disposition for charity of the other part—Appointment—Stamp duty.

An instrument was prepared for the purpose of declaring trusts of certain funds devoted to charity. The funds amounted to about Rs. 3,00,000 and came to the hands of the trustees from two sources. About Rs. 1,00,000 was the result of appeals to various persons and the rest was provided by the executors of the will of one A.H. The instrument declaring the trusts was engrossed on

* Reference No. 3 of 1911.