

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice and Mr. Justice Shah.

GULAM GOSS WALAD MIA KHOT AND ANOTHER (ORIGINAL PLAINTIFFS NOS. 1 AND 3), APPELLANTS *v.* SHRIRAM PANDURANG JAIRAM-RAO AND ANOTHER, SONS AND HEIRS OF THE DECEASED PANDURANG JAIRAMRAO ZUNJARRAO, MINORS, BY THEIR GUARDIAN SHANKAR JAIRAMRAO AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

1918.

October 15.

Indian Limitation Act (IX of 1908) sections 6, 7 and Article 144—Mortgage—Mahomedan family—Sale by one co-heir—Suit for redemption by other heirs—One of the plaintiffs, a minor—Suit not barred.

M, a Mahomedan mortgaged the property in suit to J in 1895. M died in 1901, and his widow sold the equity of redemption to J, who obtained possession of the property under the sale. In 1914, M's son G and daughters S and K sued for redemption of the mortgage of 1895, and for possession. Of these plaintiffs G and K had attained majority three years before suit, while plaintiff S attained majority in July 1913. The lower Court held the suit barred as regards plaintiffs G and K under Article 144 read with section 6 of the Limitation Act on the ground that the possession of J became adverse in 1901.

Held, that the suit having been brought within three years of the date when the youngest plaintiff S attained majority was not barred by limitation under section 7 of the Limitation Act, because the right to redeem was indivisible and neither of the plaintiffs G and K was qualified to discharge or release the equity of redemption.

SECOND appeal against the decision of J. A. Saldanha, Assistant Judge of Thana, varying the decree passed by A. Majid, Subordinate Judge at Bhiwandi.

Suit for redemption and possession.

The property in suit originally belonged to one Mia Khot. He mortgaged it with Jairam, the father of defendants Nos. 1 and 2, by a simple mortgage deed, dated the 8th March, 1895.

* Second Appeal No. 826 of 1917.

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In 1900, Mia died leaving him surviving his widow Mariambi, son Gulam Goss (plaintiff No. 1), and two daughters Soograbibi (plaintiff No. 2) and Khoorshedbibi (plaintiff No. 3). Of these Gulam Goss was born in May 1890 (attained majority in May 1908), Soograbibi in July 1895 (attained majority in July 1913) and Khoorshedbibi in 1896.*

On the 2nd April, 1901, Mariambi sold the mortgaged property to Jairam for Rs. 1,000 in order to pay off the mortgage and other debts of her deceased husband. The sale deed purported to have been executed by Mariambi on her behalf as well as on behalf of the plaintiffs Nos. 1 and 2. Plaintiff No. 3 was no party to it.

In 1914, the plaintiffs sued for redemption of the mortgage of 1895 and for possession of the property from the defendants.

The defendants contended that the sale of 1901 being effected by Mariambi to pay off her deceased husband's debts was binding on the plaintiffs; that it was *bona fide* and for valuable consideration; and that the plaintiffs' suit was barred by limitation.*

The Subordinate Judge held that the claim of plaintiff No. 1 was barred under Article 144 of the Limitation Act, 1908, and that of plaintiff No. 2 was within time under section 6 of the Act; as to plaintiff No. 3 he found that she being not a party to the sale of 1901 and not having any knowledge of the sale, was not bound by it. Plaintiffs Nos. 2 and 3 were, therefore, allowed to redeem and to recover possession of their shares in the property on payment of the proportionate amount of the debt due thereon.

The Assistant Judge, on appeal, held that the plaintiffs Nos. 1 and 3 having knowledge of the sale of 1901, their claim was barred under Article 144 read with

section 6 of the Limitation Act, 1908. He, therefore, varied the decree of the Subordinate Judge by holding the claim of plaintiff No. 2 alone in time and allowed her to redeem and recover possession of her share in the property.

Plaintiffs Nos. 1 and 3 appealed to the High Court.

W. B. Pradhan, for the appellants :—Mia's widow could only transfer her interest by the sale of 1901. The interests of plaintiffs did not pass by the sale : see *Abdul Majeeth v. Krishnamachariar*⁽¹⁾.

It is true that the mortgage in suit was a simple mortgage and Jairam was placed in possession of the mortgaged property as a result of the sale ; but as the sale was unauthorised except as to the interest of the widow, Jairam should be held as holding the property as a mortgagee.

The lower Court held the suit barred as regards the plaintiffs Nos. 1 and 3 under Article 144 of the Limitation Act, 1908. This is wrong. The mortgage was one and indivisible ; and so long as all the plaintiffs had not reached majority, no adverse possession could begin to run. The claim of plaintiffs Nos. 1 and 3 should, therefore, have been allowed : see section 7 of the Limitation Act, 1908.

P. B. Shingne, for the respondents :—In this case by reason of the purchase of the equity of redemption by the mortgagee, the indivisible character of the mortgage was destroyed : see section 60 of the Transfer of Property Act, 1882. Thereupon it was open to plaintiff No. 2 who was grown up, to sue and agitate the same point which has been raised in the present suit. That was not done. So the present suit is time-barred not only against

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plaintiff No. 2 but also as against plaintiffs Nos. 1 and 3, because plaintiff No. 2 could alone have sued, being entitled to an interest in the property: see section 91, Transfer of Property Act, 1882, and *Lakshuman Giriraya Naik v. Madhav Krishna Shenvi*⁽¹⁾. If so, the whole suit should have been held as barred by time. The mother could give a valid discharge and this she did. The original mortgage was a simple mortgage and by virtue of the sale to Jairam, he went into possession and for more than twelve years the possession had been with Jairam or his transferee. The case is also governed by Article 134 of the Limitation Act, 1908.

SCOTT, C. J.:—Mia Khot in 1895 mortgaged the property in suit to Jairam, the father of the defendants Nos. 1 and 2. In 1901 the mortgagor being dead his widow purported to sell the equity of redemption to Jairam. Jairam subsequently sold his interest in the property to the defendant No. 3.

The sale by the mortgagor's widow could only transfer her 1/8 share as a Mahomedan widow to the mortgagee; the remaining 28/32 in the equity of redemption belonged to the plaintiffs, the son and daughters of the deceased. The present suit was filed on the 21st of April 1914 for redemption. The defence is that the suit is as to all the plaintiffs' interests except that of plaintiff No. 2 barred by limitation because Jairam obtained possession at the time of the sale, the plaintiff No. 3 was a major at that date and the plaintiff No. 1 became a major in May 1908 and did not sue for redemption or possession within three years. The lower Court has held the suit barred as regards the plaintiffs Nos. 1 and 3 under Article 144 read with section 6 of the Limitation Act on the ground that the possession of Jairam became adverse in 1901.

(1) (1890) 15 Bom. 186.

This conclusion, however, appears to be inconsistent with section 7 of the Limitation Act, according to which, where out of several persons jointly entitled to sue one is under disability and a discharge cannot be given in respect of the cause of action by any other of them, time will not run until the disability has ceased. Here the cause of action in the plaintiffs is the equity of redemption. The mother has not discharged and was not qualified to discharge it. Mr. Justice Chitty in *Bolton v. Salmon*⁽¹⁾, said: "Where a mortgage is made by two tenants-in-common, both of them must be parties to the action to redeem; one cannot redeem in the absence of the other. Where two different estates are mortgaged, the person entitled to redeem one estate cannot bring an action to redeem without making the person entitled to redeem the other estate a party (see *Cholmondeley v. Clinton*⁽²⁾). For this purpose there is no difference between a mortgage of two different estates or two undivided shares of the same estate." For this reason neither of the plaintiffs who attained majority more than three years before the date of the institution of this suit was qualified to discharge or release the equity of redemption. The right was indivisible and the suit having been brought within three years of the date when the youngest plaintiff attained majority is within time.

SHAH, J.:—I concur. I desire to add that even treating the possession of the mortgagee and his transferee as the possession of a purchaser and not that of a mortgagee, I think, the result would be the same. The plaintiffs as co-sharers would be jointly entitled to sue him in respect of their shares for partition, and none of them would be competent to give a discharge in respect of the whole interest not vested in the purchaser. Thus

(1) [1891] 2 Ch. 48 at p. 52.

(2) (1820) 2 J. & W. 134.

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under section 7 of the Limitation Act the right of the three plaintiffs to recover possession of 28/32th share in the property would be within time, as the claim of one of them, who was under a disability, is within time. The purchaser in possession would be equitably entitled to have his rights under the simple mortgage satisfied before he can be called upon to part with his possession. The result is substantially the same as if he were a mortgagee in possession with this difference that he may not be liable to account as a mortgagee in possession.

Decree reversed.

J. G. R.

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Before Mr. Justice Shah on difference between Mr. Justice Beaman and Mr. Justice Heaton.

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October 17.

BHUTA WALAD JAYATSING (ORIGINAL PLAINTIFF-APPLICANT), APPELLANT
v. LAKADU DHANSING AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), section 144—Decree for plaintiff—Reversal of the decree in appeal—Restoration of the trial Court's decree in second appeal—Claim for restitution—Plaintiff's right to claim restitution.

A question being referred whether a plaintiff who obtained a decree in his favour in the trial Court and went into possession under it, and was put out of possession under the decree of the first Court of appeal reversing the trial Court's decree, and who succeeded in the Court of second appeal, which restored the judgment of the trial Court, can claim any benefit under section 144, Civil Procedure Code, 1908, in respect of time he was dispossessed between the decrees of the first and second appeal Courts,

Held, that the plaintiff could claim such benefit under section 144 of the Civil Procedure Code, 1908.

SECOND Appeal against the decision of C. C. Dutt, Assistant Judge of Khandesh, confirming the decree passed by J. H. Betigiri.

* Second Appeal No. 22 of 1917.