

1919.

BHAU
MAHADU
v.
VITHAL
ATTATRAYA.

his agricultural work from there, but for some other purpose of profit. So the impression remains, whether it was intended or not, that both the Judges in the Courts below have decided that the plaintiff's right to remove the structure arises from the circumstance that it is a dwelling house and not a shed. It seems to me that to hold that for a farmer to build a dwelling house on a portion of his agricultural land for his own residence, and in such a way as to facilitate his agricultural work, is necessarily contrary to the intention of an agricultural tenancy, is to come to a very remarkable and an unreasonable decision. I am unable, therefore, to find that the orders made by the lower Courts follow from the facts which they have found, and I think that this appeal as proposed must succeed and that the suit must be dismissed with costs.

Appeal allowed.

R. R.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Heaton.

1919.

December 5.

TAIRAMIYA WALAD PIRASAHEB PATAYIT AND ANOTHER (ORIGINAL DEFENDANTS NOS. 19 AND 24), APPELLANTS v. SHIBELISAHEB WALAD FAKIRSAHEB DUNGE AND OTHERS (ORIGINAL PLAINTIFF AND DEFENDANTS NOS. 1 TO 3, 23 AND 25), RESPONDENTS^o.

Indian Limitation Act (IX of 1908), Schedule I, Articles 134' and 148—Mortgage—Transfer from mortgagee—Suit for redemption—Mortgagor's right of redemption not defeated by reason of mortgagee's transfer.

In 1882, certain lands were mortgaged with possession by the plaintiff's father. In 1883, the mortgagee mortgaged the lands to the predecessor-in-title of the defendants representing himself as absolute owner. In 1916, the plaintiff having sued for redemption, the defendants contended that the suit was barred under Article 134 of the Limitation Act, 1908.

^o Appeal from Order No. 49 of 1918.

Held, that the suit was not barred as on the facts the proper Article applicable to the case was Article 148 and not Article 134 of Schedule I of the Limitation Act, 1908.

PER MACLEOD, C. J. :—"A suit to recover possession is not the same thing as a suit to redeem, and a mortgagor's right to redeem, the period of limitation for which is 60 years under Article 148, will not be defeated merely because his mortgagee transfers the mortgage to another person."

SECOND appeal against the decision of L. C. Crump, District Judge of Belgaum; reversing the decree passed by R. G. Shirali, Second Class Subordinate Judge at Athani.

Suit for redemption.

On the 14th March 1882, the plaintiff's father mortgaged with possession certain lands to four persons. One of these lands survey No. 525 was mortgaged to the predecessor-in-title of defendant No. 19 in 1883 by one of the original mortgagees representing himself to be an absolute owner. Two other lands survey Nos. 95 and 104 were similarly mortgaged by other original mortgagees to the predecessor-in-title of defendants Nos. 23, 24 and 25.

In 1916, the plaintiff sued for redemption of all the lands mortgaged and for possession.

The contending defendants Nos. 19 and 23 to 25 pleaded that the plaintiff's father did not mortgage the lands to them and therefore no suit for redemption would lie against them; that their mortgagors mortgaged the lands representing themselves to be the absolute owners; and that the suit was barred under Article 134 of the Limitation Act, 1908.

The Subordinate Judge allowed the plaintiff to recover possession of the plaintiff lands except the mortgaged portions of survey Nos. 95, 104 and 525. In respect of these numbers the plaintiff's suit was held barred under Article 134 of the Limitation Act:

1919.

TAIRAMU
v.
SHIBELI
SAHEB.

1919.

AIRANIYA

v.
SHIBELI-
SAHEB.

Ramchandra v. Sheikh Mohidin⁽¹⁾; *Seeti Kutti v. Kunhi Pathumma*⁽²⁾.

On appeal, the District Judge held that the plaintiff could recover possession of survey Nos. 95, 104 and 525 upon paying what might be found due to defendants Nos. 19, 23, 24 and 25 on an account being taken under the Dekkhan Agriculturists' Relief Act. His reasons were as follows :—

“ I agree with the lower Court that the point is governed by Article 134 ; but it does not follow that the plaintiff cannot redeem. A party may obtain a title by adverse possession, but in my opinion he can in no case obtain a title greater than that which he himself asserts. The respondents have never held themselves out to be anything more than mortgagees and they cannot, therefore, have acquired an absolute title which alone could defeat the plaintiff's claim for redemption. Now though the lower Court does not say so in so many words, it is obvious that the decision implies that in such circumstances an absolute title is acquired. That is not so. The title which is acquired is the title which is asserted and respondents are, therefore, mortgagees and nothing more than mortgagees. And the plaintiff being admittedly a person interested in the property can redeem these mortgages. The following cases decided by the Bombay High Court appear to me to be in point :—*Maluji v. Fakirchand*, I. L. R. 22 Bom., page 225; *Ramchandra v. Sheikh Mohidin*, I. L. R. 23 Bom., page 614 and *Bagas Umarji v. Nathabhai Utamram*, I. L. R. 36 Bom., page 146.

The defendants appealed to the High Court.

P. B. Shingne, for the appellant :—This case is governed by Article 134 of the Limitation Act. My clients are transferees for valuable consideration and have been in possession for more than 12 years. Their vendor (who was a mortgagee) purported to convey the property which is at present in their possession as an absolute owner and as they have been in possession of the property, the question whether they had notice of the mortgage at the time when they dealt with the property is immaterial. This is the ratio of the cases referred to in the judgment of the lower Court and

(1) (1899) 23 Bom. 614.

(2) (1917) 40 Mad. 1040.

hence the order of remand is wrong and the decree of the trial Court should be restored.

1919.

TAIRAMIYA
v.
SHIBRA-
SAHEB.

A. G. Desai, for the respondents was not called upon.

MACLEOD, C. J.—This was a suit for redemption against a large number of defendants to redeem certain Survey Numbers from a mortgage executed by the plaintiff's father to certain mortgagees. A decree was passed by the lower Court declaring that there was nothing due on the plaint mortgage and directing that the plaintiff should recover possession of the plaint mortgaged lands, except the mortgaged portions of survey Nos. 95, 104 and 525 from the defendants that might be in possession of the same. The plaintiff's claim for possession of plaint portions of Survey Nos. 95, 104 and 525 was dismissed.

In appeal the lower appellate Court has held that the plaintiff can recover possession of those three Survey Nos. 95, 104 and 525 upon paying what might be found due to defendants Nos. 19, 23, 24 and 25 on an account being taken under the Dekkhan Agriculturists' Relief Act. These particular defendants have now appealed. They claim that the plaintiff's suit as against them is barred under Article 134 of the Indian Limitation Act. That Article refers to a suit to recover possession of immoveable property conveyed or bequeathed in trust or mortgaged and afterwards purchased from the trustee or mortgagee for a valuable consideration. In this case apparently the argument is that because the defendants are mortgagees from the original mortgagee of these Survey Numbers the plaintiff's suit as against them is barred after 12 years from the date of the transfer of the original mortgage. The case of *Bagas Umarji v. Nathabhai Utamram*⁽¹⁾ appears to be conclusive on

(1) (1911) 36 Bom. 146.

1919.

TAIBANIYA

v.

SHIBELI-
SAHEB.

this question, for it appears obvious that a suit to recover possession is not the same thing as a suit to redeem, and a mortgagor's right to redeem, the period of limitation for which is 60 years under Article 148, will not be defeated merely because his mortgagee transfers the mortgage to another person. I agree with the argument of the learned appellate Judge in discussing this question, and the appeal therefore fails and must be dismissed with costs.

HEATON, J. :—I agree that Article 134 of the Schedule to the Indian Limitation Act does not cover the case we are dealing with. The suit is a suit for redemption and such a suit is covered by Article 148. The mortgage debt has been paid off by the profits of the land, the mortgaged property being in the possession of the mortgagee. So far, therefore, the plaintiff is entitled to possession of the whole of the mortgaged property. But his claim is resisted in respect of three Survey Numbers by certain of the defendants who purchased these Numbers from the mortgagee. Of course the mortgagee had no right to sell them, and so these defendants have not acquired any title merely by reason of their purchase. At least they have not acquired anything better than such title as the mortgagee could convey to them. Being without title to the property, or at any rate a title which enables them to resist the plaintiff on that ground, they must of course surrender possession to the plaintiff, unless they have a claim on some other ground. The only ground, so far as I can see, on which they could have a claim would be adverse possession. They have been placed in the position of mortgagees by the lower Court. The debts due to them which are the prices paid by them for their purchases are to be paid by the plaintiff claiming redemption. That is the most they could possibly be entitled to, unless they establish a title by adverse

possession against the plaintiff mortgagor who seeks to redeem. Whether they have done so or not is primarily a question of fact. It has been found by the lower appellate Court that they have not established a title by adverse possession other than a title to be redeemed. Nothing has been said to us in argument in this appeal to lead us to suppose that the lower appellate Court made any mistake of law in arriving at this conclusion. I agree, therefore, that this appeal must be dismissed with costs.

1919.

TAIRAMIYA
v.
SHIBELI-
SAHEB.

Decree confirmed.

J. G. R.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Heaton.

BAI RAMI, DAUGHTER OF HANSJI BHANA (ORIGINAL DEFENDANT No. 6)
PETITIONERS v. JAGA DULLABH AND OTHERS (ORIGINAL PLAINTIFFS),
OPPONENTS.*

1919.

December 5.

*Civil Procedure Code (Act V of 1908), section 115—Interlocutory order—
High Court has no power to call for record.*

Under section 115 of the Civil Procedure Code, 1908, the High Court might call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto; but it has no power to call for the record of any case which is under trial by a Court subordinate to the High Court.

CIVIL Extraordinary application under section 115, Civil Procedure Code, 1908, praying that the order of the Subordinate Judge of Bulsar in Suit No. 308 of 1918, be set aside.

One Jaga Dulabh and others filed a Suit No. 308 of 1918, to recover possession against the petitioner (defendant No. 6) and others.

*Civil Application No. 105 of 1919 under Extraordinary Jurisdiction.