

APPELLATE CIVIL.

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

1920.

January 6.

KALU DEVBA (ORIGINAL PLAINTIFF No. 2), APPELLANT *v.* RUPCHAND KISONDAS AND OTHERS (ORIGINAL DEFENDANTS AND PLAINTIFF No. 1), RESPONDENTS.*

Indian Limitation Act (IX of 1908), Art. 134—Mortgagor and mortgagee—Redemption—Purchase by mortgagee at a Court sale—Transfer by mortgagee to third persons—Mortgagee repurchasing from the transferee—Mortgagor entitled to redeem the property re-purchased.

The properties in suit were mortgaged with possession in 1885 by two persons, S and D. In 1888, in execution of a money decree against the mortgagors the properties were sold, and the interest of the mortgagor S alone was purchased by the mortgagee at a Court sale. In 1892 three of these properties, Survey Nos. 11, 54 and 87 were sold by the mortgagee to third persons and in 1898 the mortgagee bought back Survey Nos. 54 and 87 from the vendees. The plaintiffs-mortgagors sued for redemption of all the properties in 1910.

The lower appellate Court held that D alone was entitled to redeem all the properties in suit except Survey Nos. 11, 54 and 87 in respect of which the claim to redeem was barred under Article 134 of the Limitation Act, 1908, and that D could have no right to claim compensation on account of these lands. On appeal to the High Court by D,

Held, that D's claim for redemption and compensation in respect of Survey No. 11 was rightly disallowed, but that he was entitled to redeem Survey Nos. 54 and 87 as these properties having come back into the possession of the defendant, he must be treated as mortgagee and not as an innocent transferee without notice.

SECOND appeal against the decision of M. I. Kadri, Assistant Judge of Khandesh, modifying the decree passed by G. M. Pandit, Subordinate Judge at Jalgaon.

Suit for redemption.

On the 10th April 1885, a possessory mortgage deed was passed by two brothers Shivba and Devba to defendant No. 1's father, Kisan Ramchandra, for an old

* Second Appeal No. 942 of 1918.

debt of Rs. 1,500. It related to certain lands and houses out of which two lands Survey Nos. 54 and 87 were situated at Bharadi and a Survey No. 11 at Sarve.

In 1888, the properties under the mortgage of 1885, were sold in execution of a money decree by the Court, subject to the mortgage and were purchased by the mortgagee Kisandas himself with the permission of the Court. By the Court sale, the mortgagee got only the half share of Shivba.

In 1889, Survey No. 11 was sold by the mortgagee to one Supdu whose interest was purchased by defendant No. 8 in 1901.

The other two Survey Nos. 54 and 87 were sold by the mortgagee in 1892 to one Kushaba, from whom mortgagee's son Rupchand repurchased those numbers in the year 1898.

In 1910, the mortgagors Shivba and Devba's son Kalu (plaintiffs Nos. 1 and 2 respectively) sued for redemption of the mortgage of 1885 under the Dekkhan Agriculturists' Relief Act, 1879. The defendant No. 1 contended that the suit was barred under section 47, Civil Procedure Code, 1908, and as regards Survey Nos. 11, 54 and 87 it was barred under Article 134, Limitation Act, 1908.

The Subordinate Judge held that the plaintiff was entitled to redeem the plaintiff lands except Survey Nos. 11, 54 and 87, the claim in respect of which was barred under Article 134 of the Limitation Act, 1908, and that the plaintiff was not entitled to any compensation for the loss occasioned by the sales of these three lands.

On appeal, the District Judge modified the decree holding that plaintiff No. 2 alone was entitled to

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redeem as by the Court sale of 1888 interest of Shivba (plaintiff No. 1) had passed to the mortgagee. In other respects the decree was confirmed.

Plaintiff No. 2 appealed to the High Court against the decree in so far as it excluded his claim for redemption of Survey Nos. 11, 54 and 87.

K. H. Kelkar, for the appellant.

G. S. Rao, for the respondent.

MACLEOD, C. J. :—This suit was originally filed in 1910 by the plaintiffs who sued for redemption of a mortgage dated 10th April 1885. The suit was dismissed in the trial Court. On appeal the case was remanded, and again on appeal from the order of remand it was held by the High Court that the one plaintiff Shivba had no right to redeem, and the suit would have to be dismissed as his interest in the equity of redemption had been sold. As regards the other plaintiff who represented Devba, the other mortgagor, the Court decided that he should be allowed an opportunity of redeeming the outstanding mortgage. The case therefore went back to the Subordinate Judge who directed that the plaintiffs should recover from the defendants possession of the properties in suit with the exception of Survey Nos. 54 and 87 of Bharadi and Survey No. 11 of Sarve free from the mortgage. This decree was upheld on appeal except that it was modified by substituting the word "plaintiff No. 2" for the "plaintiffs". The 2nd plaintiff Kalu Devba has now appealed against that part of the decision of the Assistant Judge which decided that he should not be entitled to recover Survey Nos. 54 and 87 of Bharadi and Survey No. 11 of Sarve.

With regard to Survey No. 11, that is now in the possession of an outsider, having been sold at a Court

sale, and all that the 2nd plaintiff would be entitled to would be compensation from the mortgagee on the ground that when redemption was sought the mortgagee could not produce the property mortgaged. Both the lower Courts have come to the conclusion that compensation should not be allowed, and we agree with the reasons given in the judgment of the learned Assistant Judge.

But with regard to Survey Nos. 54 and 87, they stand on an entirely different footing as they are in the possession of the 1st defendant as representative of the original mortgagee. The original mortgagee purchased, as he thought, the equity of redemption of both the mortgagors at a Court sale. Then he sold the property to two outsiders, and after the period of six and ten years respectively bought back those properties from the persons to whom he had sold them. He now resists the plaintiff's claim to redeem on the ground that he is in possession, not as mortgagee, but as purchaser, and the plaintiff's claim to redeem is barred under Article 134 of the Indian Limitation Act if he could show that the suit to redeem has been brought more than twelve years after the original transfer. But the fallacy in that argument lies in this that the defendant was responsible for the original mistake. He ought to have seen that he had only bought the equity of redemption of one of the mortgagors, and he cannot derive any benefit from his negligence by purporting to sell the whole of the property to third parties, and then purporting to obtain a good title by repurchasing those properties from those parties. In my opinion the original mistake is revived by the properties coming back into the possession of the defendant, and he must be treated now as a mortgagee and not as an innocent transferee without notice. Therefore I think the original decree must be modified by directing that the

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2nd plaintiff should recover from the defendants' possession of the properties in suit with the exception of Survey No. 11 of Sarve free from the mortgage. With regard to the successful appellant he pays his own costs up to the 13th November 1916 when the Subordinate Judge gave the judgment, and he will get his costs in this Court and in the first appeal Court from the defendants.

Decree modified.

J. G. R.

APPELLATE CIVIL.

Before Mr. Justice Shah and Mr. Justice Crump.

1920.

January 9.

NARAYAN BALAJI NAGARKAR AND ANOTHER (ORIGINAL DEFENDANTS),
APPELLANTS v. KASHIBAI KESHAV SHANKAR DOND NAIK (ORIGINAL
PLAINTIFF), RESPONDENT.*

Guardians and Wards Act (VIII of 1890), sections 34 (A), 35 and 36—Person acting as a guardian—Appointment of guardian who passes a bond—Ward dying leaving minor widow heir—Re-appointment of guardian without bond—Liability to account to minor—Liability of legal representatives of the guardian.

A minor having been left as the sole surviving male member of his family, his estate was for a time managed by his maternal grandfather. The latter was subsequently appointed by the Court as guardian of the property and passed a bond under section 34 (a) of the Guardians and Wards Act, 1890. On the death of the minor, he retained management of the property on behalf of the minor's widow, without re-appointment as guardian. Some months afterwards he was again appointed guardian of the property by the Court, but without a bond. The guardian having died, the minor's widow sued his legal representatives for an account of his management:—

Held, that the suit was maintainable, for neither section 35 nor section 36 of the Guardians and Wards Act, 1890, operated as bar.

Held, also, that the legal representatives of the guardian were liable to account, if it was established that property of the minor did go into the hands of the guardian and thence into the hands of his representatives.

* Appeal from Order No. 9 of 1918.