

RAMALINGAM
v.
THIRUGNANA
SAMMANDHA.

be said to have properly tried. Indeed, he seems to have thought that the plaintiff's failure in another suit to which the defendant was no party precluded the recognition of the right claimed by the plaintiff in the present case. In this the Subordinate Judge was clearly mistaken, as the decision in the previous suit could not make the plaintiff's present claim against another defendant *res judicata*.

I think that the plaintiff is justified in his contention that there has been no decision on the principal question raised in the suit, and that, although some of the findings recorded by the Subordinate Judge may indicate what his conclusion on that question is likely to be, the case ought to be remanded.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Wilkinson.

MUTHU (PLAINTIFF), APPELLANT,

v.

KAMBALINGA AND ANOTHER (REPRESENTATIVES OF DEFENDANT
No. 4), RESPONDENTS.*

Limitation Act, 1877, sch. II, art. 134—Suit to redeem by assignee of equity of redemption—Title purchased at execution sale.

Suit, in 1885, by the assignee of the equity of redemption to redeem a mortgage of 1826. The mortgagees were put into possession under the mortgage and no interest was paid. In 1855, the mortgage premises were sold at a Court sale in execution of a decree against the mortgagees as if they formed part of their family property, and the defendant derived title from the execution purchaser who had dealt with it as absolute owner:

Held, that the suit was barred under Limitation Act, 1877, sch. 11, art. 134.

SECOND APPEAL against the decree of J. A. Davies, Acting District Judge of Tanjore, in appeal suit No. 115 of 1887, affirming the decree of G. Ramasami Ayyar, District Munsif of Kumbakonam, in original suit No. 245 of 1885.

Suit filed in 1885 to redeem a mortgage, dated 22nd February 1826, and executed to one Kichu Chetti, who was father of defendants Nos. 1 and 2 and grandfather of defendant No. 3. The

* Second Appeal No. 257 of 1888.

plaintiff sued as purchaser under a registered sale deed from the mortgagor's grandson.

MUTHU
v.
KAMBALINGA.

It was alleged that possession of the mortgaged property was delivered to the mortgagees in lieu of interest. It appeared that the property was attached as the family property of defendants Nos. 1 and 2 and sold to Ramadu Chetti in 1855 in execution of a decree obtained against them in original suit No. 327 of 1836, and that it was subsequently sold at a sale held in execution of a decree obtained in original suit No. 12 of 1881 against the widow of Ramadu Chetti and purchased by defendant No. 4.

Defendants Nos. 1, 2 and 3 did not appear.

Defendant No. 4 pleaded, *inter alia*, that the suit was barred under the Limitation Act, sch. II, art. 134, as being "a suit to recover possession of immovable property . . . mortgaged and afterwards purchased from the . . . mortgagee for a valuable consideration."

The District Munsif dismissed the suit, and his decree was affirmed by the District Judge who said :—

"The property said to have been originally mortgaged in 1826 was brought in a Court sale from the mortgagee on the 20th September 1855 for valuable consideration as per exhibit X. The plaintiff had therefore only 12 years' time from that date to sue, whereas this suit was brought in 1885 or 30 years afterwards."

The plaintiff preferred this second appeal.

Rama Rau and *Bhashyam Ayyangar* for appellant.

Subramanya Ayyar for respondents.

The arguments adduced on this second appeal appear sufficiently for the purpose of this report from the following judgments :—

MUTTUSAMI AYYAR, J.—This was a suit brought by the appellant to redeem a house which, he alleged, was mortgaged in February 1826, to the ancestor of respondents Nos. 1—3. The house has since been the subject of two Court sales. The first was held in 1855 in execution of the decree in original suit No. 327 of 1836 which was passed against the first and second defendants, and one Ramadu became purchaser. The second sale was held in execution of the decree in original suit No. 12 of 1881 which was instituted against Ramadu's widow, and respondent No. 4 was the purchaser at that sale. Respondent No. 4 pleaded, *inter alia*, limitation in bar of the claim and relied on Act XV of 1877,

MUTHU.
v.
KAMBALINGA.

sch. II, art. 134. The Judge upheld the contention on appeal, and it is urged in second appeal that the suit is governed by the sixty years' rule. It is urged (i) that art. 134 does not apply to Court sales and (ii) that respondent No. 4 ought to show that what he actually purchased was the absolute title to the house and that he instituted due inquiry as to the title of the judgment-debtors which was put up to sale. Art. 134 describes the suit to which it is to apply as a suit to recover possession of immovable property conveyed or bequeathed in trust or *mortgaged and afterwards purchased from the trustee or mortgagee for a valuable consideration* and it then prescribes 12 years from the date of the purchase as the period of limitation. This ought to be read together with art. 148 which prescribes 60 years for a suit against a mortgagee to redeem or recover possession of immovable property mortgaged, and, when so read, it is clear that the purchase contemplated in art. 134 is that of the absolute title to or property in the subject of the mortgage. A mere assignment of the mortgage is not within the purview of the article, for the assignee will only stand then in the shoes of the mortgagee and cannot be regarded as purchaser of the property under mortgage. This view is in accordance with the decision of the Privy Council with reference to Act XIV of 1859, section 5, in *Juggernath Sahoo v. Syud Shah Mahomed Hossein*(1). There is also no doubt that the party relying on art. 134 which cuts down the mortgagor's right to sue from 60 years to 12 years is bound to show that he purchased the absolute title and that he paid value for it. As to the contention that the article does not apply to Court sales, we do not think that it can be supported. Though, in a Court sale, the sale is not the act of the mortgagee, but the act of the Court executing the decree, yet the purchase is of the property under mortgage by reason of the exercise by the Court of the power of sale vested in the mortgagee. We can see no distinction between it and a voluntary sale, when the purchaser bargained for and bought the absolute title and when he had no means of information showing that the position of the judgment-debtors was really that of mortgagees in regard to the property purchased. If an honest mistake made in connection with a purchase for value at a voluntary sale is protected after 12 years' adverse possession, we do not see why

(1) L.R., 2 I.A., 48.

a similar mistake made in connection with a Court sale should not be likewise protected. The same view was taken by the High Court at Allahabad in *Bhagwan Sahai v. Bhagwan Din*(1). In the case before us, the sale certificate issued to Ramadu described the house as the property of defendants Nos. 1 and 2. Several documents show that Ramadu dealt with it as absolute owner ever since 1855. I am of opinion that the decision of the Judge that the suit is barred by art. 134 is right, and I would dismiss this second appeal with costs.

MUTHU
KAMBALINGA.

WILKINSON, J.—The plaintiff as the purchaser in January 1885 of the equity of redemption sues to redeem a mortgage alleged to have been granted in 1826 by Peddu Chetty Viranna Chetty, the ancestor of plaintiff's vendor to Kichu, the ancestor of defendants Nos. 1—3. Defendant No. 4 purchased a portion of the property in Court sale in execution of the decree obtained in original suit No. 12 of 1881 against the heirs and representatives of one Ramadu Chetty who had himself purchased the property in execution of a portion of a decree in original suit No. 327 of 1836 obtained against defendants Nos. 1 and 2. The Lower Appellate Court held that the suit was barred by art. 134, sch. II of the Limitation Act, and dismissed the plaintiff's suit without going into the merits. On appeal, it is argued that what defendant No. 4 purchased was not an absolute title, but a mortgage. By art. 134 the right of a mortgagor to recover possession of immovable property mortgaged and afterwards purchased from the mortgagee for valuable consideration is limited to 12 years from the date of purchase. In the case of *Radanath Doss v. Gisborne*(2) the Privy Council laid down what in their view was the meaning of the word purchaser in section 5, Act XIV of 1859, which corresponded to art. 134. They held that the word must mean some person who purchases that which in fact is a mortgage upon a representation made to him and in the full belief that it is not a mortgage, but an absolute title. And reading together arts. 134 and 148, it is evident that the purchase referred to in art. 134 must be a purchase of the absolute title. It is therefore incumbent upon the purchaser whether in a Court sale or in a private sale, for I see no reason why any distinction should be drawn between them, to show that he purchased the absolute title in the full belief

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

(2) 14 M.I.A., 1.

MUTHU
v.
KAMBALINGA.

that it was the absolute title he was purchasing. No reason can be assigned why the same protection which is afforded to a purchaser for valuable consideration at a private sale should not be extended to a purchaser at Court auction. It is a question of fact in each case what passed by the sale, an absolute title, or only the right of the mortgagees. There is evidence in this case to show that Ramadu purchased in the full belief that he was purchasing an absolute title, and that he always dealt with the property as if he had acquired an absolute estate. The decree of the Lower Court is therefore right, and this second appeal must be dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

KUNHAMMED (DEFENDANT No. 2), APPELLANT,

v.

NARAYANAN MUSSAD (PLAINTIFF), RESPONDENT.*

1888.
Sept. 6.
1889.
Feb. 11.

Landlord and tenant—Malabar kanam—Change in character of land—Passive acquiescence of landlord—Estoppel—Compensation for improvements by tenant.

Land was demised on kanam for wet cultivation. The demisee changed the character of the holding, by making various improvements which were held to be inconsistent with the purpose for which the land was demised. On a finding that the landlord had stood by while the character of the holding was being changed and had thereby caused a belief that the change had his approval :

Held, on second appeal, that the demisee was entitled to compensation for his improvements on redemption of the kanam. *Ramsden v. Dyson* (L.R., 1 H.L., 129) followed.

SECOND APPEAL against the decree of F. H. Wilkinson, District Judge of South Malabar, in appeal suit No. 496 of 1887, modifying the decree of O. Chandu Menon, Acting District Munsif of Shernad, in original suit No. 457 of 1886.

This was a suit by the plaintiff to evict the defendant from certain land demised by him on kanam to the defendant's father on 17th November 1888.

The plaintiff stated that the land demised was a "palliyal or two-crop paddy land," and the kanam deed provided for the use by

* Second Appeal No. 1151 of 1888.