APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Sadasiva Ayyar.

1918, February, 5, 6 and 12.

MUNIA GOUNDAN (THIRD DEFENDANT), APPELLANT,

v.

RAMASAMI CHETTY AND NINE OTHERS (PLAINTIFF AND DEFENDANTS NOS. 1, 2 AND 4 TO 10) RESPONDENTS.*

Limitation Act (IX of 1908), arts. 126, 144 and 148—Sale of equity of redemption by one of two mortgagors—Redemption by vendee—Possession of property by vendee for more than 12 years—Sale by the other co-mortgagor to another—Suit by latter to redeem his half-share—Suit, more than 12 years after first vendee took possession on redemption, whether barred.

The first defendant and his father G, mortgaged with possession the suit lands to the second defendant in 1892; in 1897 G sold the equity of redemption to the third defendant, who redeemed the lands and obtained possession in 1898. The first defendant sold his interest in the lands in 1910 to the plaintiff, who instituted a suit in 1912 to redeem his half-share in the property on payment of half the mortgage-debt. The third defendant pleaded that the suit was barred by limitation:

Held, that article 148 of the Limitation Act was not applicable to the case and the suit was barred by limitation, as the case fell within article 126.

Semble.—The suit was also barred under article 144.

Jai Kishen Joshi v. *Budhanand Joshi* (1916) I.L.R., 38 All., 138, *Bhaiji Sham Rao* v. *Hajimiya Mahomed* (1890) 14 Bom., L.R., 314, followed; and *Ramaswamy Ayyar* v. *Vanamamalai Ayyar* (1899) I.L.R., 23 Bom., 137 (F.B.); s.c. (1915) 26 I.C., 873, *Vasudeva Mudaly* v. *Srinivasa Pillay* (1907) I.L.R., 30 Mad., 426 (P.C.), explained.

SECOND APPEAL against the decree of V. S. NARAYANA AYYAR, the Temporary Subordinate Judge of Salem in Appeal No. 99 of 1915, preferred against the decree of G. R. SUBBARAYA AYYAR, the District Munsif of Dharmapuri, in Original Suit No. 702 of 1912.

The material facts appear from the judgment.

G. S. Ramachandra Ayyar and *E. Ramaswami Ayyar* for the appellant.

T. R. Ramachandara Ayyar and *T. R. Krishnaswami Ayyar* for the first respondent.

OLDFIELD, J. OLDFIELD, J.—The facts admitted or found are that first defendant and his father Gopal Rao, mortgaged their property to

* Second Appeal No. 1 of 1917.

second defendant with possession under Exhibit 1. Gopal Rao afterwards sold the equity of redemption, as though the property were his self-acquisition, to third defendant by Exhibit II. The lower appellate Court has found, and we accept its findings, that the property belonged to the family and the sale does not bind first defendant. After Gopal Rao's death, first defendant sold to plaintiff by Exhibit A and plaintiff now sues for possession of first defendant's share on payment of the appropriate proportion of the mortgage amount, which third defendant has paid. The question is whether the suit, filed on 26th August 1912, is in time. It will be if the article of Schedule I, Limitation Act, applicable is No. 148. It may be, if the article is No. 144 and third defendant's possession, which, it is not disputed, began in 1898, was not adverse to first defendant and plaintiff. It will not be if the article is No. 126.

It is simplest to disregard for the present the distinction between articles Nos. 144 and 126. The substantial question is then whether the suit is for redemption or for possession, subject no doubt to the satisfaction of third defendant's lien. It is brought in effect by one co-owner, represented by plaintiff, for recovery of mortgaged property redeemed by another co-owner and now in possession of his transferee, third defendant; and argument has turned on whether article No. 148 or No. 134 would apply to the case thus simplified. The question has not been dealt with by this Court. But the conclusion reached in Allahabad and Bombay is in favour of the latter. It was no doubt held in *Ashfaq Ahmad* v. *Wazir Ali*(1) that, when one co-heir of a mortgagor had redeemed the whole mortgage the suit against his representative was subject to article No. 148. But recently, when that decision was considered in *Jai Kishan Joshi* v. *Budhanand Joshi*(2) the question being whether article 134 should be applied against a transferee from a redeeming co-owner on the assumption that the latter had the equivalent of a mortgage right, one learned Judge held, with reference to the principle stated in section 95, Transfer of Property Act, that he was only a charge-holder and applied article No. 144 whilst the other concurred, observing with reference to the earlier decision that the possession of the charge-holder need not be regarded

(1) (1892) I.L.R., 14 All., 1. (2) (1916) I.L.R., 38 All., 138.

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as in all respects equivalent to that of a mortgagee. The view taken in *Ashfaq Ahmad* v. *Wazir Ali*(1) was not adopted in *Vasudev* v. *Balaji*(2) or in other cases decided by the Bombay High Court and referred to therein or in *Bhaiji Shamrao* v. *Hajimiya Mahomed*(3). The objections made to the reasoning in these authorities are that the Transfer of Property Act was not applicable to the facts, the mortgage in the later Allahabad case having been executed before it and the Act not being applicable to the Bombay Presidency at the time, and that the distinction between the positions of a mortgagee and a charge-holder or as he is called in the Bombay cases, a lienor, has been abrogated since the decision of the Privy Council in *Vasudeva Mudaly* v. *Srinivasa Pillay*(4). The first is unsubstantial, the principle involved not depending on the Act for its validity. The second was no doubt not noticed in the judgments in question. But it cannot affect the conclusion. For the Privy Council held only that a simple mortgage was to be treated as equivalent to a charge for the purpose of article No. 132, not that every charge was a mortgage for the purpose of article No. 134. And the argument is unsustainable, because third defendant's right, being equivalent only to that of Gopal Rao, is, as the cases referred to show, not based on the principle of subrogation recognized in section 101, Transfer of Property Act. For neither Gopal Rao nor third defendant became or could have become absolutely entitled to the property so far as first defendant's share was concerned. As *Danappa* v. *Yamnappa*(5) and other cases referred to in *Raushan Ali Khan Chowdhury* v. *Kali Mohan Moitra*(6) show the right is to contribution and is secured only by a lien. These considerations applied to the present case, decision must be that plaintiff's suit is not for redemption and is not subject to article No. 148.

The question is then between articles Nos. 126 and 144, the contention in connexion with the latter being that enquiry must be held to ascertain the date, at which third defendant's possession became adverse to first defendant and plaintiff. It is urged that the lower appellate Court has already dealt completely with the

(1) (1892) I.L.R., 14 All., 1.
(2) (1902) I.L.R., 26 Bom., 500.
(3) (1890) 14 Bom. L.R., 314.
(4) (1907) I.L.R., 30 Mad., 426 (P.C.).
(5) (1902) I.L.R., 26 Bom., 379.
(6) (1906) 4 C.L.J., 79.

matter in its reference to first defendant's alleged acquiescence; but that is only one aspect of it. The decision in *Bhavrao* v. *Rakhim*(1) has been referred to as negativing third defendant's right to an enquiry; but it is not clear that it can be applied to the facts in the case before us. To these facts article No. 126 is exactly applicable; and it was applied to similar facts in *Ramaswamy Ayyar* v. *Vanamamalai Ayyar*(2), the superfluity of any enquiry as to the character of defendant's possession being pointed out. The suit being subject to article No. 126 and having been filed over thirteen years after the possession of third defendant began, is out of time and must be dismissed with costs throughout, the District Munsif's decree being restored and the appeal being allowed.

SADASIVA AYYAR, J.—The third defendant is the appellant. The suit was for redemption of one-fourth share in a certain property half of which was mortgaged for Rs. 700 in 1892 to the second defendant by the first defendant and his father who owned the said half-share in equal moities of one-fourth and one-fourth. The plaintiff is the purchaser of the first defendant's one-fourth share. The other half share in the property belonged to one Narasayya but we are not concerned with that half share in this suit.

The first defendant's father and Narasayya sold the entire property to the third defendant and to another person (who transferred his rights afterwards to the third defendant) for Rs. 2,000. As regards Narasayya's half-share which was sold for Rs. 1,000, there is no dispute in this suit. As regards the other half share which the first defendant's father sold for the remaining Rs. 1,000, the first defendant's father is found to have had no right to sell the first defendant's one-fourth share out of that half-share. Thus the third defendant, so far as title is concerned, has the same only to the extent of three-fourths share. As there was a mortgage for Rs. 700 in 1892 on both the quarter shares which belonged to the first defendant, and to his father in favour of the second defendant and as half of that Rs. 700 or Rs. 350 is binding on the first defendant's one-fourth share now vested in the plaintiff, the plaintiff offers in the plaint to pay

(1) (1899) I.L.R., 23 Bom., 137 (F.B.); s.c. (1915) 26 I.C., 873.
(2) (1915) 26 I.C., 873.

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Rs. 350 and seeks to redeem the said one-fourth share on payment of the said Rs. 350.

As I said already, the first defendant's father sold away both the one-fourth shares in 1897. Though the second defendant was the original mortgagee under the mortgage of 1892, as the third defendant after his purchase in 1897 paid up in April 1898 the Rs. 700, mortgaging to the second defendant out of the sum of Rs. 1,000 (the price he paid to the first defendant's father for the half share) and is in possession of the half share from April 1898, this suit for redemption of one-fourth share is really directed against the third defendant.

Several defences to the suit were raised by the third defendant (the appellant before us), but I think it is necessary to consider only the defence of limitation. The plea of bar by limitation is based on the fact that from April 1898 the third defendant has been in adverse possession (claiming as full owner) till the date of suit (August 1912), that is, for more than fourteen years. Articles 126 and 144 of the Limitation Act are relied upon.

The District Munsif upheld the plea of limitation without mentioning in his judgment the article of the Limitation Act on which he relied. The Subordinate Judge on appeal held that the suit was not barred by limitation because the mortgage of 1892 for Rs. 700 was payable only in June 1902 which was within twelve years of the date of the plaint (August 1912). His judgment also does not refer to any of the articles of the Limitation Act. He gave a decree for redemption in favour of the plaintiff on payment of Rs. 350 and of half of the value of the improvements. (The claim for improvements even if the plaintiff was entitled to redeem was put forward by the third defendant on the ground that the plaintiff's vendors knew of the sale of 1897, that the third defendant redeemed and got into possession in April 1898 and that third defendant made improvements of large value to plaintiff's knowledge without objection on plaintiff's part.) The Subordinate Judge quotes from the District Munsif's judgment without dissent as follows :—

"He" (the plaintiff) "stood by when these," that is the improvements, "were made. He knew of the sale and of the third defendant's possession." Then the learned Subordinate Judge says: "*there is no dispute to the claim for compensation.*" But the claim

(that is, the amount due for the value of the improvements) "should be proved by the best evidence."

The Subordinate Judge therefore refused to accept the amount of Rs. 4,000 claimed by the third defendant as the value of the improvements and directed the issue of a commission by the lower Court to exactly ascertain such value before passing the final decree for the redemption of the one-fourth share.

As I said, it is necessary for the disposal of this appeal to consider only the question of limitation. I am clear in my opinion that article 126 of the Limitation Act applies to this case. That article provides a limitation period of twelve years for a suit by a Hindu governed by the Mitakshara law "to set aside his father's alienation of ancestral property," the period being calculated from "when the alienee takes possession of the property." It has been held under the analogous article 44 relating to a suit by a minor whose property was alienated by his guardian) that the expression "suit to set aside a transfer of property" includes a suit in which there is a prayer for consequential relief of possession: see *Annamalay Chettiar* v. *Pitchu Ayyar*(1). I am also clear that the article 126 which speaks of a suit "to set aside" the father's alienation of ancestral property denotes also a suit in which possession is claimed and does not only contemplate a mere declaratory suit: see Rustomjee's Limitation Act, page 326, quoting *Dev Raj* v. *Shiv Ram*(2). The present suit is by a person claiming from a Hindu (the first defendant) governed by the law of the Mitakshara to set aside the said Hindu's (first defendant's) father's alienation of ancestral property to the extent of the first defendant's share and for consequential relief of possession by redemption. The alienee (the third defendant) took possession of the property in April 1898 and, as more than twelve years had elapsed from that date before the date of suit, the suit is barred under this article. Mr. T. R. Ramachandra Ayyar for the respondent contended that the article 12[illegible] (first column) when it uses the words

"to set aside his father's alienation of ancestral property" means "to set aside his father's alienation of ancestral property *provided the alienation was made by the father alleging that it was ancestral property or at least without alleging that it was not ancestral property.*"

(1) (1905) I.L.R., 28 Mad., 122. (2) (1914) P.R. No. 70.

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I see no reason whatever to add any such words as those italicized by me to the first column of the article. Mr. Ramachandra Ayyar relied upon the decision of their Lordships of the Privy Council in *Balwant Singh* v. *R. Clancy*(1), to the effect that when an elder brother mortgages a property as if he was the sole owner and not as the manager of the family consisting of himself and his younger brother, the creditor is not entitled to prove that the younger brother's share was also bound by the mortgage as executed by the *de-facto* manager for necessary family purposes. In the first place, it is not easy to see what the above observation has to do with the interpretation of the article 126. Further, their Lordships clearly make a distinction between an alienation by an elder brother and an alienation by a father. They state at page 303:

"It need not hardly be said that Sheoroj Singh" (the alienor's elder brother) "was not an ancestor or a predecessor of Maharaj Singh" (the younger brother).

The Legislature and the Hindu law do make a distinction between an alienation by a father of ancestral property and that by any other person who was a mere manager.

The doctrine of right by birth in the son is wholly antiquated and inconvenient for modern times. The Privy Council have taken advantage of the texts relating to the father's power of alienation for antecedent debts to mitigate the inconvenience of that doctrine and the legislature has provided by a special article 126 for the perfection of the title of an alienee from the father when a Hindu son who wants to take advantage of the antiquated Mitakshara law seeks to set aside such an alienation. It is significant that the alienation under article 126 need *not* be for consideration. It is also significant that article 126 applies alike to an alienee with and to an alienee without notice: see *Bhavrao* v. *Rakhim*(2). The legislature has clearly fixed an overt and patent fact, namely, the taking of possession of the property by the alienee as the event from which the period has to be calculated so as to avoid as far as possible difficult questions as to notice.

Mr. Ramachandra Ayyar further argued that the words in the third column of article 126,

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(1) (1912) I.L.R., 34 All., 296, et seq.

(2) (1899) I.L.R., 23 Bom., 137, at p. 142 (F.B.); s.c. (1915) 26 I.C., 873.

"when the alienee takes possession of the property" means "when the alienee takes possession of the property *by the sole and unaided virtue and effect of father's alienation*" and that where the alienee gets possession by redeeming a previous usufructuary mortgage the date of such possession given by mortgagee will not form the starting point under the third column and so apply article 126. Here again I see no reason whatever to add to the plain language of the article. Supposing for instance the alienation by the father is made one year after a trespasser had deprived the father of his possession of the property and the alienee after his alienation sues the trespasser and gets into possession, can it be argued that the son can come in more than twelve years afterwards treating the alienee's possession as that of a mere co-sharer and treating article 126 as not applicable because the alienee had to sue the trespasser in order to get possession?

Assuming, however, that article 126 is not applicable, I think that the suit is barred also under article 144. In *Vasudev* v. *Balaji*(1) the facts were as follows:—

V and *G*, co-owners of a land, mortgaged it in 1872. *V* alone redeemed it in 1882 and obtained possession and he and his heirs asserted adverse and exclusive title to the whole and continued in possession till 1898. Then *G's* heirs brought a suit in 1898 for redemption of their half share. JENKINS, C.J., and CROWE, J., held that the co-owner who redeemed the whole of the mortgage was not a mortgagee and did not stand in the shoes of the mortgagee, that he was a mere charge holder, that a charge holder can assert and claim adverse possession and that after twelve years the charge could not be redeemed by the other co-sharer as the title by adverse possession became perfected. The learned Judges held that article 148 applied only to a suit against a mortgagee and not to a suit against a person who obtained a charge by paying up the mortgagee. In this connexion, it might be remarked that, under section 95 of Transfer of Property Act, one of several co-mortgagors who redeems the mortgaged property and obtains possession thereof does not himself become the mortgagee but is given only a charge on the share of the other co-sharers for the proportion of the expenses

(1) (1902) I.L.R., 26 Bom., 500.

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of redemption and of obtaining possession. In this case, it is clear on the proved documents and the facts found by the lower appellate Court that the third defendant when he purchased in 1897 had the animus to claim title as the sole owner of the equity of redemption and not merely to claim title to the first defendant's father's one-fourth share, and that he took possession in April 1898 with the *animus* to hold the whole half share against all the world and not as a mere co-sharer with the first defendant in that half share. That possession of immoveable property is notice to the whole world of the title under which possession is held, and that possession is prima facie adverse and exclusive are well known principles of law: see *Magu Brahma* v. *Bholi Dass*(1). Of course, a mortgagee or a co-sharer or a tenant who first obtains possession *as such* cannot without notice to the mortgagor or to the other co-sharers or to the landlord (as the case may be) claim to hold adversely, that is, by mere unilateral declaration of intention he could not convert his original possession into the adverse possession, but in this case the possession was obtained from the very beginning under an assertion of exclusive title.

The date fixed for the redemption in the mortgage of 1892 has no relevancy on the question of adverse possession as it is not a mortgagee who sets up adverse possession but a purchaser from one of the co-mortgagors: see Freeman on Co-tenancy, section 224, at pages 296 and 297.

In the result, I hold that the suit is clearly barred by limitation under article 126, and even if article 126 does not apply, under the general article 144 and I would therefore set aside the decree of the lower appellate Court and restore that of the District Munsif with costs payable by the plaintiff to the third defendant throughout.

K.R.

(1) (1913) 20 I.C., 195.