APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Ramesam.

RUKKU SHETTI AND OTHERS (PLAINTIFFS), APPELLANTS,

1925, March 24.

v.

T. RAMACHANDRAYA AND OTHERS (DEFENDANTS), RESPONDENTS.*

Limitation Act (*IX of* 1908), *art.* 134—*Mortgagee—Sale by mortgagee to another for value—Vendee put in possession on sale—Suit by mortgagor for redemption, more than* 12 *years after sale—Suit, whether barred under article* 134—*"good faith" in purchaser, whether necessary for application of article* 134—*Limitation Acts of* 1859, 1871, 1877 *and* 1908 *compared.*

Where a mortgagee in possession transfers the property under a sale-deed for consideration to another and puts him in possession, and what was bargained for by the transferee was an absolute sale, though he knew that the transferor had only a mortgagee's interest, on a suit instituted by the mortgagor for redemption more than 12 years from the date of sale,

Held, that article 134 of the Limitation Act (IX of 1908), applied to the case, even though the vendee was not a transferee in good faith but knew that the vendor had only a mortgagee's interest; and that the suit was barred by limitation.

The decision of the Privy Council in *Subbaiya Pandaram* v. *Mahammad Mustapha Marcayar,* (1923) I.L.R., 46 Mad., 751 (P.C.), applying article 134 to transferees from trustees, is also applicable to transferees from mortgagees mentioned in the same article.

Kannuswami Thanjirayan v. *Muthusami Pillai,* (1917) M.W.N., 5, and *Muthaya Shetti* v. *Kanthappa Shetti,* (1918) 34 M.L.J., 431, followed.

APPEAL against the decree of K. GOPALAN NAYAR, the Subordinate Judge of South Kanara, in Original Suit No. 21 of 1919.

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* Appeal Suit No. 182 of 1921.

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The material facts appear from the judgment of RAMESAM, J.

C. V. Anantakrishna Ayyar for appellants.

B. Sitarama Rao for respondents.

JUDGMENT.

SPENCER, J.

SPENCER, J.—I agree with RAMESAM, J. I am unable to regard the omission of the words "in good faith," which appeared in the corresponding articles of the Limitation Acts of 1859 and 1871, as being without any significance, so as to throw the onus on a purchaser of the full interest from a mortgagee to prove that he acted in good faith before he can plead limitation. The same article 134 governs both properties conveyed in trust and properties mortgaged, when they have been transferred afterwards for valuable consideration. In the case of trust property the Privy Council has decided in *Subbaiya Pandaram* v. *Mahammad Mustapha Marcayar*(1) that a purchaser for valuable consideration with notice of the trust can under article 134 plead 12 years' adverse possession as a defence to a suit brought by the trustee. I see no reason to suppose that trusts were intended to be put in a worse position than mortgages as regards recovery of alienated property. The only distinction between the positions of a purchaser from a mortgagee and a purchaser from a trustee, is that a mortgagee as such has the mortgage interest, which is assignable, in the property, whereas a trustee as such has no transferable interest. This distinction is pointed out in *Subbaiya Pandaram* v. *Mahamad Musthapha Maracayar*(2), but nevertheless it was held in that case that a transferee of trust property need not prove good faith before taking advantage of article 134, and the

(1) (1923) I.L.R., 46 Mad., 751 (P.C.). (2) (1917) 32 M.L.J., 85.

decision was confirmed by the Privy Council in *Subbaiya Pandaram* v. *Mahammad Mustapha Marcayar*(1). My judgment in *Kannuswami Thanjirayan* v. *Muthusami Pillai*(2) was quoted with approval in *Muthaya Shetti* v. *Kanthappa Shetti*(3) and we have not been shown any reason for doubting its correctness beyond a foot-note at page 516 of Rustomji's Commentary on the Law of Limitation (Third Edition). The view of the majority of the Full Bench, which decided *Seeti Kutti* v. *Kunhi Pathumma*(4), that article 134 does not apply to cases where the transferee from a mortgagee does not get possession of the property will not help the appellants before us who are out of possession and ask for delivery of possession. In every case where article 134 is set up as a defence by a transferee from a mortgagee it is material to see what interest the mortgagee purported to transfer to him [vide *Rego* v. *Abbu Beari*(5), *Muthaya Shetti* v. *Kanthappa Shetti*(3), *Veerabadra Tevan* v. *Veerappa Tevan*(6) and *Baluswamy Iyer* v. *Venkitaswamy Naicken*(7)]. Exhibit II, dated July 16th, 1878, purports to be an absolute sale of the properties in A schedule and not a mere assignment of a mortgage interest in them. I think that both seller and purchaser must have honestly believed that the entire interest of the owner was being transferred by this document, seeing that if Exhibit I, dated January 12th, 1872, were to be treated as a sale with an option for re-purchase after four years and before six years, the date for repurchase had passed and the property had become vested entirely in the purchaser on January 12th, 1878. The present suit was rightly found by the Subordinate

(1) (1923) I.L.R., 46 Mad., 751 (P.C.).
(2) (1917) M.W.N., 5.
(3) (1918) 34 M.L.J., 431.
(4) (1917) I.L.R., 40 Mad., 1040 (F.B.).
(5) (1898) I.L.R., 21 Mad., 151.
(6) (1912) 15 I.C., 609.
(7) (1917) 32 M.L.J., 24.

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Judge to be time-barred and the appeal must be dismissed with costs.

RAMESAM, J.—This appeal arises out of a suit for redemption of a mortgage. The plaintiffs' predecessors in title, namely, one Parameshwari Hengsu and others, mortgaged such of the properties as are comprised in Schedule A and the properties in Schedule A-1 to one Manjunatha Naika by Exhibit I, dated the 12th January 1872, for Rs. 14,000. The mortgagee conveyed the properties in Schedule A by Exhibit II, dated the 16th July 1878, to one Venkappa the ancestor of the defendants and the defendants obtained them for their share at a family partition. The mortgagors assigned the equity of redemption in the mortgaged properties by Exhibit B, dated the 12th September 1906, to one Booba Shetti from whom it devolved on the plaintiffs under the Aliyasantana Law. We are not now concerned with the properties in Schedule A-1 as to which the interest of the mortgagee also has come to the plaintiff's hands by various transactions. The Subordinate Judge dismissed the suit. In appeal the claim for the properties in Schedule A-2 has not been pressed and no reference need be made to them and we are only concerned with the properties in Schedule A. Two points have been argued by the learned vakil for the appellants.

(1) Whether Exhibit I is a mortgage by conditional sale or a sale with an agreement for re-purchase?

(2) Assuming it is a mortgage, whether the suit is barred by limitation under article 134 of the Limitation Act?

In the view I take of the second question, I think it is unnecessary to discuss the first. For the purposes of discussion I will assume in favour of the appellant that

Exhibit I ought to be construed only as a mortgage by conditional sale. The question now is whether, the properties having been sold by Exhibit II, article 134 of the Limitation Act does not apply.

Mr. Anantakrishna Ayyar, the learned vakil for the appellants, contends that article 134 of the Limitation Act can only apply where the transferee from the mortgagee took the properties in the belief that the transferor was absolutely entitled to them. That this was the law under the corresponding articles of the Acts of 1859 and 1871 admits of no doubt. See *Radanath Doss* v. *Gisborne*(1). But the words "in good faith" which appeared in that article have been omitted in the Acts of 1877 and of 1908. The question is, whether it can be contended that under the Acts of 1877 and of 1908 the knowledge on the part of the purchaser of the true nature of the interest of the transferor prevents the application of article 134. Mr. Anantakrishna Ayyar relied on *Singaram Chettiar* v. *Kalyanasundaram Pillai*(2). Though the remarks at page 738 of that decision are somewhat in favour of the appellant, the point was not actually decided in that case. The next decision relied on by him is *Tholasinga Mudali* v. *Nagalinga Chetty*(3) where the *obiter dictum* in *Singaram Chettiar* v. *Kalyanasundaram Pillai*(2) was followed by SADASIVA AYYAR and NAPIER, JJ. The next case relied on by him is the decision in *Muthaya Shetti* v. *Kanthappa Shetti*(4). In that case, it is observed,

"If the transferee bargained for, and believed he is bargaining only for, the interest of the mortgagee, he cannot acquire title as the absolute owner of the property. After all, article 134 is only a branch of the law of prescription, and the question to be determined would be what it is that the purchaser prescribed

(1) (1871) 14 M.I.A., 1.
(2) (1914) M.W.N., 735.
(3) (1916) 1 M.W.N., 28.
(4) (1918) 34 M.L.J., 431.

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for. The fact that he knew that his vendor had only a mortgage right would not be conclusive on this question. The real test would be, did he ask for and obtain an absolute right in the property and believe himself that he was having an absolute interest in it? In *Pandu* v. *Vithu*(1), that is the test that was suggested."

I do not see how these remarks of SESHAGIRI AYYAR, J., help the appellants. If the transferee purported to purchase the absolute interest even though he knew that the transferor had only the interest of a mortgagee, the article would still apply according to this view. BAKEWELL, J., added that

"If the title adduced by the vendor and the deed of transfer to the purchaser are consistent with an intention to transfer an absolute interest, the burden will lie upon the plaintiff to show that the circumstances of the transfer negative such an intention."

He made no reference to the case of *Singaram Chettiar* v. *Kalyanasundaram Pillai*(2) unlike SESHAGIRI AYYAR, J. The finding shows that the deed of mortgage in that case was styled a sale deed though construed by the High Court as a mortgage by conditional sale. The period for redemption fixed in it had expired when the deed of transfer was executed and it was said that the vendee would naturally suppose that he was purchasing an absolute tisle. The finding accordingly was that the transferor intended to transfer an absolute interest and that the intention of the parties was that there should be an absolute transfer of title of the property. This finding was accepted by the High Court and the Second Appeal was dismissed. I do not think that this case really supports the appellants.

Mr. Sitarama Rao, for the respondent, relied on the case *Kannuswami Thanjirayan* v. *Muthusami Pillai*(3)

(1) (1895) I.L.R., 19 Bom., 140. (2) (1914) M.W.N., 735.
(3) (1917) M.W.N., 5.

in which my learned brother took part. He pointed out that the decision in *Veerabadra Tevan* v. *Veerappa Tevan*(1) was really a case of an assignment of the mortgagee's interest. He also referred to 38 Madras, 1064, which was a case of a transferee from a trustee. He agreed with the decision in *Pandu* v. *Vithu*(2) and differed from CHAMIER, J.'s opinion in *Ghasi Ram* v. *Kishna*(3) and held that the purchaser need not prove that he purchased in good faith, that is, without constructive notice of the restricted nature of the vendor's title. In *Baluswamy Iyer* v. *Venkitaswami Naicken*(4) it was held, in the case of a transferee from a trustee, that knowledge of the limited nature of the transferor's title will not disentitle the transferee from taking advantage of article 134 of the Limitation Act. In the case of trusts this is the view also adopted in *Subbaiya Pandaram* v. *Mahamad Musthapa Maracayar*(5) which was afterwards affirmed by the Privy Council in *Subbaiya Pandaram* v. *Mahammad Mustapha Marcayar*(6). These decisions were referred to by the learned Judges who decided *Muthaya Shetti* v. *Kanthappa Shetti* (7) as consistent with their view. To sum up, the possible cases that may arise in a matter of this sort are four—

(1) Where the transfer on its face purports to be an assignment of the mortgagee's interest only: In such a case article 134 can never apply.

(2) Where the transfer purported to be a sale deed but as a matter of fact only an assignment of the mortgagee's interest was all that was bargained for: It may be conceded that in such a case also article 134 does not apply. And this is all that was decided in *Muthaya Shetti* v. *Kanthappa Shetti*(7).

(1) (1912) 15 I.C., 609.
(2) (1895) I.L.R., 19 Bom., 140.
(3) (1915) 30 I.C., 564.
(4) (1917) 32 M.L.J., 24.
(5) (1917) 32 M.L.J., 85.
(6) (1923) I.L.R., 46 Mad., 751 (P.C.).
(7) (1918) 34 M.L.J., 431.

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(3) Where the deed of transfer is a sale-deed and what was bargained for by the transferee is also an absolute sale though he knew that the transferor has only a mortgagee's interest. In such a case, though under the Acts of 1859 and 1871, article 134 may not apply, I think under the Acts of 1877 and 1908 it applies. This is also the view taken by the Calcutta High Court in *Ram Kanai Ghosh* v. *Rai Sri Sri Hari Narayana Singh Deo Bahadur*(1), which was also a case of a trustee. Seeing that the Privy Council have come to the same conclusion in *Subbaiya Pandaram* v. *Mahammad Mustaphu Marcayar*(2), I do not think any value can be attached to the dissent from the decision in *Ram Kanai Ghosh* v. *Raj Sri Sri Hari Narayana Singh Deo Bahadur*(1) in *Singaram Chettiar* v. *Kalyanasundarama Pillai* (3).

(4) Where the transfer is in the form of a sale deed and the transferee bargained for an absolute interest and acted *bona fide* throughout. To such a case there is no doubt that article 134 will always apply. Only the third case is the one in respect of which there seems to be some difference of opinion. But it seems to me that the preponderance of opinion in this High Court, in Bombay, in Calcutta and in the Privy Council is in favour of the view that article 134 applies. In the present case, though we may now construe Exhibit I to be a deed of mortgage, it is impossible to say that the purchaser under Exhibit II acted otherwise than *bona fide*. According to the terms of Exhibit I, the debt was to be paid off after the 12th of January 1876, and before the 12th of January 1878, and in default of payment on the latter date, it was to operate as an absolute sale. Under the law as it then stood, the mortgagee might have honestly thought that he obtained an absolute title

(1) (1905) 2 C.L.J., 546. (2) (1923) I.L.R., 46 Mad., 751 (P.C.).
(3) (1914) M.W.N., 735.

by the default of payment within the stipulated date and the transferee might have also similarly thought that the transferor had an absolute title. That both were acting perfectly *bona fide* is clear from the recitals in Exhibit II. It must be remembered that the Transfer of Property Act had not been enacted in 1878. The Privy Council held in *Pattabhiramier* v. *Vencatarow Naicken*(1) that the principle that a mortgage is for ever redeemable was not known to the ancient law of India. It is true that in a later case, *Thumbusawmy Moodelly* v *Hoosain Rowthen*(2), Their Lordships indicated a different rule in the case of mortgages after the year 1858. But the parties to Exhibit II might well have thought that in the case of mortgage documents between 1871 and 1875 the decision in *Pattabhiramier* v. *Vencatarow Naicken*(1) applied. It is true that the Madras High Court repelled such a contention, but this was long after 1878. In the above remarks I assumed that the parties to Exhibit II knew that the proper construction of Exhibit I is that it was a mortgage by conditional sale. But even this is extremely doubtful. Whatever view we may now take of Exhibit I, there is nothing to show that the parties to Exhibit II did not honestly suppose it to be a deed of absolute sale which is what it purported to be. I think the present case is a case where the transferee acted *bona fide* according to the strictest meaning of the term, and article 134 applies. There is nothing to show that he did not pay the full value, according to the prices that ruled in 1878. I think the appeal fails on this ground and ought to be dismissed with costs.

K.R.

(1) (1870) 13 M.I.A., 560. (2) (1875) I.L.R., 1 Mad., 1 (P.C.).