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STRAIGHT, J.—The only point put forward as the substantial question of law involved, which would entitle the petitioner to appeal to Her Majesty in Council, is that taken by the first ground of the memorandum of appeal. I am of opinon that, rules having been framed under the Civil Procedure Code in that behalf, this Court's judgments are not governed by s. 574 of the Civil Procedure Code, but by these rules, and therefore I do not think the objection relied on by the petitioner raises any substantial question of law. The application must be refused with costs.

OLDFIELD, J.—I entirely concur in the opinion of the learned Chief Justice.

BRODHURST, J.—I concur with the learned Chief Justice that there is no ground for granting the application for leave to appeal to Her Majesty in Council, and I would refuse the certificate, and dismiss the petition with costs.

TYRRELL, J.—I concur.

## APPELLATE CIVIL.

1886
*November* 16.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.*

BHAGWAN SAHAI (DEFENDANT) *v.* BHAGWAN DIN AND OTHERS (PLAINTIFFS)*

*Mortgage—Sale of mortgagee's rights and interests for the recovery of arrears of revenue—Suit for redemption—Act XV of* 1877 *(Limitation Act), sch.* ii, *No.* 134—*Regulation XI of* 1822, *s.* 29—*Regulation XVII of* 1806.

It was not intended that property which would pass on the sale by a mortgagee of his interest should come within the scope of art. 134, schedule ii of the Limitation Act (XV of 1877). That article was intended to protect, after the expiration of twelve years from the date of a purchase, a person who, happening to purchase from a mortgagee, had reasonable grounds for believing, and did believe, that his vendor had the power to convey and was conveying to him an absolute interest, and not merely the interest of a mortgagee. *Radanath Doss* v. *Gisborne and Co.* (1), *Piarey Lal* v. *Saliga* (2), and *Kamal Singh* v. *Batul Fatima* (3), referred to.

Contemporaneously with the execution of a registered deed of sale of zamindari property in 1835 for Rs. 4,000, the vendee executed a deed in favour of the

* First Appeal No. 177 of 1885, from a decree of Syed Farid-ud-din Ahmad, Subordinate Judge of Cawnpore, dated the 2nd August, 1885.

(1) 14 Moo I. A. 1. (2) I. L. R., 2 All. 394.
(3) I. L. R., 2 All. 460.

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vendors, which also was registered, and by which he agreed that if within ten years the vendors should pay Rs. 4,000 in a lump sum without interest, he would accept the same and cancel the sale, and that he should be in possession during that period. This transaction admittedly amounted to a mortgage by conditional sale. The mortgagee remained in possession, and his name was entered as that of proprietor in the Collector's register, in which no allusion was made to a mortgage. In 1840 his rights in this property were sold by auction for arrears of Government revenue due by him on account of other land, and apparently no notice was given by any one at or prior to the sale that it was the mortgagee's interest only which was about to be or was being sold. The property was purchased for Rs. 3,000 by *S*, who took possession, and in 1845 sold it for Rs. 3,000 to *T*, who took possession and in 1847 sold it for the same sum to *C*. On the occasion or each transfer, the name of the transferee was entered in the Collector's register as that of proprietor. No application for foreclosure was made at any time. In 1885, the representatives of the mortgagors brought a suit against the representative of *C* for redemption of the mortgage, and for mesne profits. The defendant pleaded (i) that the suit was barred by limitation under art. 134, sch. ii, of Act XV of 1877, (ii) that the several transferees were innocent purchasers for valuable consideration without notice, who had purchased in each case from the person who was, with the consent, express or implied, of the persons for the time being interested the ostensible owner, and had in each case, prior to the purchase, taken reasonable care to ascertain that the transferor had power to make the transfer, and had acted in good faith.

*Held* that art. 134 of the Limitation Act did not apply to the case, inasmuch as that article referred only to persons purchasing what was *de facto* a mortgage, having reasonable grounds for the belief, and believing that it was an absolute title; and that, having regard to s. 29 of Regulation XI of 1822, to the presumption that the several transferees knew the law and made inquiries as to the interest they were purchasing, and examined the register in which the deed constituting the transaction of 1835 a mortgage was registered, and also having regard to the fact that Rs. 3,000 only were paid as purchase-money in each case, and to the circumstance that it was doubtful whether a purchaser at a formal auction-sale such as that in question could be said to have purchased without notice an absolute interest from the mortgagee, it must be inferred that the transferees knew, or might, or ought to have known, unless they wilfully abstained from inquiry, that the interest which they respectively were purchasing was merely that of a mortgagee.

*Sobhag Chand Gulab Chand* v. *Bhai Chand* (1) referred to.

*Held* that as by Regulation XVII of 1806 mortgagors in such a case as the present were entitled to redeem within sixty years, the plaintiffs were entitled to a decree for redemption.

The facts of this case are stated in the judgment of the Court.

The Hon. *T. Conlan*, Mr. *Habibullah*, and the Hon. Pandit *Ajudhia Nath*, for the appellant.

(1) I. L. R., 6 Bom. 193.

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Pandit *Bishambar Nath*, Munshi *Hanuman Prasad*, and Lala *Lokhu Lal*, for the respondents.

EDGE, C. J., and TYRRELL, J.—This is an appeal by Bhagwan Sahai, one of the defendants in the Court below, from the judgment of the Subordinate Judge of Cawnpore, dated the 2nd August, 1885, by which he decreed the claim of the plaintiffs, the now respondents, for possession of the property in suit on their paying to the defendant, the now appellant, Rs. 4,000, principal mortgage-consideration. The Subordinate Judge ordered that the parties should bear their respective costs. From this judgment the plaintiffs have not, nor have the defendants, other than Bhagwan Sahai, appealed. The plaintiffs' claim in the action was for the redemption of an alleged mortgage and for mesne profits; and their case was, that Alam Singh, Chandi Singh, Bhawani Din, Manna Singh, Durjan Singh, Ghasi Singh, Siva Din, Ishri Singh, Pranu, Dina, and Gulam, sold the entire 16 annas zamindari interest in mauza Haribaspur, pargana Ghatampur, zila Cawnpore, to one Ganga Din, for the sum of Rs. 4,000, by executing a sale-deed in his favour on the 20th February, 1835, and causing its registration on the following day. The execution and registration of the sale-deed were admitted. The plaintiffs also alleged that Ganga Din contemporaneously with the execution of the sale-deed executed a deed in favour of the vendors, which we shall refer to as the "contemporaneous deed," by which he, amongst other things, agreed that if the vendors should, within ten years from the 20th February, 1835, pay Rs. 4,000 in a lump sum and without interest, he would accept the same and cancel the sale, and that he should be in possession during that period. The fact that Ganga Din had contemporaneously with the execution of the sale-deed executed the "contemporaneous deed" in question, a copy of which appears at page 12 of the appellant's book, was not contested on behalf of the appellant before us.

The plaintiffs contended that the sale was a conditional sale or a mortgage by conditional sale. The correctness of this contention was admitted on behalf of the appellant. The plaintiffs also alleged that Ganga Din went into possession as mortgagee, and subsequently in 1840, the right of Ganga Din "as mortgagee" in mauza Haribaspur was sold by auction for arrears of revenue due by him in

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respect of mauza Sumerpur, zila Banda, to one Sukh Din, who took possession of the property in suit; and that the fact of the property being subject to the mortgage was proclaimed at the auction-sale. It was common ground that from 1835 until Sukh Din's name was substituted in the register, Ganga Din appeared as the proprietor in the Collector's register, in which no allusion was made to a mortgage. The appellant contended that at or prior to the auction-sale no notice was given that the property was subject to a mortgage, or that Ganga Din's rights and interests were those only of a mortgagee, or that Ganga Din was anything else than the proprietor, which, so far as the Collector's register was concerned, he appeared to be, and that Sukh Din was a purchaser for valuable consideration and without notice of the mortgage. It was also common ground that in 1845 Sukh Din sold the property for Rs. 3,000 to one Thakur Prasad, who took possession, and two years subsequently sold it for Rs. 3,000 to one Husain Ali, who, in 1852, sold it for Rs. 3,000 to one Sheo Charan, deceased, who was succeeded by the appellant as his son and heir, and that the appellant is in possession; and that on the occasion of each transfer the name of the transferee was entered in the Collector's register as that of the proprietor. It was alleged by the respondents that at the time of each transfer by sale a notice on behalf of those claiming the equity of redemption in the mortgaged premises was given to each purchaser, including Sukh Din. This was denied by the appellant. It was also common ground that no application for foreclosure had been made. The plaintiffs—Bhagwan Din, Kampta, Mathura, Lochi, Bhairon Singh, Prayag, Gulab, Bhawani Din, Manna Singh, Ratan, Hira Lal, Badalu, Puran, Ganga, Anganu, Lalman, and Lala—are the representatives of the vendors-mortgagors. The plaintiffs Durga Prasad and Madho Prasad, eight days before the institution of this suit purchased from the other plaintiffs an 8 annas 7½ pies and 4 krants share of the interest (if any) which such other plaintiffs had or alleged they had in the entire 16 annas zamindari interests of mauza Haribaspur. Musammat Mathura, one of the defendants below, is the daughter and heiress of Ganga Din. She admitted the plaintiffs' claim. The defendants, Jaur and Khushal, who were heirs of Siva Din, one of the vendors-mortgagors, party to the sale-deed of

1885, did not join in the suit. It has not been proved that any one gave notice at, or prior to, the auction-sale that the property was mortgaged or that it was the mortgagee's interest only which was about to be, or was being, sold. It was contended on behalf of the appellant, and denied on behalf of the respondents, that the suit was barred by art. 134, sch. ii of the Limitation Act,—Act XV of 1877—that the agreement contained in the "contemporaneous deed" had been abandoned; and that Sukh Din, Thakur Prasad, Husain Ali, and Sheo Charan, were respectively innocent purchasers for valuable consideration without notice, who had purchased in each case from the person who was, with the consent, express or implied, of the persons for the time being interested, the ostensible owner of the property; that the transferee in each case had, prior to his purchase, taken reasonable care to ascertain that his transferor had power to make the transfer, and had acted in good faith.

The appellant relied upon the cases of *Piarey Lal* v. *Saliga* (1), and the case of *Kamal Singh* v. *Batul Fatima* (2). It is sufficient to say that, holding the views which we do of the facts of the present case, the cases cited do not appear to us to be authorities on the points of law which we have to decide.

These contentions, which involve issues of law and of fact, we shall deal with in their order. As to the question of limitation we find that in the case of *Radanath Doss* v. *Gisborne & Co.* (3) their Lordships of the Privy Council had under their consideration s. 5 of Act XIV of 1859, which, with the exception that it contained the words "*bonâ fide*" and "purchaser," which do not appear in art. 134, sch. ii of the Limitation Act, 1877, was practically the same as art. 134 above referred to. Their Lordships held there that a defendant, in order to claim the benefit of s. 5 of the Act of 1859, had to show three things:—"*First*, that he is a purchaser according to the proper meaning of that term; *second*, that he is a *bonâ fide* purchaser; and *third*, that he is a purchaser for valuable consideration." They say further:—"Now, what is the meaning of the term 'purchaser' in this section? It cannot be a person who purchases a mortgage as a mortgage, because

(1) I. L. R., 2 All. 394. (2) I. L. R., 2 All. 460.
(3) 14 Moo. I. I. A. 1.

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that would be merely equivalent to an assignment of a mortgage; it would be the case of a person taking a mortgage with a clear and distinct understanding that it was nothing more than a mortgage. It, therefore, must mean, in their Lordships' opinion, some person who purchases that which *de facto* is a mortgage upon a representation made to him, and in the full belief, that it is not a mortgage, but an absolute title." Can the omission of the word "purchase" from art. 134 cause any essential difference in this respect between the construction which we should place upon art. 134? We think not. In our opinion it could not have been intended that property which would pass on the sale by the mortgagee of his interest, should come within the meaning of art. 134. That article was, we believe, intended to protect, after the expiration of twelve years from the date of a purchase, a person who, happening to purchase from a mortgagee, had reasonable grounds for believing, and did believe, that his vendor, who professed by the conveyance to convey, had the power to convey, and was conveying to him, an absolute interest and not merely the interest of a mortgagee. Otherwise it is difficult to conceive why sixty years should be the period of limitation under art. 148, and twelve years the period under art. 134. Under art. 148 the term "mortgagee," having regard to the sixty years' period of limitation, must be held to include an assignee of a mortgage. Construing as we do art. 134, we come to the conclusion on the facts as we find them, that art. 134 does not apply in this case. By s. 29 of Regulation XI of 1822, it is provided that in "cases in which any land belonging to a defaulter or his surety may be sold for the recovery of an arrear of revenue, not being the land on account of which the arrear may have accrued, then whether the said land sold be *malguzari* or *lakhiraj*, the purchaser shall only be held to have acquired the rights, interests, and title possessed by the said defaulter or surety, in like manner as if the land had been sold by private sale or under a decree of Court in liquidation of a private debt." Consequently the interest of Ganga Din, which was sold to Sukh Din at the auction, was that of a mortgagee. Further, Sukh Din, the auction-purchaser, who must be presumed to have known the law, must also be presumed to have made inquiries as to the interest which Ganga Din had in the property, unless he

wilfully shut his eyes and abstained from all reasonable inquiry. An inquiry at the auction-sale must have disclosed what Ganga Din's interest was; and although Ganga Din appeared in the Land Register as proprietor, still an examination of the local Registrar's books would have disclosed the fact that the "contemporaneous deed," which constituted the transaction of 1835 a mortgage transaction, had been registered, which we find it had been within a few hours of the execution and registration of the sale-deed. Besides this, it is open to doubt whether a person who purchased at a formal auction-sale such as that in question, could be said to have purchased without notice an absolute interest from the mortgagee—see the case in the Privy Council above referred to and the judgments in *Sobhag Chand Gulab Chand* v. *Bhai Chand* (1). We also draw an inference from the fact that Sukh Din paid only Rs. 3,000 for the interest that he purchased, that he must have known that he was purchasing merely the mortgagee's interest in a property liable to be redeemed at any moment. It is practically inconceivable that Thakur Prasad who purchased in 1845, Husain Ali who purchased two years later, or Sheo Charan who purchased in 1852, made no reasonable inquiry as to Sukh Din's title or omitted to examine the register to ascertain whether or not any incumbrances had been registered affecting the property which they were buying; and it is to be noticed in each of the cases that the purchase-money was Rs. 3,000. We come to the conclusion that Sukh Din, Thakur Prasad, Husain Ali, and Sheo Charan knew, or might, or ought to, have known, unless they wilfully abstained from inquiring, that the interest which they respectively were purchasing was that of a mortgagee merely.

There is no evidence that the mortgagors or their representatives intended to abandon, or did in fact abandon, their rights, or allowed any one to believe that they had abandoned them. On the contrary, we find it proved that Chedi Din, on behalf of himself and his co-sharers in the equity of redemption, from time to time took such steps as a needy man acting for needy co-sharers had it in his power to take, to assert his and their right to the equity of redemption. As to the other points raised by the appellant, we, consistently with the views which we have already expressed on the

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facts, hold that Sukh Din, Thakur Prasad, Husain Ali, and Sheo Charan, were not innocent purchasers without notice; that if they were not aware of the interest which they respectively purchased as we believe they must have been, they respectively took no reasonable care to ascertain what their respective vendors' titles were, and that if they assumed to purchase more than a mortgagee's interest they did not act in good faith. As by Regulation XVII of 1806 mortgagors in such a case as the present were entitled to redeem within sixty years, we hold that the respondents were entitled to redeem. We dismiss this appeal with costs, and as the respondents have not appealed from the judgment or order below, the respondents have the opportunity of redeeming on the terms decreed.

*Appeal dismissed.*

## FULL BENCH.

1886
*November* 17.

*Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst, and Mr. Justice Tyrrell.*

MUHAMMAD SULEMAN KHAN AND OTHERS (APPLICANTS) *v.* FATIMA (OPPOSITE PARTY).*

*Stat. 24 and 25 Vic., c. 104, s. 15—Revision of judicial proceedings—Jurisdiction of High Court—Civil Procedure Code, s. 622.*

*Held* by EDGE, C. J., and OLDFIELD and BRODHURST, JJ., that under s. 15 of 24 and 25 Vic., c. 104, it is competent to the High Court, in the exercise of its power of superintendence, to direct a Subordinate Court to do its duty or to abstain from taking action in matters of which it has no cognizance; but the High Court is not competent, in the exercise of this authority, to interfere with and set right the orders of a Subordinate Court on the ground that the order of the Subordinate Court has proceeded on an error of law or an error of fact. The High Court's power to direct a Subordinate Judge to do his duty is not limited to cases in which such Judge declines to hear or determine a suit or application within his jurisdiction.

*Held* by STRAIGHT and TYRRELL, JJ., that the word "superintendence" used in s. 15 of the Charter Act contemplated and now includes powers of a judicial or *quasi*-judicial character, apart from those conferred on the Court by s. 622 of the Civil Procedure Code; but that the last mentioned provision may properly be accepted as indicating the extent to which the Court should ordinarily interfere with the findings of such subordinate tribunals as are invested with exclusive jurisdiction to try and determine all questions of law and fact arising in suits within their exclusive cognizance, and in which their decisions are declared by law to be final.

* Misc. Application No 242 of 1885.