FULL BENCH.

1898
June 30.

Before Mr. Justice Blair, Mr. Justice Banerji, and Mr. Justice Aikman.

BEHARI LAL AND OTHERS (DEFENDANTS) *v.* MUHAMMAD MUTTAKI (PLAINTIFF).*

Act No. XV of 1877 *(Indian Limitation Act) Sch. ii Arts.* 134, 144—*Trust - Mortgage—Limitation—Suit by trustee to set aside mortgages of trust property made by his predecessor in office.*

A *sajjada nashin* in possession of certain *waqf* property during the years 1864 to 1869 executed various mortgages of portions of the *waqf* property, professing to do so in his capacity of *sajjada nashin.* The mortgagor died in February 1891, and on the 6th of April 1891, was succeeded by his son as *sajjada nashin.* On the 25th of November, 1893, the son brought a suit to recover possession of the mortgaged property, of which the mortgagees were in possession, on the ground that the mortgages were in violation of the trust and thereof invalid.

Held by the Court that the suit was barred by limitation.

Per BLAIR, J.—Whether or not art. 134 of the second schedule to the Indian Limitation Act, 1877, applies to the case is immaterial, if art. 134 does not apply the suit would be barred by art. 144 of the same schedule, limitation commencing to run against the trustee from the dates of the mortgagees obtaining possession under their respective mortgages. *Nilmony Singh* v. *Jagabandhu Roy* (1), *Yesu Ramji Kalnath* v. *Balkrishna Lakshman* (2), *Bejoy Chunder Banerjee* v. *Kally Prosonno Mookerjee* (3), and *Madhava* v. *Narayana* (4), referred to.

Per BANERJI, J.—The suit is barred by art. 134 of the second schedule to the Indian Limitation Act, 1877, which is as much applicable to a suit against a mortgagee for value from a trustee as to a suit against a person to whom the trustee has sold trust property for value. *Gobind Nath Roy Bahadoor* v. *Ranee Luchmee Koomaree* (5), *Yesu Ramji Kalnath* v. *Balkrishna Lakshman* (2), *Maluji* v. *Fakir Chand* (6), and *Nilmony Singh* v. *Jagabandhu Roy* (1), referred to.

Per AIKMAN, J.—The term "purchased" as used in art. 134 of the second schedule cannot be taken as including "mortgaged," but art. 144 would apply and be a bar to the suit.

THE facts of the case sufficiently appear from the judgments.

Munshi *Haribans Sahai,* for the appellants.

Mr. *Amiruddin,* for the respondent.

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* Second appeal No. 927 of 1895, from a decree of Maulvi Muhammad Anwar Husain Khan, Subordinate Judge of Farrukhabad, dated the 6th August 1895, reversing a decree, Munshi Bakhtawar Lal, Munsif of Farrukhabad, dated the 26th September 1894.

(1) I. L. R., 23 Calc., 536.
(2) I. L. R., 15 Bom., 583.
(3) I. L. R., 4 Calc., 327.
(4) I. L. R., 9 Mad., 244.
(5) 11 W. R., C. R., 36.
(6) I. L. R., 22 Bom., 225.

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BLAIR, J.—The suit out of which this second appeal arises was brought by the plaintiff respondent as *sajjada nashin* of a certain shrine to recover possession of certain land, the property of the shrine, by dispossession of the defendants and invalidation of the mortgages made to them by the plaintiff's predecessor in office, one Bande Ali. The plaintiff also prayed for mesne profits and costs. The plaintiff in his plaint alleged the cause of action to have arisen on February 26th, 1891, the date of the death of his father, the previous *sajjada nashin*, and upon the 6th of April 1891, the date of the plaintiff's accession to that office. The only substantial point in the statement of defence which is now at issue is the plea that the suit is barred by limitation. The Court of first instance dismissed the suit applying art. 134 of the second schedule of the Limitation Act. The lower appellate Court decided that art. 134 did not apply, that the defendants' possession as mortgagees was not adverse so long as their mortgagor was alive, and that consequently the suit of the plaintiff was not barred by adverse possession. It is found that the property is *waqf* and inalienable. It is not disputed that the mortgagees took possession of several plots at the dates of the mortgages in which they were respectively hypothecated. The mortgages were seven in number and were made on the following dates:—

1. The 18th of August, 1864.
2. The 14th of August, 1865.
3. The 29th of October, 1866.
4. The 7th of October, 1867.
5. The 17th of November, 1867.
6. The 14th of August, 1869.
7. The 19th of September, 1869.

The contentions of the parties were most ably put before us by Mr. *Haribans Sahai* for the appellants and by Mr. *Amir-ud-din* for the respondent. For the appellants it was contended that the case fell within the provisions either of art. 134 or of art. 144 of the Indian Limitation Act, and that under either of them the suit was time-barred. The words of those articles are respectively

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as follows:—Article 134. "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; period, 12 years; time from which period begins to run, the date of the purchase." Article 144. "A suit for possession of immovable property or any interest therein not hereby otherwise specially provided for; period, 12 years; time from which period begins to run, when the possession of the defendant becomes adverse to the plaintiff." Now it appears to me clear that the mortgages impeached fall within the comprehensive exception provided in section 10 of Act No. XV of 1877. The mortgagees are certainly "assigns for valuable consideration," and as such are entitled to the protection of such article of limitation as may be applicable to their case. It was part of Mr. *Haribans Sahai's* contention that the word "purchased" in art. 134, even if not co-extensive in its subject-matter with the alienations included in the assignments excepted by section 10 of the Limitation Act, was used in that section in the technical sense of the word "purchase" which in English Law would include both a mortgage and a lease. In support of that proposition he cited the case of *Nilmony Singh* v. *Jagabandhu Roy* (1). The passage on which he relied is to be found on page 544. The opinion therein expressed is no doubt favourable to the contention of Mr. *Haribans Sahai*, but does not amount to a ruling. The case of *Yesu Ramji Kalnath* v. *Balkrishna Lakshman* (2), clearly lays down that the word "purchased" in art. 134 is used in the technical English sense and includes "mortgaged." Sir Charles Sarjent, the Chief Justice, in delivering the judgment of the Court, refers to the case of *Radanath Doss* v. *Gisborne & Co.*, to be found in (3), at page 15, in which the Privy Council, discussing section 5 of Act XIV of 1859, say "purchaser means purchaser according to the proper meaning of the word," and puts upon that interpretation a construction limited by the peculiar circumstances of the case

(1) I. L. R., 23 Calc., 536. (2) I. L. R., 15 Bom., 583.
(3) 14 Moo., I. A., 1.

before their Lordships. It is, however, in the view I take of the limitation applicable to the present suit, unnecessary for me to consider what the Privy Council intended to convey by the expressions above cited. If art. 134 applies, *cadit quæstio*, the period of limitation has long run out. If, however, art. 134 does not apply, we have then, in order to apply art. 144 as a bar to the plaintiff's suit, to find the time from which adverse possession commences. For that purpose it becomes necessary to consider the meaning of the word "assigns" in section 10 of the Limitation Act. It is a word of the widest significance in respect to the nature of the transfers to which it relates. It does not in its accepted meaning import any restriction upon the *quantum* of interest transferred. The assignment of a lease or a mortgage would apparently lie within its purview, just as much as an out and out sale of immovable property. In order to narrow its meaning it would be necessary to show that interests of a more limited kind would be outside the scope and policy of the enactment. No reason for such a restriction is apparent, and indeed it seems to me that the provisions of the Act would be practically nullified by attempting to draw any such distinction. To include in the section out and out sales and exclude leases or mortgages for enormous periods would reduce the operation of the section to a sheer futility. But if transfers for a period, however long, are held to be covered by the section, it seems impossible to draw a quantitative line, and to place transfers for some more limited period outside of it.

Whatever interpretation is put upon the word "purchase" in section 134, this much is plain, that the effecting of such "purchase" creates *ipso facto* an actionable wrong, and confers upon every cestui que trust whose interests are affected an immediate right of action, which, in the case of "purchases" for value would subsist unimpaired for twelve years. It seems difficult to frame any plausible contention that under the provisions of that article no right of action would accrue during the incumbency of the alienating trustee, but would come into being only on the termination

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of his trusteeship and would subsist for twelve years from such termination. That would place the alienee of an unauthorized trustee in a position differing materially for the worse from that of a squatter, who, without a shred of right or title, chose to take possession of a neighbour's land. The latter would acquire an unimpeachable title in twelve years, while the other would continue liable to extrusion for the period of the trustee's tenure of office plus the term of twelve years. The omission in section 10 of Act No. XV of 1877, and also in art. 134 of the second schedule to the same Act of the words "in good faith," which found place in the corresponding provisions of Act No. IX of 1871, indicates clearly the intention of the Legislature to do away with any distinction among those who without right or title assume ownership of the property of others. *Mutatis mutandis* the same observations apply to art. 144. In that case also the construction contended for by the respondent's counsel would extend for an indefinite time the period of limitation. It appears to me that the suit contemplated by section 10 of the Limitation Act is a suit by a cestui que trust to set aside an illegal alienation by his trustee, and by art. 134 the time from which limitation would begin to run is fixed as the date of the purchase. Under that article it is manifestly immaterial whether the trustee continued in his office or not. At the moment of sale the cause of action arose. It would hardly be consistent that under the comprehensive article applicable to all cases not specially provided for, *i.e.*, art. 144, the period at which adverse possession would commence should be deferred till the trustee had ceased to hold office. Apart from authority it seems impossible as a matter of principle to hold that the possession derived from a trustee who had no right to authorize such possession, would be otherwise than adverse to the cestui que trust from the moment of its commencement. As far as the cestui que trust is concerned it would be wholly immaterial whether the intruder's possession was unauthorized by any human being whomsoever, or authorized only by a person who

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had no right to give such authority. The case of *Bejoy Chunder Banerjee* v. *Kally Prosonno Mookerjee* (1), is in point, and in my opinion was rightly decided. To the same effect is the case of *Madhava* v. *Narayana* (2). The right of the present plaintiff to sue is a right not personal to himself, except in so far as he has an interest in common with other beneficiaries, but vests in him as the representative of the cestui que trustent, and it is in that capacity only that he now sues. The possession which he seeks to determine is a possession adverse to his cestui que trustent. I would hold therefore that limitation begins to run from the dates of the respective mortgages with possession, the latest of which was executed in 1869, and that the suit is therefore barred by the twelve years' rule.

BANERJI, J.—The only question which we have to determine in this appeal is whether, as contended by the defendants appellants, the claim is barred by limitation.

The suit is by a *sajjada nashin*, or the superior of a shrine, to recover possession of property found to belong to the shrine which the plaintiff's predecessor in office mortgaged to the predecessor in title of the defendants, who are now in possession as usufructuary mortgagees. The mortgages were made between the years 1864 and 1869. The mortgagor, the last *sajjada nashin*, died on the 26th of February 1891. The plaintiff was appointed on the 6th of April of that year. The suit was instituted on the 25th of November 1893. It is contended on behalf of the plaintiff that limitation began to run from the date of his appointment to the office of *sajjada nashin*, or, at the earliest, from the date of the death of his predecessor, and not from the dates of the mortgages. On the other hand, it is urged that the dates of the mortgages should be held to be the dates from which the operation of limitation commenced.

Mr. *Amiruddin*, the learned counsel for the respondent, has relied in support of his contention on the ruling of their

(1) I. L. R. 4 Calc., 327. (2) I. L. R. 9 Mad. 244.

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Lordships of the Privy Council in *Jewun Dass Sahoo* v. *Shah Kubeer-ood-deen* (1) which was followed in *Piran* v. *Abdool Karim* (2). The Lords of the Privy Council held that it was the duty of the Government under the law then in force to protect endowments, that the plaintiff in that case was the procurator of Government, and that his right to sue accrued on his being appointed *mutawalli* or manager.

I am of opinion that since the passing of Act No. XX of 1863, the manager of a religious endowment cannot be held to be a procurator of Government, and a suit by him for the protection of endowed property cannot be regarded as a suit on behalf of Government. Act No. XX of 1863, as its preamble recites, relieved the Government "from the duties imposed on them by Regulation XIX of 1810, so far as those duties embrace......the appropriation of endowments made for the maintenance of religious establishments......or involve any connection with the management of such religious establishments." A suit by the manager of an endowment brought after the passing of that Act would, in my opinion, be governed by the ordinary rule of limitation applicable to all plaintiffs other than the Government, and the ruling of their Lordships of the Privy Council referred to above cannot affect such a suit. This view is supported by the decision of the Calcutta High Court in *Shaikh Laul Mahomed* v. *Lalla Brij Kishore* (3).

We have next to consider what rule of limitation will apply to the present case. The learned vakil for the appellants urges that the suit is governed by art. 134 of the second schedule of the Indian Limitation Act; that, if that article is not applicable, art. 144 would apply, and that the defendants' possession must be held to be adverse from the dates of the mortgages made in their favour.

It must be taken upon the findings of the lower appellate Court that Bande Ali, the mortgagor, was the trustee of the

(1) 2 Moo. I. A., 390. (2) I. L. R., 19 Calc., 203, at p. 218.
(3) 17 W. R., C. R., 430.

property of the shrine, and that he was in possession as manager and trustee. By section 10 of Act No. XV of 1877 no suit against a trustee for trust property can be barred by lapse of time, but the section excludes from its operation suits against assigns from the trustee for valuable consideration. There is no question that a mortgagee is an assign, and it is not disputed that in this case the mortgagee took the mortgages from Bande Ali for valuable consideration. Section 10 therefore cannot be of any avail to the plaintiffs, and we must seek in the schedule the article which will govern the case. If article 134 is applicable, the claim is undoubtedly beyond time, the suit having been brought long after the lapse of twelve years from the dates of the mortgages under which the defendants are in possession. The suit referred to in the article is 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. Now the question is—Is a mortgagee from a trustee for valuable consideration a purchaser for valuable consideration? There can be no doubt that if we were to answer the question with reference to what an English lawyer would understand by a purchaser for valuable consideration, we must answer it in the affirmative, a mortgagee being a purchaser *pro tanto* (see Watson's Compendium of Equity, Volume II, page 1184). Was the expression used by the Indian Legislature also in the same sense in article 134? The intention of the Legislature may be gathered from the history of the legislation on the subject. Section 2 of Act No. XIV of 1859 provided that a suit against a trustee or his representative for possession of trust property would not be barred by any length of time. Section 5 of the Act excluded from the operation of that section a *bonâ fide* purchaser for value from a trustee. It was held by the Calcutta High Court, with reference to that section, in *Gobind Nath Roy Bahadoor* v. *Ranee Luchmee Koomaree* (1), that a mortgagee is a purchaser within the meaning of the section. In Act No. IX of 1871, which took the place of

(1) 11 W. R., 36.

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Act No. XIV of 1859, it was enacted in section 10, which was substituted for section 2 of the former Act, that the rule that no limitation should operate against a trustee or his representative would not apply to a purchaser in good faith for value from a trustee. In Act No. XV of 1877 this protection was granted to all "assigns for valuable consideration" and the words "in good faith" were omitted. Section 5 of Act No. XIV of 1859, in so far as it related to purchasers from trustees, was in substance re-enacted in article 134 of schedule ii of Act No. IX of 1871, and article 134 of the present Act is also to the same effect, with this exception that it does not require that the purchaser should be a purchaser in good faith. It seems to me that when in Act No. IX of 1871 the Legislature protected from the provisions of section 10 purchasers from trustees, it provided a limitation for suits against such purchasers in article 134. When the same protection was extended to all assigns for value in Act No. XV of 1877 and the Legislature did not provide any specific article to govern suits against such assigns other than article 134, it must be presumed that it intended that article to apply to suits against all assigns for value and used the words "purchased for valuable consideration" in that article in the sense in which those words are ordinarily understood by lawyers, so as to include mortgages and leases. If article 134 does not apply to such cases, the only other article applicable would be article 144. But there appears to be no reason why the Legislature should have provided one rule of limitation in the case of a suit against a person to whom trust property is sold for value and another in the case of a mortgagee or other assign for value from a trustee. The principle applicable to both these classes of assigns and the policy upon which they were excluded from the operations of section 10 are apparently the same. I am accordingly of opinion that article 134 is as much applicable to a suit against a mortgagee for value from a trustee as to a suit against a person to whom the trustee has sold trust property for value. This view is supported by the ruling of the Bombay High Court (Sarjent, C. J., and Candy, J.)

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in *Yesu Ramji Kalnath* v. *Balkrishna Lakshman* (1), which was followed by Farran, C. J., and Fulton, J., in *Maluji* v. *Fakir Chand* (2), and by the opinion expressed by the Calcutta High Court in *Nilmony Singh* v. *Jagabandhu Roy* (3), and we have not been referred to any case which ruled to the contrary. For the above reasons I hold that article 134 applies in this case, and that the claim is barred by limitation.

As I am of opinion that article 134 specially provides for a case like the present, article 144, which governs suits for possession of immovable property not specially provided for, is not applicable. Had that article, however, been in my opinion applicable, I should have had considerable hesitation in holding that in this case the possession of the mortgagees defendants became adverse to the beneficiaries from the date of the mortgage. Had the mortgage been made by the trustee in repudiation of the trust, and had he ignored the right of the beneficiaries and mortgaged the property as his own, the possession of the mortgagees might be regarded as adverse to the beneficiaries from the date of the mortgage, but where, as in this case, the mortgage was made by the trustee in his capacity as such and for alleged purposes of the trust, I doubt very much that the possession of the mortgagee could be held to be adverse to the beneficiary until after the death or removal of the trustee. Holding, however, the view that I do in this case it is not necessary to decide this question.

I would allow the appeal and dismiss the suit with costs.

AIKMAN, J.—I concur with my learned colleagues in thinking that this appeal must be allowed. Shortly stated, the following are the facts of the case:—There is in the Farrukhabad district a Muhammadan shrine called the Durgah of Hazrat Makhdum, for the support of which a grant of land was made in the time of the Muhammadan Emperors. Upwards of thirty years ago Bande Ali, the then curator of the shrine, mortgaged with possession a portion of this endowed property to the predecessor

(1) I. L. R., 15 Bom., 583. (2) I. L. R., 22 Bom., 325.
(3) I. L. R., 23 Calc., 536.

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in title of the defendants appellants. On the 26th February 1891 Bande Ali died, and, on the 6th of April following, his son, Muhammad Muttaki, the plaintiff respondent, was appointed curator in his father's stead.

On the 25th of November 1893 the plaintiff brought the suit out of which this appeal arises, not to redeem the mortgaged property, but to recover possession of it on the ground that the mortgages granted by Bande Ali were in violation of the trust and therefore invalid.

The Court of first instance dismissed the suit as barred by limitation. The lower appellate court held that the suit was within time, and gave the plaintiff a decree. The defendants come here in second appeal.

The sole question we have to decide is whether the plaintiff's suit for possession is or is not beyond time.

Section 10 of the Limitation Act provides that no suit for the purpose of following trust property in the hands of a trustee or a trustee's legal representatives or assigns (not being assigns for valuable consideration) shall be barred by any length of time. It is clear from this that an assign from a trustee for valuable consideration acquires a good title by prescription. A mortgagee is an assign for valuable consideration. The defendants are therefore entitled to plead limitation, and the only point for consideration is which article of the second schedule of the Limitation Act applies.

In a somewhat similar case it was held by the Calcutta High Court that either article 134 or article 144 applied. If the words "purchased from" in article 134 can be held to be equivalent to "mortgaged by," that article would exactly cover the present case. It has been held both by the Bombay and Calcutta High Courts that the word "purchased" here is used in its technical English sense, and is wide enough to cover the case of a mortgage. But we find this word used elsewhere in the same schedule, *e. g.*, article 138, and the context shows that there it cannot be used in the wide signification which has been attributed to it in article 134.

I prefer to look upon the case as falling under article 144, and to hold that the mortgagees have acquired by prescription as against the beneficiaries a right *pro tanto* adverse so as to entitle them to retain possession of the property until they are redeemed. The ruling relied on by the learned counsel for the respondent, *Piran* v. *Abdool Karim* (1), is in his favour, but it appears to me that the learned Judge who decided that case has overlooked the fact that the *ratio decidendi* of the Privy Council decision in *Jewan Dass Sahoo* v. *Shah Kubeer-ood-deen* (2), has disappeared with the enactment of Act No. XX of 1863.

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For the above reasons I concur in the decree proposed.

BY THE COURT.—The order of the Court is that the appeal is decreed with cost. The decree of the lower appellate Court is set aside with costs, and that of the Court of first instance restored.

Appeal decreed.

APPELLATE CIVIL.

1898
June, 30.

Before Mr. Justice Banerji.

MUL CHAND AND OTHERS (DECREE-HOLDERS) *v.* RAM RATAN AND ANOTHER (JUDGMENT-DEBTORS).*

Civil Procedure Code, section 544—Decree proceeding upon ground common to several defendants—Decree upset in appeal but restored on appeal by one only of the defendants—Execution for costs by other defendants—Appeal—Decree to be executed where there has been an appeal.

A suit brought against several defendants was dismissed with costs. The plaintiffs appealed, and the case was remanded to the Court of first instance under section 562 of the Code of Civil Procedure. One of the defendants appealed against the order of remand to the High Court, which set aside the order of remand and restored the decree of the first Court.

Held, that, the decree of the first Court being restored in its entirety, the defendants who had not appealed were entitled to take out execution of that decree for the costs awarded to them by it, notwithstanding that they were not

* Second Appeal No. 551 of 1896, from a decree of W. F. Wells, Esq., District Judge of Agra, dated the 22nd April 1897, reversing an order of Maulvi Siraj-ud-din Ahmad, Subordinate Judge of Agra, dated the 23rd January 1897.

(1) I. L. R., 19 Calc., 203. (2) 2 Moo. I. A., 390.