1915

EMPEROR v. GOBIND SAHAI.

the present case. But in accordance with those two rulings it is only the Judge concerned who can deal with this matter. It will be open, therefore, to the present applicant to make any such application as he deems fit to Mr. Justice BANERJI in view of those two rulings. It is not possible for us to deal with this matter. In so far as it is an application for review, the present application must fail and we reject it. In so far as it is an application contemplated by the two rulings mentioned above, it must be dealt with by Mr. Justice BANERJI. For this purpose it must be sent back to Mr. Justice BANERJI, and it will be open to him to pass any such order as he may deem fit.

The case coming back to Mr. Justice BANERJI his Lordship passed the following order.

BANERJI, J.—A Bench of this Court has held that as the order passed by me on the 22nd of July, 1915, was not sealed, this application for revision must be deemed to be still pending. I have heard the learned vakil, who has now appeared for the applicant and who has addressed the Court at considerable length. I see no reason, in view of the findings of the courts below, to admit this application. I accordingly reject it.

Application rejected.

MISCELLANEOUS CIVIL.

Before Mr. Justice Tudball and Mr. Justice Piggott.

1915
December, 11.

JAI KISHAN JOSHI (PLAINTIFF) *v.* BUDHANAND JOSHI AND ANOTHER (DEFENDANTS).*

Act No IX of 1908 (*Indian Limitation Act*), *schedule I, articles* 134, 144—*Suit for redemption by co-mortgagor—Property already redeemed re-mortgaged and finally sold to second mortgagee—Limitation—Act No. IV of* 1882, (*Transfer of Property Act*), *section* 95.

In 1860 the father of a family of four sons mortgaged some of the family property. In 1877, after the death of the father, one of the sons again mortgaged the property and with the money borrowed on the second mortgage paid off the first mortgage. The second mortgagee or his son remained in possession of the property as mortgagee until 1898, when the second mortgagor sold it to the son of the second mortgagee. In 1912, a grandson of the original mortgagor sued for redemption of the mortgage of 1860.

* Civil Miscellaneous No. 86 of 1915.

Held, that the suit was barred by limitation under article 144 of the first schedule to the Indian Limitation Act, 1908, whatever might have been the position of the members of the family (which was not clear) as regards jointness or separation.

Article 134 does not apply to a person who being interested in part of a mortgage redeems the whole, such person being merely a charge-holder and not a mortgagee; *Ashfaq Ahmad* v. *Wazir Ali* (1) distinguished.

THIS was a reference by the Local Government under rule 17 of the Kumaun Rules, 1894.

The facts of the case were as follows:—

One Debi Dat Joshi was owner of a certain number of villages including the village in dispute. On the 13th of August, 1860, he executed a usufructuary mortgage of the village in dispute along with certain other properties in favour of one Debi Dat Panth for a sum of Rs. 451, and covenanted to redeem the same in four years. Debi Dat Joshi died, leaving his son Jai Dat Joshi, the defendant No. 2 and his grandson, Jai Krishna Joshi, the plaintiff. On the 13th of December, 1877, in order to pay off the debt due on the village in dispute on account of the mortgage of 1860, Jai Dat Joshi, defendant No. 2, motgaged the said village to the father of the defendant No. 1, Buddhi Ballabh Joshi for a sum of Rs. 100 for a term of ten years. The material portion of this mortgage deed was as follows:—"Whereas I am entitled to $126\frac{6}{16}$ *nales* of land assessed to Rs. 6-7-0 in mauza Sanjari. This share was mortgaged during the time of my father to Debi Dat Panth. I have mortgaged this land to you for Rs. 100." The prior mortgage on the village in dispute was duly paid off and possession obtained by the defendant No. 2. On the 26th of May, 1898, Jai Dat Joshi, the defendant No. 2, sold the village in dispute to the defendant No. 1 for Rs. 300. The material portion of the sale-deed ran as follows:—"Whereas I own an ancestral share in the village Sanjari, in which a third share amounting to $126\frac{6}{16}$ *nales* of land assessed to Rs. 6-7-0 is the extent of my share. This share was on the 13th of Decem ber, 1877, for a period of ten years, mortgaged to your father, Jai Krishna. Now as this money has not been paid and I am entitled to a *shikmi* partition with my brother Krishna and this very share was mortgaged to pay off the debt of the time of my father, I sell all my rights and interest . . . to you for a sum of Rs. 300." The

(1) (1889) I. L. R., 14 All., 1.

1915

JAI KISHAN JOSHI v. BUDHANAND JOSHI.

present suit was brought by the plaintiff for possession of the village in dispute against the defendants on payment of Rs. 100, the amount payable on account of the mortgage of 1860. The suit was defended on the ground, *inter alia*, that it was barred by limitation, that Jai Dat, defendant No. 2, was the manager of a joint Hindu family of which the plaintiff was a member, and that for payment of the mortgage debt due upon the said property he had full authority to sell it. The court of first instance (the Assistant Collector of Almora) decreed the suit, holding that the suit was not barred by limitation, "that the four sons of Debi Dat, Joshi were not members of a joint Hindu family, but that their property was joint," that Jai Dat Joshi "had no right to transfer the shares of his brothers and nephews who were not members of a joint Hindu family with him," and that the position of defendant No. 2 was that of a mortgagee of the mortgagee rights in the property in dispute. The plaintiff appealed to the court of the Deputy Commissioner of Almora, who, setting aside the decree of the first court remanded the case to that court with directions to have the plaint amended as indicated in his judgement. The plaint was accordingly amended, but the court of first instance again decreed the suit and confirmed the findings previously arrived at by that court. The plaintiff again appealed to the court of the Deputy Commissioner of Almora, who again set aside the decree of the first court holding that the mortgage of 1860 was paid up and the suit to redeem the same was not maintainable. The Commissioner of Kumaun confirmed the decree of the court of the Deputy Commissioner. At the plaintiff's instance, the Local Government referred the case for the opinion of the High Court under rule 17 of the Kumaun Rules, 1894.

Pandit *Baldeo Ram Dave* (with him Dr. *Surendra Nath Sen*), for the plaintiff :—

There was no finding by the court of first appeal whether the plaintiff and the defendant No. 2 were members of a joint Hindu family of which the defendant No. 2 was the manager. The court of first instance had come to the conclusion that there was no joint family nor was defendant No. 2 a managing member. It had come to the conclusion that at the time the

mortgage of 1860 was redeemed by defendant No. 2, he and the plaintiff were co-owners of the village in dispute. Upon this assumption, when one of two or more co-mortgagors redeems the whole, he, as to the portion which represents the interest of his co-mortgagor, stands in the shoes of the mortgagee from whom he redeems, and as such he has got the same rights and the same liabilities, and the co-owner whose portion has thus been redeemed has the right to redeem such portion from his co-mortgagor on payment of the proportionate amount due upon his share of the property. Such an act of a co-mortgagor cannot change the position of the other co-owner to something less than that of a co-mortgagor or to abridge the period of limitation within which he ought to come in to redeem. A Full Bench of this Court has held that a suit by a co-owner for redemption would be governed by article 148 of the second schedule to the Limitation Act, 1877, and the time will begin to run from the time the original mortgage became payable; *Ashfaq Ahmad* v. *Wazir Ali* (1). The position of defendant No. 2 when he redeemed the mortgage of 1860 was as regards the share of the plaintiff, that of a mortgagee. Any mortgage made by him of such rights to the father of defendant No. 1 was a mortgage of his mortgagee rights, and the sale by him of that portion which belonged to the plaintiff did not convey to the defendant No. 1 anything more than what he himself possessed. So far as this Court is concerned it is now settled law that if the transferee for valuable consideration from the mortgagee has actual knowledge that his vendor's title was merely that of a mortgagee, and that he was not under the belief that he was purchasing an absolute interest, the suit against him would not be barred by article 134 of the Limitation Act; *Drigpal Singh* v. *Kallu* (2), *Ghasi Ram* v. *Krishna* (3), *Parmalal* v. *Rameshar Sahai*, L. P. Appeal No. 48 of 1915, decided on the 12th of November, 1915. The defendant No. 1, when he purchased the property from defendant No. 2, was fully aware of the mortgage of 1860 and its redemption by one of the co-sharers as the facts recited in the mortgage-deed of 1877 and the sale-deed of 1898 conclusively indicate.

(1) (1889) I. L. R., 14 All., 1. (2) (1915) I. L. R., 37 All., 660.

(3) (1915) 13 A. L. J., 877.

1915

JAI KISHAN JOSHI v. BUDHANAND JOSHI.

Mr. *M. L. Agarwala*, for defendant:—

It is not necessary to go into the question as to whether the family was joint or separate. Under section 25 of the Transfer of Property Act the defendant No. 2 was nothing more than a *charge-holder*. Article 134 of the Limitation Act was not applicable as he was not a *mortgagee* within the meaning of that article. The only article which would be applicable would be article 144, and the suit was barred by limitation.

Pandit *Baldeo Ram Dave*, was heard in reply.

TUDBALL, J.—This is a reference by the Local Government under rule 17 of the rules and orders relating to the Kumaun division, 1894.

One Debi Dat Joshi had four sons (1) Krishna Nand, (2) Yangya Dat, (3) Narotam, (4) Jai Dat, defendant No. 2. The first is dead and his son Chandramani has also died without issue.

The plaintiff, Jai Krishna, is the son of the second son. The third has died without issue. Jai Dat, defendant 2, is the fourth.

The property now in suit is part of the family property. On the 13th of August, 1860, Debi Dat Joshi gave a usufructuary mortgage of this and other property to one Debi Dat Panth for a sum of over Rs. 400.

After the former's death, the defendant Jai Dat repaid Rs. 100 out of the mortgage debt to the mortgagee, who thereupon released to him the property now in suit. Jai Dat, to obtain this sum, made a similar mortgage of this same property for the sum of Rs. 100 in favour of Jai Krishna Joshi (deceased), father of defendant No. 1, Buddhi Ballabh Joshi.

This was on the 13th of December, 1877, and for a period of ten years. In the deed, Jai Dat clearly stated that the mortgaged property belonged to himself, that it was his *maurusi* village and he owned this share; that it had been mortgaged by his father to Debi Dat Panth and as the latter was pressing for payment he, therefore, mortgaged it, in order to be able to pay off Debi Dat Panth. He agreed that when he paid off the mortgage money he would also repay to his mortgagee whatever sum the latter had paid to Government as revenue during the running of the mortgage.

For nearly twenty-one years his mortgagee remained in possession *as such* until the 26th of May, 1898. On this latter date Jai Dat Joshi, being unable to pay off the debt, sold the property to the defendant No. 1, Buddhi Ballabh Joshi, the son of the mortgagee, for this sum of Rs. 300. Of this Rs. 236 paid off the debt and the vendor took the balance in cash. From that date the vendee has remained in possession until the present suit was brought in the year 1912, i.e., some fourteen years afterwards.

The suit is one to redeem the mortgage of 1860, created by Debi Dat Joshi, and the plaintiff claims possession of the whole of the property on payment of Rs. 100. The court of first instance decreed the claim on payment of Rs. 328-8-6.

The courts of first and second appeal dismissed the suit. In the reference to the Court we are asked our opinion as to (1) whether or not the case should be remanded to the court of first appeal for re-decision of the appeal as that court has failed to decide the issue whether Jai Dat Joshi had a right to represent the joint family or not; (2) the correctness or otherwise of the decision of the court of second appeal. There has been great confusion in the pleadings in the case. In the order of reference it is assumed that the family was joint, whereas in the argument before us that is a disputed fact. The defendant's case is that the family was joint and Jai Dat Joshi acted throughout as the managing member. The plaintiff's case is not clear from the pleadings in the various plaints filed. In this Court on his behalf it is stated that the family had separated, but the property had not been divided.

No issue whatever was framed as to whether the defendant Jai Dat was or was not the managing member of the joint family. The court of first instance assumed that the family was joint and in its finding on the fourth issue—"how do the mortgage of 1877 and the sale of 1898 affect plaintiff's right of redemption"—it remarked:—"I am not satisfied that he was the manager of the joint family."

Assuming for the moment that the family was joint, and that Jai Dat was not the managing member, the facts are that one member of a joint family mortgaged a part of the family property in 1877, paid off a prior mortgage debt due thereon from the

1915

JAI KISHAN JOSHI v. BUDHANAND JOSHI.

family and then in 1898 sold the property to the second mortgagee who has been in possession for over twelve years.

As a person interested in the mortgaged property he had power to redeem the mortgage of 1860 and that mortgage no longer exists and cannot now be redeemed. There is no question of "subrogation" in the matter. The second mortgagee paid his money to Jai Dat, as the deed shows, and the latter paid off the first mortgagee. If the principle did at all operate it would do so for the benefit of the second mortgagee. The defendant No. 1 does not seek to stand upon the first mortgage. In the circumstances assumed it is clear that he having purchased from a member of the family incompetent to sell, has held adversely to the joint family for over twelve years and the suit against him must fail.

Next if we assume that the family was joint and that Jai Dat was its managing member no suit for redemption of the mortgage of 1860 can lie and the defendant has clearly held adversely against the joint family since the date of his purchase. In this aspect the suit must equally fail.

Assuming, however, that the family was separate (though the properties had not been divided among the co-owners) other considerations arise.

When in 1877 Jai Dat redeemed the mortgage of 1860 he acquired a charge on the plaintiff's share for the latter's share of the debt paid (vide section 95 of the Transfer of Property Act). This statute no doubt was not then in force, but it did not on this point make any alteration in the law of mortgage as previously administered. If Jai Dat had not dealt further with the property, but had merely taken possession and held it, the plaintiff would, under the ruling of this Court in *Ashfaq Ahmad* v. *Wazir Ali* (1), have had a period of sixty years from the date of the mortgage of 1860 within which to recover his share from Jai Dat on payment of his share of the debt. Article 148 of schedule II of the Limitation Act of 1877 was applied by the Full Bench of this Court to a suit of such a nature, though that article in terms applies only to a suit to redeem a mortgage; whereas section 95 of the Transfer of Property Act shows that the co-owner

(1) (1899) I. L. R., 14 All., 1.

redeeming merely acquires a charge, which is very different from a mortgage. In any case the co-owners thus suing cannot sue to redeem the original mortgage, but only to recover his own share of the property redeemed by payment of his share of the expense. In the case before us, however, the matter is complicated by the transfer by Jai Dat, i.e., the mortgage of 1877 and the sale of 1898.

In the case of each of these he purported to transfer property belonging to himself, and his transferee has held for thirty-one years as mortgagee and fourteen years as vendee.

Either article 144 or article 134 of the second schedule to the Limitation Act will apply to a suit for possession of the plaintiff's share. On behalf of the plaintiff, it is urged that he is in the position of a mortgagor suing to recover possession of property from a transferee from his mortgagee and that article 134 would apply, and therefore, under the rulings of this Court there must be a finding as to whether the transferee took in good faith and in ignorance of the plaintiff's rights or with a full knowledge of those rights, and therefore, the suit should be remanded to the court of first appeal for a finding on that question of fact. On behalf of the defendant, however, it is urged that article 134 does not apply, as this is no case of a transfer by a mortgagee: that the decision in *Ashfaq Ahmad* v. *Wazir Ali* (1), can only be applied to a suit by one co-owner to redeem his share from the co-owner who has paid off the mortgagee and its principle should not be extended to article 134, where the suit is one between the co-owner and a third person, a transferee, and that section 95 of the Transfer of Property Act clearly shows that Jai Dat was merely a charge-holder and not a mortgagee and that article 144 is the only article which can and ought to apply. In my opinion section 95 of the Transfer of Property Act clearly shows that Jai Dat became merely a charge-holder when he paid off the mortgage of 1860. The fact that, as regards his co-owners his position became analogous to that of a mortgagee does not make him a mortgagee when the law clearly states that he is only a charge-holder.

In my opinion article 144 applies. The defendant appellant has held adversely clearly from the year 1898. There is no

(1) (1889) I. L. R., 14 All., 1.

1915

JAI KISHAN JOSHI v. BUDHANAND JOSHI.

question of fraud or collusion. The contending defendant has held the property some thirty-five years prior to suit as usufructuary mortgagee and vendee from Jai Dat, and the plaintiff has remained silent and unquestioning. Both the mortgage and the sale-deed were registered. It, therefore, is clear to my mind that whether the family was joint or separate the suit was bound to fail. I would, therefore, answer the two questions as follows:—(1) It is unnecessary, in the circumstances of this case, to have any finding on the question as to whether Jai Dat Joshi represented the family or not; though it is obvious that the suit could not be decreed against the defendant until a decision thereon had been reached; (2) that the decree of the Commissioner is correct, though perhaps not for the reasons stated by him.

I would order the plaintiff to pay all costs in all courts.

PIGGOTT, J.—I concur generally. It is obviously useless to remand the suit if it is barred by limitation on the facts stated by the plaintiff himself. The case for the latter is only arguable on the assumption that Jai Dat and his brothers had separated, but had left the property in suit undivided. Assuming these facts, the question is whether the plaintiff can invoke the principles laid down by this Court in *Ashfaq Ahmad* v. *Wazir Ali* (1) so as to save limitation. The point may be stated thus:—"If the holder of a charge under section 95 of the Transfer of Property Act (No. IV of 1882) is in possession of the property which is the subject of that charge, what is the limitation applicable to a suit by the owners of the said property for recovery of possession on payment of the charge?" The question is not free from difficulty, and the view taken by this Court has not been universally accepted. The operation of article 144 of the schedule to the Indian Limitation Act can only be avoided by bringing the case under the operation of some other article of the schedule. If article 144 be applied, then the further question would arise as to the circumstances under which the possession of the charge-holder becomes adverse to that of the owners. This Court saw a way out of the difficulty by laying down the principle that the possession of the charge-holder should be regarded as that of the original mortgagee, the provisions of

(1) (1889) I. L. R., 14 All., 1.

article 148 of the schedule to the Limitation Act being applied so as to permit the owners to sue for possession by redemption of the charge within sixty years of the date of the original mortgage. The question then before the Court was one of limitation only; it was not laid down that the possession of the charge-holder should be regarded as in all respects equivalent to the possession of a mortgagee. That point was not considered at all. In the present case the charge-holder has been claiming title in himself, adversely to the persons whom we must, for the sake of argument, regard as the true owners, ever since he redeemed the original mortgage. He has himself transferred the property in suit, first by way of mortgage and then by way of sale. The present suit is not against the alleged charge-holder only, but principally against his transferee. It seems to me obviously impossible to apply the provisions of article 148 to the present suit; nor is such application necessitated by any principle laid down in the case of *Ashfaq Ahmad* v. *Wazir Ali* (1). It follows that the present suit can only be saved from the operation of article 144 by bringing under it article 134. On this point I have felt some doubts. It is very difficult to apply article 134 on its strict wording; the only doubt in my mind is whether the learned Judges who decided the case of *Ashfaq Ahmad* v. *Wazir Ali* (1) would not have regarded its application as a legitimate extension of the principle which they laid down as to the charge-holder's stepping into the shoes of the original mortgagee. On the whole, I think it sufficient to say that I am not prepared to dissent from the view taken by my learned colleague. For one thing I do not think it worthwhile to do so on the facts of the present case; the application of article 134 might necessitate a remand for a further finding as to the *bona fides* of the transferee defendant and the payment of consideration, but I do not feel any serious doubt that it would result in the dismissal of the suit. Accepting article 144 of the schedule as the proper article to be applied, I can feel no doubt whatever that the possession of the principal defendant has been adverse to the plaintiff for more than the statutory period of twelve years. I concur, therefore, in answering the reference as proposed by my learned colleague.

Record returned.

(1) (1889) I. L. R., 14 All., 1.