the mind of the Judge when he passed the decree, and he must have struck, or the parties must have done so with his approval, a fair average rate for the whole period. The defendant moreover, alleges that on the strength of the terms of the decree he has let the land to tenants and thus incurred obligations towards them. It would be manifestly unfair to expose him to risk at the suit of such tenants. We think that when a mortgagee is, under a decree, continued in possession of the mortgaged property for a definite time he is entitled to retain that possession until the expiration of the specified period and is not liable to be redeemed before then at the wish of the plaintiff. His position otherwise would be most anomalous.

We reverse the orders of the Courts below and dismiss the Darkhást No. 377 of 1895 with costs throughout.

Order reversed.

APPELLATE CIVIL.

Before Sir C. Farran, Kt., Chief Justice, and Mr. Justice Fulton.

MALUJI AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* FAKIRCHAND AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

1896. *April* 16.

Limitation Act (XV of 1877), Sch. II, Art. 134—Purchaser for value—Mortgage—Mortgage in 1842—Subsequent mortgage in 1872 by mortgagee representing himself to be owner—Decree on second mortgage—Sale in execution—Purchaser at auction sale—Right of original mortgagor in 1892 to redeem mortgaged property.

In 1842 Andoji, the grandfather of the plaintiff, mortgaged the land in question to one Manekchand with possession. On 9th May, 1872, Manekchand's son Lakhmichand, who was then still in possession, representing himself to be the owner mortgaged the property with possession to Tuljaram (defendant No. 2) and Sarupchand, the grandfather of Lakhmichand Gulabchand (defendant No. 3). These defendants sued upon their mortgage of May, 1872, and obtained a decree and sold the property in 1881 in execution, purchasing it themselves. Defendant No. 3 subsequently sold his share to one Fulchand (defendant No. 4). In 1892 the plaintiff, (who was the grandson of Andoji, the original mortgagor in 1842,) sued the first defendant (the grandson of the original mortgagee Manekchand under the mortgage of 1842) for redemption, making Tuljaram and Lakhmichand and Fulchand (defendants Nos. 2, 3 and 4) party-defendants.

* Second Appeal, No. 340 of 1894.

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The defendants contended that they were purchasers for value, and that the suit was barred by article 134 of the Limitation Act.

Held, that the plaintiff was entitled to redeem. By the sale in 1881 the interest of defendant No. 1 (grandson of original mortgagee under the mortgage of 1842) became vested in them. The plaintiff could then have redeemed them on paying off the amount due under the mortgage of 1842, disregarding the mortgage of 9th May, 1872, altogether. But when the defendants Nos. 2 and 3 had held possession under that mortgage for twelve years (*i.e.* on 9th May, 1884) that mortgage, under article 134 and section 28 of the Limitation Act, became a valid mortgage as regards the plaintiffs, and they could not after that date recover possession without redeeming it also. The purchase by defendants Nos. 2 and 3 at the auction sale in 1881 could not avail them, as the present suit was brought within twelve years from that date.

Though a mortgagee is a purchaser for value he is not an out-and-out purchaser, but only a purchaser *sub modo*. He purchases a mortgagee's interest in the land, *viz.*, a right to hold the mortgaged property until the debt is paid.

A mortgagee is *pro tanto* a purchaser for value within the meaning of article 134 of the Limitation Act (XV of 1877).

SECOND appeal from the decision of S. Hammick, District Judge of Ahmednagar, confirming the decree of Ráo Sáheb B. Y. Gupte, Subordinate Judge of Karjat.

Suit for redemption. In 1842 one Andoji, the grandfather of the plaintiffs, mortgaged the land in question to one Manekchand with possession.

In May, 1872, Manekchand's son Lakhmichand Manekchand, who was then still in possession representing himself to be the owner, mortgaged the land with possession to Tuljaram (defendant No. 2) and Sarupchand, the grandfather of Lakhmichand Gulabchand (defendant No. 3), and on 17th September, 1878, these mortgagees obtained a decree on their mortgage, and in April, 1881, sold the land in execution and bought it themselves, duly obtaining a certificate of sale. Subsequently to their purchase they held possession prior to this suit for nearly eleven years, and Lakhmichand Gulabchand (defendant No. 3) had sold his share to one Fulchand (defendant No. 4) and had given him possession.

In 1892 the plaintiffs, who were the grandsons of Andoji, the original mortgagor, brought this suit against the first defendant Fakirchand (grandson of Manekchand the original mortgagee) for redemption of the mortgage of 1842, making Tuljaram and

Lakhmichand and Fulchand (defendants Nos. 2, 3 and 4) party defendants.

The defendants alleged that in 1872 the land was the property of Lakhmichand Manekchand, who had mortgaged it in May, 1872, to defendants Nos. 2 and 3, representing himself to be the owner. They pleaded that they were purchasers for value, and that the suit was barred by limitation under article 134 and section 28 of the Limitation Act (XV of 1877).

The Subordinate Judge relying on the decision in *Yesu Ramji* v. *Balkrishna*[1] held that the claim was time-barred and dismissed the suit.

On appeal by the plaintiffs the Judge confirmed the decree.

The plaintiffs having then preferred a second appeal, the High Court (Farran, C. J., and Parsons, J.), on the 6th September, 1894, sent down the following issue for the findings of the lower Courts: —

"Whether when the defendants Nos. 2 and 3 took the mortgage from defendant No. 1 in 1872 they did so with notice that defendant No. 1 was himself a mortgagee, or whether they took the mortgage on the representation and in the belief that his was an absolute title?"

The findings of both the lower Courts on the issue were that when defendant No. 1 mortgaged the land to defendants Nos. 2 and 3 he put himself forward as the absolute owner of the property.

Ghanashám N. Nadkarni appeared for the appellants (plaintiffs):—The defendants are, no doubt, purchasers for value under article 134, Schedule II, of the Limitation Act. But we submit that they are purchasers in a limited sense. What the defendants Nos. 2 and 3 purchased at the auction sale was the interest of the mortgagee under the mortgage of 1842. That interest would have become an absolute ownership under article 134 in twelve years. But this suit is brought within twelve years. They are, therefore, only mortgagees and not owners, and the plaintiffs are entitled to redeem.

Mahadeo V. Bhat appeared for the respondents (defendants) :— We rely on *Yesu Ramji* v. *Balkrishna*[1]; Shephard on Limitation,

(1) I. L. R., 15 Bom., 583.

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p. 103; Vol. XVI, p. 466, of the Proceedings of the Legislative Council. The first adverse act on the part of the defendants took place in the year 1872, when defendant No. 1, professing himself to be the owner, mortgaged the land to defendants Nos. 2 and 3. The present suit not being brought within twelve years from that date is clearly time-barred.

FARRAN, C. J.:—We have considered, and are not prepared to dissent from the ruling in *Yesu* v. *Balkrishna*[1] that mortgagees are (*pro tanto*) purchasers for value within the meaning of article 134 of the Limitation Act. "A purchaser for value" is an expression well known to lawyers, used in contradistinction to a mere volunteer; and we do not find that there are sufficient indications afforded in the Limitation Act to lead us to feel confident that it has not been used by the Indian Legislature in article 134 in that sense. It is so used in the English Statute (3 and 4 Will. IV, clause 27, section 25), the cases decided under which may, we think, be resorted to as a guide to the meaning of the expression. They will be found collected in Lewin on Trusts, page 876.

This is not, however, decisive, as held by the lower Courts, against the plaintiffs' right to redeem altogether. It only, we think, imposes upon them the necessity of redeeming the mortgage created by the father of defendant No. 1 before they can recover possession of the property. Though a mortgagee is a purchaser for value he is not an out-and-out purchaser, but only a purchaser *sub modo*. He purchases a mortgagee's interest in the land, *viz.*, a right to hold the mortgaged property until his debt is paid.

The dates and facts as alleged or found are these. The plaintiffs' ancestor, it is alleged, in 1842 mortgaged the land with possession to the grandfather of the defendant No. 1. On the 9th May, 1872, the father of the defendant No. 1, representing himself to be the owner, mortgaged the property with possession to the defendant No. 2 and to the ancestor of defendant No. 3. On an issue sent down it has been found that the mortgagees (defendants Nos. 2 and 3) in taking the last-mentioned mortgage

(1) I. L. R., 15 Bom., 583.

were led to believe that defendant No. 1 was the full owner of the mortgaged property and as such executed the mortgage in their favour. They did not merely take an assignment of defendant No. 1's mortgage interest. In 1878 the defendant No. 2 sued the defendant No. 1, and in that suit obtained a decree upon the mortgage of 9th May, 1872, and in execution of the decree caused the mortgage property to be sold in 1881. It was purchased by the defendant No. 2 on behalf of himself and his co-mortgagee, defendant No. 3. The latter subsequently sold his interest in the property to the defendant No. 4. The plaintiffs filed the present suit for redemption in 1892.

As none of the defendants have held possession as out-and-out purchasers for the statutory period of twelve years, the plaintiffs have not, we think, under article 134 lost their right to redeem. All the interest of defendant No. 1 has now centred in the other defendants. The plaintiffs would, therefore, be entitled to redeem them on paying off the amount of the alleged mortgage of 1842, unless the law of prescription has validated the mortgage of 9th May, 1872. Until the defendants held possession under that mortgage for the full period of twelve years, the plaintiffs could have disregarded it and recovered possession, notwithstanding its existence, by paying off the amount due on the original alleged mortgage of 1842. When, however, the defendants Nos. 2 and 3 had held possession under it for twelve years (which would be on the 9th May, 1884), article 134 coupled with section 28 of the Limitation Act gave, we think, legal validity to it, and the plaintiffs from that date were barred by article 134 from recovering possession of the property, disregarding the mortgage of 9th May, 1872. The possession of the defendants Nos. 2 and 3 was, however, only that of mortgagees, and like all other mortgagees they were, of course, liable to be redeemed at suit of the person entitled to the equity of redemption, and still are, we think, liable to be redeemed, as the out-and-out ownership, which their purchase of 1881 might (it was a Court sale, and we express no opinion as to its effect) have conferred on them, if twelve years had elapsed from its date at the time of suit brought, does not avail them. The suit was brought within twelve years of the purchase. As, however, the defendants' purchase in 1881 does not avail

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them, we think that they can fall back upon their position of mortgagees under their mortgage of 9th May, 1872, which, as we have said, became by prescription a valid mortgage on the 9th May, 1884. The plaintiffs must, therefore, redeem that mortgage before they can recover possession of the mortgaged premises. For these reasons we must reverse the decree of the Courts below and remand the case for determination of the remaining issues. Costs hitherto incurred to be costs in the cause.

Decree reversed and case remanded.

APPELLATE CIVIL.

Before Sir C. Farran, Kt., Chief Justice, and Mr. Justice Fulton.

1896. *April* 16.

PATEL PANACHAND GIRDHAR AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* THE AHMEDABAD MUNICIPALITY (ORIGINAL DEFENDANT), RESPONDENT.*

Municipality—Suit against municipality for injunction—Notice of action—Bombay Act VI of 1873, *Secs.* 17, 33 *and* 42—*Discretion of municipality to take action under Section* 33, *clause* 3 *of Bombay Act VI of* 1873—*Court's power to interfere with such discretion—Bombay Act II of* 1884, *Sec.* 48.

A suit for an injunction to restrain a municipality from removing a certain building or construction is not an action "for anything done, or purporting to have been done in pursuance of the Act" within the meaning of section 48 of Bombay Act II of 1884. Such a suit can, therefore, be brought without giving previous notice to the municipality.

Apart from the provisions of section 33 of Bombay Act VI of 1873, it is only if the site of a building is vested in a municipality under section 17, that this body is empowered, whether by section 42 or by any other section, to take steps for the removal of the building.

The discretion of taking action or otherwise under the 3rd clause of section 33 is vested in the municipality, which alone can determine whether or not the removal of a building erected contrary to the provisions of section 33 is or is not a measure likely to promote the public convenience. If the municipality adopt the proper procedure, no Court can review its decision on the ground that in the opinion of the Court the removal of the building is not likely to promote public convenience. The Legislature has confided to the municipality, and the municipality alone, the duty of deciding what measures within its legal powers are for the public convenience, and its discretion is not subject to control by the Courts.

* Second Appeal, No. 541 of 1895.