

## APPELLATE CIVIL.

*Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Crowe.*

1902.  
March 13.

VASUDEV BHIKAJI AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS, v.  
BALAJI KRISHNA AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.\*

*Mortgage—Co-mortgagors—Redemption of entire mortgage by one co-mortgagor, who obtains possession of whole property—Subsequent suit against him by other co-mortgagors for their share of the property—Plea of adverse possession—Co-mortgagor who pays off entire mortgage has a charge on the property—Article 148 of Limitation Act (XV of 1877)—Limitation.*

In 1872, Vinayak and Ganesh, co-owners of the land in question, mortgaged it for Rs. 300. In 1882, in a suit brought by the mortgagee, a consent decree was passed ordering redemption on payment by the mortgagors of Rs. 400. Vinayak paid off the whole amount, redeemed the mortgage, and obtained possession of the land, which he and his heirs continued to hold down to 1898. In 1898, the heirs of Ganesh brought this suit against the heirs of Vinayak, claiming to recover a moiety of the land. The defendants pleaded adverse possession for more than twelve years. The plaintiffs contended that Vinayak, having redeemed the mortgage, stood in the shoes of the mortgagee as regards his co-mortgagor Ganesh and his heirs, and that the latter had sixty years within which to redeem under article 148 of the Limitation Act (XV of 1877).

*Held*, that article 148 did not apply and that the plaintiff's claim was barred by limitation. Article 148 applies to a suit against a mortgagee. A co-mortgagor who has redeemed the whole mortgage is not a mortgagee. His transaction does not amount to a mortgage. He has merely a charge on the property.

SECOND appeal from the decision of T. Walker, District Judge of Ratnágiri, confirming the decree of Ráo Bahádur A. G. Bhaye, First Class Subordinate Judge.

In 1872, Vinayak Gangadhar and Ganesh Padhye, the owners of the land in question, mortgaged it for Rs. 300 to Vasudev Gopal.

On the 5th April, 1882, in a suit brought by Vasudev Gopal, the mortgagee, a consent decree was passed for the redemption of the mortgage on payment of Rs. 400 by the mortgagors. Vinayak Gangadhar, one of the mortgagors, paid the amount of the decree and redeemed the mortgage and obtained possession of the property.

Ganesh Padhye died in 1883 and Vinayak Gangadhar in 1885.

\* Second Appeal No. 464 of 1901.

In 1898, the heirs of Ganesh Padhye brought this suit against the representatives of Vinayak Gangadhar, claiming the half share of the land in question which had belonged to Ganesh in his lifetime.

The defendants answered that the land really belonged solely to Vinayak although it had been purchased in the joint name of himself and Ganesh Padhye, and they pleaded limitation.

The Subordinate Judge dismissed the suit.

On appeal by the plaintiffs, the Judge found that the land was the property of Vinayak and Ganesh, but he held that the claim of the plaintiffs was barred by limitation, the defendants and their predecessors having had adverse possession for more than twelve years.

The plaintiffs preferred a second appeal and contended that Vinayak, a co-mortgagor, who had paid off the whole mortgage-debt and obtained possession, was in the position of a mortgagee as regards his co-mortgagor, and that the latter could sue for redemption and possession of their share within sixty years from the date of the mortgage under article 148 of the Limitation Act (XV of 1877).

*Vasudev R. Jogtekar* for appellants:—Our predecessor Ganesh and Vinayak were co-mortgagors of the land in question with equal rights. They could sue the mortgagee for redemption and possession within sixty years from the date of the mortgage, *i.e.* 1872, under article 148 of the Limitation Act (XV of 1877). It is true that, in 1882, Vinayak paid off the whole of the mortgage-debt, but in doing so he did not deprive Ganesh, his co-mortgagor, of his right. Vinayak, by his payment, merely stepped into the shoes of the mortgagee so far as the rights of his co-mortgagor Ganesh were concerned, and Ganesh still remained entitled to redeem his half share from Vinayak within sixty years: *Ashfaq v. Wazir*<sup>(1)</sup>; *Starling on Limitation*, page 358. Their relation was similar to that of mortgagor and mortgagee. Between a mortgagor and a mortgagee there cannot be adverse possession; and a co-mortgagor who redeems and gets possession of the mortgaged property does not hold adversely as against his

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co-mortgagor. No doubt the cases of *Ramchandra v. Sadashiv*<sup>(1)</sup> and *Vithal v. Dinkarrao*<sup>(2)</sup> are against this contention; but in our favour we have the decision of the Full Bench in the Allahabad case already cited.

*Narayan V. Gokhale* for the respondents (defendants):—The decision of *Ashfaq v. Wazir Ali*<sup>(3)</sup> is of no authority here. The Bombay cases do not appear to have been cited to the Court. We have held adversely to the plaintiffs for more than twelve years. This case does not come within article 148 of the Limitation Act. That article deals with a suit by a mortgagor against a mortgagee and not with such a case as this, which is a suit by a co-mortgagor against a co-mortgagor who has paid off the whole mortgage. A co-mortgagor who has paid off the mortgage is not in the position of the mortgagee. He merely has a charge on the property for the amount which he has paid in excess of his own share: see section 95 of the Transfer of Property Act (IV of 1882). To such a case article 148 does not apply. It is not correct to say that there cannot be adverse possession between co-mortgagors: *Ramchandra v. Sadashiv*<sup>(1)</sup>; *Vithal v. Dinkarrao*<sup>(2)</sup>; *Moidin v. Oothumanganni*<sup>(4)</sup>; *Gobardhan v. Sujan*<sup>(5)</sup>; *Fakir Baksh v. Sadat Ali*.<sup>(6)</sup> Even as between a mortgagor and mortgagee, there may be adverse possession: Ghose on Mortgage, pages 176-7; *Chinto v. Janki*<sup>(7)</sup>; Mitter on Limitation, page 148.

JENKINS, C.J.:—This is a suit to recover by partition a half share of certain immovable property. It was dismissed by the first Court and this decree was confirmed on appeal. Hence this second appeal, in which the question argued has been whether the suit was barred by limitation, as determined by the lower Appellate Court under the following circumstances.

In 1872, Vinayak Gangadhar and Ganesh Padhye mortgaged the land in suit for Rs. 300, and in 1882 a consent decree for Rs. 400 and costs was passed against the mortgagors in favour

(1) (1886) 11 Bom. 422.

(4) (1888) 11 Mad. 416.

(2) (1901) 3 Bom. L. R. 665.

(5) (1894) 16 All. 254.

(3) (1889) 14 All. 1.

(6) (1885) 7 All. 376.

(7) (1892) 13 Bom. 50.

of the mortgagee. The decretal amount was paid by Vinayak and he alone redeemed the property and obtained possession. It is held by the District Judge that there has since then been twelve years' adverse possession on the part of Vinayak and those claiming under him, and that his title has become absolute.

To this it is objected that article 148 governs the case, and this view, it is said, is supported by the decision of the Allahabad High Court in *Ashfaq v. Wazir Ali*,<sup>(1)</sup> which differs from the present case only in the fact that the redemption there was not, as in this suit, under a decree. In this Court, however, a different view has prevailed: *Ramchandra v. Salashin*,<sup>(2)</sup> *Faki Abas v. Faki Nurudin*,<sup>(3)</sup> and *Vithal v. Dinkarrao*.<sup>(4)</sup>

The question then is whether the opinions expressed in the Bombay cases are so opposed to the words of article 148 that we ought to refer the matter to a Full Bench. We think not. It is to be noticed that it is a condition of article 148 that it should be one against a mortgagee, so that we have to see whether a co-mortgagor who has redeemed answers that description.

It, no doubt, has been held that the article applies to the transferee of a mortgage, but the position of a redeeming mortgagor is, in our opinion, essentially different. Were the Transfer of Property Act applicable, his position would be defined by section 95 of that Act, under which a redeeming co-mortgagor has a charge on the share of each of the other co-mortgagors. Then in section 100 it is provided that where immovable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property. We see, therefore, from this that in the Transfer of Property Act a distinction is drawn between a charge and a mortgage, and that what a redeeming co-mortgagor has is a charge and not a mortgage. From this it would follow that he would not be a mortgagee within the meaning of article 148. No doubt this reasoning proceeds on the provisions of the Transfer of Property Act which does not govern this case; but, in our

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(1) (1889) 14 All. 1.

(3) (1891) 16 Bom. 191.

(2) (1886) 11 Bom. 422.

(4) (1901) 3 Bom. L. R. 685.

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opinion, the Act merely gives legislative expression to what was the law apart from it, so that even without the Act our conclusion would be the same.

It was argued that to hold article 148 not applicable would be to prejudice the plaintiff by an act to which he was no party; but that argument has no force here, inasmuch as the redemption was under a decree passed against both mortgagors.

What considerations would apply if the redemption were without the mortgagor's knowledge, we need not now discuss.

The result is that the decree must be confirmed with costs.

*Decree confirmed.*

## APPELLATE CIVIL.

*Before Mr. Justice Candy and Mr. Justice Fulton.*

GORDHANLAL AND ANOTHER (ORIGINAL DEFENDANTS), APPELLANTS, v.  
DARBAR SHRI SURAJMALJI (ORIGINAL PLAINTIFF), RESPONDENT.\*

1902.

March 10.

*Land Revenue—Local Fund Cess—Bombay Act III of 1869, section 8—Liability for Local Fund Cess—Village given by ruling Chief by way of maintenance (jivak giras), liability to Local Fund Cess of—Superior holder—Voluntary payment of cess by ruling Chief—Claim to recover payments from actual holders of village—Contract Act (IX of 1872), sections 69 and 70—Bombay Local Boards Act (Bombay Act I of 1884)—Bombay Land Revenue Code (Bombay Act V of 1879).*

The plaintiff was the Chief of Patri and the village of Kamijala was one of the villages belonging to the estate. It was held by the defendants, having been granted to their ancestor many years ago by the ancestor of the plaintiff as 'jivak giras,' i.e., maintenance allotted to the cadets of the ruling family. From the date of the passing of the Bombay Local Funds Act (Bombay Act III of 1869) until 1884 the cess imposed upon this village under that Act was paid to Government by the plaintiff and recovered by him from the defendants. After the passing of Bombay Act I of 1884 (Bombay Local Boards Act) disputes arose as to the plaintiff's right to recover the cess from the defendants. In 1888 the Bombay Government decided that the defendants, and not the plaintiff, were the 'superior holders' of the village and as such responsible to Government for the local fund cess. This view was subsequently confirmed by the Secretary of State. Thereupon the plaintiff filed this suit for a declaration that

\* Second Appeal No. 207 of 1900.