

after the successful party was so remiss in seeking to execute it, the plaintiffs might have gathered fresh courage, and might have after a certain period had elapsed from the date of the decree determined to set up again a title in themselves against the successful party in that suit. But we have no evidence of that, and certainly there is no evidence that they took that attitude before the 1st August 1908. But we think that it would require very strong evidence indeed on the part of a losing party to acquire a fresh title by adverse possession against the decree of the High Court or of any Court, and he would certainly have to act in such a way that the parties interested could have no doubt whatever with regard to his motives in order that they might be enabled to take proper steps to stop time from running. But in this case although the execution of the decree in Suit No. 96 of 1893 was barred by time, yet as laid down by the late Chief Justice in *Bala v. Abai*⁽¹⁾, although the remedy may be barred the right remains. We therefore think that the decision of the learned District Judge was correct. The appeal fails and must be dismissed with costs.

Decree confirmed.

J. G. R.

⁽¹⁾ (1909) 11 Bom. L. R. 1093.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Heaton.

RAMCHANDRA KOLAJI PATIL AND ANOTHER (ORIGINAL PLAINTIFFS),
APPELLANTS v. HANMANTA AND ANOTHER SONS AND HEIRS OF THE
DECEASED LAXMAN WALAD DAGDU KADASKAR AND OTHERS (ORIGINAL
DEFENDANTS), RESPONDENTS.^a

*Withdrawal of suit—Suit for redemption—Permission to withdraw on condition
that a fresh suit to be brought within two years—New suit after eight years.
—Limitation.*

^a Second Appeal No. 195 of 1918.

1920.

MIR
AKBARALI
v.
ABDUL
AJJ.

1920.

January 7.

1920.

RAMCHANDRA
KOLAJI
v.
HANMANTA.

The plaintiff filed a suit to redeem a mortgage, but not wishing to proceed with the suit, he was allowed to withdraw it with permission to bring a fresh suit provided that such suit was brought within two years from the date of the order. The new suit was brought eight years after the order for withdrawal of suit. It was dismissed by the lower Courts on the ground that the plaintiffs had not complied with the conditions imposed by the order. On appeal to the High Court,

Held, that the order for withdrawal of suit imposing a limitation of two years was erroneous and it would not affect the plaintiff's right to redeem during the period of limitation allowed by the Limitation Act.

SECOND appeal against the decision of C. V. Vernon, District Judge, Ahmednagar, confirming the decree passed by V. G. Vaidya, Subordinate Judge at Rahuri.

Suit for redemption.

The property in suit originally belonged to the plaintiff's grandfather. He sold it to the defendants by a sale deed, dated the 18th October 1902. In 1914 the plaintiffs filed a suit for a declaration that the sale deed in suit represented a mortgage transaction and prayed for accounts under the Dekkhan Agriculturists' Relief Act, 1879.

The defendants contended, *inter alia*, that the transaction was a *bona fide* sale for a valuable consideration; that the plaintiffs had filed a Suit No. 220 of 1905 for the same reliefs as were claimed in this suit; that the suit was allowed to be withdrawn on condition that the new suit should be filed within two years and that the costs of the defendants in that suit should be paid before filing the new suit; that this condition was not carried out and hence the suit was barred.

The Subordinate Judge found that the sale deed was really a mortgage transaction as alleged by the plaintiffs but dismissed the 'plaintiffs' suit as time-

barred on the ground that it was not brought within the time allowed by the withdrawal order.

On appeal, the District Judge confirmed the decree.

Plaintiffs appealed to the High Court.

P. V. Nijasure, for the appellants.

B. J. Desai with *P. V. Kane*, for respondents Nos. 1 and 2.

MACLEOD, C. J.:—This was in effect a redemption suit filed by the plaintiff in 1914 to redeem and recover property mortgaged in 1902. It appears that the plaintiff filed Suit No. 220 of 1905 to redeem the mortgage, but not wishing to proceed with that suit he was allowed to withdraw it with permission to bring a fresh suit provided that such suit was brought within two years and that the cost of defendants in that suit were first paid. This suit was brought eight years after the withdrawal, and the plaintiff's suit has, therefore, been dismissed on the ground that he has not complied with the conditions imposed by the order allowing him to withdraw the first suit. It appears to us that the Court has failed to consider what was the nature of the suit filed in 1905. It is also possible that the considerations which induced the Full Bench to decide the case of *Ramji v. Pandharinath*⁽¹⁾ had not been recognised in the previous decisions of the Indian Courts. The effect of the order made by the Court in the previous suit was to restrict the period of limitation which is allowed by law to a mortgagor to redeem. So long as it had not been decided that there was no mortgage at all then the relationship of mortgagor and mortgagee existed. The law allows a particular period to the mortgagor within which he can redeem the mortgage.

(1) (1918) 43 Bom. 477.

1920.

RAMCHANDRA
(KOLAJI
v.
HANMANTA.

The mere fact that he files a suit to redeem and then either abandons or withdraws it will not deprive him of his right to redeem. It is only when there has been a decision that there was no mortgage at all that it necessarily follows that the right to redeem falls to the ground. The result, therefore, of the decision of both Courts in this case would be that although it has never been decided that the plaintiff is not a mortgagor, still he has no right left in him to redeem the property, and that on general principles must be wrong. Therefore, in my opinion, the view taken by the learned District Judge of the order made in Suit No. 220 of 1905 was erroneous, for the Court had no power to make an order which affected the plaintiff's right to redeem during the period of limitation allowed by the Indian Limitation Act. We set aside the decree of the lower appellate Court and remand the case for findings on facts. Costs costs in the cause.

HEATON, J. :—The only matter of importance with which we are concerned is whether the present suit is beyond time. The plaintiff who brought an earlier suit for redemption had been allowed to withdraw that suit with leave to bring another, provided he brought that other within two years. He has now brought another suit for redemption; but he has not done so within two years; he has indeed allowed eight years to elapse. Apart from any other matter whatever, having regard to section 374 of the Civil Procedure Code of 1882 which lays down that the law of limitation is not affected when leave is given, I should say that it was not open to the Court to impose a limitation of two years. Consequently I should hold that the suit is within time. My Lord the Chief Justice has dealt with another aspect of the case, namely, that the right to bring a suit for redemption is not lost so long as there has not been the decision of a Court against the

1920.

RAMOHANDRA
KOLAJI
v.
HANMANTA.

existence of the relationship of mortgagor and mortgagee. No doubt that in general is so, but I do not at present myself wish to express any opinion whether supposing a plaintiff brings a suit for redemption and abandons it, he would then have, or would not have, a right to bring a fresh suit for redemption. The particular matter before us can be disposed of, I think, without expressing an opinion on that point. I agree that the case should be remanded to be determined by the Court of first appeal on its merits. Costs costs in the cause.

*Decree reversed
and case remanded.*

J. G. R.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Heaton.

KALLANGOWDA BIN NANGANGOUDA PATIL AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS v. BIBISHAYA KOM SHAH MAHOMED KHAN ALIAS APPASAHEB JAHAGIRDAR AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS. °

1920.

January 7.

Indian Limitation Act (IX of 1908), Schedule 1, Articles 123 and 144—Mahomedan law—Joint property—Property devolving on sons on death—One of the sons selling his share to a third person—Suit for partition—Property held by sons as tenants-in-common—Time to run when one co-tenant excludes the other from joint property.

Two Mahomedan brothers M and G succeeded to their father's property according to Mahomedan law. G mortgaged his share in the property to plaintiffs and eventually sold the equity of redemption to them. The plaintiffs sued to recover possession of G's share by partition. The trial Court dismissed the suit as time-barred under Article 123 of the Indian Limitation Act, 1908.

Held, that the proper article applicable would be Article 144 of the Limitation Act, as the plaintiffs' suit was in terms a suit to have partitioned property which the two persons were holding as tenants-in-common.

° First Appeal No. 108 of 1918.