accordingly he is entitled to the notice prescribed in the case of yearly tenants under section 84 of the Bombay Land Revenue Code. The result is that both appeals should, in my opinion, be dismissed with costs.

MACLEOD, C. J. :—I agree.

Appeals dismissed.

R. R.

APPELLATE CIVIL.

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

SHIVUBAI KOM RAJARAM SHETE (ORIGINAL PLAINTIFF No. 2), APPELLANT *v.* SHIDDHESHWAR MARTAND HEGADE AND OTHERS (ORIGINAL DEFENDANTS AND PLAINTIFF No. 1), RESPONDENTS*.

1920. *October* 7.

Civil Procedure Code (Act V of 1908), Order I, Rule 10 (2), Order XXXIV, Rule 1—Mortgage—Suit for redemption—Suit by some of the heirs of mortgagor—Application to add remaining heirs as defendants, after cause of action had become time-barred—Indian Limitation Act (IX of 1908), section 22.

Some of the heirs of a mortgagor sued to redeem the mortgage a few days before the expiry of the period of limitation. To meet an objection raised for non-joinder of parties, the plaintiffs subsequently applied to make the remaining heirs party-defendants to the suit. The lower Courts declined to make them parties on the ground that the claim as regards them was barred by section 22 of the Indian Limitation Act, 1908. The plaintiffs having appealed :—

Held, that the plaintiffs' right to redeem which they had when they filed the suit was not lost by their omission to make the remaining heirs parties. They were only necessary parties to save multiplicity of suits and to prevent the mortgagee being subjected to suits being filed against him in succession by various parties entitled to the equity of redemption.

Held, also, that it was within the discretion of the Court under Order I, Rule 10, sub-rule (2), of the Civil Procedure Code, to make the remaining heirs co-defendants, and then to consider what would be the legal result of such addition.

*Second Appeal No. 160 of 1919.

1920.

SHIVUBAI v. SHIDDHESHWAR MARPAND.

PER FAWCETT, J. :—"There is no provision in either the Civil Procedure Code or the Indian Limitation Act which says that a party cannot be added after his right of suit or liability to be sued (as the case may be) is barred by the provisions of the Indian Limitation Act. Accordingly I think it is absurd to hold that the plaintiffs' right of redemption is entirely lost because he has not complied with the provisions of Order XXXIV, Rule 1. That, in my opinion, would be subordinating justice to a technicality of procedure."

SECOND appeal from the decision of J. D. Dikshit, District Judge of Sholapur, confirming the decree passed by M. G. Mehta, Subordinate Judge at Barsi.

Suit to redeem a mortgage.

The mortgage in question was executed on the 10th January 1854 by one Anna to the grandfather of defendant No. 1 for a term of two years. On the 6th January 1916, the plaintiffs, two of the heirs of the mortgagor, sued to redeem the mortgage, making two other heirs party-defendants. There were, however, two more of the mortgagor's heirs, viz., Limba and Sugandha, who had not been made parties to the suit.

The defendant No. 1 objected to the non-joinder of parties; and the trial Court raised a preliminary issue:—Whether the plaintiffs are entitled to maintain the suit without making Limba and Sugandha parties? The Court found the issue in the negative and dismissed the suit.

On appeal, the District Judge confirmed the decree on the following grounds :—

"It follows that Limba and Sugandha are interested in the equity of redemption. They are also necessary parties to the suit under Order XXXIV, Rule 1. The provisions of Order I, Rule 10 (1) are obviously not applicable to the facts of the present case. As regards sub-rule (2) it need only be said that the suit having been barred so far as they were concerned at the time a motion for adding them was made, they could not be added as parties having regard to section 22 of the Limitation Act. As they are necessary parties to the suit the Subordinate Judge had no option but to dismiss the suit. The ruling in I. L. R. 28 Bom. 11, cited for the appellant, is not applicable".

Plaintiff No. 2 appealed to the High Court.

P. B. Shingne, for the appellant.

Jayakar, with *N. V. Gokhale* and *P. V. Kane*, for respondent No. 1.

MACLEOD, C. J. :—The plaintiffs filed this suit for redemption and possession of the plaint property, alleging that the mortgage deed was passed by one Anna Dhondiba deceased to the grandfather of the first defendant on the 10th January 1854. The period for the payment of the mortgage was two years, and the suit was filed on the 6th of January 1916, four days before the right to redeem was barred by the law of limitation. The heirs of Anna, the mortgagor, appear in the pedigree at page 6, and for the purposes of this second appeal it must be taken as proved that Limba and Sugandha, daughters of Renuka, are two of the heirs of Anna, and were, therefore, interested in the equity of redemption. They were not parties to the suit, and accordingly an issue was raised whether the plaintiffs were entitled to maintain the suit without making Limba and Sugandha parties. That issue was found in the negative. The plaintiffs then presented an application under Order I, Rule 10, asking the Court to make them co-plaintiffs. The learned Judge in the trial Court dismissed the application and accordingly dismissed the suit.

Undoubtedly the rights of Limba and Sugandha at the time this application was made to redeem the mortgaged property were barred. But the learned Judge does not seem to have considered whether they could have been added as co-defendants. However, this point was considered in appeal, and apparently the learned District Judge considered that the plaintiffs made no application for their being brought on record,

1920.

SHIVUBAI v. SIDDHESHWAR MARTAND.

but that they asked the Court to exercise its powers under Order I, Rule 10, and add Limba and Sugandha as party-defendants. The learned Judge, therefore, considered the plaintiffs' case from that point of view, and came to the conclusion that Limba and Sugandha could not be added as defendants under Order I, Rule 10, sub-rule (2) because the suit was barred so far as they were concerned at the time the application for adding them was made, so they could not be added as parties having regard to section 22 of the Indian Limitation Act.

The learned Judge thought that the ruling in *Guruvayya* v. *Dattatraya* [1] was not applicable. It was perfectly clear that any one of several parties entitled to the equity of redemption of mortgaged property was entitled to file a suit to redeem, but owing to the provisions of Order XXXIV, Rule 1, all other parties who were interested in the equity of redemption were necessary parties to the suit. Therefore the suit as framed was defective, and as long as Limba and Sugandha were not brought on the record, the plaintiffs' suit was bound to fail.

Then it was said that owing to the provisions of section 22 of the Indian Limitation Act they could not be brought on the record as co-defendants. All that section 22 says is this : " Where, after the institution of a suit, a new plaintiff or defendant is substituted or added, the suit shall, as regards him, be deemed to have been instituted when he was so made a party". We are entitled, therefore, to look to what would be the state of affairs after Limba and Sugandha had been brought on the record, apart from the Indian Limitation Act, if the plaintiffs are entitled to bring them there. If the plaintiff was seeking any relief against them, clearly his claim to such relief would be barred. But it does

[1] (1903) 28 Bom. 11.

not follow in all cases where a party is added as defendant to the record after the period when the main relief claimed by the plaintiff against the other defendants would be barred, that by adding that defendant the whole of the plaintiff's claim becomes barred by limitation. That point was considered in the case I have already referred to, viz., *Guruvayya* v. *Dattatraya* [1], and it was held there that: "Section 22 (of the Limitation Act) does not in itself purport to determine directly whether the joinder of parties after the institution of a suit shall in all cases necessarily involve the bar of limitation, if the period prescribed for such a suit has then expired. Such a result must depend upon consideration of the question whether the joinder was necessary to enable the Court to award such relief as may be given in the suit as framed...If fresh parties are merely joined for the purpose of safeguarding the rights subsisting as between them and others claiming generally in the same interest, the determination (by application of the provisions of section 22 of the Limitation Act) of the date of institution of the suit as regards such freshly joined parties does not ordinarily affect the right of the original plaintiff to continue the suit, and would not therefore attract the application of the general provisions of the Limitation Act".

No doubt the facts in that case were entirely different from the facts in this case. The question is whether the principle laid down there can be applied to this case. We start with this fact that the plaintiffs' right to redeem against the heirs of the mortgagee was not barred when they filed the suit. The suit was defective by reason that, when they filed it, they did not make Limba and Sugandha parties. But must it follow,

[1] (1903) 28 Bom. 11 at pp. 17, 18.

1920.

SHIVUBAI v. SHIDDHESHWAR MARTAND.

if they are now put on the record, that the plaintiffs' claim against the mortgagee's heirs is barred owing to the provisions of section 22 of the Limitation Act? I do not think that will be the proper result to follow, or that the plaintiff's right, which he had when he filed this suit, should be lost by his omission to make those persons parties. They are only necessary parties to save multiplicity of suits, and to prevent the mortgagee being subjected to suits being filed against him in succession by various parties entitled to the equity of redemption. Admittedly in this case these persons could not file thereafter a suit to redeem the mortgaged property if the plaintiff's suit failed, and, therefore, they were merely necessary for the record in order to satisfy the provisions of Order XXXIV, Rule 1, and I do not think it was ever intended that the plaintiffs in a case like this were liable to lose their rights to redeem because they had omitted to make a person party to the suit who ought to have been made a party. I think it was clearly within the discretion of the Court under Order I, Rule 10, sub-rule (2) to make these parties co-defendants, and then to consider after they had been made co-defendants what would be the legal result of such addition. I think, therefore, that the case must go back to the trial Court with a direction that Limba and Sugandha should be placed on the record as co-defendants, and that as they are purely formal parties, (there being no relief claimed against them) and they are only on the record to prevent the possibility of any attempt being made by them in the future to redeem the mortgaged property, a decree for redemption can safely be made in favour of the plaintiffs. As the plaintiffs have been in default, there will be no costs in this Court or in the Court below. Costs in the trial Court will be costs in the cause.

1920.

SHIVUBAI v. SHIDDHESHWAR MARTAND.

FAWCETT, J. :—The District Judge considers in regard to the question of joining these two persons under Order I, Rule 10, sub-rule (2), that the suit having been barred so far as they were concerned at the time the motion for adding them was made, they could not be added as parties, having regard to section 22 of the Indian Limitation Act. I entirely disagree from this view of the law in a case like the present. The plaintiffs' suit falls under Article 148 of the Indian Limitation Act. It was, so far as the provisions of Order I, Rule 3, Civil Procedure Code, are concerned, properly constituted as filed. Plaintiff alone could sue for redemption, and all the defendants against whom the relief of redeeming and recovering possession was and could be claimed were actually joined. Therefore the suit, which was brought within the prescribed period of limitation, was not barred under section 3 of the Indian Limitation Act. This section 3 is the only operative enactment which renders it obligatory on the Court to dismiss a suit which is barred by limitation under the First Schedule. Section 22 merely says that, as regards these two persons, the suit shall be deemed to have been instituted when they have been made parties. But that in no way affects the present suit under section 3. No relief is claimed by the plaintiff against these two persons, and the previous non-operation of section 3 remains unaffected, because the suit is still one brought within the prescribed period of limitation. There is no provision in either the Civil Procedure Code or the Indian Limitation Act which says that a party cannot be added after his right of suit or liability to be sued (as the case may be) is barred by the provisions of the Limitation Act. Accordingly I think it is absurd to hold that the plaintiff's right of redemption is entirely lost because he has not complied with the provisions of Order XXXIV, Rule 1. That, in my

1920.

SHIVUBAI v. SHIDDHESHWAR MARTAND.

opinion, would be subordinating justice to a technicality of procedure. We have in Order I, Rule 9, a clear provision that no suit shall be defeated by reason of non-joinder of parties, and therefore, if parties can be added, they certainly should be added in order to meet a valid objection to the suit on the ground of non-joinder of parties. One of the reasons why Limba and Sugandha, as heirs interested in the equity of redemption, should be joined is no doubt in order to safeguard the interests of the mortgagee, against whom they might otherwise bring separate suits. But in the present case, as they have lost any such right to bring a suit against the mortgagee by limitation, this reason does not really operate. I venture to think that the main reason why they should be joined is that, under section 95 of the Transfer of Property Act, the plaintiff could require them as co-heirs of the mortgagor to contribute towards the expenses incurred by him in obtaining possession of the land, and that they should therefore have an opportunity of being heard in regard to any account that is drawn up for the purpose of passing a decree for redemption. Thus in *Hall* v. *Heward*[a], the executrix of a mortgagor sued for redemption, and although the heir-at-law of the mortgagor is ordinarily a necessary party, yet as he was unknown, the Court allowed a decree for redemption to issue, safeguarding at the same time the interests of the heir-at-law. In the judgments in that case, it is said that the only argument in favour of the objection that was raised about want of parties was that the heir-at-law would not be bound by an account taken in his absence. This objection, however, was held not to be substantial enough to prevent the Court passing the decree which it did. Therefore these two heirs are added mainly for safeguarding the rights

[a] (1886) 32 Ch. D. 430.

subsisting between them and the plaintiff, and that being so the case falls clearly within the principle laid down in *Guruvayya* v. *Dattatraya*[1], which, I think, is obviously correct and should be followed in the present case. It has been adopted in several cases by the other High Courts, and is practically approved of by the Privy Council in *Kishan Prasad* v. *Har Narain Singh*[2]. In *Shahasaheb* v. *Sadashiv Supdu*, [3] it was held that the provisions of Order XXXIV, Rule 1, were not of an imperative character. In this case it is not necessary to go so far as that, nor does section 99 of the Civil Procedure Code come into play here, as it did there, in support of the view taken in that decision. In the present case there has been an application to add these two co-heirs as parties, and the application is one which, in my opinion, should have been assented to by the trial Court. I, therefore, concur in the order remanding the case.

Decree reversed : case remanded.

R. R.

[1] (1903) 28 Bom. 11. [2] (1911) 33 All. 272.
[3] (1918) 43 Bom. 575.

APPELLATE CIVIL.

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

ISUFALLI HASSANALLY AND ANOTHER (ORIGINAL PLAINTIFFS), APPLICANTS *v.* IBRAHIM DAJIBHAI AND ANOTHER (ORIGINAL DEFENDANTS), OPPONENTS*.

1920. *October 7.*

Indian Contract Act (IX of 1872)—Bailment—Machine useless for purpose for which hired—Liability of bailee.

A bailee for hire is ordinarily bound to return the article hired at the end of the period for which it is hired, but when an article is hired out for use for

* Civil Extraordinary Application No. 134 of 1920.