A SMT. DILBOO (DEAD) BY LRS. AND ORS.

v.

SMT. DHANRAJI (DEAD) AND ORS.

SEPTEMBER 12, 2000

B [V.N. KHARE AND S.N. VARIAVA, JJ.]

Code of Civil Procedure, 1908 : Section 100—Mortgage executed by L in 1902—Suit for redemption of mortgage filed by R-1 in 1961 i.e. 59 years thereafter—Question of fact arose whether predecessors in title of R-1 were C *heirs of L—Predecessors in title were party defendants in the suit—During the trial, none of them came to the witness box to confirm the contents of the documents on record to prove that they were heirs of L—After appreciation of evidence, trial court held the said predecessors in title not to be heirs of L and dismissed the suit—First appellate Court, dismissing the appeal, upheld* D *the findings of the trial court—On second appeal, High Court reversed the findings of the Courts below holding that non-examination of predecessors in title of R-1 did not matter as they would only have confirmed contents of documents on record—On appeal, Held : The question whether predecessors in title of R-1 were heirs of L was a question of fact—Both the Courts below had given a concurrent finding that they were not heirs of L—Courts below* E *had not excluded the documents on record, rather had considered the same—High Court erred in law and fact in re-appreciating the evidence and arriving at a contrary conclusion.*

Limitation Act, 1908/Evidence Act : Articles 134 and 148/Sections 101, 102, 103, and 104—Mortgage—Suit for redemption filed by the title holder F *59 years thereafter—Third party interest created by the mortgagee in between—Fact of creating third party interest in the knowledge of predecessors in title—Held : According to Article 148 of the Act suit for redemption of mortgage is to be filed within 60 years—If mortgagee creates third party interest in excess of right enjoyed by him then the suit for recovery of* G *possession from the third party has to be filed within 12 years according to Article 134 of the Act—After the lapse of 12 years, title of third party in possession gets perfected—Period of 12 years runs from the date of knowledge of the plaintiff—Onus of proof is on the plaintiff to prove that the suit is within time—In the absence of proof, plaintiff's claim would fail—Where the* H *document creating third party interest is registered, date of registration is*

the date of deemed knowledge. A

In 1902, a widow L mortgaged two houses 'X' & 'Y' and twenty trees in favour of R Six years thereafter when L died, a person claiming to be the heir of L's husband claimed the said properties by filing a suit which was dismissed holding the said person not to be the heir of L's husband. Later, in 1914, another person claimed the said properties by filing a suit on the B ground of being an heir of L which was also dismissed. In the written statement in the said suit, R and his brother S stated that the said property had come to them under an oral Will made by L's husband. Thus R and S were setting up a title adverse to the estate. In 1916, R and S mortgaged 'Y' house to one H for a period of ten years. The mortgagee was put is possession. C As no mortgage had been created in favour of S, now an interest in excess of the interest of the mortgagee was being created. In 1942, R sold a part of 'X' house to T. R sold it as an absolute owner. In 1954 T sold it to U and V. In the meantime in 1948 sons of R and S sold the house which had been mortgaged to H, to M and K with a right to redeem the mortgage. In 1959, M and K i.e. the purchasers of right of redemption of 'Y' house filed a suit D for redemption against H which was compromised and a decree for redemption was passed in favour of M and K. After a year, six persons claiming to be the heirs of L, sold to the Ist Respondent their equity of redemption in respect of the property mortgaged to R by L. This was done by way of two sale deeds dated 01-03-1960 and 21-03-1960. Three years thereafter the E said sale deeds were confirmed by two more sale deeds which were registered. However, before these subsequent registered sale deeds, Respondent 1 demanded redemption of the mortgage executed by L which was refused. Consequently, a suit for redemption of mortgage of the said property was filed by Respondent 1. The said suit did not challenge the sale deeds of 1942 and 1948 i.e. the deeds executed by R in favour of T and the other executed F by the sons of R and S in favour of M and K. The plaint also referred to the suit of 1914 filed by a person claiming to be the heir of L meaning thereby that Respondent 1 and his predecessors-in-title were aware of the adverse claim of R and S in respect of the suit property. The said suit was dismissed by the Trial Court on the basis of the fact that even though the predecessors- G in-title of R-1 were party defendants in the suit yet none of them came to the witness box to prove that they were the heirs of L. The suit was also held to be barred by limitation. T, M and K were held to be *bonafide* purchasers for value without notice. First appeal preferred by Respondent 1 was dismissed. On second appeal, the High Court reversing the finding of facts by the Courts below held that the suit was not barred by limitation. The High Court H

A also held that non-examination of predecessors-in-title of Respondent 1 did not matter as they would have only confirmed the statements in the documents. Hence, the present appeal.

Allowing the appeal, the Court

B HELD : 1.1. As admitted by the High Court, the question whether the predecessors-in-title of Respondent 1 were heirs of L was purely a question of fact. Both the Courts below had given concurrent findings that it was not proved that the predecessors-in-title of Respondent 1 were related to L. The justification sought to be given by the Judge that there was an error of law C in excluding documents from consideration is patently wrong. Both the Courts below had not excluded the documents from consideration. Both the Courts below had considered the documents. Both the Courts below had rightly held that mere statements in documents prepared by concerned/ interested parties cannot establish proof of facts stated therein. Parties who could establish the relationship were available. They were party defendants D to the suit. Both the Courts below had rightly noted that these parties had chosen not to step into the witness box. Both the Courts below had correctly appreciated the evidence and arrived at the correct conclusion. The High Court in re-appreciating the evidence and arriving at a contrary conclusion erred not only in law but also on facts. [224-F-H]

E

2.1. The High Court also seriously erred in reversing the finding of both the Courts below that the Suit was barred by limitation. The suit was governed by Limitation Act, 1908. Thus, according to Article 148 of the Act a suit for redemption of mortgage could be filed within 60 years. But if the mortgagee had created an interest in excess of the right enjoyed by him then F to recover possession against the third party, the suit had to be filed within 12 years of the transfer becoming known to the plaintiff, under Article 134 of the Act. The rational in cutting down the period of 60 years to 12 years is clear. The 60 years period is granted as a mortgagee always remains a mortgagee and thus the rights remain the same. However when an interest G in excess of the interest of the mortgagee is created then the third party is not claiming under the mortgagee. The position of such a person could not be worse than that of a rank trespasser who was in open and hostile possession. As the title of the rank trespasser would get perfected by adverse possession on expiry of 12 years, so also the title of such transferee would get perfected by adverse possession on expiry of 12 years. The period of 12 H years has to run from the date of knowledge by the plaintiff of such transfer.

It is always for the party who files the suit to show that the suit is within time. Thus in cases where the suit is filed beyond the period of 12 years, the plaintiff would have to ever and then prove that the suit is within 12 years of his/her knowledge. In the absence of any averment or proof, to show that the suit is within time, it is the plaintiff who would fail. Whenever a document is registered the date of registration becomes the date of deemed knowledge. In other cases where a fact could be discovered by due diligence then deemed knowledge would be attributed to the plaintiff because a party cannot be allowed to extend period of limitation by merely claiming that he had no knowledge. [226-G-H; 227-A-B]

2.2. It is clear that S was claiming ownership rights from as far back as 1914/1915. It is not the plaintiff's case that her predecessors were not aware of Suit No. 17 of 1914 or the pleadings therein. On the contrary in para 10 of the plaint a mention is made about this suit. This clearly shows that predecessors in title were aware of the suit and the claim made therein. They and/or the other heirs of L, who were alive at that time, chose not to challenge S within 12 years of such assertion. As S was not a mortgagee so his title got perfected by adverse possession long before 1960 when this suit was filed. It is clear that the predecessors in title had informed plaintiff about Suit No. 17 of 1914. It was for the plaintiff to aver and prove that her suit was in time against S and his family members. There is no averment or proof as to how the suit was in time. [227-D-E]

2.3. In the plaint there is no averment or statement that predecessors in title of Respondent 1 were not aware of these transactions. The mortgagee i.e. H and the purchasers i.e. T, M and K were put in possession of the property sold to them. There was no attempt to hide these transactions. The moment the respective person i.e. H, then T and then M and K took possession the predecessors were put to notice that some right had been created in favour of the third party. With a little diligence and minimal enquiry it could have been found out what that right was. The fact that there is no evidence that the predecessors in title were not aware clearly establishes that they were aware. The suit was only filed on 06-12-1960. On this date it was clearly time barred as R had created a mortgage for 10 years of 'Y' house on 12-09-1916 and R alongwith S had sold part of 'X' house to T on 26-10-1942. [227-H; 228-A-C]

2.4. In respect of mortgage of 1916 in favour of H the High Court held that the said mortgage had been re-deemed vide compromise dated 11-04-

A 1962 in the suit for redemption filed by M and K in 1959. In so holding the High Court conveniently ignored the fact that the redemption only took place in 1959 while long before that the right to make a claim, provided predecessors in title stepped into shoes of mortgagor, against H was already time barred. The redemption by M and K was not on behalf of the mortgagors but under an independent right claimed by them. Therefore, the redemption did not B extend limitation or give any fresh right to Respondent 1 or his predecessors. It has to be remembered that M and K were permitted to redeem in their own right inspite of the objections by the predecessors-in-title of Respondent 1. Also it is entirely erroneous to hold that Article 134 of the Act would not apply to a transaction of mortgage where an interest in excess of the right C of the mortgagee has been created. Thus the finding of the High Court on this count cannot be sustained at all. [228-H; 226-A]

2.5. In respect of sale in favour of T in 1942, the High Court seeks to hold that the suit is in time on the ground that U was not able to sustain his averment that the plaintiff's predecessors had knowledge of the nature D of the sale executed. The High Court has seriously erred in forgetting that it was for the plaintiff to aver and to prove that her predecessors had no knowledge of this sale or its nature. In para 4 of the plaint a reference is made to this sale. Thus R-1 and her predecessors had knowledge of this sale. It was for them to aver and prove that their knowledge was within 12 years of the suit. By wrongly casting the burden on the defendant and by ignoring E the fact that the plaintiff had neither averred nor proved that her predecessor did not have knowledge of the transaction prior to 12 years of the filing of the suit, the High Court has seriously erred in considering the *bonafides* of the transaction of 20-12-1954. The remedy was already barred by reason of the transaction of sale dated 26-10-1942. T had perfected his rights in the F property as that sale was not challenged within 12 yeas of knowledge of the plaintiff's predecessors. By sale of 20-12-1954 T was selling rights which he had acquired. He was not selling mortgagees interest or rights. Thus considering the *bonafide* of the purchasers under transaction of 20-12-1954 did not arise at all. Even otherwise in Article 134 the Legislature has purposely omitted the words "*bonafide*". All that is required is a purchaser G for valuable consideration it is also pertinent to note that the High Court does not hold that the transaction of 26-10-1942 was not *bonafide*. Thus T would also get the protection of Section 41 of the Transfer of Property Act. Thus the findings of the High Court in this regard cannot be sustained at all. [231-E-H; 232-A-B]

H 2.6. In respect of the transaction of sale dated 04-12-1948 the High

Court holds that the date of knowledge would be date of registration on 15-01-1949 and that the suit was within 12 years of that date. However, what the High Court ignores is that the sale is also by son of S. As S had perfected title by adverse possession, therefore, even if the plaintiff had a right, no relief could have been granted in respect of the share of S. [232-C]

Patel Bhudarbhai Maganlal **v.** *Patel Khemabhai Ambaram,* **[1997] 10 SCC 611;** *Lalji Jetha* **v.** *Kalidas,* **AIR (1967) SC 978;** *Sant Lal Jain* **v.** *Avtar Singh,* **AIR (1985) SC 857 and** *Ishwar Dass Jain* **v.** *Sohan Lal,* **[2000] 1 SCC 434, referred to.**

Krishna Prasad **v.** *Baraboni Coal Concern Ltd.,* **AIR (1937) PC 251;** *Jai Nandan* **v.** *Umrao Koeri,* **AIR (1929) All. 305 and** *Lachman* **v.** *Monia,* **AIR (1929) All. 759, held inapplicable.**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3673 of 1982.

From the Judgment and Order dated 13.7.82 of the Allahabad High Court in S.A. No. 2100 of 1973.

Pramod Swarup, T.N. Singh, B.M. Sharma, C.M. Patel, Ms. Pareena Swarup and S.N. Singh for the Appellants.

V.K.S. Choudhary, A.S. Pundir, Tirupurari Ray, Yash Pal Dhingra, R.M. Vithlani and S.N. Kalra for the Respondents.

The Judgment of the Court was delivered by

S. N. VARIAVA, J. This Appeal is against an Order dated 13th July 1982 in a Second Appeal No. 2100 of 1973 wherein the High Court has proceeded to appreciate evidence and on questions, purely of fact, overruled concurrent findings of facts by two Courts below. Cross objections have been filed by the 1st Respondent against directions in the impugned Judgment to have ascertained, amongst others, the state of the different parts or portions of the suit property and improvements made therein and their value.

Briefly stated the facts are as follows:

On 30th August 1902 Smt. Lakshamania widow of Narayan Sonar mortgaged two houses and twenty trees in favour of Ram Charan Sonar. The

A mortgage was for a sum of Rs. 499. It is claimed by the Appellants that Ram Charan Sonar and his brother Swaroop Sonar were already staying in the suit property with Narayan Sonar. The said Smt. Lakshamania died on 3rd November, 1908.

One Smt. Piyari, claiming to be the nearest heir of the husband of Smt.
B Laxmina, filed Suit No. 328 of 1908 and made a claim to the suit property. This Suit was dismissed on the ground that Smt. Piyari was not an heir of Shri Narayan or of Smt. Lakshamania.

One Shri Bharat Sonar, claiming to the heir of Smt. Laxmina, filed Suit
C No. 17 of 1914 making a claim to the suit property. This Suit was also dismissed on the ground that Shri Bharat Sonar was not an heir of Smt. Laxmina. In this Suit Ram Charan Sonar and Swaroop Sonar had averred, in their written statement, that the suit property had come to them under an oral Will by Shri Narayan. Thus as far back as in 1914/1915 Ram Charan Sonar and Swaroop Sonar set up a title adverse to the estate. To be remembered that
D Swaroop Sonar was not a mortgagee under the mortgage deed of 1902.

On 12th September 1916 Ram Charan Sonar and Swaroop Sonar executed a mortgage in favour of one Hanuman. This mortgage was in respect of one of the houses (which for sake of convenience is called the 'southern house). The mortgage was for a fixed period of 10 years. Thus the rights of the
E mortgagor to redeem within the period of 10 years was being affected. Also, as indicated above, Swaroop Sonar was not a mortgagee. He had already claimed ownership of this property in suit No, 17 of 1914. Now he was mortgaging as owner. Thus an interest in excess of the interest of the mortgagee was being created. The mortgagee Hanuman was put in possession of the
F southern house as a mortgagee.

On 26th October, 1942 Ram Charan Sonar sold a part of the other house (which for sake of convenience is called the northern house) to one Ram Charan Teli. We have seen the sale deed. Ram Charan Sonar described the northern house as "my personal property". Thus Ram Charan Sonar sold not
G as a mortgagee but as an absolute owner. Thus again an interest in excess of the interest of a mortgagee was created. Ram Charan Teli was put in possession of the house sold to him.

On 4th December, 1948 Appellant No. 8 (who is the son of Ram Charan Sonar) along with Appellant No. 9 (who is the son of Swaroop Sonar) sold
H the southern house to Ramraj and Lakshman. The Sale Deed was registered

on 15th January, 1949. Ramraj and Lakshman were given a right to redeem the mortgage from Hanuman. This sale was also on the footing that the sellers were owners of the property.

On 20th December, 1954 Ram Charan Teli sold the house to Lakhan and Mahavir Kandu. They were put in possession of the house.

Ram Raj and Laxman filed Suit No. 85 of 1959 against Hanuman for redemption of the mortgage. In this Suit objections were sought to be taken by some of the predecessors in title of the present Respondent No. 1. That Suit was compromised and on the basis of the compromise a decree for redemption was passed against Hanuman and in favour of Ram Raj and Lakshman.

By two sale deeds dt. 1st March 1960 and 21st March 1960 Sita Ram, Ganesh, Bechni, Rajwanti, Bhoju and Bhuwel, claiming to be the heirs of Smt. Laxmina, sold their equity of redemption to the 1st Respondent. On 25th February 1963 two further sale deeds confirming the earlier two sale deeds were executed. These were got registered. On 4th October 1960 i.e. before the registration of the subsequent sale deeds, Respondent No. 1 demanded redemption of the mortgage executed as far back as on 30th August, 1902. This was refused and, therefore, the 1st Respondent filed the present Suit, i.e. Suit No. 3 of 1961, for redemption of mortgage.

In this suit 1st Defendant was the son of Ram Charan Sonar. The 2nd Defendant was the grandson of Swaroop Sonar. Ramraj and Lakshman were Defendants 4 and 5 respectively. Lakhan and Mahavir Khandu were Defendants 5 and 6 respectively. Hanuman was made Defendant No. 7. Sita Ram, Ganesh, Bechni, Rajwanti, Bhoju and Bhuwel were Defendants 8 to 13 respectively. We have seen the plaint. The Suit is merely for redemption of mortgage. In the suit, as regards the transfers, it is averred as follows:

> "4. That Ram Charan Sonar, mortgagee right in respect of part of the mortgaged house given in Schedule Aa of the plaint to Ram Charan Teli. Thereafter deceased Ram Charan Teli transferred it to the defendants 5 and 6 who have been in possession thereof as transferees from the mortgagee and the remaining portion of the house Schedule 'Aa' of the plaint has been in possession of the defendants 1 and 2 as a mortgagees."
>
> 5. That Ram Charan Sonar had executed a fictitious mortgage deed in

favour of Hanuman, defendant No. 7 in respect of house of Schedule 'Ba' of the plaint and thereafter the defendants 1 and 2 transferred the said house in favour of Ram Raj and Laxman, defendants 3 and 4 and their possession will be treated as of mortgagees.

There is no averment that the sale deeds are not genuine and/or not binding. No declaration, challenging the Sale Deeds of 26th October, 1942 and 4th December, 1948, has been sought. The only relief claimed is for redemption of mortgage. At this stage it must be mentioned that in para 10 of the plaint there is a reference to Suit No. 17 of 1914. This shows that Respondent No. 1 and her predecessors in title were aware of the pleadings in that suit and were thus aware that as far back as 1914/1915 Ram Charan Sonar and his brother Swaroop Sonar had made a claim adverse to the estate.

Seven written statements were filed by the various sets of Defendants. A large number of defences were taken up. For purposes of this Appeal we do not need to reproduce or deal with all the defences. The main defences were that the persons from whom 1st Respondent got title were not heirs of Lakshamania and that they had no right to transfer the equity of redemption. It was also claimed that the old houses had fallen down and Ram Charan Sonar and Swaroop Sonar had, to knowledge of all, constructed new houses on the land and were occupying those as owners. It was claimed that Ram Charan Sonar and Swaroop Sonar had perfected title by adverse possession. It was further claimed that the suit was barred by limitation. The transferee Defendants also took up defence under Section 41 of the Transfer of Property Act. In an additional written statement filed by Defendants 1 to 4 it was also contended that on the date the suit was filed the Plaintiff had no title as the earlier sale deeds were invalid and that the subsequent sale deeds of 25th March 1963 did not cure the defect.

This Suit was dismissed by the Trial Court on 20th March, 1967. The Trial Court held, on proper appreciation of evidence, that it had not been proved by the 1st Respondent or on her behalf that her predecessors in title were heirs of Smt. Lakshamania. It was noted by the Trial Court that the predecessor in title were party defendants in the Suit and yet none had stepped into the witness box in order to prove that they were the heirs. The Trial Court took note of the fact that some documents had been relied upon to prove the relationship. The Trial Court correctly held that no reliance could be placed on those documents. The Trial Court noted that an admitted relative i.e. one Smt. Mantorani gave evidence and stated on oath that some of the

predecessors in title of the 1st Respondent were not heirs of Lakshamania. The Trial Court, which was the best judge of her testimony and demeanor, believed her testimony. The Trial Court held that the 1st Respondent had acquired no right, title or interest in the suit property and was not entitled to claim redemption. The Trial Court also gave a finding that the predecessors in title of the 1st Respondent had full knowledge of the transactions of mortgage and sale by Ram Charan Sonar and his brother Swaroop Sonar. The Trial Court noted that in the mortgage deed and the sale deed executed by the brothers and then by Defendants 1 and 2 they had claimed themselves to be owners. The Trial Court noted that none of the admitted heirs of Lakshamania had, in spite of knowledge of such claims, made any protest or filed a suit. The Trial Court held that the suit was barred by limitation. The Trial Court also held that Ram Charan Teli as well as Ramraj and Lakshman were bona fide purchasers for value without notice.

Being aggrieved by this Judgment 1st Respondent filed Civil Appeal No. 149 of 1967. The first Appellate Court found, on a proper appreciation of evidence, that Ram Charan Sonar and Swaroop Sonar had been making claims to be owners of the property, ever since the death of Lakshamania, and that no heir of Lakshamania had refuted this claim. The first Appellate Court also noted that the predecessors in title of the 1st Respondent had not stepped into the witness box to prove that they were related to Lakshamania. The first Appellate Court also held that the documents relied upon by the 1st Respondent viz Ex. 20, Ex. 21 and Ex. 22 would not establish relationship as the persons who could give the best evidence had been available and had not stepped into the witness box. The first Appellate Court noted that the only family member who gave evidence was Smt. Mantorani and she had deposed that some of the predecessors in title of the 1st Respondent were not related. The first Appellate Court thus held that it was not proved that the predecessors in title of the 1st Respondent were related to Smt. Lakshamania. The first Appellate Court also held that the Suit was time barred so far as the Mortgage Deed of 12th September, 1916 and the Sale Deed of 26th October, 1942 were concerned. The first Appellate Court noticed that the Sale Deed dated 26th October, 1942 was for a sum of Rs. 800 which created an interest in excess of the one held by the alleged mortgagee. The first Appellate Court held that the Suit against the purchasers was barred by Article 134 of the Limitation Act. With these findings the Civil Appeal was dismissed on 20th March, 1967.

1st Respondent then filed Second Appeal No. 2100 of 1973. To be noted that the question whether or not the predecessors in title of the 1st Respondent

A were heirs of Smt. Laxmina was purely a question of fact. It went to the root of the case. That it was purely a question of fact was also noted by the High Court. This is clear from the fact that in the Judgment it is recorded as follows:

> "The second point before the lower appellate court related to the plaintiff's right to sue. The finding that Sitaram was not the son of
B Paltan and Bechni and Rajwanti were not the daughters of Gajadhar and Madho respectively, is *undoubtedly a finding of fact*, but here again it was contended by Mr. V.K.S. Choudhary that here the finding is vitiated by errors of law and procedure."
>
> (emphasis supplied)

C In spite of so noting the High Court then proceeds to re-appreciate evidence in a Second Appeal. Reliance is placed on Exs. 20, 21 and 22 to arrive at a finding that these documents established the relationship. The High Court holds that non examination of the predecessors in title of the 1st Respondent did not matter as they would only have confirmed the statements in these
D documents. The High Court disbelieves evidence of Smt. Mantorani without any cogent reasons. High Court tries to justify its appreciation of evidence in the following manner:

> "..... findings arrived at by the lower appellate court were vitiated by an error of law in excluding from consideration the documentary
E evidence on this question ..."

The law on the subject is very clear. Even under the unamended Section 100 of the Code of Civil Procedure, the Court could only interfere on a question of law. As admitted by High Court the question, whether the predecessors in title were heirs of Lakshamania was purely a question of fact.
F Both the Courts below had given concurrent findings that it was not proved that the predecessors in title of the 1st Respondent were related to Smt. Lakshamania. The justification sought to be given by the Judge that there was an error of law in excluding documents from consideration is patently wrong. Both the Courts below had not excluded the documents from
G consideration. Both the Courts below had considered the documents. Both the Courts below had rightly held that mere statements in documents prepared by concerned/interested parties cannot establish proof of facts stated therein. Parties who could establish the relationship were available. They were party Defendants to the suit. Both the Courts below had rightly noted that these parties had chosen not to step into the witness box. In our view both the
H Courts below had correctly appreciated the evidence and arrived at the correct

conclusion. The High Court in re-appreciating evidence and arriving at a contrary conclusion erred not only in law but also on facts. To be remembered that Defendants 3 to 7 were outsiders. They were not members of the family. As they had denied relationship the same had to be established. It had to be established in a manner which would give them an opportunity to repudiate it. Mere statements made by interested family members in earlier documents would not bind them or be proof against them.

Now let us see whether the reliance on these documents is justified. The documents relied upon are Exs. 20, 21 and 22. Exs. 20 and 21 were documents in which Sitaram described himself as son of Paltan. One fails to understand on what basis the Judge holds that this statement of Sitaram in the documents would prove relationship. Sitaram is party Defendant No. 8. He is available to give evidence. He chooses not to step into the witness box. In such circumstances both the Courts below had correctly held that no reliance could be placed on these documents as the person who made the statement chose not to subject himself to cross-examination. We also find very strange the comment of the High Court that had he stepped into the witness box he would have confirmed the statement in these documents. The High Court seems to have forgotten that parties may make statements in documents which are not true but that they may not be willing to support those statements in the witness box because they would be subject to cross-examination and the falsity of the statement established. The other document relied upon by the High Court is Ex. 22. This is the Will of one Nauragi. In this Will Bechni is described by Nauragi as her daughter. The Court below had rightly noted that this did not prove that Bechni was daughter of Gajadhar. The Will does not say so. We fail to understand how the High Court presumes that this establishes that Bechni is daughter of Gajadhar. More importantly Bechni is Defendant No. 10. She does not step into the witness box to depose that she is daughter of Gajadhar and/or to support the Will. The Courts below had thus rightly held that no reliance could be placed on this document. Thus the finding of the High Court, in the Second Appeal, cannot be sustained at all. Both the Courts below were right in concluding that it had not been established that the predecessors in title of the 1st Respondent were related to Smt. Lakshamania or Shri Narayan. Both the Courts below were right in holding that the 1st Respondent thus acquired no title and had no right to claim redemption. The 1st Respondent could thus not maintain the suit and the same should have been dismissed on this ground itself.

At this stage it must be mentioned that Mr. Chaudhary sought to

A support the finding of the High Court by submitting that Ram Charan Sonar and Swaroop Sonar had in the written statement filed in Suit No. 17 of 1914 given a genealogy of the family and that that genealogy established the relationship. We see no substance in this submission. The Judge has not based his findings on that genealogy. In 1914 neither Sita Ram nor Bechni were born. That genealogy does not show Defendants 8 or 9 or 10 or 11 or
B 12 or 13. Thus that genealogy does not establish relationship. If anything that genealogy disproves case that these Defendants were relations. In any case a genealogy prepared by Ram Charan Sonar and Swaroop Sonar would not bind Defendants 3 to 7. In this view of the matter nothing further requires to be considered. However before we part it must be mentioned that the High
C Court also seriously erred in reversing the finding of both the Courts below that the Suit was barred by limitation.

This Suit was governed by the Limitation Act of 1948. Arts. 134 and 148 read as follows:

D 134.	To recover possession of immovable property conveyed or bequeathed in trust or mortgaged and afterwards transferred by the trustee or mortgagee for a valuable consideration. E	Twelve years	When the transfer becomes known to the plaintiff.
148.	Against a mortgagee to redeem or to recover possession of immovable property mortgaged. F	Sixty years	When the right to redeem or to recover possession accrues:

Thus a Suit for redemption of mortgage could be filed within 60 years. But if the mortgagee had created an interest in excess of the right enjoyed by him then to recover possession against the third party the Suit had to be filed within 12 years of the transfer becoming known to the Plaintiff. The
G rational in cutting down the period of 60 years to 12 years is clear. The 60 years period is granted as a mortgagee always remains a mortgagee and thus the rights remain the same. However when an interest in excess of the interest of the mortgagee is created then the third party is not claiming under the mortgagee. The position of such a person could not be worse than that of a rank trespasser who was in open and hostile possession. As the title of the
H rank trespasser would get perfected by adverse possession on expiry of 12

years so also the title of such transferee would get perfected after 12 years. The period of 12 years has to run from the date of knowledge by the Plaintiff of such transfer. It is always for the party who files the Suit to show that the Suit is within time. Thus in cases where the suit is filed beyond the period of 12 years, the Plaintiff would have to aver and then prove that the Suit is within 12 years of his/her knowledge. In the absence of any averment or proof, to show that the suit is within time, it is the Plaintiff who would fail. Whenever a document is registered the date of registration becomes the date of deemed knowledge. In other cases where a fact could be discovered by due diligence then deemed knowledge would be attributed to the Plaintiff because a party cannot be allowed to extend period of limitation by merely claiming that he had no knowledge.

A B C

As set out above Swaroop Sonar was claiming ownership rights from as far back as 1914/1915. It is not the Plaintiffs case that her predecessors were not aware of Suit No. 17 of 1914 or the pleadings therein. On the contrary in para 10 of the Plaint a mention is made about this suit. This clearly shows that predecessors in title were aware of the suit and the claim made therein. They and/or the other heirs of Smt. Lakshamania, who were alive at that time, chose not to challenge Swaroop Sonar within 12 years of such assertion. As stated above Swaroop Sonar was not a mortgagee. So his title got perfected by adverse possession long before 1960 when this suit was filed. It is clear that the predecessors in title had informed Plaintiff about Suit No. 17 of 1914. It was for the Plaintiff to aver and prove that her suit was in time against Swaroop Sonar and his family members. There is no averment or proof as to how the suit was in time.

D E

Apart from this, as set out above, other interest in excess of rights of mortgagee had been created. They are:

F

(a) Ram Charan Sonar created a mortgage for 10 years, of the southern house, on 12th September 1916.

(b) Ram Charan Sonar and Swaroop Sonar sold a part of the northern house to Ram Charan Teli on 26th October 1942.

G

(c) On 4th December 1948 a sale takes place in favour of Ramraj and Lakshman. This is registered on 15th January 1949.

In the Plaint there is no averment or statement that the predecessors in title of the 1st Respondent were not aware of these transactions. In evidence there is no deposition that the predecessors in title were not aware of these

H

A transactions. The mortgagee i.e. Hanuman and the purchasers i.e. Ram Charan Teli and Ramraj and Lakshman were put in possession of the property sold to them. There was no attempt to hide these transactions. The moment that the respective person i.e. Hanuman, then Ram Charan Teli and then Ramraj and Lakshman took possession the predecessors were put to notice that some right had been created in favour of a third party. With a little diligence B and minimal enquiry it could have been found out what that right was. The fact that there is no evidence that the predecessors in title were not aware clearly establishes that they were aware. The suit is only filed on 6th December 1960. On this date it is clearly time barred so far as transactions at (a) and (b) above are concerned. Yet the High Court holds that the suit is not time C barred and grants redemption of the entire property. Let us now see the erroneous and absolutely fallacious reasoning adopted by the High Court to hold that the suit was not barred by limitation in respect of these two transactions.

In respect of the mortgage dt. 12th September 1916 the High Court D states as follows:

> "So far as the mortgage deed of 1916 Ex.A/4 is concerned, it has already been seen above that Hanuman, defendant No. 7, thus clearly stated that he was not in possession under that Mortgage deed. The mortgage has been re-deemed vide-compromise in Suit No. 85 of 1959 E dated the 11th April, 1962, between Ram, who was the plaintiff in that suit and is third defendant in the present suit, and Hanuman, Mahadeo, Sankatha and others of whom Hanuman, Mahadeo and Sankatha are defendants Nos. 1, 2 and 7 respectively in the present suit. At any rate the usufructuary mortgage is not a kind of transfer which could F attract the applicability of Article 134 of the schedule to the Indian Limitation Act, 1908. Accordingly, I hold that the present suit could not be said to be barred by limitation under Article 134 by reason of the transfers made by Ex.A/4."

In so holding the High Court conveniently ignores the fact that the G redemption only took place in 1959. Long before that the right to make a claim, provided predecessors in title stepped into shoes of mortgagor, against Hanuman was already time barred. The redemption by Ramraj and Lakshman was not on behalf of the mortgagors but under an independent right claimed by them. Therefore the redemption did not extend limitation or give any fresh right to the 1st Respondent or her predecessors. It must be remembered that H Ramraj and Lakshman were permitted to redeem in their own right in spite of

objections by the predecessors in title of the 1st Respondent. Also it is entirely erroneous to hold that Article 134 would not apply to a transaction of mortgage where an interest in excess of the right of the mortgagee has been created. Thus the finding of the High Court on this count cannot be sustained at all.

In respect of the sale in favour of Ram Charan Teli on 26th October 1942 the High Court holds as follows:

> "Another sale deed referred to was that dated the 26th October, 1942 in favour of Ram Charan Teli, who in his turn executed a sale deed dated the 20th December, 1954 in favour of defendants No. 5 and 6. This refers to a part of the house under Mad 'As' of the plaint. Defendant No. 5 is Lakhan Kandu who appeared as D.W.3 and gave his name as Ram Lakhan Sahu. The plea of the bar of limitation under Article 134 was based on paragraph 18 of the written statement of defendants Nos. 5 and 6 in which it was stated that Ram Charan Sonar sold the house as owner; Paltan's family members were aware of it, but they never raised any objection within 12 years thereof, nor did they file any suit, hence, the suit is barred by limitation prescribed by Article 134. In cross-examination Ram Lakhan Sahu (D.W.3) stated: (Translated into English for convenience to the Hon'ble Judges):
>
> > "In para 18 of the written statement the family members of Paltan had knowledge. How it is written, I do not know. Whether this thing is written rightly or wrongly I cannot tell."
>
> This statement of Ram Lakhan Sahu (D.W. 3) knocks the bottom out of the plea raised by defendants Nos. 5 and 6 that the suit for possession in respect of the house under Mad 'as' which was under their possession and which they had purchased from Ram Charan Teli, who in its turn had purchased it under a sale deed dated the 26th October, 1942 - Ex.A/2- was barred by limitation. The limitation prescribed by Article 134 of the Schedule to the Indian Limitation Act, 1908, for recovery of possession of immovable property which was mortgaged and is afterwards transferred by the mortgagee for a valuable consideration, was 12 years from the date when the transfer becomes known to the plaintiff. The plaintiff had purchased the properties in suit in the year 1960 and the suit was filed on the 6th Dec., 1960. It is the knowledge of her predecessors-in-interest which mattered for purposes of computating the limitation of 12 years prescribed by the said Article 134. The predecessors-in-interest or the

A persons from whom the plaintiff had purchased the property were the members of the family of Narayan. Paltan was admittedly a collateral of Narayan and when defendants Nos. 5 and 6 pleaded in paragraph 18 of the written statement that the family members of Paltan were aware of the purchase of the property of Ram Charan Sonar as owner, they meant the predecessors-in-interest of the plaintiff from whom she B had purchased the properties in suit. The sworn statement of Ram Lakhan Sahu (D.W. 3) wipes out the plea contained in paragraph 18 of the written statement. But Ram Lakhan Sahu (D.W. 3) had also stated in his examination-in-chief that : (translated into English for convenience to the Hon'ble Judges):

C

> "When I got the sale deed executed by Ramlakhan Teli, at that time Sitaram had objected."

And in cross-examination he stated: (translated into English for convenience to the Hon'ble Judges):

D

> "Sitaram tells him as son of Palton but he is not his son..... When Sitaram had come to make objection against my sale deed, I was knowing him even from before it. I did not write in my written statement about the point of objection of Sitaram."

Looking to the evidence it appears that while it could be said that E the plaintiff or her predecessors-in-interest were aware of the fact that the defendants Nos. 5 and 6 were exercising rights of full ownership over the part of the house under *Mad 'Aa'* since the purchase made by defendant no. 5 in the year 1954, and saw that house being made packka two or three years thereafter, vide- statement of Sukh Deo (P.W. 4), *I have not been able to find any evidence to show that they* F *were aware of the fact that Ram Charan Sonar had sold the full ownership in the house to Ram Charan Teli by the sale deed dated the 26th October, 1942 (Ex.A/2).* The finding that the suit was barred by limitation under Article 134 in respect of the house purchased by defendant no. 5 under *Mad 'Aa'* is thus without any basis and being G based on no evidence it is vitiated in law and liable to be set aside as such."

(emphasis supplied)

Thus the High Court seeks to hold that the suit is in time on the ground that Lakhan was not able to sustain his averment that the Plaintiffs predecessors H had knowledge of the nature of the sale executed on 26th October 1942. The

High Court has seriously erred in forgetting that it was for the Plaintiff to aver and to prove that her predecessors had no knowledge of this sale or its nature. There is no such averment or proof. The High Court is itself commenting on the fact that it has not been able to find any evidence that the predecessors had knowledge. What the High Court forgets is that in para 4 of the plaint a reference is made to this sale. Thus the 1st Respondent and her predecessors had knowledge of this sale. It was for them to aver and prove that their knowledge was within 12 years of the suit. It was for them to aver and prove that they had no knowledge of the nature of this transaction. Even after repeated questions from Court the learned counsel for the Respondent could not show to us any averment or proof that this knowledge was within 12 years of the suit. Also to be remembered that Lakhan purchased from Ram Charan Teli on 20th December, 1954. How did the High Court expect him to depose about knowledge of Plaintiff predecessors about the transaction of 26th October, 1942. To be remembered that Ram Charan Teli was put in possession of the property and started staying there with his family. It is impossible to believe that the predecessors would not know that a stranger had started residing there. A simple enquiry would disclose under what rights he was staying there. Advisably there is no averment that the predecessors were not aware of this transaction or its nature and advisably nobody stepped into the witness box to state that they were not so aware. There was no burden or duty on the Defendants to prove knowledge on part of the Plaintiff. It is only after, and if, the Plaintiff first averred and then proved that the suit was within 12 years of the date they gained knowledge of the transaction that the burden will have shifted on the Defendant to show that the Plaintiff's claim is false. In the absence of any such averment and proof the Plaintiff must fail. No question arose of the Defendants having to show that the Plaintiff or her predecessors had knowledge. By wrongly casting the burden on the Defendant and by ignoring the fact that the Plaintiff had neither averred nor proved that her predecessor did not have knowledge of the transaction prior to 12 years of the filing of the suit, the High Court has seriously erred in law. The High Court has also seriously erred in considering bona-fides of the transaction of 20th December 1954. The remedy was already barred by reason of the transaction of sale dt. 26th October 1942. Ram Charan Teli had perfected his rights in the property as that sale was not challenged within 12 years of knowledge of the Plaintiffs predecessors. By the sale of 20th December 1954 Ram Charan Teli was selling rights which he had acquired. He was not selling mortgagees interest or rights. Thus considering bona-fides of the purchasers under transaction of 20th December 1954 did not arise at all. Even otherwise in Article 134 the Legislature has purposely omitted the

A words "bona-fide". All that is required is a purchaser for valuable consideration. It is nobody's case that the sales of 26th October 1942 and/or 20th December 1954 were not for valuable consideration. Also pertinent to note that the High Court does not hold that the transaction of 26th October 1942 was not *bonafide*. Thus Ram Charan Teli would also get the protection of Section 41 of the Transfer of Property Act. Thus the findings of the High Court in this B regard cannot be sustained at all.

In respect of the transaction of sale dt. 4th December 1948 the High Court holds that the date of knowledge would be date of registration on 15th January 1949 and that the suit was within 12 years of that date. However what C the High Court ignores is that the sale is also by the son of Swaroop Sonar. As set out above Swaroop Sonar had perfected title by adverse possession. Therefore, even if the Plaintiff had a right, no relief could have been granted in respect of the share of Swaroop Sonar.

Thus the Judgment of the High Court is unsustainable also on the D question of limitation. On the above mentioned two grounds the Suit should have been dismissed.

Before we pronounce the Order the authorities relied upon by Mr. Choudhary have to be dealt with. Mr. Choudhary has relied upon *Patel Bhudarbhai Maganbhai* v. *Patel Khemabhai Ambaram* reported in [1997] 10 E S.C.C. 611. In this case one Bai Jivi had mortgaged the property to one Kana. The wife of Kana executed the mortgage in favour of one Kuber. Bai Jivi then filed a suit for redemption of the mortgage. The defence taken up was that Bai Jivi had asserted a right as an owner by executing a mortgage deed in favour of Kuber and that this mortgage deed was in the knowledge of the F plaintiff and, therefore, the suit for redemption which has been filed beyond the period of 12 years could not be maintained. This Court held that once a mortgagee always a mortgagee. This Court further also observed as follows:

> "It is seen that Bai Jivi or her successor-in-interest were not made parties either to the second mortgage executed on 31-5-1935 or to the G suit for redemption nor any acknowledgment in that behalf has been pleaded or established. It is also seen that in the plaint the only pleading was that Hati became aware of the execution of the mortgage in favour of the second mortgagee in 1935. It is true that Bai Jivi had knowledge of assertion of any hostile title either as an owner or of any other title detrimental to her interest and acquiesced to it; perhaps H the contention bears relevance."

This Court further held that the mortgage of Kuber had been redeemed by Shivi and, therefore, Shivi only continued as a mortgagee and against her the period of limitation was 30 years. In the present case it is to be seen that there was an absolute sale in favour of Ram Charan Teli on 26th October, 1942. Then, on 4th December 1948, there was an absolute sale in favour of Ramraj and Lakshman. The mortgage executed in favour of Hanuman was redeemed not by Ram Charan Sonar and his brother but by Ramraj. Ram Charan Teli, Ramraj and Lakshman were claiming title not as mortgagees or sub-mortgagees but in their own rights. On the above quoted observations of this Court it would be clear that by executing these documents Ram Charan Sonar and Swaroop Sonar were claiming title hostile to the mortgagor and had created absolute interest in the property in favour of third parties. The suit against those third parties would become barred if not filed within a period of 12 years. This authority, therefore, is not of much assistance to Mr. Choudhary.

For the same reason the cases of *Krishna Prasad* v. *Baraboni Coal Concern Ltd.* reported in AIR (1937) P.C. 251; *Jai Nandan* v. *Umrao Koeri* reported in AIR (1929) Allahabad 305; *Lachman* v. *Munia* reported in AIR (1925) Allahabad 759 and *Iswar Dass Jain* v. *Sohan Lal* reported in [2000] 1 SCC 434 can be of no assistance to the 1st Respondent.

Mr. Choudhary also relied upon the case of *Lalji Jetha* v. *Kalidas* reported in AIR (1967) SC 978. In this case one Sundarji mortgaged two shops in Jamnagar on 11th December, 1907. The mortgagee was put in possession. On 25th August, 1930 family members of Sundarji, who had in the meantime died, entered into an Agreement to Sell the two shops and certain other property to the mortgagee. After having entered into such an Agreement to Sell the family members of Sundarji sold the said shops to one Lalji Jetha and Kanji Jetha on 10th September, 1930. The mortgagee filed a suit for specific performance of the Agreement to Sell and for setting aside the subsequent Sale Deed. This Court ultimately held that the Sale Deed could not be declared to be void but that the Sale Deed was subject to the Agreement to Sell in favour of the mortgagees. In our view this Judgment has no application to the facts of the present case and is entirely irrelevant.

Mr. Choudhary also relied on the case of *Sant Lal Jain* v. *Avtar Singh* reported in AIR (1985) SC 857. In this case a lease has been created in favour of a party. The lessee gave a licence to a third party for a specific period. That licence was terminated and a suit for recovery was filed by the lessee. In the meantime the licensee purchased the property from the owner. This Court held

A that even though the licensee may have purchased the property from the registered owner, still the licensee could not, deny the title of the lessor. This Court held that the licensee must first surrender possession and seek his remedy separately in case he has acquired title. There could be no dispute with the proposition of law. But they have no application so far as Swaroop Sonar and the purchasers under sale deeds of 12th October 1942 and 4th B December 1948 are concerned. These parties were not claiming any rights under the mortgage.

For the above reasons the Appeal is allowed. The impugned Judgment is set aside. The suit will stand dismissed. In the view which we have taken, C it is not necessary for us to consider the cross objections which had been filed by the 1st Respondent. This Appeal stands disposed of accordingly. In the circumstances of the case there will be no order as to costs.

R.C.K. Appeal allowed.