

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.

1897.
July 21.

POKREE SAHEB BEARY (PLAINTIFF), APPELLANT,

v.

POKREE BEARY AND ANOTHER (DEFENDANTS NOS. 1 AND 2),
RESPONDENTS.*

*Transfer of Property Act—Act IV of 1882, s. 72—Mortgage accounts—Costs
* incurred by mortgagee.*

Land, having been mortgaged to the defendant, was let by him for rent to the mortgagor. The rent fell into arrear and the mortgagee sued and obtained a decree for the rent in arrear and for possession. Subsequently after the mortgagor's death, her heir, the present plaintiff, unsuccessfully resisted execution of the decree obtained against her, asserting that she had no right to mortgage the property which, it was alleged, had belonged to his father. The plaintiff now brought a suit for redemption :

Held, that in taking the account the defendant was entitled to have credit for the costs incurred in the proceedings between him and the plaintiff, but not in the proceedings between him and the original mortgagor.

SECOND APPEAL against the decree of W. C. Holmes, District Judge of South Canara, in Appeal Suit No. 7 of 1894, modifying the decree of S. Raghunathayya, District Munsif of Mangalore, in Original Suit No. 20 of 1892.

The plaintiff sued to recover possession of land which had been mortgaged by his mother and predecessor in title to the defendant. The suit was treated as a redemption suit, and the chief question was as to whether, in taking the mortgage account, the mortgagee was entitled to credit for the costs of certain litigation. The circumstances relating thereto were stated by the District Munsif as follows :—

“Patrumma appears to have obtained back on chalgeni the entire property mortgaged to first defendant (*vide* exhibits II and V). In 1884 first defendant sued plaintiff's* mother to recover possession of the said mortgaged property with arrears of rent, and also future rent, and got a decree (*vide* exhibit V). In executing this decree, first defendant was resisted by plaintiff, who contended that the property was his father's, but his contention was disallowed, the property being held to be his mother

* Second Appeal No. 482 of 1896,

“Pathumma’s property (*vide* exhibits V and VII, the judgment in the Court of First Instance and in Appellate Court, respectively, the latter of which had been passed on 9th September 1886). . . . At about the close of 1887, first defendant appears to have applied for execution of his decree by arresting the plaintiff, son of Pathumma, who was then dead ; but the Court appears to have declined to arrest him, until after the attachment and sale of debtor’s property should take place.”

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The present appeal was preferred by the plaintiff.

Pattubhirāma Ayyar for appellants.

Narayana Rau for respondents.

JUDGMENT.—The Lower Court have properly held that exhibit III is not binding upon the plaintiff, and that the first defendant is not therefore entitled to the sum therein mentioned.

The next question is whether the first defendant is entitled to all or any of the sums allowed by the District Judge as payable by the plaintiff before he can recover possession of the mortgaged property. The sums are claimed as due in respect of costs incurred by the first defendant in certain suits (exhibits V, VI and VII). The sum in exhibit V represents costs incurred by first defendant in a suit for rent due by the original mortgagor as a tenant of the first defendant. The tenancy was created subsequent to the mortgage, and the rent was not made a charge on the property by the contract between the parties. Moreover, the decree in the suit was only a personal decree. In these circumstances, we are unable to hold that these costs were incurred for the due management of the property, and the collection of the rents within the meaning of section 72 (a) of the Transfer of Property Act, 1882. To hold otherwise would, in many cases, enable the mortgagee to recover from the mortgagor the expenses incurred by the former in attempting to recover rents from tenants put into possession by himself. Should such tenants fail to pay, there is no reason why the mortgagor should be responsible for the expenses of the litigation, unless, of course, he has entered into any contract with the mortgagee to be responsible. The fact that, in the present case, the mortgagor is the tenant can make no difference in principle, since she was sued as tenant, not as mortgagor. The first defendant is not entitled to make these costs a charge on the property. As regards the costs incurred in the other suit to which exhibits VI and VII relate, we observe that in that suit the mortgagor’s title

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was impeached by the present plaintiff, and the costs were incurred by the first defendant, the mortgagee, in defending the mortgagor's title. Such costs are clearly within the rule in section 72 (c) of the Transfer of Property Act.

The law to this effect was laid down long ago in *Godfrey v. Watson* (1) and *Parker v. Watkins* (2) is no exception to the rule. For all that was there decided was that "if some litigious person chooses to contest his (the mortgagee's) title to the mortgage, that should not affect the parties interested in the equity of redemption." The Vice-Chancellor, however, expressly observed that "where a mortgagee has been put to expense in defending the title to the estate, the defence being for the benefit of all parties, he is entitled to charge those expenses against the estate." The latter is precisely the present case.

The District Judge was therefore right in allowing these costs.

The District Judge has not given any finding as to the amounts to be allowed with reference to the repairs of the embankment and the trees cut, but the sum is trifling, and the respondents' vakil does not press to have the case sent back for a finding on these matters.

Both parties have, to some extent, failed to establish their respective contentions.

We shall, therefore, allow the first defendant only half the costs throughout. The plaintiff must bear his own.

The decree for redemption will be modified in accordance with these findings, and the time for redemption will be three months from this date.

(1) 3 Atk., 517.

(2) John, 133.