

## APPELLATE CIVIL.

*Before Mr. Justice Subrahmania Ayyar and Mr. Justice Davies.*

1904.  
September  
15, 22.

AIYAPPA REDDI (DEFENDANT), APPELLANT,

v.

KUPPUSAMI REDDI (PLAINTIFF), RESPONDENT.\*

*Mortgage—Mortgage of interest in tenancy in common by one of two co-tenants—Deterioration of mortgagor's interest by act of other co-tenant—Suit for damages by mortgagee against wrong doer—Maintainability—Limitation Act XV of 1877, art. 49—Wrongfully removing specific property.*

K, who was a tenant in common with the defendant, mortgaged her interest to the plaintiff. The plaintiff instituted a suit against K for the recovery of the mortgage amount by sale of the mortgaged property. Pending the appeal in that suit, the defendant cut down all the trees on the land and appropriated the same to himself. On the sale of K's interest in the land which took place after the removal of the trees, the plaintiff realised only a portion of the decree amount. The mortgagee now instituted the present suit against the defendant for the damage suffered by him by reason of the defendant having appropriated K's share of the wood. The suit was filed within three years of the act complained of :

*Held*, that the suit was maintainable. From the time of lending his money, the mortgagee, whether in or out of possession, acquires the right to have the mortgaged property secured from deterioration in the hands of the mortgagor or of any other person to whose rights those of the mortgagee are superior.

*Held also*, that the suit was not barred by limitation. It was not the act of cutting down the timber, but the subsequent appropriation of the wood by the defendant which ought to have been left for the share of the mortgagor, that operated to the injury of the plaintiff. Limitation began to run from the date when the defendant appropriated the wood to himself.

SUIT by a mortgagee of the interest of one of two tenants in common, in certain property, against the other tenant for damages. Plaintiff held a mortgage over the interest of Kanakammal in certain lands. Defendant was a co-tenant with Kanakammal in the said lands, and his interest was not mortgaged to the plaintiff. Plaintiff sued Kanakammal for the amount of his mortgage debt and obtained a decree. Pending an appeal from that decree defendant cut down all the trees which stood on the land, and

\* Civil Miscellaneous Appeal No. 93 of 1904 presented against the decree of D. Broadfoot, Esq., District Judge of Chingleput, in Appeal Suit No. 205 of 1903, presented the decree of M.R.Ry. V. Swaminatha Ayyar, District Munsif of Poonamallee, in Original Suit No. 478 of 1902.

appropriated the wood. Plaintiff was only able to realize a portion of his decree, as against Kanakammal's interest in the land. He, now, within three years of the defendant's appropriation of the cut wood, sued the defendant for the damage suffered by reason of defendant's act in appropriating the wood. Further facts appear in the judgment. The District Munsif held that article 36 applied and that the suit was barred by limitation. The District Judge on appeal held that article 48 applied, and reversed the decree and remanded the suit for disposal:

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Against that order defendant preferred this appeal.

*T. V. Seshagiri Ayyar* for appellant.

*C. V. Anantakrishna Ayyar* for respondent.

JUDGMENT—SUBRAHMANIA AYYAR, J.—The plaintiff held a simple mortgage from one Kanakammal upon her one-fourth share of certain lands which contained trees, she being a tenant in common with the defendant who was entitled to the remaining three-fourths. Pending the appeal in the suit instituted by the plaintiff for the recovery of the mortgage amount by the sale of the mortgaged interest, the defendant, who had also been impleaded in the suit, under section 85 of the Transfer of Property Act, as a person holding undivided possession with the mortgagor of the land which was the subject of the tenancy in common, cut down all the trees on the land and appropriated the same to himself. On the sale of the mortgagor's interest in the land, which took place after the removal of the trees, the plaintiff realized but a portion of the amount due to him under the decree passed in the said suit. The present action is for damages alleged to have been caused to the plaintiff by the defendant having appropriated to himself the mortgagor's share of the wood cut.

On behalf of the defendant it was contended before us that the plaintiff had no right of action against the defendant in respect of the wood in question.

Now undoubtedly from the time of lending his money, the mortgagee, whether he be in or out of possession, acquires the right to have the mortgaged property secured from deterioration in the hands of the mortgagor or of any other person to whose rights those of the mortgagee are superior (see Fisher on 'Mortgage,' Fourth Edition, page 293). Hence it has been held that the mortgagee is entitled to maintain an action for any act done by the mortgagor or by his authority, essentially impairing

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the inheritance, such as cutting timber, tearing down houses, fixtures and the like although such fixtures may have been placed on the premises by the mortgagor after the making of the mortgage, and likewise against strangers whose wrongful act affects injuriously the mortgage security (see Washburn on 'Real Property,' Fifth Edition, Volume II, pages 139 and 140, and *Frothingham v. McKusick*(1), *Searle v. Sewyer*(2), *Wilhen v. Moulton*(3), and *Goading v. Shea*(4), cited in 'American Digest,' Century Edition, Volume 35, columns 1045, 1046 and 1047). The contention referred to is, therefore, untenable. I also hold that the suit was in time, as it was instituted within three years from the date when the defendant appropriated the wood to himself. It was conceded on both sides that the mere act of cutting down all the timber which stood on the common property did not, having regard to the rights *inter se* of the defendant on the one hand and his tenant in common, the mortgagor, and those claiming through her, on the other, constitute a wrong. It was the defendant's subsequent appropriation of the wood which ought to have been left for the share of the mortgagor that operated to the injury of the plaintiff. No doubt the case cannot be held to fall within article 48 of the second schedule to the Limitation Act as the District Judge decided, the plaintiff never having had a right to the possession of the wood. But he having been entitled to have the wood sold as part of his security, the taking of the wood by the defendant which interfered with such right of the plaintiff was one to which the next article 49 applies.

I would therefore dismiss the appeal with costs.

DAVIES, J.—I concur.

(1) 24 Me. (11 Shep.), 408.

(3) 127 Mass, 509.

(2) 127 Mass, 491.

(4) 103 Mass, 360.