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Ziaul Hasan, J.

contract which the agent has made touching the discharge of the trust. The legal contract is that one of the uses to which the property entrusted will be put is that certain moneys and accurate accounts will periodically be delivered at the head office. The omission or the rendering of false accounts at the head office infringes the agreement regarding the mode in which the property will be used . . ."

In the present case the accused having failed to deliver up the moneys realized by him in spite of repeated demands, it can be held with much greater force that he used the property entrusted to him in violation of the legal contract which he made with his master. This is an aspect of the case which the learned trying Magistrate entirely lost sight of.

I am therefore clearly of opinion that the City Magistrate of Lucknow had jurisdiction to try the case and accepting the application for revision set aside the order of discharge of the accused and send back the case to the trial Court for enquiry according to law.

APPELLATE CIVIL

Before Mr. Justice Bisheshwar Nath Srivastava and Mr. Justice E. M. Nanavutty

1936
February, 3

NAWAB MIRZA MOHAMMAD SADIQ ALI KHAN (DEFENDANT-APPELLANT) *v.* M. NIAZ AHMAD AND OTHERS, DEFENDANTS, AND OTHERS PLAINTIFFS (RESPONDENTS)*

Civil Procedure Code (Act V of 1908), Order XXXIV, rule 9 —Mortgage suit—Separate suits on a mortgage, if allowable —Decree to one defendant against another defendant, if permissible.

It is well settled that in a mortgage suit all questions of account between the mortgagor and the mortgagee must be gone into and decided in that suit and that separate suits can not be brought by the several heirs of a mortgagee to enforce

*First Civil Appeal No. 40 of 1934, against the decree of Pandit Parduman Kishen Kaul, Subordinate Judge of Sitapur, dated the 12th of December, 1933.

the mortgage. *Mahabir Pershad Singh* v. *Macnaghten* (1), *Satyabadi Behara* v. *Harabati* (2), and *Ameenammal* v. *Meenakshi* (3), relied on.

Where, therefore, some of the heirs of a mortgagee bring a suit for the money due on a mortgage and implead the other heirs, who did not join in the suit, as defendants along with the mortgagors, it is the duty of the Court to go into the question of the entire mortgage and to determine once for all the accounts between the mortgagors on the one side and all the representatives of the mortgagee on the other and the mortgagors defendants are entitled to a decree for the surplus amount paid by them to one of the mortgagee-defendants and the fact of the mortgagors and the mortgagee-defendants being arrayed on the same side as defendants is a matter of no consequence and that the equitable principle embodied in Order XXXIV, rule 9 of the Code of Civil Procedure applies to the case.

Messrs. *Akhtar Husain* and *Durga Dayal,* for the appellants.

Mr. *Muhammad Ayub,* for the respondents.

SRIVASTAVA and NANAVUTTY, JJ.:—This is an appeal by one of the defendants against the decree, dated the 12th of December, 1933, of the learned Subordinate Judge of Sitapur.

The facts of the case which has given rise to this appeal are that on the 15th of April, 1916, one Imran Ahmad executed a deed of simple mortgage for Rs.17,000 in favour of Nawab Baqar Ali Khan of Sheeshmahal, Lucknow. The mortgagee died on the 17th of January, 1921, leaving as his heirs two widows, Nawab Fakhr Jehan Begam, plaintiff No. 1, and N. Sharf Jehan Begam, defendant No. 6, one daughter N. Abid Jehan Begam, plaintiff No. 3, and four sons, Nawab Taqi Ali Khan, plaintiff No. 2, Nawab Sadiq Ali Khan, defendant No. 4, N. Kazim Ali Khan, defendant No. 5, and one Naqi Ali Khan. Naqi Ali Khan is also dead and is represented by defendants 7 and 8. Imran Ahmad the mortgagor died about 1928 leaving defendants 1 to 3 as his legal representatives. After the death of Nawab

(1) (1889) L.R., 16 I.A., 107. (2) (1907) I.L.R., 34 Cal., 223.
(3) (1920) 60 I.C., 226.

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Baqar Ali Khan disputes arose amongst his heirs and a partition suit was instituted in which Nawab Sadiq Ali Khan, defendant No. 4, laid claim to the entire property left by Nawab Baqar Ali Khan as the eldest son of his father on the basis of a family custom. It was eventually held in this litigation that succession to the non-taluqdari property of Nawab Baqar Ali Khan was governed by the Mahomedan Law. On the 20th of April, 1933, the plaintiff instituted the present suit claiming a decree for Rs.47,617 principal and interest on the basis of the mortgage, dated the 25th of April, 1916 and prayed that in case of the mortgagor's failure to pay this amount it may be realized by sale of the mortgaged property. The other heirs and legal representatives of Nawab Baqar Ali Khan who did not join in the suit, were impleaded as defendants 4 to 8. The plaint in this suit gave the mortgagor credit for Rs.4,092-8-0 which had been paid to Nawab Baqar Ali Khan in his lifetime. On the 4th of August, 1933, a compromise was arrived at between the plaintiffs on the one hand and defendants 1 to 3 on the other, and no contest remained between these parties after the filing of this compromise. Defendants 5, 6, 7 and 8 were also paid their share of the mortgage money and they filed the receipts exhibits A-14 and A-13 in full discharge of all their claims on the basis of the mortgage in suit. Thus the only contest which remained was between defendants 1 to 3 and defendant No. 4. As between them the learned Subordinate Judge found that Nawab Baqar Ali Khan had received a sum of Rs.411-8 in addition to the sum of Rs.4,092-8 for which credit had been given in the plaint. He further found that after the death of Nawab Baqar Ali Khan a sum of Rs.8,350 had been paid by the mortgagor to defendant No. 4 on account of the mortgage in suit. As regards the share of defendant No. 4 it was held that he was entitled only to a 7/36ths share, that is Rs.3,740-11 and that he had therefore received Rs.4,060-15-8 in excess of his share. He accordingly

passed a decree for this amount together with future interest at 6 per cent. per annum from the date of the decree till realization in favour of defendants 1 to 3 against defendant No. 4.

The learned counsel for defendant No. 4 appellant has in the first place questioned the correctness of the lower Court's finding about the alleged payment of Rs.411-8 to Nawab Baqar Ali Khan. We are clearly of opinion that the finding of the lower Court is correct and must be upheld. Exhibit A-1 is the receipt, dated the 20th of June, 1919, executed by Ahmad Ali Khan who was the mukhtar of Nawab Baqar Ali Khan as well as of his wife Nawab Fakhr Jehan Begam for a sum of Rs.950. It is stated in the receipt that the amount had been realized on account of interest on the mortgage in suit as well as the interest on another deed which stood in favour of Nawab Fakhr Jehan Begam. As the receipt did not specify the portion of the money realized in respect of the interest on each of the aforesaid two deeds, the learned Subordinate Judge has divided it proportionately. In the absence of any evidence showing the portion which was intended to be paid in respect of each of the two deeds we think the lower Court was right in dividing it in proportion to their amount. We have therefore no hesitation in upholding the finding of the lower Court on this point.

The next and the main contention urged in the appeal is that as soon as the compromise had been arrived at between the plaintiffs and defendants 1 to 3 the suit should be deemed to have come to an end and no decree for the surplus payment could be passed in favour of defendants 1 to 3 against defendant No. 4. If the suit had not been one based on a mortgage the contention would have had considerable force. The argument in our opinion ignores the true character and scope of a mortgage suit. It is well settled that in a mortgage suit all questions of account between the mortgagor and the mortgagee must be gone into and decided in that suit. The learned counsel for the

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appellant has been constrained to admit that separate suits could not be brought by the several heirs of the mortgagee to enforce the mortgage. It was therefore necessary that the whole question of accounts relating to the mortgage should be gone into in this suit. In *Mahabir Pershad Singh* v. *Macnaghten* (1) it was held by their Lordships of the Judicial Committee that in a suit brought by the mortgagee for sale the mortgagors were entitled to have a general account taken as between themselves and the mortgagee and to insist that the rights of the parties be decided on the basis of the result of such account. It was further held that they were debarred from claiming to go into such account in a subsequent suit. In *Satyabadi Behara* v. *Harabati* (2) also their Lordships of the Calcutta High Court expressed themselves to the same effect. They observed that the provisions of the Transfer of Property Act plainly indicate that in a redemption suit the whole of the accounts between the mortgagor and the mortgagee must be taken. These remarks are equally applicable to a suit for sale. In *Ameenammal* v. *Meenakshi* (3) their Lordships of the Madras High Court observed as follows:

"The cases in *Mahabir Pershad Singh* v. *Macnaghten* (L.R., 16 I.A., 107), *Vinayak* v. *Dattatraya* (I.L.R., 26 Bom., 661), *Rukhminibai* v. *Venkotesh* (I.L.R., 31 Bom., 527), *Satyabadi Behara* v. *Harabati* (I.L.R., 34 Cal., 223), clearly establish, in my opinion, that where a transaction of mortgage has become fully ripened so that the rights and liabilities of the parties can be dealt with by the Court before which the suit is brought in respect of that transaction, whether the suit is for foreclosure by the mortgagee or for sale by the mortgagee, or, in the alternative, for foreclosure or sale by the mortgagee or for redemption by the mortgagor, all questions (including even claims for rent due on transactions inseparably connected with the

(1) (1889) L.R., 16 I.A., 107. (2) (1907) I.L.R., 34 Cal., 223.
(3) (1920) 60 I.C., 226.

mortgage) relating to the taking of accounts between the mortgagor and the mortgagee ought to be decided in one and the same and in the very first suit, and no second suit can be brought by either party for any claim arising out of that same transaction of mortgage".

It is not necessary to multiply authorities for this proposition. It should also be noted that as no suit for partial enforcement of the mortgage could lie therefore the plaintiffs had brought the suit claiming the entire money due on the mortgage by sale of the mortgaged property and impleading the other heirs of the mortgagor as defendants. In the circumstances even after a compromise had been arrived at between the plaintiffs and defendants 1 to 3 it was the duty of the Court to go into the question of the entire mortgage and to determine once for all the accounts between the mortgagors on the one side and all the representatives of the mortgagee on the other. It is not denied that a sum of Rs.8,350 has been paid by the mortgagors to defendant No. 4 on account of the mortgage in suit. It is further admitted that this payment was made to him as he had been claiming to be the sole heir of his father by virtue of the custom of single heir succession. As it has been finally held that all the heirs of Nawab Baqar Ali Khan were entitled to their legal shares in the mortgagee rights in the deed in suit therefore we are of opinion that, in the circumstances of this case, the defendants 1 to 3 were entitled both in law and in equity to a decree for the surplus amount paid by them to defendant No. 4 on the assumption of his representing the entire mortgagee interest. Order XXXIV, rule 9 of the Code of Civil Procedure prescribes that if on the taking of accounts in a redemption suit it is found that the mortgagee-defendant has been overpaid the Court shall pass a decree directing him to pay to the plaintiff-mortgagor the amount which may be found due to him. We think that in view of the special character of a mortgage suit the fact of the mortgagors and the

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defendant-appellant being arrayed on the same side as defendants is a matter of no consequence and that the equitable principle embodied in Order XXXIV, rule 9 of the Code of Civil Procedure should apply to the present case also.

For the above reasons we uphold the decision of the lower Court and dismiss the appeal with costs.

The cross-objections are not pressed. They are also dismissed with costs.

Appeal dismissed.

APPELLATE CRIMINAL

Before Mr. Justice E. M. Nanavutty

1936
February, 5

RAM AUTAR AND OTHERS (APPELLANTS) *v.* KING-EMPEROR (COMPLAINANT-RESPONDENT)*

Indian Penal Code (Act XLV of 1860), sections 395, 411 and 412—Stolen property produced by accused from a field not belonging to him—No other evidence—Receiving and possessing stolen property, offence of—Evidence of exclusive possession, if essential—Conviction under sections 395, 411 and 412, whether good.

Where in a case of dacoity the only evidence against an accused is that he produced stolen property from under a tree in a certain field not belonging to him, the evidence is not enough to prove his complicity in the commission of the dacoity.

The possession contemplated by sections 411 and 412 of the Indian Penal Code is exclusive possession; otherwise the receiver or the possessor of the stolen property would run the risk of losing the stolen property, if some one else could get hold of it. In the circumstances of the case the accused cannot be said to be in exclusive possession of the stolen property as anybody could have access to the tree in the field where it was buried, and so he could not be convicted under these sections.

Mr. *Matinuddin*, for the appellants.

The Assistant Government Advocate (Mr. *H. K. Ghose*), for the Crown.

*Criminal Appeal No. 676 of 1935, against the order of M. Humayun Mirza, Sessions Judge of Bara Banki, dated the 18th of October, 1935.