

Solicitors for appellant: *Watkins and Hunter.*

Solicitors for respondent company: *Lee Sanderson and Co.*

## LETTERS PATENT.

*Before Terrell, C. J. and Adami, J.*

KAILASH RAI

v.

MUSAMMAT JAGA KUER.\*

1930.

Oct. 30.  
Nov. 26.

*Mortgage—suit for redemption—denial of mortgage in defence—specific terms of mortgage not proved—finding that mortgaged property belonged to plaintiff and that defendants held as mortgagees—defendants, failure of, to prove title otherwise—plaintiff, whether entitled to decree for redemption on facts found.*

The plaintiff brought a suit in which she sought to redeem two mortgages which she alleged had been executed by her husband in favour of the father of the defendant no. 1 some 30 or 32 years before the institution of the suit. It was alleged that under these mortgages the defendants were in possession of the fruit trees standing on three separate plots of land. The amount alleged to have been advanced was in one case Rs. 35 and in the other Rs. 15. The defendants denied the mortgages and asserted that their remote ancestor had planted the trees on the ghairmazrua land of the landlord with the landlord's permission, and that their family had been in possession ever since.

The plaintiff was unable to produce a copy of the mortgage deeds from the Registration office as the documents did not require registration. She, therefore, sought to prove the transactions by the secondary evidence of witnesses who stated that they were present at the execution and attested the deeds.

\* Letters Patent Appeal no. 24 of 1930, from a decision of the Hon'ble Mr. Justice R. L. Ross, dated the 21st January, 1930.

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The Munsif decreed the suit. On appeal the District Judge held that, although the plaintiff had proved that at one time her husband held title to the trees and there was evidence to show that the defendants were in possession under some sort of mortgage, it lay on her to prove the two specific mortgages before she could get redemption.

In his opinion the secondary evidence by which she attempted to prove the mortgages did not satisfy the requirements of section 63 of the Evidence Act, 1872, and he, therefore, dismissed the suit. On second appeal a learned Judge of the High Court reversed the finding of the District Judge and decreed the plaintiff's suit holding that although evidence did not fulfil the requirements of section 63(5) of the Evidence Act, the findings of fact arrived at by the District Judge were sufficient to entitle the plaintiff to succeed.

*Held*, in Letters Patent appeal, that, although the specific terms of the mortgages were not proved, the finding that the plaintiff had title to the trees and the defendants were the mortgagees of the same, coupled with the fact that the defendants did not prove their title otherwise, was sufficient to entitle the plaintiff to redeem.

*Bala v. Shiva*(1), followed.

*Sevaji Vijaya Raghunadha Valoji Kristnan Gopalar v. Chinna Nayana Chetti*(2), *Ramachandra Apuji v. Balaji Bhau Rao*(3), *Krishna Pellai v. Rangasami Pellai*(4) and *Sheo Prasad v. Lalit Kuer*(5), distinguished.

Appeal by the defendants.

The facts of the case material to this report are stated in the judgment of Adami, J.

*Sambhu Saran* (with him *P. P. Varma* and *N. N. Rai*), for the appellants.

*N. N. Sinha* and *B. P. Varma*, for the respondent.

(1) (1902) I. L. R. 27 Bom. 271.

(2) (1864) 10 Moo. I. A. 151.

(3) (1894) I. L. R. 9 Bom. 137.

(4) (1895) I. L. R. 18 Mad. 462.

(5) (1896) I. L. R. 18 All. 403.

ADAMI, J.—The plaintiff in this suit sought to redeem two mortgages which she alleged had been executed by her husband in favour of the father of defendant no. 1 some 30 or 32 years before the institution of the suit. Under these mortgages the defendants were in possession of the fruit trees standing on three separate plots of land. The amount advanced was in one case Rs. 35 and in the other Rs. 15.

The defendants denied the mortgages and asserted that their remote ancestor had planted the trees on the ghairmazrua land of the landlord with the landlord's permission, and that their family had been in possession ever since.

The plaintiff was unable to produce a copy of the mortgage deeds from the Registration Office as the documents did not require registration. She, therefore, sought to prove the transactions by the secondary evidence of witnesses who stated that they were present at the execution and attested the deeds.

The Munsif decreed the suit on the strength of the record-of-rights which showed the plots on which the trees stand in the name of the plaintiff's husband with a remark that the trees were in possession of the defendant no. 1's father, and of the oral evidence that plaintiff's husband planted the trees and had mortgaged them to the defendant's father. He found that the defendants had failed to produce any document to prove their title or any receipt to show payment of rent by them.

On appeal the District Judge held that, though the plaintiff had proved that at one time her husband held title to the trees, and there was evidence to show that the defendant was in possession under some sort of mortgage, it lay on her to prove the two specific mortgages before she could get redemption. In his opinion the secondary evidence by which she attempted to prove the mortgages did not satisfy the requirements of section 63 of the Evidence Act, and he, therefore, dismissed the suit.

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The learned Judge of this Court on Second Appeal reversed the finding of the lower appellate court, holding that, though the evidence did not fulfil the requirements of section 63(5) of the Evidence Act, the finding that plaintiff had title to the trees and that the defendants were mortgagees of the same was sufficient to entitle the plaintiff to redeem the mortgages, and, as the defence was a denial of the mortgages and there was no pleading either that the mortgages were satisfied or that they were for different or higher amounts, the amounts stated in the plaint must be accepted. The decree of the Munsif was therefore restored.

Before us in Letters Patent Appeal reliance is placed on the decisions in *Sevraji Vijaya Raghunadha Valoji Kristnan Gopalar v. Chinna Nayana Chetti*(<sup>1</sup>), *Ramachandra Apaji v. Balaji Bhanu Rao*(<sup>2</sup>), *Krishna Pellai v. Rungasami Pellai*(<sup>3</sup>) and *Sheo Prasad v. Lalit Kuar*(<sup>4</sup>), and it is urged that it lay on the plaintiff to prove each of the two specific mortgages by clear and indefeasible evidence, and that she could succeed only by the strength of her own title and not by the weakness of her opponent's. That proposition cannot be gainsaid. The cases cited, however, can be distinguished from the present one, in that here it has been found as a fact that the defendants held the trees as mortgagees, and there are good grounds for this finding. In the first place the record-of-rights shows that the title to the plots on which the trees grow is in the plaintiff, in the second place the landlord's counterfoil receipts relating to one at least of the plots describe the defendants who paid the rents as mortgagees of the plaintiff's husband. This evidence of the plaintiff has not been rebutted by any documentary evidence of the defendants showing that they have any other title or have paid rent in

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any other character. It is true that the plaintiff failed to prove the contents of the mortgage deeds which she alleges to have been executed and that there is no secondary evidence, as found by the courts below, but we have witnesses who depose that there were two mortgage transactions between the plaintiff's husband and the father of defendant no. 1.

In the case of *Bala v. Shiva*<sup>(1)</sup> the plaintiff sought to redeem a mortgage which he alleged had been executed 45 years before. The defendants denied the mortgage. The plaintiff in the plaint stated that he did not know the exact date or the terms of the mortgage. The Subordinate Judge dismissed the suit, being of opinion that the plaintiff was bound to prove a specific mortgage, and that he had failed to do so. On appeal to the Bombay High Court it was held that the real question was whether the defendants were mortgagees of the property in question. The plaintiff did not tie himself down to a specific mortgage made at a particular time. He was entitled to succeed if he proved that the land was held by the defendants as mortgagees. Chandavarkar, J. said "If the Lower Appellate Court finds that the defendants' ancestors came into possession as mortgagees and that the plaintiff's allegation as to a mortgage is proved, it will be for the defendants to meet that case."

I would follow the decision in that case. Though the actual terms of the deeds have not been proved, it has been found that the defendants are mortgagees in respect to the trees in dispute, and they have brought forward nothing to prove their title otherwise except oral evidence which has been disbelieved. The landlord's papers do not show them to be tenants.

In my opinion the decision appealed against was correct and I would dismiss this appeal with costs.

COURTNEY TERRELL, C. J.—I agree.

*Appeal dismissed.*

(1) (1902) I. L. R. 27 Bom. 271.

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