APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Nándbhái Haridás.

VITHAL NILKANTH PINJALE, APPELLANT (ORIGINAL DEFENDANT), *v.* VISHVASRA'V BIN BA'PUJIRAV, RESPONDENT (ORIGINAL PLAINTIFF).* 1884 *June* 17.

Mortgage—Redemption of whole property by owner of a part—Lien on remaining part for contribution of share of money paid to redeem—Right to such contribution transferable.

The owner of a part of the equity of redemption can redeem the whole property mortgaged from the mortgagee after paying the whole of the money due on the mortgage, and has a lien on the share of the co-owner for the proportional contribution of that share to the sum expended in redemption, and this right or interest is as capable of transfer as the aggregate group of interests called the ownership.

Bábáji in one transaction mortgaged two fields (Nos. 20 and 22) to Jairám. On the 16th January, 1869, in execution of a decree against Bábáji his interest in one of them (No. 22) was sold, and Rámji became the purchaser. Rámji, however, did not take possession. On the 25th April, 1877, Bábáji paid off Jairám's mortgage with money borrowed from the defendant Vithál, to whom Bábáji again mortgaged the two fields as security. Rámji died, leaving a son Bála, whose interest in field No. 22 was conveyed by his grandfather Ránuji (Rámji's father) to the plaintiff. Bála was not a party to the conveyance, but attested it with an expression of assent. The plaintiff now sued the defendant Vithál to eject him from No. 22.

Held that the defendant Vithal had a lien on No. 22, and that the plaintiff could not eject him without paying him the amount of such lien. When Rámji purchased No. 22 he and Bábáji stood in equal positions towards the mortgagee Jairám. Jairám might enforce his rights under the mortgage against both together, or against either of the two, leaving that one, if forced to pay the whole sum, to recover the proper rateable contribution from the other. On the other hand, Rámji might redeem the whole and seek contribution from Bábáji, or Babáji might redeem the whole and seek contribution from Rámji. Whichever of the two redeemed, he would have a lien on the share of the other for the proportional contribution of that share to the sum expended in redemption. Bábáj did, in fact, redeem the mortgage to Jairám, and thereupon became entitled to a lien on Rámji's share of the property, *viz.*, field No. 22. He then mortgaged his whole interest to the defendant Vithal, including his lien on No. 22. Rámji, who had not yet obtained possession of No. 22, was entitled to get it only on paying off the amount of the lien which had passed to the defendant Vithal.

THIS was a second appeal from the decision of R. F. Mactier, Judge of the District Court of Sátára, reversing the decree of the Subordinate Judge of the same place.

* Second Appeal, No. 14 of 1883.

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This suit was brought by the plaintiff to recover possession of some land (Survey No. 22) situate in the village of Shendrey. This field together with another (Survey No. 20) originally belonged to one Bábáji bin Buchháji. Bábáji had mortgaged with possession both these fields together to one Jairám Wáman by a bond duly registered. In the execution of a money decree obtained by a third party against Bábáji, the interest of Bábáji in one of the fields, *viz.*, Survey No. 22, was sold on 16th January, 1869, and was purchased by one Rámji bin Ránuji. Rámji did not obtain possession. On 25th April, 1877, Bábáji borrowed money from the defendant Vithal, paid off Jairám's mortgage, and again mortgaged his interest in the property to Vithal, the defendant. Rámji having died in the meanwhile, his father Ránuji, on the 5th January, 1881, conveyed his interest in field No. 22 to the plaintiff Vishvasráv. Rámji's son Bála was not a party to this conveyance, but had attested it.

Upon these facts the Subordinate Judge found that "the plaintiff had bought Rámji Ránuji's rights in the land, but at that time Jairám's mortgage with possession existed, and that, therefore, plaintiff had bought Rámji Ránuji's right to redeem the land from Jairám's mortgage, which again was bought back by Bábáji Buchháji and transferred to Vithal, and that, without Vithal's claim being ascertained, this claim would not lie." Accordingly the Subordinate Judge threw out the plaintiff's claim.

The plaintiff Vishvasráv thereupon appealed to the District Judge, who reversed the decree of the Subordinate Judge, and awarded plaintiff's claim with costs. In his judgment he said :—

"It is clear that in this case plaintiff's vendor Rámji had the right to repay Jairám's mortgage and enter on the land, and this right the plaintiff bought. There is now no legal mortgage on this land at all. Jairám's is satisfied, and he does not object ; and that of Vithal being illegal, as made by the wrong person Bábáji Buchháji, whose land was then sold, gives no right to Vithal to hold this land No. 22, and plaintiff having bought Bábáji's rights in this land, which has no legal mortgage on it, must have it made over to him. In the former mortgage of Jairám and the present one of Vithal's there were two fields mortgaged—No. 22 the

subject of the present suit, and No. 20 which is also in Vithal's hands. No. 20 is not in dispute; but No. 22, not being legally in mortgage to Vithal, must be made over to plaintiff."

The defendant Vithal thereupon appealed to the High Court.

Yashvant V. Athalye for the appellant.—The District Judge was wrong in holding that Rámji alone was entitled to redeem from Jairám. The case of *Apáji Bhivráo* v. *Kavji*[1], referred to by the District Judge, has no application to the facts of the present case. There the whole of the equity of redemption was sold by the Court. The owner of the part of the equity of redemption can redeem the whole property mortgaged. Rámji, the plaintiff's vendor, having purchased only a portion of the property mortgaged to Jairám by Bábáji, and Bábáji having retained his equity of redemption in the remaining portion, even after the Court sale, Bábáji had an indisputable right to redeem the whole property and mortgage it to Vithal. The decision of the District Judge ought to be reversed, and plaintiff's claim thrown out with costs.

Pándurang Balibhadra for the respondent.—The decision of the lower Court is correct. After the Court sale of Bábáji's interest Bábáji had no right to redeem the property from Jairám and mortgage it to Vithal. He relied on the case of *Apáji Bhivráo* v. *Kávji*[1].

WEST, J.—Bábáji's two fields Nos. 20 and 22 were mortgaged together to Jairám. Bábáji's interest in one of the two, *viz.*, No. 22, was sold in execution of a decree obtained by a third party, and was purchased in execution by Rámji. No question of fraud on Bábáji's part has been raised, or of his being bound, so far as possible, to make good a conveyance of No. 22, which omitted all mention of the mortgage to Jairám. Thus, when Rámji became purchaser of No. 22, he and Bábáji stood in precisely equal positions towards Jairám. Jairám could, after giving the requisite notices, enforce his rights under the mortgage against both together, or against either of the two, leaving that one, if forced to pay the whole sum, to recover the proper rateable contribution from the other. On the other hand, as Rámji might redeem the

(1) I. L. R., 6 Bom. 64.

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whole, and seek contribution from Bábáji, so might Bábáji redeem the whole and seek contribution from Rámji—*Norender Náraín Singh* v. *Dwárka Lal Mundur* [1]. Whichever of the two redeemed, he would have a lien on the share of the other for the proportional contribution of that share to the sum expended in redemption, and this right or interest would be as capable of transfer as the aggregate group of interests called the ownership.

Bábáji did, in fact, redeem the mortgage to Jairám. He then mortgaged his whole interest in the property to Vithal. This interest included his lien on field No. 22 held by Rámji as owner, which lien, therefore, was pledged to Vithal equally with Bábáji's ownership of the field No. 20. Rámji, who had never yet obtained possession, was entitled to get it only on paying to Vithal such a sum as represented Rámji's proper share of what had been paid to Jairám to free the property of which Rámji was part owner.

Rámji now died, leaving a son Bála. His interest in this property was conveyed by his grandfather Ránuji to the plaintiff Vishvasráv, and Bála attested the deed with an expression of assent. Though Bála, being Rámji's son, was his heir, and Ránuji thus had no right to deal with the property as his own, yet probably the acquiescence of Bála in the conveyance would bind him in favour of Vishvasráv to make the transaction good. He ought, however, to have distinctly assigned his interest to Vishvasráv, or else he ought to have been made a party to a suit for the purpose of binding him on the ground of what he had done against any questioning of Vishvasráv's title. Vishvasráv, however, without thus establishing his own title, sued to eject Vithal from the property purchased by Rámji. Vithal claimed payment of the whole amount advanced by him to Bábáji. What he could properly claim as against Rámji, or his representative, was the proportional contribution to Jairám's claim resting on field No. 22. Vishvasráv did not offer to pay this; he went on the ground that when Jairám's claim was extinguished, the whole property was freed, and that Bábáji could not then mortgage field No. 22 to Vithal. As we have seen, however, he had no right to turn out Vithal without paying the amount of his lien, and his suit was,

[1] I. L. R., 3 Calc., 408.

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therefore, properly rejected by the Subordinate Judge. The contrary decree of the District Court must be reversed, and that of the Subordinate Judge restored, with costs throughout on the plaintiff Vishvasráv.

Decree reversed with costs.

ORIGINAL CIVIL.

Before Sir Charles Sargent, Knight, Chief Justice, and Mr. Justice Bayley.

LEGEYT, PLAINTIFF, *v.* HARVEY AND ANOTHER, DEFENDANTS.* *July* 2.

Delivery order—Effect of endorsement of—Vendor's lien—Indian Contract Act (IX of 1872), *Sec.* 108.

The plaintiff was a broker in cotton and also traded in cotton on his own account. On the 27th January, 1883, he contracted with the defendants to sell to them 100 candies of cotton, at Rs. 200 per candy, *deliverable from the 15th to the 25th April following.* On the 30th January, 1883, in his capacity as broker, he effected a contract for the sale of the same 100 candies of cotton by the defendants to L. & Co. at Rs. 202 per candy.

L. & Co. sold the cotton to D., and D. again sold it back to the defendants at Rs. 191 per candy. The defendants then sold it to H., by whom it was sold to K., and K. finally sold it to B. & Co. at Rs. 191 per candy. B. & Co. obtained possession of the cotton from the plaintiff on or about the 24th April on payment of Rs. 191 per candy, for which they had contracted to buy it from K.

The delivery order for the cotton had been sent on the 20th April by the plaintiff to the defendants, who immediately, on receiving it, wrote to the plaintiff as follows:—"We beg to ask *pro forma* for survey on 100 bales M.-G. Broach cotton tendered by you to us to-day. As we are handing over the delivery order to a third party please secure payment for the cotton direct, and before parting with the cotton, if necessary." The delivery order was then endorsed by the defendants to their vendees (L & Co.), who in turn endorsed it to D., by whom it was endorsed to the defendants. By subsequent endorsements it came ultimately to B- & Co., who, as above mentioned, got delivery of the cotton from the plaintiff on payment of Rs. 191 per candy.

The plaintiff, who had sold to the defendants at Rs. 200 per candy and who received from B. & Co. only Rs. 191 per candy, sued the defendants in the Small Cause Court for the difference.

The defendants contended that after the receipt of the letter written by them to the plaintiff he was bound not to deliver the cotton to L & Co., or to any subsequent endorsee of the delivery order, until he had obtained pay-

*Small Cause Court Suit, No. 15,786 of 1883.