APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Nánábhái Haridás

1884
September 23.

RA'GHO SALVI (ORIGINAL PLAINTIFF), APPELLANT, *v.* BÁLKRISHNA SAKHA'RA'M (ORIGINAL DEFENDANT), RESPONDENT.*

Mortgage of property owned by co-sharers—Subsequent severance of interests—Suit by one co-sharer to redeem more than his share—Parties—Time of taking objection.

In 1805 a two-anna share in certain property held by co-sharers was mortgaged to the defendant. The mortgage was effected by the mortgagor as manager of all the co-sharers in union. In 1848 one of the co-sharers redeemed his share of two pies in the mortgaged property, and a further share of two pies therein was redeemed by a second co-sharer in 1867. The plaintiff was admittedly the owner of another two-pie share; but he now sued the defendant to redeem the whole of the property still unredeemed, *viz.*, a one anna eight pies' share of the original mortgage. The defendant objected that the plaintiff could only redeem his own two-pie share, which had become separated from the rest. The plaintiff denied that the estate had been divided.

Held, that the plaintiff's claim being to redeem all that remained of the estate in the mortgagee's possession, the suit could not be maintained, unless all the other persons interested in the equity of redemption were before the Court either as co-plaintiffs or as defendants. Without their presence the suit could not be properly disposed of, and the excuse, that the defendant did not take objection at the right time, had, under such circumstances, no validity. As owner of a two-pie share, which by consent of all interested had become an estate wholly separated from the other parts of the original aggregate, the plaintiff would have been bound to set forth the transactions on which his right rested.

SUIT for redemption. The plaintiff sued to redeem a share of one anna and eight pies in the Khoti of Kheda, a village in the Ratnágiri District. It appeared that the original mortgage comprised a two-anna share which was held by co-sharers. The mortgage was effected in 1805 by one Bábá Gungáji as manager of all the co-sharers in union. Subsequently, *viz.*, in 1848, one Báji Yesu, a co-sharer, redeemed his share of two pies in the said property, and another co-sharer redeemed a further share of two pies in 1867. The plaintiff was admittedly the owner of another two-pie share, but he now sued to redeem the whole of the remaining unredeemed property, *viz.*, a one anna eight pie share of the original mortgage.

The defendant objected that the plaintiff could only redeem his own two-pie share, which he alleged had become separated

*Second Appeal, No. 124 of 1883.

from the rest. The plaintiff denied that the estate had been divided.

The Subordinate Judge of Chiplún awarded the plaintiff's full claim on payment of Rs. 50 and also mesne profits.

He held that the plaintiff was entitled to sue as being admittedly owner of a two-pie share. On appeal by the defendant the Assistant Judge varied the decree, and held the plaintiff entitled to redeem only a two-pie share of the property. He rejected his claim to costs and mesne profits with the following remarks :—

"As to the amount of the original mortgage, there is no satisfactory evidence. In 1848 one of the co-sharers, named Báji, redeemed a two-pie share for Rs. 35. The original mortgage appears to have been effected by Bábá Gungáji as manager of all the sharers in union. * * * * * The sharers, who, at the time of the original mortgage, were in union, must now have been divided, as Báji has separately redeemed his share. I do not think, therefore, that, in the absence of any evidence on the point from defendant, it can be presumed that this debt, or any part of it, was on behalf of any of the sharers other than Hanmant.

"Besides Bábáji's share of two pies, Gan Paud's share of two pies has been redeemed and sold to defendant. Defendant also alleges that he has purchased the equity of redemption of another share, but of this he has not yet produced any evidence. But I think that, in any case, the joint character of the mortgage no longer subsists, and that plaintiff is not, therefore, entitled to redeem more than his own share against defendant's wish."

The plaintiff appealed to the High Court.

Goculdás Kahándás Párekh (*Shivshankar Govindrám* with him) for the appellant.—The appellant as owner of a part of the mortgaged property can insist on redeeming the whole. The mortgage was a joint mortgage, and each one of the joint owners has a right to redeem—Fisher on Mortgage, para. 1225. The severance of right to redeem would not affect anything in the mortgage itself. Severance of such right has been recognized to the extent of the share severed. Mutual assent of severance

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would extend to those parts which were separately redeemed, and not to the rest of the property—*Nawáb Azimut Alikhán* v. *Jowáhir Sing*[1]. The defendant could not resist the appellant's right to redeem which as a co-owner of the equity of redemption he possesses—*Alikhán* v. *Mahamadkhan*[2]. The question of severance was not raised in the Court of first instance, and cannot be raised on appeal—*Báji Yashvant* v. *Dhondo Atmárám*[3]. The original mortgage deed was not produced in evidence, but another one was produced. A mortgagee is not allowed to withhold evidence of the extent of liability from the Court—*Shek Abdulla* v. *Shek Muhammad*[4].

Ráo Sáheb *V. N. Mándlik* for the respondent.—The plaintiff was a separated shareholder, and can only redeem his own share. Though the point of severance ought to have been raised in the Court of first instance, the Court of Appeal can raise it. The case of *Shek Abdulla* v. *Shek Muhammad*[5] has no application.

WEST, J.—The present plaintiff, owner apparently of a two-pies sub-share in property consisting of a two-annas share in a *khoti* estate mortgaged in A.D. 1827, sued to redeem a one anna eight pies part of that two-annas share. He averred that four pies had been redeemed, in parts of two pies each, by two other sharers. Such redemption in *takshims* or separate fractions might imply that there had been a division of the interests in the equity of redemption in a partition amongst the mortgagor's family, and that the mortgagee had assented to this fragmentation of what in itself was an indivisible obligation entitling him to claim complete payment as the condition of releasing any part of the mortgaged property. But such a breaking up of the interests so recognized would not have left in the plaintiff Rágho a right to redeem more than his own two-pies share which is what the District Court has awarded to him on payment of a sum of Rs. 35. Whether, however, the share of the plaintiff Rágho in this particular part of the once common estate is really two pies, or whether the equity of redemption was, as is now contended, never divided, his suit could not be maintained, could

(1) 13 Moo. Ind. Ap., 404.
(2) Printed Judgments for 1881, p. 319.
(3) Printed Judgments for 1883, p. 331.
(4) 1 Bom. H. C. Rep., 177.
(5) 1 Bom. H. C. Rep., 177.

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not be properly tried, in the form in which he brought it. He sought to redeem a one anna eight pies share, and so suing, he was bound to bring all the other persons interested in the equity of redemption before the Court. As owner of a two-pies share, which by consent of all interested had become an estate wholly separated from the other parts of the original aggregate, he would have been bound to set forth the transactions on which this right rested, but his claim was really to redeem all that remained of the estate in the mortgagee's possession. In such a suit he was bound to make all his co-owners of the equity of redemption co-plaintiffs or defendants—*Norender Nárain Sing* v. *Dwárka Lál Mundar*(1) (2). Without their presence the suit could not be properly disposed of, and the excuse, that the defendant mortgagee did not take objection at the right time, has, under such circumstances, no validity.

We must reverse the decrees of the Courts below, and remand the cause for re-trial after the plaintiff has added the names as parties of the persons concerned according to the nature of the share and the right on which he intends to rely. Costs to follow the final decision.

Decrees reversed and case remanded.

(1) I. L. R., 3 Calc., 397. (2) 3 Bea., 355.

REVISIONAL CRIMINAL.

Before Mr. Justice West and Mr. Justice Nánábhái Haridás.

QUEEN EMPRESS *v.* TRIBHOVAN MA'NEKCHAND AND OTHERS.*

1884 *October* 10.

Criminal Procedure Code (Act X of 1882), Secs. 517 and 523—Evidence of ownership—Evidence Act, I of 1872, Sec. 25—Confession made to police officer, admissibility of, for other purposes than as a confession.

Statements made to the police by accused persons as to the ownership of property which is the subject-matter of the proceedings against them, although inadmissible as evidence against them at the trial for the offence with which they are charged, are admissible as evidence with regard to the ownership of the property in an inquiry held by the Magistrate under section 523 of the Criminal Procedure Code (X of 1882.)

* Criminal Reference, No. 121 of 1884.

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An order, after trial, made by a Criminal Court for the restoration of property under section 517 of the Criminal Procedure Code (Act X of 1882) is conclusive as to the immediate right to possession; where an order has to be made under section 523, the Magistrate may in the inquiry proceed on such evidence as is available and make an order for handing the property to the person he thinks entitled. This does not conclude the right of any person. The real owner may proceed against the holder of the articles or for damages as for conversion.

The High Court declined to interfere with an order, made by a Magistrate under section 523 of the Criminal Procedure Code, for the delivery of property, where the Magistrate made such order upon the mere evidence of a confession of the accused to the police that the property was stolen from the adjudged owner.

THIS was a reference under section 438 of the Criminal Procedure Code (Act X of 1882), by E. M. H. Fulton, Acting Sessions Judge at Surat.

The reference for purposes of report was as follows:—

"Some time ago ornaments worth about Rs. 4,000 were stolen from one Bálubhái Manekchand. For a considerable period nothing was discovered, but finally three persons were arrested, *viz.*, Tribhovan Mánekchand, brother of Bálubhái, Hargovan Pranu, and Nagindás Kasindás. They were all three convicted of dishonestly receiving stolen property; but, on appeal to Mr. Macpherson, Tribhovan Mánekchand and Hargovan were acquitted.

"2. It is not disputed that Tribhovan Mánekchand had possession of a certain ornament, called a *jalini kanthi*, which he got melted down by a Soni into a gold bar. This bar Tribhovan Mánekchand got one Tribhovan Kasidás to pawn on his behalf to Purshottam Raghunáth, in whose possession it was found by the police.

"3. A sum of Rs. 278-8 was found in the possession of Hargovan Pranu, who is alleged to have stated in the presence of the police that the money was acquired by pawning certain ornaments stolen from Bálubhái to Nagindás. Nagindás was convicted of the receipt of these ornaments, and his conviction was upheld on appeal.

"4. When convicting Tribhovan Mánekchand and Hargovan the Magistrate ordered the gold bar found with Purshottam and Rs. 278-8 found with Hargovan to be handed over to the complainant Bálubhái. In deciding the appeals the Sessions Judge, however, made no order as to their disposal.

"5. On this the Magistrate issued proclamations under section 523, and after six months took the evidence adduced by the various parties concerned, and on the 30th June passed an order handing over the money and the gold bar to Bálubhái. He appears, however, to have stayed execution of his own order until the disposal of the petitions of Hargovan and Purshottam on the subject.

"6. After examining the proceedings, I find that there is no evidence that Bálubhái was the owner of the property, except the statements made by Hargovan and Tribhovan Mánekchand before the police. The Magistrate thinks that the whole of these statements are admissible in evidence in these proceedings, but I am unable to agree with him. Keshavlál deposes that Hargovan told the *panchâit* and police that he had acquired Rs. 278-8 by pawning to Nagindás certain ornaments stolen from Bálubhái. To prove this whole statement against Hargovan in any proceeding whatever seems to me to be contrary to the provisions of section 25 and section 26 of the Evidence Act. Doubtless under section 27, Hargovan's statement, that he pawned ornaments to Nagindás, is admissible, inasmuch as the ornaments were found in consequence of this statement, but this does not prove that they belonged to Bálubhái, or that they were stolen, or that Hargovan received Rs. 278-8 for them.

"7. Then, as regards the gold bar pawned to Purshottam, it is clear, that, even if a confession made to the police is admissible in such a proceeding as this, no statement made by Hargovan can be proved against Purshottam. It is mere hearsay. As regards Tribhovan Mánekchand's statements, if they can be used as admissions against Purshottam (which I think is doubtful) they are not of any value, as he never admitted, even before the police, that the "*jalini kanthi*" was Bálubhái's. He always maintained that it was his own.

"8. Under these circumstances, as there is, in my opinion, no legal evidence that either the money or the gold bar belonged to Bálubhái, I think the Magistrate's order should be set aside, and that an order should be passed, directing the property to be returned to the persons in whose possession it was found. The

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Magistrate's order is absolutely inconsistent with the acquittals of Tribhovan and Hargovan by this Court, and can only be sustained if it can be held that irregular proof of ownership is admissible under section 523 of the Criminal Procedure Code (Act X of 1882)."

Nagindás Tulsidás for Purshottam Raghunáth and Hargovan Pranu.—The order founded on the statements made to the police officers was wrong. The statements were of the nature of confessions, and, as such, those statements could not be made use of against the accused. The order of the Magistrate for the restoration of property, being made after acquittal, was wrong.

Goculdás Kahándás for Bálubhái.—The inquiry, though one in a Criminal Court, should be regarded as that of a Civil Court, and the confessions were receivable in evidence. Under the provisions of the Evidence Act such evidence is admissible. Section 25 does not exclude it. The Evidence Act distinguishes between confessions and admissions. The person who made the confession has ceased to be an accused person, and the admission is no longer a confession. It is simply an admission, and can be used as such.

WEST, J.—"Confession" in section 25 of the Indian Evidence Act I of 1872 means, as in section 24, a "confession made by an accused person", which it is proposed to prove against him to establish an offence. For such a purpose a confession might be inadmissible which yet for other purposes would be admissible as an admission under section 18 against the person who made it (section 21) in his character of one setting up an interest in property, the object of litigation or judicial inquiry and disposal.

Where there has been a trial and an order by the trying Court under section 517 of the Criminal Procedure Code (Act X of 1882) that concludes the immediate right to possession. Where, as in this case, an order has to be made under section 523, the Magistrate may in the inquiry proceed on such evidence as is available, and make an order for handing property to the person he thinks entitled. This does not conclude the right of any person. The real owner may proceed against the holder of the articles or for damages as for a conversion. It does not seem

necessary, therefore, for this Court to interfere : see *Bullock* v. *Dunlap* (1), in which the accused had been acquitted, yet failed in his suit against the police officer, retaining a ring pending the Magistrate's disposal of his application for instruction as to disposal of it under Stat. 2 and 3 Vic., cap. 71, sec. 29. Reference may be made also to *Dover* v. *Child* (2).

These cases show that the Magistrate may make an order on such evidence as is available, which order is good as to the delivery and possession, without depriving the real owner of any action that he may have for the assertion of his right in the Civil Court. In the Code of Criminal Procedure the provisions in this respect are less explicit than in the English Statutes, but the principle recognized is the same, and leads to similar consequences.

(1) L. R., 2 Ex. Div., 43. (2) L. R., 1 Ex. Div., 172.

REVISIONAL CRIMINAL.

Before Mr. Justice West and Mr. Justice Scott.

QUEEN EMPRESS *v.* GANGA'RA'M SANTRA'M.*

1884 *October* 29.

Theft—Indian Penal Code (Act XLV of 1860), Sec. 378—Removal of property against wish of ostensible purchaser thereof—Apparent title or colour of right to property.

To constitute theft it is sufficient if property is removed, against his wish, from the custody of a person who has an apparent title, or even a colour of right, to such property.

Cape v. *Scott* (1) followed.

THIS was a reference, under section 438 of the Criminal Procedure Code (Act X of 1882), by E. Hosking, Esquire, Sessions Judge of Khándesh at Dhulia.

The reference was stated as follows :— The Case for the Prosecution was as follows :-

"Gangárám Santrám, (the accused), a blacksmith, owed complainant Girju Rs. 60, and during Gangárám's absence his wife Dhondi on the 21st July, 1884, sold, by Gangárám's direction, his

*Criminal Reference, No. 133 of 1884.

(1) L. R., 9 Q. B., 269, at p. 277.