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parties, if there had been no memorandum at all on the promissory note, there would have been a complete equitable mortgage. When we consider what the memorandum is, we find it is not the contract for the mortgage,—not the agreement to give a mortgage for the Rs. 1,200, but nothing more than a statement, by Woomáchurn Bánerji, of the fact from which the agreement is inferred. It is an admission by him that he had deposited the deeds upon the advance of the money for which the promissory note was given. It is not by the memorandum that the Court takes the agreement for the mortgage to be proved, but by the deposit of the deeds, and this is no more than a piece of evidence showing the fact of the deposit which might be proved by any other evidence. The memorandum need not have been produced."

Following the law thus laid down, I must hold that the plaintiffs have failed to establish that they have an equitable mortgage over the premises in question, and their suit must, therefore, be dismissed.

Costs to follow the event.

Attorneys for the plaintiffs:—Messrs. *Tyabji and Dáyábhái.*

Attorneys for the second defendant:—Messrs. *Payne, Gilbert and Sayáni.*

APPELLATE CIVIL.

Before Mr. Justice Birdwood and Mr. Justice Jardine.

1886. *April 20.*

NA'RO HARI BHA'VE, DECEASED, BY HIS SON AND HEIR, A'TMA'RA'M, A MINOR, BY HIS GUARDIAN, MAHA'DUJI SAKHA'RA'M BHA'VE, AND ANOTHER, (PLAINTIFFS), APPELLANTS, *v.* VITHALBHAT AND OTHERS, (DEFENDANTS), RESPONDENTS.*

Mortgage—Redemption—Right of one of several joint mortgagors to redeem the whole estate—Parties to a redemption suit.

1. In the case of joint-family property, which, though held in certain shares by the several co-parceners, is mortgaged as a whole and redeemable upon payment of the entire sum, each and every one of the mortgagors has a right to redeem the whole estate, seeking his contribution from the rest.

* Second Appeal, No. 726 of 1883.

2. The rule is the same as regards any persons, other than the original mortgagors, who have acquired any interest in the lands mortgaged by the operation of law, or otherwise in privity of title.

3. In a suit by one of the joint tenants, or tenants-in-common, to redeem the whole estate, all persons in whom portions of the equity of redemption are vested, must be made parties to the suit(1).

The plaintiffs sued to redeem a sixteen-pies' *takshim* of the *khoti* village of Shirbe, which had been jointly mortgaged by Shankroji, the owner of one-half share of the *takshim*, and Hábáji, the eldest of the four sons of Pratáb, the owner of the remaining half share. The plaintiffs were the owners, by purchase at two Court sales, of the equity of redemption of two out of the eight-pies' share belonging to Shankroji and of one-quarter of the eight-pies' share belonging to Pratáb. One of these sales was in execution of a decree against Rámji, the eldest of the five sons of Shankroji, and the other in execution of a decree against Hábáji. After the institution of the suit, the defendants purchased privately the shares in the equity of redemption belonging to Bálá, the fifth son of Shankroji, and to Sáyá and Devji, two of the sons of Bábá, the fourth son of Shankroji. Under these sales, they claimed to be owners of a four-pies' share in the *takshim*. Pending the appeal in the District Court, the defendants allowed Lakshman, the grandson of Pratáb, to redeem a two-pies' share, and Lakshman's brother, Rághu, to redeem a pie's share.

Held, that as the sixteen-pies' *takshim* of the *khoti* village, though held in certain shares by the original mortgagors, was undivided family property, which was mortgaged as a whole and for an entire sum, the plaintiffs, as owners by purchase of a part of the equity of redemption, had a right to redeem the whole of the sixteen-pies' *takshim*. And this right could not be affected by the conduct of the defendants *post litem motam*, either by their purchase of a share in the equity of redemption pending the suit, or by the partial redemption allowed by them pending the appeal.

Held, also, that, though the plaintiffs had a right to redeem the whole estate, no decree could be made to that effect until all the co-sharers, in whom the equity of redemption was vested, had been joined as parties to this suit.

Held, also, that the defendants had no power to permit partial redemption, as before partition none of the co-sharers could redeem any particular share.

SECOND appeal from the decision of C. B. Izon, District Judge of Ratnágiri, amending the decree of Ráo Sáheb P. D. Gadgil, Subordinate Judge of Sangmeshvar.

Two brothers, Shankroji and Pratáb, were the joint owners of a sixteen-pies' *takshim* of the *khoti* village of Shirbe. The following table shows the different sharers in this *takshim* :—

(1) *Vide* I. L. R., 12 Calc., 414, 423.

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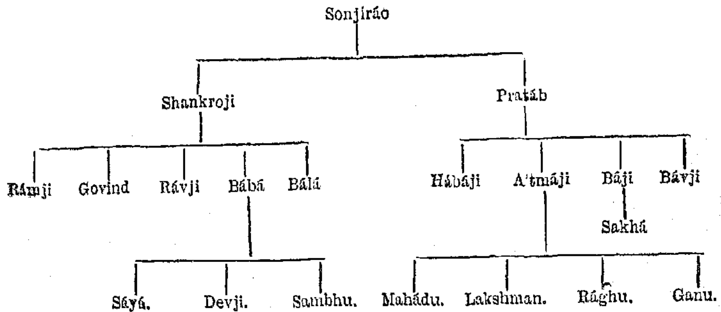

In 1831, Shankroji and Hábáji, the eldest son of Pratáb, who was then dead, mortgaged for Rs. 492 the whole of the sixteen-pies' *takshim* to the defendants. On the 18th August, 1857, in execution of a decree against Rámji, the eldest son of Shankroji, his right, title, and interest in the mortgaged *takshim* was purchased at a Court sale by Narso Hari, the father of the minor plaintiff. On the 30th July, 1886, the other plaintiff, Mahádji Sakháráin Bháve, bought, at a Court sale, Habáji's interest in the same *takshim*. The plaintiffs claimed to be owners, by purchase of the equity of redemption, of ten out of the sixteen-pies' *takshim*, and sought by their present suit to redeem the whole of the *takshim*. After the institution of the suit, the defendants purchased privately the shares in the equity of redemption belonging to Bálá, the fifth son of Shankroji, and to Sáyá and Devji, the sons of Bábá, the fourth son of Shankroji. Under these sales, they claimed to be owners of a four-pies' share in the *takshim*. Pending the appeal in the District Court, the defendants allowed Lakshman, the grandson of Pratáb, to redeem a two-pies' share, and his brother Rághu a pie share.

The Court of first instance found that the plaintiffs were owners of Shankroji's eight-pies' share and Hábáji's two-pies' share, and decreed redemption of a ten-pies' share of the *takshim*. The lower Appellate Court held that, under the sale in execution of the decree against Rámji, the plaintiffs had purchased only Rámji's two-pies' share, and that they were also owners of Hábáji's two-pies' share. It allowed redemption of a nine-pies' share,—that is, of so much of the sixteen-pies' *takshim* as had not been purchased by the defendants pending the suit, or allowed by them to be redeemed pending the appeal.

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Yashvant Vásudev Athlay for the appellants:—As owners of a fragment of the equity of redemption, the plaintiffs have a right to redeem the whole estate. This right is not affected by the defendants purchasing four-pies of the *takshim*. That purchase was subsequent to the suit, and, therefore does not destroy the unity of the mortgage—*Pandjiráv* v. *Nároji*[1]: see also Macpherson on Mortgage (7th ed.), p. 339. It is unnecessary to consider whether the plaintiffs are owners of a four or a ten-pies' *takshim*. The mortgage is indivisible. A mortgagor may claim in equity, that he shall not pay the whole debt after the mortgagee has himself broken the unity of the lien.

Shántárám Náráyan for the respondent:—It is not an accepted doctrine that a purchaser of a portion of mortgaged property can, as of right, redeem the whole property. Where the mortgagee purchases a part of the equity of redemption, the unity of the mortgage lien is broken, and the purchasers of other portions of the equity of redemption are entitled to redeem only their portions on payment of a proportionate share of the debt. The condition of the property at the time of redemption must be taken into account. The plaintiff has no right to redeem the whole. It is the right of the mortgagee to be redeemed piecemeal—*Nawáb Azimat Ali Khán* v. *Jowáhir Sing*[2]: see also Macpherson on Mortgage, pp. 344, 446, (7th ed.) The Privy Council case is followed in *Chunder Náth Mullick* v. *Nilakant Banerjee*[3] by the Calcutta High Court—*Bekon Singh* v. *Báboo Deen Dayál Láll*[4]. The doctrine of *lis pendens* does not apply to this case. The plaintiff does not sue to declare the defendants' purchase invalid, but merely to postpone it. Cites *Asansáb Ravuthan* v. *Vámana Rau*[5].

Yashvant Vásudev Athlay, in reply, referred to *Sakhárám Náráyan* v. *Gopál Lakshman*[6], *Alikhán Dáudkhán* v. *Mahomedkhán Samsherkhán*[7], and *Rágho Náráyan* v. *Devsávant*[8].

BIRDWOOD, J.:—The plaintiffs sued to redeem a sixteen-pies' *takshim* (share) of the *khoti* village of Shirbe, which had been

(1) Printed Judgments for 1881, p. 57.
(2) 13 Moore I. A., 404, 415, 416.
(3) I. L. R., 8 Calc., 690, 699.
(4) 24 Calc. W. R. Civ. Rul., 47.
(5) I. L. R., 2 Mad., 223.
(6) Printed Judgments for 1883, p. 51.
(7) Printed Judgments File for 1881, p. 319.
(8) 2 Morris S. D. A., 255.

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jointly mortgaged by Shankroji, the owner of one-half share of the *takshim*, and Hábáji, the eldest of the four sons of Pratáb, the owner of the remaining half share. The plaintiffs claimed to be owners, by purchase at two Court sales, of the equity of redemption of the eight-pies' share belonging to Shankroji and of one quarter of the eight-pies' share belonging to Pratáb. One of these sales was in execution of a decree against Rámji, the eldest of the five sons of Shankroji, and the other in execution of a decree against Hábáji. After the institution of the suit, the defendants purchased privately the shares in the equity of redemption belonging to Bálá, the fifth son of Shankroji, and to Sáyá and Devji, two of the sons of Bábá, the fourth son of Shankroji. Under these sales, they claimed to be owners of a four-pies' share in the *takshim*. Pending the appeal in the District Court, the defendants allowed Lakshman, son of A'tmáji and grandson of Pratáb, to redeem a two-pies' share, and Lakshman's brother Rághu to redeem a pie share.

The Subordinate Judge allowed the plaintiffs to redeem a ten-pies' share of the *takshim*. He held them to be owners of Shankroji's eight-pies' share and Hábáji's two-pies' share.

The District Judge held that, under the sale in execution of the decree against Rámji Shankroji, the plaintiffs acquired only Rámji's two-pies' share. He held, also, that they were owners of Hábáji's two-pies' share. He allowed redemption of a nine-pies' share,—that is, of so much of the sixteen-pies' *takshim* as had not been purchased by the defendants pending the suit, or allowed by them to be redeemed pending the appeal.

It has been contended, on behalf of the plaintiffs in this Court, that, as owners of a part of the equity of redemption, they were entitled to redeem the whole of the mortgaged estate, and to seek contribution from the other sharers, including the defendants, who had purchased shares, and that their right so to redeem could not be affected by the defendants' purchase pending the suit, or the partial redemption permitted pending the appeal. For the defendants, it is contended that the indivisible character of the mortgage has been destroyed by such purchase and partial redemption; and the decision of the Privy Council in *Nawáb*

Azimut Ali Khán v. *Jowáhir Sing*[1] is relied on as showing that the plaintiffs are entitled only to redeem the share of the *takshim* purchased by them on payment of a proportionate part of the mortgage-debt. That case must, however, be distinguished from the present, inasmuch as the purchasers of the equity of redemption in that case were apparently owners, not of undivided shares of the mortgage property, (as in the present case), but of distinct parcels which had been separately put up for sale by the Court. The plaintiffs purchased one of the mortgaged villages, and the mortgagee purchased other villages. Certain definite portions of the mortgage-debt seem to have been chargeable on each of the parcels which were sold. Their Lordships held that the mortgagee was entitled to retain possession of the villages purchased by him, as against the plaintiffs, if desirous of doing so, and that the right of the plaintiffs was, in that case, "limited to the redemption and recovery of their village of Hosseinpore upon payment of so much of the sum deposited in Court as represented the portion of the mortgage-debt chargeable on that village." The case was referred to and considered in *Sakhárám Náráyan* v. *Gopál Lakshman*[2], in which Sargent, C. J., and Kemball, J., said: "The ground of that decision we apprehend to be that the plaintiffs were only the owners of a distinct village comprised in the property mortgaged, and not sharers in the whole of such property." It was not, therefore, the intention of the Privy Council to set aside the ordinary rule, that one of several tenants-in-common may redeem the whole estate. That rule had, indeed, no application to the particular circumstances of the case. In the present case, the present owners of the equity of redemption are tenants-in-common. The mortgage was for an entire sum, and the property, though held in certain shares by the original joint tenants, was mortgaged, as in *Norender Náráin* v. *Dwárká Lál*[3], as a whole, and was "redeemable only upon payment of the entire sum. Each and every one of the mortgagors was interested in payment of that money and the redemption of the estate, and each and every one of them had a right, by payment

(1) 13 Moo. I. A., 404.

(2) See *infra*, p. 656.

(3) L. R., 5 I. A., 18.

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of the money, to redeem the estate, seeking his contribution from the others"—*Norender Náráin* v. *Dwárka Lál*(1). And the rule is the same as regards any persons, other than the original mortgagors, "who have acquired any interest in the lands mortgaged by operation of law, or otherwise, in privity of title;" for, as explained in section 1023 of Story's Equity Jurisprudence, "Such persons have a clear right to disengage the property from all encumbrances, in order to make their own claims beneficial or available. * * *. When any such person does so redeem, he or she becomes substituted to the rights and interests of the original mortgagee in the land, as in the civil law." In *Rágho Náráyen* v. *Devsávant*(2), a Full Court decided that, when the mortgage of an estate has been executed by several proprietors, an action by one proprietor for his share would not lie, and that the action to recover the whole was good. In *Alikhán Dáudkhán* v. *Mahomedkhán Samsherkhán*(3), the defendant mortgagee had become the owner, by inheritance, of the fourth share in the mortagaged property belonging to one of the mortgagors; and Melvill and Kemball, JJ., awarded redemption of only three-fourths of the property; but, in that case, the deceased mortgagor's fourth share, to which the defendant had succeeded, had actually been separated by a decree from the rest of the property; and, under the circumstances, the Court thought that "the defendant should not be compelled to surrender Dáudkhán's fourth share." But in the present case, though the defendants have, apparently, acquired a four-pies' share in the mortgaged *takshim*, it is an undivided share, which can only be reduced to separate enjoyment on a general partition among the plaintiffs and the other sharers who have not yet been joined as parties and the defendants themselves in their character as purchasers.

The principle on which partial redemption was allowed in *Alikhán Dáudkhán* v. *Mahamadkhán Samsherkhán*(3) does not, therefore, apply to the present case. In *Marakar Akath Kondarakayil Mamu* v. *Punjapatath Kuttu*(4), the fifth defendant,

(1) L. R., 5 I. A., 27.
(2) 2 Morris S. D. A., 255
(3) See *infra*, p. 658.
(4) I. L. R., 6 Mad., 61.

who was an assignee of a mortgagee, had acquired by purchase a share in the equity of redemption. The Madras High Court held that he could not be required to surrender possession of the whole of the mortgaged property against his consent until the plaintiff had, "by a proper suit for partition, ascertained definitely to what shares he and the fifth defendant were respectively entitled." The Court, therefore, refused a decree for redemption of the whole; and, at the same time, held that a decree for a redemption of a portion was equally impossible, for "that would be to convert the suit into a suit for partition, which, without the consent of all the parties, could not be permitted."

We think, for the reasons we have already given, that a decree for the redemption of a portion of the mortgaged property cannot rightly be made in the present case. At the same time, as the plaintiffs were clearly entitled, at the time when the suit was instituted, to redeem the whole, that right ought not to be affected by the conduct of the defendants *post litem motam*. Whether, if the defendants had purchased a share in the equity of redemption before the institution of the suit, we should have followed the Madras ruling, it is, of course, unnecessary for us to say. But as, when sued, the defendants enjoyed the property only in their character as mortgagees, they were clearly not entitled to resist the plaintiffs' claim; and by, thereafter, purchasing a share in the equity of redemption, they cannot force the plaintiffs to "a proper suit for partition." As to the partial redemption permitted by them to Lakshman and Rághu, it is, perhaps, sufficient to say that, if that transaction be not subject to the decree to be made in this case, that would only be so because it was one which the defendants had no power at all to permit; for, before partition, none of the co-sharers could redeem any particular share—*Gan Sávant Bál Sávant* v. *Náráyan Dhond Sávant*[1]. And any payment made to the defendants by Lakshman and Rághu must be credited in the mortgage account to the sharers generally, and cannot rightly be credited to those two co-sharers only. We are of opinion, therefore, that, in the circumstances of the present case, the plaintiffs are entitled to

(1) I. L. R., 7 Bom., 467.

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redeem the whole estate. But we do not make a decree to that effect, because all the persons, in whom portions of the equity of redemption are vested, have not been made parties to the suit, as they ought to have been[1]. The plaintiffs sue alone. They do not profess to sue in any representative character,—either as representing a joint family or a joint tenancy. Whether, if they professed so to represent other co-sharers in the equity of redemption, it would be necessary, under the present Code of Civil Procedure, to join those sharers, we are not called upon to decide. But, suing for themselves only, as they are entitled to do, they must, nevertheless, follow the ordinary rule, and join all co-sharers in the suit. If any such persons will not join them in redeeming, they must be made defendants.

As those persons have not yet been joined, we do not deal with any of the other questions raised in this case, *viz.*, as to whether the mortgage included the *khoti khásgi* land, and as to the interest to be awarded on the mortgage-debt, and as to the extent of the plaintiffs' interest in the equity of redemption.

These questions really arise as between all the parties interested, and must be decided after the suit has been properly constituted as to parties.

We reverse the decrees of the Courts below, and remand the case for retrial after the necessary parties have been joined. Costs to follow the final decision.

Decree reversed and case remanded.

(1) See Macpherson's Law of Mortgage in British India, (7th ed.,) p. 344.

NOTE.—The following is a report of Regular Appeal No. 69 of 1881, referred to in the above judgment. The case was heard on the 15th February, 1883, by Sargent, C. J., and Kemball, J.: see Printed Judgments for 1883, p. 51:—

SAKHÁRA'M NA'RA'YAN *v.* GOPA'L LAKSHUMAN.

The plaintiff Sakhárám sued to redeem the village of Golwán, which, he alleged, was mortgaged by his ancestor to the defendants' ancestor by a bond dated 23rd December, 1817, for Rs. 769-3-8, repayable within ten years. The defendants answered *(inter alia)* that not only the plaintiff's ancestor, but he and the other proprietors of the village, seven in all, had mortgaged the village; that a portion of the village, consisting of three *thikans*, had been sold to the mortgagees by the descendants of some of the original mortgagors; and that the plaintiff was not entitled to redeem the whole village. The First Class Subordinate Judge of

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Ratnágiri found that the village had been jointly mortgaged by seven persons, of whom plaintiff's ancestor was one, and that the mortgagees had purchased three *thikans* in the village. He held that the plaintiff, as owner of a part of the equity of redemption, was only entitled to redeem his share. From this decision the plaintiff appealed to the High Court.

SARGENT, C. J. :—The Subordinate Judge has decided that the plaintiff can only redeem his share in the village, on the authority of a decision of the High Court of Allahabad—*Kuray Mal* v. *Puran Mal*(1). In that case a mortgage had been executed by three joint proprietors of an estate. Subsequently, the share of one of the mortgagors was purchased by the plaintiff, and the share of another by the mortgagee himself. Under those circumstances, the Court held, on the authority of the decision of the Privy Council in *Nawab Azimut Ali Khán* v. *Jowahir Sing*(2), that the plaintiff could only redeem his own share. In the latter case, sixteen *mauzes* had been mortgaged by their owner to the appellant. Subsequently, the estate was sold in parcels, one of the villages (*mauze* Hosseinpore) being purchased by the plaintiffs. Two other villages, Jilpore and Rukunpore, and the one-fourth share in village Chundári were purchased by other persons. The appellant, the mortgagee, purchased twelve other villages, and also three-fourth share of village Chundári. The plaintiffs sought by their plaint to redeem the village purchased by themselves, as well as those purchased by the other persons, except the mortgagee, and their Lordships held "that the appellant, if desirous of retaining possession of these villages as mortgagee, was entitled to do so against the plaintiffs, whose right, in that case, they said, was limited to the redemption and recovery of their village of Hosseinpore upon payment of so much of the sum deposited in Court as represented the portion of the mortgage-debt chargeable on that village." The ground of that decision, we apprehend to be that the plaintiffs were only the owners of a distinct village comprised in the property mortgaged, and not sharers in the whole of such property. In the case, however, before the Court of Allahabad, the owners of the equity of redemption were tenants-in-common, and, except as to the share purchased by the mortgagee, there would appear to have been no reason for departing from the ordinary rule, that one of several tenants-in-common may redeem the whole, as was practically decided, under similar circumstances, in the case to which our attention has been drawn, by Melvill and Kemball, JJ., (*Alikhán Dáudkhán* v. *Mahamadkhán Samsherkhán*)(3). No issue, however, having been framed which raised the question as to the relation in which the original mortgagors stood to one another, and there being, consequently, no materials on the record to enable us to determine it, it will be necessary to send the case back for the Subordinate Judge to take evidence, and record a finding on the following issue :—

"Was the mortgage (exhibit 62) one by persons who were tenants-in-common holding undivided shares in the mortgaged village, or persons who were holders of distinct portions of such village ?"

And to send the finding up to this Court.

(1) I. L. R., 2 All., 565.

(2) 13 Moore's Ind. Apps., 40.

(3) Printed Judgments for 1881, p. 319.

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The following is a report of Second Appeal No. 234 of 1881, also referred to in the above judgment. The appeal was heard by Melvill and Kemball, JJ., on 5th December 1881 : see Printed Judgments for 1881, p. 319 :—

ALIKHÁN DA'UDKHA'N, (DEFENDANT NO. 2), APPELLANT, v. MAHAMAD-KHA'N SAMSHERKHA'N DESHMUKH, (PLAINTIFF), RESPONDENT.

The plaintiff, Mahamadkhán Samsherkhán, sued to redeem Survey No. 38 (consisting of sub-Nos. 1, 2, 3, 4, 5,) in the *khoti* village of Nadgam. He alleged that it belonged to Bávákhán Sarjiákhán and Hasankhán Salabatkhán, who had mortgaged it, forty years before, to the father of Ibráhimkhán Mahomed, defendant No. 1 ; that on 28th June, 1873, he (plaintiff) purchased Hasankhán's 4 annas' share in the whole village ; and that from time to time he offered defendant No. 1 repayment of the mortgage-debt, which was refused. Defendant No. 1 answered that Bávákhán's share had been sold in execution of a decree and bought by defendant No. 2, Alikhán Dáudkhán, and that the whole of the Survey No. 38 had been redeemed from him by Alikhán Dáudkhán.

Defendant No. 2, Alikhán Dáudkhán, replied that the land in dispute was originally the joint property of Bávákhán, Hasankhán, and his father Dáudkhán; that, in execution of a decree for partition of the land in dispute, sub-No. 1 fell to the share of Bávákhán, sub-No. 2 to that of Hasankhán, and sub-Nos. 3, 4, 5, to Dáudkhán ; that he (defendant No. 2) had purchased Bávákhán's interest in sub-No. 1 at a Court sale, and had redeemed defendant No. 1's mortgage by paying him Rs. 57. He, therefore, disputed the plaintiff's right to redeem the whole or any part of the land in suit.

The Court of first instance found that the land in dispute had been partitioned among the co-sharers, as alleged by defendant No. 2, and awarded the plaintiff's claim as to sub-No. 2 only, and rejected the rest of the claim.

The lower Appellate Court amended the decree of the first Court, by declaring that the plaintiff, as owner of part of the equity of redemption, was entitled to redeem the whole of the land in dispute. Thereupon the defendant No. 2 appealed to the High Court.

MELVILL, J. :—The general rule, no doubt, is that one of several owners of the equity of redemption has a right to redeem the whole of the mortgaged property. But, in the present case, the defendant, Alikhán, has become, by inheritance, the owner of Dáudkhán's fourth share in the mortgaged property, and there has been a decree by which Dáudkhán's fourth share has been separated from the rest of the property. Under these circumstances, we think that the defendant should not be compelled to surrender Dáudkhán's fourth share. The remaining three-fourths of the property he must surrender to the plaintiff on payment of three-fourths of the amount due under the mortgage. It is true that the defendant claims to be purchaser of Bává's one-half share of the property ; but the Assistant Judge has found that the purchase is not proved, and, therefore, in respect of this moiety, the defendant must be considered as being in possession solely as mortgagee ; and, as mortgagee, he cannot resist the plaintiff's right to redeem. He must surrender Bává's moiety ; and if he has any claim to it as purchaser, he must establish such claim by separate suit. We amend the decree of the Assistant Judge, and decree that plaintiff do pay to the defendant, Alikhán, within

six calendar months from this date, the sum of Rs. 46-14-0, being three-fourths of the sum of Rs. 62-8-0 found by the Assistant Judge to be due on the mortgage, and be thereupon put in possession of sub-Nos. 1 and 2 of Survey Field No. 38; and that, in default of such payment, the plaintiff be for ever foreclosed. His claim to redeem sub-Nos. 3, 4 and 5 is rejected. The plaintiff to bear the costs of appeal in the Court below. Each party to bear his own costs in the Court of first instance and in this Court.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Birdwood.

1885. *July 6.*

GULIBA'I, widow of BA'LMUKAND, (original Plaintiff), Appellant, *v.* JAGANNA'TH GALVANKAR, (original Defendant), Respondent.*

Decree—Execution—Suit to declare property liable to attachment in execution of a decree—Plea that the decree was collusive—Fraud—Civil Procedure Code (Act XIV of 1882), *Sec.* 283.

A. obtained a money decree against B., and, in execution, attached property in the possession of C., who claimed to have purchased it for value from B. previously to the date of the decree. The attachment was removed on the motion of C. A. then brought a suit against C., under section 283 of the Code of Civil Procedure (Act XIV of 1882), to have it declared that the property was liable to attachment and sale under the decree. C. contended that the decree, sought to be executed, was a collusive one.

Held, that C. could not be allowed to impeach the decree between A. and B.

This was a second appeal from the decision of W. H. Crowe, Judge of the district of Thána, reversing the decree of Ráv Sáheb A. K. Kotháre, Subordinate Judge of Dáhánu.

This suit was instituted by the plaintiff to have it declared that certain property was liable to sale in execution of a money decree obtained against one Rámkrishna by the deceased husband of the plaintiff. The plaintiff alleged that Rámkrishna was the owner of the property, and in possession.

The defendant contended, amongst other things, that the decree was collusive; that in 1874,—that is, previously to the date of the decree,—Rámkrishna sold it to one Máhádev, whose heir in 1878 sold it to the defendant, who was consequently in possession as proprietor.

* Second Appeal, No. 641 of 1883.