APPELLATE CIVIL.

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

SUBRA'O MANGESHAYA, (ORIGINAL DEFENDANT NO. 2), APPELLANT, *v.* MANJA'PA SHETTI, AND ANOTHER, (ORIGINAL PLAINTIFF AND DEFENDANT NO. 1), RESPONDENTS.*

1892. *January* 7.

Mortgage—Lease by mortgagor to mortgagee—Subsequent sale of equity of redemption by mortgagor—Suit by purchaser to redeem and for possession—Lease to mortgagee invalid as against purchaser.

The purchaser from the mortgagor of the equity of redemption having brought a redemption suit, the mortgagee contested his right to recover possession, on the ground that, prior to the plaintiff's purchase, the mortgagor had granted to him (the mortgagee) a *mulgeni* or permanent lease.

Held, that the plaintiff was not bound by the lease, although a long period had elapsed since it was granted, it having appeared that the plaintiff had on a former occasion contended that the lease was a forgery and fraudulent; and as the mortgagee was then entitled to possession under his mortgage, no acquiescence in the lease could be inferred from the mere fact of the mortgagee having remained in possession, it not being alleged that rent was ever paid to the plaintiff.

THIS was a second appeal from the decision of Gilmour McCorkell, District Judge of Kánara.

Suit to redeem and recover possession with mesne profits.

The facts of the case were as follows:—

By a registered deed dated the 1st June 1854, one Vithápa, the owner of the lands in dispute, mortgaged them with possession to one Mangeshaya. A portion of these lands had been already leased by him to Mangeshaya by a *mulgeni* (perpetual) lease dated 28th November, 1853. On the 4th January, 1857, Mangeshaya obtained a fresh permanent lease from Vithápa of all the property included in the mortgage and the first lease. On the 23rd June, 1858, the plaintiff Manjápa Shetti purchased from Vithápa, under a registered deed, one-third share of the equity of redemption, and in 1885 and 1886 purchased the remaining two-thirds share also. The plaintiff's deed of purchase with respect to the one-third share contained an endorsement that Mangeshaya protested against the registration of the deed, on the ground that the contracting parties had omitted to recite therein his *mulgeni* (perpetual) lease of the year 1857, and

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that the plaintiff retorted that the lease was forged and fraudulent. As purchaser the plaintiff brought the present suit against his vendor, Vithápa Shetti, and Subráo, the son of the lessee Mangeshaya, to redeem and recover possession with mesne profits.

Defendant No. 1, Vithápa Shetti, did not defend the action.

Defendant No. 2, Subráo Mangeshaya, relied on his *mulgeni* (perpetual) lease, and contested the claim to recover possession.

The Subordinate Judge (Ráo Sáheb V. D. Joglekar) passed a decree directing the plaintiff to redeem and recover possession.

Defendant No. 2 appealed to the District Court, which confirmed the decree.

Defendant No. 2 thereupon appealed to the High Court.

Shámráo Vithal for the appellant:—The first *mulgeni* lease was executed so far back as the year 1853, and no steps have been taken till the institution of the present suit to set it aside. The plaintiff, Manjápa, had notice. He came to know of our lease in the year 1858, when we protested against the registration of the sale-deed executed in his favour by Vithápa. It was, therefore, his duty to take immediate action in the matter, but beyond the fact that he then denounced the lease as a forgery he did nothing more. Both the lower Courts have found our lease to be proved. We, therefore, contend that it should be enforced as a *boná-fide* transaction, more especially as no steps were taken against it for so long a time. It is not now open to the respondents to turn round and urge that the lease is invalid.

Ghanashám Nilkanth Nádkarni (with *Náráyan Ganesh Chandávarkar*) for the respondents:—It was not necessary for us to take any steps to set aside the lease, because till redemption the mortgagee would have been entitled to retain possession, as the mortgage was one with possession. We had repudiated the lease when it first came to our knowledge, and we cannot be estopped from disputing its validity now. There is no evidence adduced by the appellant to show that we in any way acquiesced in the lease.

SARGENT, C. J.:—The plaintiff, who is the purchaser of one-third of the equity of redemption, on 23rd June, 1858, and of the remaining two-thirds in 1885 and 1886, in certain garden lands mort-

gaged in June, 1854, to the father of the second defendant, seeks by the present suit to redeem the mortgage. The defendant No. 2 disputes the plaintiff's right to recover possession, in the event of his redeeming the mortgage, of the mortgaged lands, on the ground that the lands had been already granted to him by the original mortgagor on perpetual lease on 4th January, 1857. The lower Court of appeal held that the lease in question was proved, but that the mortgagee could not set it up, and that the plaintiff was not estopped from disputing its validity.

The general rule as to agreements of this nature between mortgagor and mortgagee is stated very broadly by Lord Redesdale in *Hickes* v. *Cooke*[1], in the following terms:—"No agreement between mortgagor and mortgagee for a beneficial interest out of the mortgaged premises (such as a lease) where the mortgage continues, ought to stand, if impeached within reasonable time, from the great advantage which the mortgagee has over the other party in such a transaction." In *Webb* v. *Rorke*[2], a lease for nine hundred and ninety-nine years was disallowed as diminishing the value of the equity of redemption. A *mulgeni* or permanent lease would certainly have that effect, and the circumstance that a portion (Serial No. 5) of the mortgaged lands had been permanently let to the mortgagee when the mortgage was passed, cannot preclude the application of the rule to that portion, as one entire rent of 68 rupees was reserved by the lease in question on the whole premises. A long period has certainly elapsed since the lease was granted; but it appears that, when the one-third of the equity of redemption was sold to the plaintiff in June, 1858, the plaintiff contended that the lease was a forgery and fraudulent, and as the mortgagee was then entitled to possession under his mortgage, no acquiescence in the lease by the plaintiff can be inferred from the mere fact of the defendants having since remained in possession, as it is not alleged that rent has ever been paid to the plaintiff. We think, therefore, that the plaintiff is not bound by the lease, and that the decree should be confirmed with costs—the date of redemption being three months from the date of this decree.

Decree confirmed.

(1) 4 Dow. at p. 28. (2) 2 Sch. and Lef., 661.