

in *Nanomi Babuasin v. Modun Mohun*<sup>(1)</sup>, *Meenakshi Naidu v. Immudi Kanaka*<sup>(2)</sup> and *Mahabir Pershad v. Moheswar Nath*<sup>(3)</sup>. As a representative case of the absence of such special circumstances, Sargent, C. J., referred to *Baboo Hurdey Narain v. Pandit Rooder Perkash Misser*<sup>(4)</sup>.

In the present case the debt was one in which the two adult sons joined with the father. There was no concealment in the plaint why the father and the other brother were not joined as parties. It is found as a fact that the son sued was manager of the joint family. The debt was a family debt. The sale realized the full price of the house, and the creditor obtained possession unopposed. The appellant's deed of purchase was executed *pendent lite*, and after the attempt to raise the attachment had failed. There is thus no reason shown why the decree of the lower Court should be disturbed. We dismiss the appeal and confirm the decree. All costs on appellant.

*Decree confirmed.*

(1) L. R., 13 I. A., 1.

(3) L. R., 17 Cal., 589.

(2) L. R., 16 I. A., 1.

(4) L. R., 11 I. A., 26.

## APPELLATE CIVIL.

*Before Mr. Justice Jardine and Mr. Justice Ranade.*

NARAYAN AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* GANPAT AND OTHERS (ORIGINAL DEFENDANTS, NOS. 1 TO 9), RESPONDENTS, \*

AND

GANPAT AND OTHERS (ORIGINAL DEFENDANTS NOS. 1, 2, 3 AND 9), APPELLANTS, *v.* NARAYAN AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS.\*

*Mortgage—Mortgage by joint owner—Mortgagee becoming purchaser of part of mortgaged property—Redemption—Redemption of part of mortgaged property—Apportionment of mortgage-debt—Right of mortgagee to keep security entire—Right of purchaser of mortgagee's interest to sue for partition—Joint possession—Practice.*

When a mortgagee acquires by purchase the interest of some of the mortgagors, he acquires only a right to sue for partition after the redemption of the entire security has been effected. He must first surrender or restore the mortgage security and then urge what title he may have acquired by the purchase.

\* Cross Second Appeals, Nos. 575 and 625 of 1893.

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The general rule is that a mortgagee has a right to insist that his security shall not be split up, but in the following cases there is no objection to do so and to rateably distribute the mortgage-debt:—

(a) When the mortgagee does not insist on keeping the security entire.

(b) When the original contract itself recites that the mortgagors join together in mortgaging their separate shares.

(c) When the mortgagee has himself split up the security; *e. g.*, when he buys a portion of the mortgaged estate. In this case he is estopped from seeking to throw the whole burden on that part of the property still mortgaged with him.

In 1872 the plaintiffs' father (Khushal) and brother (Bapu) mortgaged seven lots of land with possession to the father of defendants Nos. 1, 2, and 3. Four of those lots were subsequently sold to defendants Nos. 4 to 8 with the consent of the mortgagees, who continued in possession of the remaining three lots. In 1878 in execution of a decree, Bapu's interest in these latter three lots was sold and was purchased by defendants Nos. 1, 2 and 3. In 1889 the defendants Nos. 1, 2 and 3 sold these three lots to defendant No. 9. In 1891 the plaintiffs (sons and brothers of the original mortgagors) sued to redeem all the lands comprised in the mortgage of 1872. The first Court as to the first four lots held that defendants Nos. 4 to 8 had been in adverse possession of the first four lots for more than twelve years and that as to them the suit was barred. As to the remaining three lots it passed a decree for redemption of the plaintiffs' three-fourths share of the lands and directed that on payment within six months by them of Rs. 500 to defendant No. 9 (who stood in the place of defendants Nos. 1, 2 and 3) they should be put in possession of the lands jointly with defendant No. 9. In appeal the decree was confirmed as to the first four lots, but as to the remaining three lots the Judge found that the mortgage-debt had been paid and that a sum of Rs. 348-5-0 was due from the mortgagees in possession (defendants Nos. 1, 2, 3 and 9) to the plaintiff. He, therefore, ordered payment of three-fourths of this amount by defendant No. 9 to plaintiffs, and directed that they should be put in possession of their three-fourths share of the lands jointly with defendant No. 9. On appeal to the High Court as to the right to redeem the said three lots,

*Held*, that the plaintiffs were entitled to redeem the whole of the said three lots which had been admittedly mortgaged in 1872 and not merely a three-fourths share thereof, and were also entitled to the whole of the surplus sum of Rs. 348 found due by the mortgagees in possession.

*Held*, also, that defendant No. 9, who had acquired from the mortgagees (defendants Nos. 1, 2 and 3) the equity of redemption in part of the mortgaged property, was not entitled to possession of his share jointly with the plaintiffs. The mortgaged property should first be restored to the plaintiffs and then defendant No. 9 might bring a separate suit for partition.

SECOND appeals from the decision of Rão Bahádur N. N. Nanavati, First Class Subordinate Judge, A. P., at Dhulia.

Suit for redemption. The land in question consisted of seven lots, which in 1872 had been mortgaged with possession by the

plaintiffs' father and brother (Khushal and Bapu) to one Totaram, the father of defendants Nos. 1, 2 and 3.

In the same year one of the lots was sold by the mortgagors with the consent of the mortgagee to defendants Nos. 4 and 5; similarly another was subsequently sold in the same year to defendant No. 6, and a third to defendant No. 7, and in 1876 a fourth lot was sold to defendant No. 8.

The three remaining lots remained in the possession of the defendants Nos. 1, 2 and 3 (the sons of the original mortgagee). In 1878 the mortgagors' interest in them was sold in execution of a decree against them, and it was purchased by defendants Nos. 1, 2, and 3, who duly obtained formal possession, being already in possession as mortgagees. This decree was against Khushal and Bapu, but in the certificate of sale it was stated that what was sold was the right, title and interest of Bapu; and in the list of property which had been attached in execution these lands were also mentioned as belonging to Bapu.

In 1889 defendants Nos. 1, 2 and 3 sold these latter three lots to defendant No. 9

In 1891 the plaintiffs (the sons and brothers of the original mortgagors) brought this suit for the redemption of all seven lots of land comprised in the mortgage of 1872.

Defendants Nos. 4 to 8 pleaded adverse possession for more than twelve years, and that the suit was barred by limitation.

Defendants Nos. 1, 2 and 3 as to the four lots sold to defendants Nos. 4 to 8 pleaded limitation, and as to the three lots sold to defendant No. 9 they contended that the plaintiffs' right to redeem had been extinguished by the execution sale at which they had purchased the mortgagors' equity of redemption.

The Subordinate Judge held that as to the four lots held by defendants Nos. 4 to 8, the plaintiffs' claim was barred by limitation. As to the remaining three lots, he held that by the sale in execution one-fourth share therein had passed to the purchasers (mortgagees) and that the plaintiffs (mortgagors) were, therefore, only entitled to redeem three-fourths jointly with defendant No. 9. He ordered, therefore, that the plaintiffs might redeem on payment within six months of Rs. 500 to

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defendant No. 9, " who stands in the place of the mortgagees (defendants Nos. 1, 2 and 3) together with his costs of this suit in satisfaction of the mortgage-debt due on three-fourths of the fields mentioned in the plaint. On payment being made within the aforesaid period, the plaintiffs will be put in possession of their three-fourths ' share in the fields ' jointly with defendant No. 9."

On appeal the Court confirmed the decree of the lower Court as to the four lots held by defendants Nos. 4 to 8, but as to the three remaining lots he found on taking the accounts that the mortgage-debt had been paid off, and that a surplus of Rs. 348-5-0 was due by the mortgagees in possession (defendants Nos. 1, 2 and 3) to the mortgagors (plaintiffs). He, therefore, ordered as follows :—

"The defendant No. 9, who stands in the place of the mortgagees (the defendants Nos. 1 to 3), must, therefore, pay three-fourths of this surplus to the plaintiffs over and above the restoration of three-fourths of these three fields by him to them \* \* \*. Plaintiffs be put in possession of their three-fourths share therein jointly with the defendant No. 9. \* \* "

From this decree the plaintiffs appealed to the High Court, and the defendants Nos. 1, 2, 3 and 9 filed a cross appeal.

*Vicaji and Balaji Abaji Bhagvat* for the appellants (plaintiffs):—The plaintiffs are entitled to redeem the whole of the three lots in question and not only three-fourths, and defendant No. 9 is not entitled to joint possession with them. He stands in the place of defendants Nos. 1, 2 and 3, the mortgagees. They purchased the right of Bapu at the execution sale. Bapu had an interest jointly with the plaintiffs in these lands. The purchase by the defendants of his interest gave them only a right to sue for his share by partition after all the lands had been redeemed. Their purchase of this share did not affect the right to redeem the whole security given by the mortgage of 1872. Whatever right they had, is vested now in defendant No. 9, but that right can only be exercised after redemption of the whole mortgage security—*Naro v. Vithalbhat*<sup>(1)</sup>; *Mora Joshi v Ramchandra*<sup>(2)</sup>.

(1) I. L. R., 10 Bom., 648.

(2) I. L. R., 15 Bom., 24.

*Scott and Daji Abaji Khare* for respondents (defendants Nos. 1, 2, 3, and 9):—By the execution sale the whole interest in the three lots in dispute passed to defendants Nos. 1, 2 and 3. The decree was against both Khushal, the father of the plaintiffs, and Bapu, their brother; and the interest of both passed by the sale. The land was either joint family property standing in Bapu's name or it was Bapu's exclusive property. In either case the whole interest was sold to the purchasers—*Hari Vitthal v. Jairam Vitthal*<sup>(1)</sup>. The mortgagors themselves severed the security by selling part of it to third persons with consent of mortgagees.

*Vicaji* in reply:—Both the lower Courts have found that the interest of the plaintiff's father Khushal was not sold at the execution sale and that Bapu was not the manager of the family, as Khushal was alive at the date of the sale—*Appaji Bapuji v. Keshav*<sup>(2)</sup>; *Maruti Sakharam v. Babaji*<sup>(3)</sup>.

RANADE, J.:—These are cross appeals from the decision of the First Class Subordinate Judge of Dhulia rejecting the original plaintiffs Nos. 1, 2's claim for the redemption of four lands, and awarding them joint possession with defendant No. 9 of a three-fourths share in the remaining three lands, and directing defendant No. 9 to pay to plaintiffs a three-fourths share in Rs. 348-5-0, being the surplus left after satisfying the mortgage-debt.

The mortgage of which redemption was sought was effected by plaintiffs' father and their brother Bapu in 1872, and included seven lands in all, but four of these had been alienated by Bapu to defendants Nos. 4—8 more than twelve years before the institution of the suit, which suit was accordingly held to be time-barred in respect of these lands. Bapu's right, title and interest in respect of the remaining three lands were purchased in an execution sale by defendants Nos. 1, 2, 3, who represented the original mortgagee, and were subsequently in 1889 transferred by them to defendant No. 9. There was no bar of time in respect of this part of the claim, and both the lower Courts have held that these sale transactions affected only Bapu's share, and plaintiffs

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(1) I. L. R., 14 Bom., 597.

(2) I. L. R., 15 Bom., 13 at p. 19.

(3) I. L. R., 15 Bom., 87.

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were accordingly allowed joint possession with defendant No. 9 of their three-fourths share in these lands. It is from this decree that both plaintiffs and defendants Nos. 1, 2, 3 and 9 have preferred the present cross appeals, plaintiffs contending chiefly that they were entitled to redeem the whole of these three lands, while the defendants contended that the sale of Bapu's interest transferred to them the whole interest of all the mortgagors, and not Bapu's share only.

In regard to the contention of the plaintiffs (appellants in Second Appeal No. 575 of 1893), I feel satisfied that the lower Court of appeal was in error in awarding joint possession of a three-fourths share in the three lands to the plaintiffs, and directing the defendant No. 9 to refund to plaintiffs three-fourths share in the surplus left after satisfying the mortgage-debt. If the plaintiffs had a right to redeem the mortgage of these lands, that right entitled them to sue for the redemption of the whole of these lands. Indeed, if they had brought the suit in the first instance to redeem only their share in the mortgaged lands, such a suit, splitting up the mortgage security, could not have been maintained under the rulings of this Court, which have held that when a mortgagee acquires by purchase the interests of some of the mortgagors, he acquires only a right to sue for partition after the redemption of the entire mortgaged property has been effected. He cannot resist the claim for redemption based on the mortgage admitted by him. He must first surrender or restore the mortgage security, and then urge what title he may have acquired by purchase.

In the present case, the respondent-defendants did not claim any equitable relief by way of contribution and apportionment. Their defence was that the transfer of Bapu's interest made them owners of the entire property. Plaintiff-appellants also claimed to redeem the whole, and not any portion of the mortgaged lands. The parties having thus joined issue on this basis, both the lower Courts were in error in apportioning the mortgage security and debt in the way they have done. The burden of bringing a partition suit has been thus cast upon the plaintiff-appellants, when it should properly fall upon the mortgagees and their assigns.

Looking at the authorities, it will be found that the view taken by the Madras High Court in *Mamu v. Kuttu*<sup>(1)</sup> has been expressly dissented from in several decisions of this Court. The Madras High Court held in the case noted above that in such cases the mortgagor must first by a regular partition suit ascertain his share before he sues for redemption. The judgment cites no authorities, and it does not appear that the peculiar incidents of a mortgage contract were fully considered. So far back as 1876, it was held by a Division Bench of this Court (Melvill and Nanabhai Haridas, JJ.) that such a mortgagee must first restore the security, and it will be then open to him in another suit to establish any rights he may have acquired by purchase—*Santaji v. Bayaji*<sup>(2)</sup>. This view of the law was affirmed in *Alikhan v. Mahamadkhan*<sup>(3)</sup>, which ruling is of special interest, for it makes a clear distinction between the mortgagee purchasing a portion of the equity of redemption, and a mortgagee succeeding to it by right of inheritance. While in respect of the mortgagee's rights as purchaser, it was ruled that he should surrender the security, and then establish his claim as purchaser, in respect of the rights which devolved on him by inheritance, the right of contribution and apportionment in redemption was upheld. This same view was again given effect to in *Bhikaji v. Lakshman*<sup>(4)</sup>. The authorities bearing on this subject were fully considered in *Naro v. Vithalbhat*<sup>(5)</sup> and again in *Vishnu v. Venkatrar*<sup>(6)</sup>, and finally in *Mora Joshi v. Ramchandra*<sup>(7)</sup>, in which last case, as also in *Bhikaji v. Lakshman*<sup>(4)</sup>, the ruling in *Mamu v. Kuttu*<sup>(1)</sup> was expressly dissented from.

Of course there are special circumstances in which the Courts have allowed some of the mortgagors or part purchasers of the equity of redemption to redeem a part of the mortgage security on payment of a proportion of the mortgage-debt. The Privy Council case, *Nawab Azimut Ali Khan v. Jowahir Sing*<sup>(8)</sup>, repre-

(1) I. L. R., 6 Mad., 61.

(2) P. J. for 1876, p. 17.

(3) I. L. R., 10 Bom., 658.

(4) I. L. R., 15 Bom., 27.

(5) I. L. R., 10 Bom., 648.

(6) P. J. for 1889, p. 248.

(7) I. L. R., 15 Bom., 27.

(8) 13 M. I. A., 404.

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sents one class of such cases. In that case the suit was brought by the purchaser of one out of the sixteen mouzahs mortgaged to redeem his purchase, and the mortgagee in that case did not insist on the redemption of the whole mortgage. The general rule appears to be that a mortgagee has a right to insist that his security shall not be split up—*Hurrechur Singh v. Dabee Sahoy*<sup>(1)</sup>, *Moulvie v. Jubboo*<sup>(2)</sup>—but of course (1) when he does not insist on such a right, *Asansab v. Vamana*<sup>(3)</sup>; *Ram Kristo v. Mussamut Amceeroonissa*<sup>(4)</sup>; *Mirza Ali v. Tarasoundere*<sup>(5)</sup>; *Kesree v. Seth Roshun Lal*<sup>(6)</sup>; or (2) where the original contract itself recites that the mortgagors join together in mortgaging their separate shares or (3) where the mortgagee has himself split up the security,—*Kuray Mal v. Puran Mal*<sup>(7)</sup>; *Marana v. Pendyala*<sup>(8)</sup>; *Nawab Azimut Ali Khan v. Jowahir Sing*<sup>(9)</sup>; *Nathoo Sahoo v. Lalah Amir*<sup>(10)</sup>; *Mahtab Rai v. Sant Lal*<sup>(11)</sup>;—there can be no objection to rateably distribute the mortgage-debt. In the last class of cases, the mortgagee himself splits the security by buying a portion of the estate mortgaged; and he is very properly held to be estopped from seeking to throw the whole burden on the part of the property still mortgaged with him. It was on this principle that in the present case the mortgage charge has been apportioned between the four lands sold away with the mortgagee's consent by the mortgagor Bapu, and the remaining three lands. Lastly, contribution was allowed in the case where the mortgagee succeeded by inheritance to a part of the mortgaged estate—*Alikhan v. Mahamadkhan*<sup>(12)</sup>.

In so far as the three lands in dispute are concerned, the facts of the present case do not fall within any of the special classes noted above, and the lower Courts were, therefore, not justified in departing from the current of decisions which require mortgagees to restore possession of the mortgaged property, and refer them to a separate suit for partition.

(1) Cal. W. R., 1864, p. 260.

(2) Cal. W. R., 1864, p. 75.

(3) I. L. R., 2 Mad., 223.

(4) 7 Cal. W. R., p. 314.

(5) 2 Cal. W. R., p. 150.

(6) 2 N. W. P., 4.

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

(8) I. L. R., 3 Mad., 230.

(9) 13 M. I. A., 404.

(10) 15 Beng. L. R., 303.

(11) I. L. R., 5 All., 276.

(12) P. J. for 1881, p. 319.

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The respondents' pleader Mr. Khare admitted that the decree for joint possession was not formally correct, but he contended that the informality was not of a sort which justified interference in second appeal. I cannot for reasons set forth above accept this view, and the decree must be accordingly amended.

In the other appeal, Mr. Scott for defendants Nos. 1 to 3 and 9 contended that the transfer of Bapu's interests conveyed the whole property. This contention was made to rest on two inconsistent grounds, namely, (1) that these three properties were Bapu's self-acquired property, and, (2) that Bapu was manager of the joint family, and his acts bound them all. Both the lower Courts have, however, found distinctly that the properties were not self-acquired, and that Bapu's interests sold were not those of a manager of the joint family. We must, therefore, disallow the contention, and reject this appeal.

In Appeal No. 575, we vary the decree of the lower Court, so far as to direct that defendant No. 9 should restore the three lands in dispute, Nos. 9, 17 and 19 of M<sup>a</sup>halkhedi, into plaintiffs' possession, and pay Rs. 348-5-0 to the plaintiffs. The respondents Nos. 1, 2, 3, 9 should pay appellants' costs of this appeal, and bear their own costs, and pay the respondents' costs in Appeal No. 625. Appellants in Appeal No. 575 to pay the costs of the respondents-defendants Nos. 4 to 8.

JARDINE, J. :—I concur in holding that the authorities just cited cover the first point argued and in the decree proposed.

*Decree varied.*

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