

APPELLATE CIVIL.

Before Sir C. Farran, Kt., Chief Justice, and Mr. Justice Parsons.

1896.
January 21.

PIRJADA AHMADMIYA PIRMIYA AND OTHERS (ORIGINAL PLAINTIFFS),
APPELLANTS, *v.* SHA KALIDAS KANJI AND OTHERS (ORIGINAL DEFEND-
ANTS), RESPONDENTS.*

Mortgage—Subsequent mortgage of same land—Decree on first mortgage—Sale in execution of some of mortgaged land—Purchase by subsequent mortgagees subject to their own mortgage—Effect of such sale—Redemption—Subsequent suit by mortgagors for redemption of lands other than those sold—Redemption of part of mortgaged property—Apportionment of mortgage-debt.

In 1874 plaintiffs mortgaged to one Samaldas seven fields, of which four were Survey Nos. 22, 23, 40 and 41. In 1876, they mortgaged these same four fields with other lands to the defendants. In 1877 Samaldas obtained a decree upon his mortgage and in execution sold only Nos. 22, 23 and 41, which realized sufficient to satisfy his decree. These three fields were on the application of the defendants sold subject to their mortgage, and they themselves purchased them at the sale. The plaintiffs now sued to redeem the remaining lands comprised in the mortgage of 1876, exclusive of those which had been sold in execution.

Held, that they were entitled to redeem this part of the mortgaged property, as the mortgagees had themselves acquired the plaintiffs' (mortgagors') interest in the other part and so severed their claim under the mortgage.

Held, also, that the plaintiffs were entitled to redeem on payment of such portion of the mortgage-debt as remained after deducting the portion of it to which the lands purchased by defendants were liable.

APPEAL from the decision of J. Weir, Additional Assistant Judge of Ahmedabad.

Suit for possession and declaration that the property in suit was not subject to certain mortgage liens. The plaintiffs sued under the following circumstances :—

On the 8th June, 1874, the plaintiffs mortgaged to one Samaldas Survey Nos. 7, 22, 23, 32, 35, 40 and 41 for Rs. 6,995. The mortgage purported to be with possession, but possession was not given to the mortgagee.

On the 24th March, 1876, the plaintiffs mortgaged with possession to defendants Nos. 1 and 2 (Kalidas and Nagar Vallabh) Survey Nos. 22, 23, 40, 41, 43 and 46 and five houses for Rs. 4,999.

* Appeal, No. 132 of 1894.

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In 1877 Samaldas sued on his mortgage and obtained a decree, in execution of which he attached the property comprised in his mortgage-deed. Defendants Nos. 1 and 2 then applied to the Court that the property should be sold subject to their mortgage. The property was accordingly put up to sale, but Survey Nos. 22 23 and 41 only were sold, enough money having been realized by their sale to satisfy the decree.

At the auction sale the property was purchased by defendants Nos. 3 and 4. Defendant No. 4 purchased in his own right and defendant No. 3 bought *benámi* for defendants Nos. 1 and 2, with whom he was joint. The auction sale took place on the 4th February, 1881, and the purchasers recovered possession in or about October, 1882.

In the year 1893 the plaintiffs brought the present suit to redeem the property comprised in the mortgage of 1876, with the exception of that portion of it which had been sold at the auction sale.

The Judge held that the plaintiffs were entitled to a decree for redemption of the property mentioned in the plaint, but he ordered them to repay to defendants Nos. 1 and 2 the whole of the original debt, *viz.*, Rs. 4,999.

The plaintiffs appealed.

Ghanasham N. Nadkarni, for appellants (plaintiffs) :—The Judge requires us to pay the whole debt due to defendants Nos. 1 and 2 under the mortgage of 1876. But as to part of mortgaged land, *viz.* Nos. 22, 23 and 41, our equity of redemption was sold and is now the property of the defendants, who themselves bought it at the sale. They applied that these lands should be sold subject to their mortgage, and that was done. They, therefore, now hold those lands subject to their due share of the original mortgage-debt and the remaining lands which we now seek to redeem are only subject to the remaining portion of the mortgage-debt. But the order of the Judge makes them subject to the whole debt, thus exempting the land bought by the defendants. The debt should be apportioned on the whole of the mortgaged property—*Moro Raghunath v. Balaji Trimbalé*⁽¹⁾.

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Chimanlal H. Setalvad, for respondent No. 2 (defendant No. 2).

Govardhanram M. Tripathi, for respondent No. 4 (defendant No. 4).

PARSONS, J. :—In 1874 the plaintiffs mortgaged to one Samaldas for Rs. 6,995 Survey Nos. 7, 22, 23, 32, 35, 40 and 41 (Exhibit 70), but remained on in possession. In 1876 the plaintiffs mortgaged to the defendants Nos. 1 and 2 for Rs. 4,999 Survey Nos. 22, 23, 40, 41, 43, 46 and five houses and placed them in possession (Exhibit 56).

In 1877 Samaldas sued on his mortgage and obtained a decree in execution of which he caused the property mortgaged to him to be attached. Defendants Nos. 1 and 2 then applied to the Court stating their mortgage and asking that their charge on the property might be continued (Exhibit 21). Notices were issued to the parties to the decree, and an enquiry was held, the defendant's deed of mortgage was found to be proved, and the Court ordered that "in case of notifications being issued under the plaintiffs' darkhast, the kind of interest that this applicant puts forward should be mentioned." The proclamation of sale accordingly mentioned the lien. It further stated that the right, title and interest of the plaintiffs as now existing was to be sold (Exhibit 59). The memo. of the sale (50) contains these words: "Making mention of the mortgage charge of Nagar Valabh and Kala Kanji for Rs. 4,999, the auction-sale is made so that only the right, title and interest of the defendants Pir Miya and Mamdu Miya alone will be sold."

At the sale only Survey Nos. 22, 23 and 41 were sold, enough money having been realised by their sale to satisfy the decree. Defendants Nos. 3 and 4 were the purchasers. Defendant No. 4 was a purchaser in his own right, but defendant No. 3 bought *benami* for defendants Nos. 1 and 2, with whom he was joint, so that really defendants Nos. 1, 2 and 4 are the purchasers and present owners.

The certificate of sale states that "on the abovementioned patas (lots), Survey Nos. 22 and 23, there is the san lien of Nagar Valabh and Kala Kanji under a deed for Rs. 4,999; and moreover

on the pata (lot) No. 22 there is the san lien of the abovementioned Nagar Valabh and Kala Kanji under a deed for Rs. 500; and on pata (lot) No. 41 there is the mortgage lien of the said Nagar Valabh and Kala Kanji claimable under the same deed for Rs. 4,999. Subject to these liens, which have been notified, the sale by auction has been made." The surplus money after satisfying the decree was paid to the plaintiffs (58).

There can, therefore, be little doubt on this part of the case as to what the defendants purchased. It is quite clear that they bought the land subject to the charge created by the deed of mortgage (56), and the defendant No. 4 admits that is what he bought (72). Of course, Samaldas need not have had the land sold subject to that charge, but he apparently did not oppose the application of the defendants Nos. 1 and 2 that it should be so sold, and by order of the Court it was sold accordingly. It was by the action of the defendants Nos. 1 and 2, the mortgagees themselves, that this was done, and they also became the purchasers of a share of their mortgagors in the mortgaged property.

The position, therefore, of the parties is this: Survey Nos. 22, 23, 40, 41, 43 and 46 and five houses are held still subject to the charge created by the mortgage-deed (Exhibit 56). Defendants Nos. 1, 2 and 4 have purchased the right the plaintiffs had to redeem Nos. 22, 23 and 41, but the plaintiffs have the right to redeem the rest of the property.

The plaintiffs brought this suit practically for the purpose of redeeming this property, and the Assistant Judge has allowed them to do so, but only on payment of the full mortgage-debt of Rs. 4,999. This is wrong. It ignores the fact that the property purchased by the defendants was sold subject to the mortgage and is still burdened with the mortgage-debt. The plaintiffs can redeem a part of the mortgaged property since the mortgagees have themselves acquired the share of their mortgagors and so severed their interests under the mortgage. See *Moro v. Balaji*⁽¹⁾. This is also the present law under the Transfer of Property Act, sections 60 and 67. It will, therefore, have to be ascertained what proportionate amount of the mortgage-debt is charged on the pro-

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perty purchased by the defendants, for that has to be deducted from the whole amount in order to ascertain the amount that the plaintiffs have now to pay.

We ask the lower Court to find on this issue, *viz.*, what proportionate amount of the whole mortgage-debt due under the Exhibit 56 are the defendants liable for in respect of Survey Nos. 22, 23 and 41?

Evidence can be given by the parties, and the finding should be certified to this Court within a month.

Issue sent down.

APPELLATE CIVIL.

Before Sir C. Farran, Kt., Chief Justice, and Mr. Justice Parsons.

BAPU AND OTHERS (ORIGINAL DEFENDANTS), APPLICANTS, v. VAJIR
AND OTHERS (ORIGINAL PLAINTIFFS), OPPONENTS.*

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Civil Procedure Code (Act XIV of 1882), Secs. 551, 577 and 584—Dismissal of appeal—Power of the lower Court to amend decree after dismissal of appeal—Practice—Procedure.

The dismissal of an appeal under section 551 of the Civil Procedure Code (Act XIV of 1882) leaves the decree of the lower Court untouched, neither confirmed, nor varied, nor reversed, and it remains the decree of the lower Court which can amend it, in order to bring it into accordance with its judgment.

APPLICATION under the extraordinary jurisdiction of the High Court (section 622 of the Civil Procedure Code, Act XIV of 1882) against the decision of Ráo Bahádur Chunilal Maneklal, First Class Subordinate Judge of Dhulia, with appellate powers.

The plaintiff sued to establish his right to have a mortgage-bond passed to him by the defendants registered under the Registration Act (III of 1877). The defendants having denied execution before the Registrar, registration of the bond was refused.

The defendants denied execution of the bond.

The Subordinate Judge (Ráo Sáheb Vaman M. Bodas) found that the execution of the bond by the defendants was not proved. He, therefore, rejected the claim.

* Application No. 108 of 1895 under Extraordinary Jurisdiction.