

APPELLATE CIVIL.

Before Mr. Justice Fulton and Mr. Justice Chandavarkar.

DANAPPA AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS,
v. YAMNAPPA AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

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January 10.

Mortgage—Co-mortgagors—Decree on mortgage—Private sale of mortgaged property by one judgment-debtor with leave of Court—Civil Procedure Code (Act XIV of 1882), section 305—Satisfaction of decree by one judgment-debtor—Contribution—Suit by purchaser at private sale to eject one of the judgment-debtors in possession of part of mortgaged property—Lien on such part for contribution passes to purchaser—Transfer of Property Act (IV of 1882), section 43.

In 1896 a mortgage-decree was passed against Yamnappa and Basappa (respondent-defendants) as co-mortgagors of the property in suit, and in default of payment by them of the mortgage-debt the mortgaged property was ordered to be sold. They failed to pay the amount and the decree-holder obtained an order for sale. Before the day fixed for the sale, Yamnappa, one of the judgment-debtors, applied to the Court under section 305 of the Civil Procedure Code (XIV of 1882) for a postponement of the sale in order to enable him to raise the amount of the decree by a private sale of the property. The application was granted and he sold the whole of the mortgaged property to Gurshantappa (father of the plaintiffs) for Rs. 1,534, which was duly paid to the decree-holder. Satisfaction of the decree was entered and the Court confirmed the sale. Basappa (the second judgment-debtor) was in possession of a portion of the property and he refused to give up possession, alleging that he had separated from Yamnappa and that the land in his possession had fallen to his share on separation, and contending that the sale by Yamnappa to Gurshantappa was not binding upon him and did not affect his share. The plaintiffs, who were the heirs of Gurshantappa, brought this suit to eject him. The lower Courts rejected their claim and dismissed the suit. On second appeal,

Held, that the sale by Yamnappa, although made with the leave of the Court under section 305 of the Civil Procedure Code, did not affect the interest of Basappa. The authority given to Yamnappa under that section related only to his interest, but could not affect the interest of the other judgment-debtor (Basappa) who had not joined him in applying for leave to sell under that section. The appellants (plaintiffs), therefore, purchased only that portion of the property covered by the mortgage-decree which belonged to their vendor Yamnappa, and the lower Courts were right in rejecting the claim for possession of that portion which belonged to Basappa. But

Held, also, (reversing the decree of the lower Courts,) that the appellants (plaintiffs) had a charge on the property in Basappa's possession to the extent of

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Basappa's share of the mortgage-debt. Yamnappa had paid off the whole mortgage-debt with Gurshantappa's purchase-money and had satisfied the decree. He, therefore, became entitled to a rateable contribution from his co-judgment-debtor, and he had a lien on Basappa's property for the amount of Basappa's liability under the decree. That lien passed to Gurshantappa, as transferee of Yamnappa, as soon as it came into existence, under section 43 of the Transfer of Property Act (IV of 1882). The only right, therefore, which the plaintiff could assert was the right to a lien on the property in dispute for a one-third share of the amount of the mortgage-decree.

SECOND appeal from the decision of T. Walker, District Judge of Dhárwár, confirming the decree passed by E. Reuben, Subordinate Judge at Háveri.

Certain land belonging to one Appanna and his three sons, viz. Yamnappa (defendant 1), Fakirappa and Ramappa, was mortgaged by them to one Shivappa Naik in 1887. Fakirappa subsequently died and his son Basappa (defendant 2) succeeded him. In 1896 Shivappa obtained a decree on his mortgage against the surviving mortgagors and Basappa, the son of Fakirappa (deceased), which directed them to pay the mortgage-debt or in default that the mortgaged property should be sold. Subsequently to the decree Appanna and Ramappa died.

The debt not having been paid, Shivappa obtained an order for sale of the mortgaged property, but before the date fixed for the sale Yamnappa (defendant 1) applied to the Court under section 305 of the Civil Procedure Code (XIV of 1882) for a postponement of the sale to enable him to raise the amount of the decree by a private sale of the mortgaged property. The application was granted and Yamnappa on the 10th June, 1898, sold the whole of the mortgaged property to Gurshantappa for Rs. 1,534. The purchase-money was duly paid to Shivappa, who entered satisfaction of his decree, and the Court confirmed the sale.

Gurshantappa obtained possession of all the property with the exception of a part which was in the possession of Basappa (defendant 2) and which the latter refused to give up.

Gurshantappa having died, his heirs brought this suit to recover that portion of the property which was in the possession of Basappa (defendant 2).

Basappa (defendant 2) alleged that his father Fakirappa had separated from his family seven or eight years before the suit

and that the property in question had fallen to his share and he contended that the sale in June, 1898, to Gurshantappa (plaintiff's father) was not binding on him (defendant 2).

The Court of first instance dismissed the suit, holding that Yamnappa (defendant 1) and Basappa (defendant 2) were divided, and that the sale to Gurshantappa was not binding on Basappa (defendant 2). In its judgment it said :

The next question to consider is whether the mortgage decree being binding on defendant 2 to the extent of a third share, and in satisfaction of which the amount received from the plaintiffs under the sale in dispute was applied, one-third the decretal amount, viz. Rs. 531-10-2, should be declared a charge on the plaint property. This question also must be decided against the plaintiffs in view of a recent ruling of the Madras High Court (*vide* I. L. R. 23 Mad. p. 89). No contrary ruling is pointed out, and I am bound to follow the Madras ruling cited above.

On appeal, this decree was confirmed by the lower Appellate Court.

Plaintiff preferred a second appeal.

Shamrao Vilhal for the appellants (plaintiff) :—Although Basappa was, at the date of the sale to Gurshantappa in 1898, divided in interest from Yamnappa, the sale is binding on him as it was effected by Yamnappa with the authority of the Court obtained under section 305 of the Civil Procedure Code (XIV of 1882). The sale having been made with the leave of the Court, it must be taken that Yamnappa sold and the purchaser bought the whole of the mortgaged property covered by the decree. The whole of the sale-proceeds were applied to satisfy the decree, which was against Basappa as well as Yamnappa and affected the whole of the mortgaged property. We are therefore entitled to a lien on the property in Basappa's possession to the extent of his liability under the decree.

S. V. Bhandarkar for respondent Basappa (defendant 2) :—The sale to Gurshantappa was not a Court sale. A sale effected with leave granted under section 305 of the Code is a *private* sale. The judgment-debtor may ask for permission to sell what he can legally sell in his *own interest*, but not the interest of other persons. It was Yamnappa only who applied for leave and he

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had at the time been divided for several years from his brothers. His act, therefore, could not bind the other sharers.

As to the lien now claimed on Basappa's share in the property, the point was not raised in the pleadings nor was any issue framed at the hearing. The plaintiffs did not put it forward as an alternative case. This is simply a suit in ejectment. The plaintiffs are merely purchasers at a private sale of the interests of their vendor Yamnappa. They hold no assignment of the decree nor of the mortgage, and though the purchase-money has gone in satisfaction of the mortgage-debt due by the respondents, this circumstance does not give them a lien or charge on the property in dispute belonging to Basappa. There is no equity in the plaintiffs' favour. There is no charge on the property: see *In re Leitch's Estate*⁽¹⁾; *Sugden's Vendors and Purchasers*, 14th Edition, p. 355; *Seth Chitor Mal v. Shib Lal*⁽²⁾; *Rambur v. Madoosoodhun*.⁽³⁾ The payment by Yamnappa was a voluntary payment so far as the respondent's share of the mortgage-debt was concerned and gives him no charge or lien: see *Murappa v. Rangasami*⁽⁴⁾ and *Ram Tukul v. Biseswar Lall Sahoo*.⁽⁵⁾

CHANDAVARKAR, J. :—It is necessary to state at the outset the facts of this case, so far as they are material for the purpose of the questions of law which have been argued in this second appeal.

One Shivappa obtained a decree on his mortgage against one Appanna and his three sons, namely, Yamnappa, Fakirappa and San Ramappa. That decree directed the judgment-debtors to pay the amount of the mortgage, and in default the mortgaged property to be sold. The judgment-debtors having failed to pay the amount, Shivappa obtained an order for the sale of the property. The property was advertised for sale, but before the date fixed for the sale, Yamnappa, one of the judgment-debtors, applied to the Court under section 305 of the Code of Civil Procedure for a postponement of the sale to enable him to raise

(1) (1866) 1 P. C. 296.

(3) (1867) Beng. L. R. Sup. Vol. F. B. p. 675.

(2) (1892) 14 All. 272.

(4) (1899) 23 Mad. 89.

(5) (1875) 2 I. A. 142.

the amount of the decree by a private sale of the mortgaged property. The application was granted and Yamnappa executed a sale-deed in favour of one Gurshantappa on the 10th of June, 1898. The sale related to the whole of the property covered by the mortgage and also the decree obtained thereon, and the purchase-money, which was equal to the amount of the decree, was paid by Gurshantappa into Court, from whom Shivappa received it. The Court confirmed the sale under section 305 and the decree-holder Shivappa entered satisfaction of his decree.

The present appellants, who are Gurshantappa's heirs, brought the suit, out of which this present second appeal has arisen, to recover that portion of the property sold to him which is in the possession of respondent No. 2, Basappa, who was one of the judgment-debtors against whom Shivappa had obtained his decree. The appellants alleged in the plaint that respondent No. 2, Basappa, was joint in interest with his brothers Yamnappa (respondent No. 1) and Sau Ramappa, that Yamnappa was the manager of the family, and that the sale effected by Yamnappa was binding on respondent No. 2, Basappa.

Both the Courts below have found against the appellants' allegation of union, and have rejected his claim on the ground that at the date of the sale to Gurshantappa, under whom the appellants claim, respondent No. 2 held the property in dispute in his own right as a divided member of the family. But Mr. Shamray has for the appellants argued before us that even though respondent No. 2 was not united in interests with his brother Yamnappa (respondent No. 1) at the date of the sale effected by the latter in favour of Gurshantappa, yet as the Court had under section 305 of the Code of Civil Procedure authorized Yamnappa to sell the property in satisfaction of Shivappa's mortgage-decree against both the said respondents, it must be taken that the whole of the mortgaged property covered by the decree, including that held by respondent No. 2, passed to the purchaser. We are unable to accede to that argument. It is true that section 305 provides that where an order for the sale of immoveable property has been made, if the judgment-debtor can satisfy the Court that he can raise the amount of the decree by a private sale, the Court shall authorize him to make the proposed sale;

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but there is nothing in the section from which we can infer that the Court in authorizing the sale could empower the judgment-debtor to transfer any higher interest than he had and bind the interests of others in the property. Shivappa's decree was against several judgment-debtors, and it was only one of them who applied to the Court under section 305. When the Court authorized him to sell the property, the authority could relate only to his interest, but could not affect the interests of the other judgment-debtor who had not joined him in the application. Had the property been sold by public auction, and such sale had purported to be of the right, title and interest of respondent No. 1, the legal result would have been that the sale could not have affected the interests of respondent No. 2. Why should a different result ensue merely because under section 305 the Court authorized respondent No. 1 to sell the property privately? Respondent No. 1 could, according to the general law, sell only what he had a right to sell and no more, and there is nothing in the language of section 305 which shows either expressly or by necessary implication that it was the intention of the Legislature to alter that law in the case of a sale effected under that section.

The appellants must, therefore, be taken to have purchased only that portion of the property covered by the mortgage-decree which belonged to their vendor, respondent No. 1, and the lower Courts were right in rejecting the claim for possession of the property in dispute which belonged to respondent No. 2.

But though the appellants cannot recover the property in dispute on the ground of ownership under their purchase, yet on the facts found as well as admitted they have an equity in their favour, which entitles them to hold the property rateably chargeable with the amount of the mortgage-debt to the extent of respondent No. 2's liability. The law is that where a judgment is passed against several defendants jointly and severally and some of them pay the whole of the judgment-debt, these latter become entitled to contribution from the rest: see *Suppanachari and another v. Chakkara Pattan and another*⁽¹⁾ and *Chagandas v. Gansing*.⁽²⁾ When, therefore, respondent No. 1, who was liable

(1) (1863) 1 Mad. H. C. Rep. 411.

(2) (1895) 20 For. 615.

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equally with the other judgment-debtors of Shivappa's mortgage-decree, including respondent No. 2, paid off the whole debt with the purchase-money of Gurshantappa and satisfied the decree, he (respondent No. 1) became entitled to a rateable contribution from his co-judgment-debtors. This right of contribution is recognized in the case of co-mortgagors in section 82 of the Transfer of Property Act, which provides: "Where several properties, whether of one or several owners, are mortgaged to secure one debt, such properties are, in the absence of a contract to the contrary, liable to contribute rateably to the debt secured by the mortgage": see *Ibn Harsain v. Ramdai*,⁽¹⁾ *Baldeo Sahai v. Baij Nath*,⁽²⁾ and *Ramchandra Teshvant v. Surlashiv Abaji*.⁽³⁾ Respondent No. 1 having satisfied the decree and obtained a lien on respondent No. 2's property to the extent of the latter's share of the decretal liability, Gurshantappa, as the transferee of respondent No. 1 under the sale effected under section 305, Civil Procedure Code, became entitled to that lien as soon as it came into existence, because respondent No. 1 having sold to Gurshantappa the whole of the mortgaged property, which included the property in dispute, though he had no right to sell the latter, the effect of such transfer was, according to section 43 of the Transfer of Property Act, to make it operate, at the option of the transferee on the interest which the transferer, *i.e.*, respondent No. 1, subsequently acquired in the property in dispute. The only right, therefore, which the appellants can according to law assert is the right to a lien on the property in dispute for one-third of the amount of Shivappa's decree.

Mr. Shivram Bhandarkar has strenuously contended before us that no such right of lien exists, but he has not been able to cite any authority in support of his contention. There is one decision of the Madras High Court, not cited at the Bar, which may at first sight appear to be, but is really not, in conflict with the view which we have above taken. It is the case of *Sesha Ayyar v. Krishna Ayyangar*.⁽⁴⁾ There the facts were: Certain land was mortgaged to R. A portion of that land and other lands were then mortgaged to A. R having obtained a decree

(1) (1869) 12 All. 110.

(3) (1886) 11 Bom. 422.

(2) (1891) 13 All. 371.

(4) (1900) 24 Mad. 96 at p. 108.

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on his mortgage, brought to sale in execution only that portion of the land in his mortgage which had been mortgaged to A, and R's decree was satisfied out of the sale-proceeds. The remaining portion of the land mortgaged to R was then purchased by D. A sued on his mortgage and, making D a party to the suit, claimed contribution from D on the ground that the portion he had bought was chargeable rateably with the decretal amount of R. The Court held that A had no such right of contribution. The learned Judges who decided the case say: "In our opinion section 82" (of the Transfer of Property Act) "does not justify the notion that a man who has bought a property which at one time was, with other property, subject to a mortgage may, after the mortgage-debt has passed into a decree and after the decree has been satisfied by the sale of that other property, be held responsible for part of the mortgage-debt." The Allahabad High Court has put a different construction on section 82. Whether the construction put by the High Court of Madras is sound or not it is not necessary for us to decide in the present case; but it is enough to say that case is distinguishable, for it may be that where certain property having been mortgaged by one and the same person and a portion of it subsequently mortgaged by him to another mortgagee, the first mortgagee obtains a decree on his mortgage and gets satisfaction by a sale of only a portion of the property mortgaged, no question of contribution can arise because the property belonged to one and the same person. That person could not have claimed contribution against himself, for the whole was his. When the decree was satisfied by the sale of a portion of his property, there was satisfaction of it on his account, and on his account only—there was none else who was bound to satisfy the decree and for whom also it could be said he had paid the decretal amount. His second mortgagee could not say that the mortgagor had satisfied the decree for him. The Madras decision has, therefore, no bearing on the present case.

The only question, then, is whether the appellants are entitled to assert their lien in the present suit. They did not claim relief on that title in their plaint, but they did rely on it in their arguments in the Court of first instance. They raised the point

in the lower Appellate Court, which declined to go into it on the ground that it had not been raised in the pleadings. That, however, is no ground for rejecting their suit, as the title which they can lawfully assert is clear on the facts found by both the lower Courts. As pointed out in *Mohidin v. Shivlingappa*,⁽¹⁾ the wishes of the parties must not be confounded with their rights and "because they fail to prove all they wish, there seems no reason for denying them the rights which they establish." We do not see any valid reason for rejecting the present suit and driving the parties to another litigation.

We must reverse the decree of the lower Court and substitute the following decree:—*Declare*, that the plaintiffs have a charge on the property in dispute to the extent of one-third of the amount of the decree obtained by Shivappa in suit No. 425 of 1896 against Appanna and defendants 1 and 2 and San Ramappa.

Order, that upon defendant No. 2 paying to the plaintiffs or into Court the amount above mentioned as being a charge on the property in dispute within six months from the date of this decree, the plaintiffs shall deliver up to defendant No. 2 or to such person as he appoints all documents in their possession or power relating to the property, and shall transfer the property to the said defendant free from all incumbrances created by the plaintiffs or any person claiming under them or by Garshantappa, the person under whom the plaintiffs claim.

Order, that in default of defendant No. 2 paying as hereinbefore ordered, the property in dispute or a sufficient portion thereof be sold and the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of the amount hereinbefore declared to be due to the plaintiffs, and that the balance, if any, be paid to defendant No. 2 or other persons entitled to receive the same. Parties to bear their own costs throughout.

Decree reversed.

(1) (1899) 23 Bom. 666 at p. 670; 1 Bom. L. R. 173.

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