

Mention was made above of the decision of the Settlement Officer in 1888 that Naro and Balaji and Vishwanath were "occupancy tenants" of the khoti khasgi thikans, and as such liable to pay makta only. But the decision of the High Court in 1893, alluded to above, clearly reversed the decision of the Settlement Officer as to status, and the reversal of the decision as to rent followed as a matter of course (*cf.* the ruling of the Full Bench in *Antaji v. Antaji*<sup>(1)</sup>).

The only remaining question is as to the rights of the other defendants in these thikans. The District Judge concurred with the Subordinate Judge in holding that these rights do not affect the plaintiff's claim; and we see no reason for differing from that view.

For the above reasons we must reverse the decision of the District Judge and restore that of the Subordinate Judge. Defendants Nos. 1 to 3 will bear plaintiff's costs throughout as well as their own. The other defendants will bear their own costs throughout.

*Decree reversed.*

(1) (1896) 21 Bom., 480.

## APPELLATE CIVIL.

*Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Cundy.*

SIDHESVAR (ORIGINAL PLAINTIFF), APPELLANT, v. BABAJI  
AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.\*

1899.

June 12,

*Mortgage—Suit for sale of mortgaged property—Regulation V of 1827, Sec. 15,  
Cl. 3—Special agreement—Limitation.*

Plaintiff brought this suit in 1895 on a mortgage-bond, dated 1870, to recover the balance due on the mortgage by sale of the mortgaged property, or, in the alternative, for possession of the property until payment of the balance. The mortgage contained a stipulation that, on default of payment of interest by the mortgagor, the mortgagee should take possession and hold possession in lieu of interest, and that such possession should continue until the mortgagor paid the principal and interest that remained unpaid when the mortgagee took possession.

The Judge dismissed the suit, holding that the claim for possession was time-barred, and the claim for the sale of the property could not be enforced, as the

\* Appeal, No. 92 of 1898.

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mortgage-bond contained a special agreement which took the case out of clause (3) of section 15 of Regulation V of 1827.

On appeal, *held*, reversing the decree, that section 15 of Regulation V of 1827 was not applicable, as the mortgagee never was in possession, and that the claim to enforce the mortgage security by sale was not barred.

APPEAL from the decision of E. M. Pratt, District Judge of Sholapur.

The plaintiff Sidhesvar, a minor, represented by his next friend, the Collector of Sholapur, brought this suit in 1895, to recover Rs. 1,080, the balance due on a mortgage-bond executed on the 17th June, 1870, by the deceased defendant Babaji bin Finaji to his (plaintiff's) deceased uncle Krishnappa for Rs. 540 by sale of the mortgaged property, praying, in the alternative, for possession of the property until payment of the balance due. The following is the translation of the mortgage-bond sued on:—

“Mortgage-bond (passed) to Krishnappa bin Mahadappa Hagre, Lingayat Vani,  
\* \* by Babaji valad Piraji Patil \* \* \* occupation agriculturist, in Fasli year 1280, the mortgage-deed written as follows:—

“The former debt due to you from us is Rs. 540, (on this) we shall pay interest at one rupee per cent. per mensem; and the following ancestral property of ours is (given) in mortgage:”

(Particulars of the property.)

“The aforesaid ancestral property has been in our possession from before and had been mortgaged by a registered mortgage-bond dated the 17th October, 1866. An account is now made of all former dealings, and this mortgage has been effected as security for the said rupees; but the management (*vahivat*) of the lands shall be with ourselves; we shall derive income therefrom and pay your interest every year in the month of Chaitra, and if in any year you do not receive your interest from us, at that same time we shall put you in possession of the mortgaged property; thereafter you should pay the Government assessment and enjoy the profits in lieu of interest. Thereafter we shall resume possession, (only) after the crops of the year have been removed, when we shall pay the principal debt and the arrears of interest due before your being put in possession. Till then we shall have no claim to these lands. We shall take receipts for payments of the *vasul*. This mortgage bond has been executed of our own free will and accord. Dated Jeshta Vadya 4th, 1792. 17th June 1870.”

Bapu, the son of the mortgagor Babaji, replied that he had no knowledge of the mortgage; that only a moiety of the mortgaged property belonged to him; and he prayed that an account of the

mortgage transaction should be taken under the Dekkhan Agriculturists' Relief Act (XVII of 1879.)

Defendant No. 2, Aba, the brother of the mortgagor Babaji, contended that the lands had been divided many years ago between himself and his brother, that a half share had been allotted to him at the partition; that he was not bound by the mortgage, and that the claim, so far as his share was concerned, was barred by limitation.

The Judge of the lower Court found that the mortgage executed by Babaji was proved, but that it only affected his half share, and that the debt due was now Rs. 540. He held, however, that the plaintiff's claim for possession was barred by limitation, and that having regard to the terms of the mortgage-bond, it was clearly the intention of the parties that the property should not be sold; that the provision that the mortgagee should continue in possession until the debt should be discharged was a special agreement; and that as the bond contained no promise to pay, and fixed no time for payment, the plaintiff was not entitled to either of the remedies he sought (see clause 3<sup>1)</sup> of section 15 of Regulation V of 1827).

The following is an extract from his judgment:—

“ \* \* \* It is proved that at the time of execution (of the mortgage) Babaji, defendant No. 1, and his brother defendant No. 2, were joint. \* \* \*. They, however, effected partition after the great famine and have been separate in estate for eighteen or twenty years. There is no evidence that Babaji executed the deed as manager and for a family purpose so as to bind his brother. The mortgage, therefore, does not bind the moiety of the estate which is in the possession of defendant No. 2, or those who hold under him. It is admitted that the amount specified in the deed is made up half of principal and half of interest. The mortgage contains a promise to pay interest, and provides that, in default of payment of interest, the mortgagee shall take possession of the mortgaged property. As the mortgagee has neglected to enforce this remedy, he is not entitled to interest subsequent to the mortgage. The balance due, therefore, is the original debt of Rs. 540.

(1) Section 15 of Bombay Regulation V of 1827, clause 3:—

“ Third.—In the absence of any special agreement, or recognized law or usage to the contrary, either party may at any time, by the institution of a civil suit, cause the property to be applied to the liquidation of the debt, the surplus, if any, being restored to the owner.

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"The real question for decision in this case is whether the plaintiff is entitled to either of the reliefs he claims. The claim for possession of the mortgaged property is admittedly time-barred.

"The other relief sought is recovery of the balance by sale of the mortgaged property.

"The deed recites that the property is mortgaged for the debt; the mortgagor promises to pay interest at fixed annual dates; it is further provided that, on his making default of payment, the mortgagee shall take possession and hold possession in lieu of interest, and the last provision is that such possession shall continue until the mortgagor pays the principal and the interest that remained unpaid when the mortgagee took possession.

"It was clearly, therefore, not the intention of either party that the property should be brought to sale. The provision for the possession of the mortgagee to continue until the debt is discharged is a special agreement which takes the case out of clause (3) of section 15 of Regulation V of 1827. The deed contains no promise to pay and fixes no time for payment. The plaintiff is not entitled to either of the reliefs he claims."

The plaintiff appealed.

*Vasudev J. Kirtikar* (Government Pleader) for the appellant (plaintiff):—The Judge has misconstrued the mortgage-deed in holding that it was not the intention of the parties that the mortgaged property should be brought to sale. Section 15 of Regulation V of 1827 is not applicable, because we were not in possession of the mortgaged property. Clause (3) of that section cannot operate to our prejudice, because there is no special condition in the deed that the property shall not be sold for the realization of our debt. A mortgagee has the right to recover his mortgage money by sale of the mortgaged property—*Moliram v. Vitai* <sup>(1)</sup>; *Venkatesh v. Narayan* <sup>(2)</sup>; *Mahadaji v. Joti* <sup>(3)</sup>; *Datto v. Vithu* <sup>(4)</sup>; *Yashvant v. Vithal* <sup>(5)</sup>.

We do not press our claim against the property in the hands of defendant No. 2.

There was no appearance for the respondents (defendants).

JENKINS, C. J.:—This is a suit brought by the plaintiff to enforce a mortgage security, and the first question to be considered is whether the claim is time-barred. The District Judge of Sholá-

(1) (1888) 13 Bom., 90.

(2) (1890) 15 Bom., 133.

(3) (1892) 17 Bom., 425.

(4) (1895) 20 Bom., 408.

(5) (1895) 21 Bom., 267.

pur-Bijapur has decided this in the affirmative on the ground that the plaintiff's only remedy was a suit for possession.

On the part of the appellant it is contended that this decision is wrong, and that the plaintiff is entitled to enforce his security by sale. In our opinion this contention is right.

Having regard to the date of the mortgage, the Transfer of Property Act (IV of 1882) does not apply, but the District Judge appears to have thought the case was governed by section 15 of Regulation V of 1827, and on that assumption he has held that there was a special agreement, which takes the case out of clause 3 of that section. We do not agree with this view. Even if the section applied, we think there was no such agreement. But beyond that it seems to us that the section has no application seeing that the mortgagee never was in possession. We, therefore, hold in accordance with the prior decisions of this Court, to which our attention has been drawn, that the plaintiff is entitled to enforce his security by sale, and consequently that his claim is not barred.

The Government Pleader who appears for the plaintiff has conceded that he cannot support the claim for a sale of the entirety and, therefore, the decree will not affect the moiety, which is in the possession of the defendant No. 2 or those who hold under him.

The District Judge has held that the balance due is Rs. 540, and as its correctness has not been impugned before us, we do not disturb his finding on that point.

The Court allows the appeal, reverses the decree of the lower Court and passes a decree for the plaintiff for Rs. 540 and costs in this and the lower Court to be realized by a sale of the moiety of the mortgaged property in the possession of respondent No. 1, or those who hold under him, in case such amount and costs are not paid within six months from the date of the decree of this Court.

*Decree reversed.*

1899.

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