APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

LAKSHMAN (ORIGINAL PLAINTIFF), APPELLANT, *v.* GOPAL AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

1898. *August* 18.

Partition—Co-sharer—Mortgage by co-sharer of undivided share—Partition suit subsequently brought by other co-sharer to which mortgagee not a party—Mortgaged property allotted to a sharer other than mortgagor—Rights of such co-sharer—Partition re-opened—Fraud of mortgagor and mortgagee.

Four brothers, *viz.*, Damodar, Lakshman, Balvant and Parashram, were joint owners of certain land. For purposes of convenience each was in possession of a certain portion, but there was no formal partition. The particular land in question in this suit (Pot Nos. 1 and 2 of Survey No. 174) was a part of the land in possession of Balvant. In 1867, without the knowledge of his brothers, Balvant mortgaged these plots of land to the first defendant for Rs. 2,800. In 1886 Damodar sued for partition of the whole property, and in 1891 Lakshman brought a similar suit. By the decrees in these suits, Pot No. 1 was allotted to Damodar and Pot No. 2 was awarded to Lakshman. The mortgagee was not a party to either suit, the plaintiffs in these suits (as found by the High Court) having had no notice of the mortgage. Damodar and Lakshman, on attempting to get possession of the lands allotted to them respectively by the partition decrees, were obstructed by the mortgagee, and now brought these suits against him and the heirs of Balvant (defendants Nos. 2—9), claiming possession of the lands allotted to them free of the mortgage-debt, or that the partition should be re-opened, and that unencumbered land should be allotted to them and the mortgaged land given to Balvant's branch of the family (defendants Nos. 2—9).

Held, that the partition should be re-opened and the mortgaged land assigned to the defendants Nos. 2—9.

Where a co-sharer of joint property has mortgaged his share without the knowledge of his co-sharers, and there has subsequently been a partition suit to which, through the fraud of the mortgagor and the mortgagee, the latter has not been made a party, he (the mortgagee) will only be allowed to proceed for the recovery of his mortgage-debt against that portion of the property which has been allotted to his mortgagor.

Hem Chunder v. *Thako Monie Dbi*(1) approved.

CONSOLIDATED second appeals from the decision of Ráo Bahádur N. G. Phadake, Joint First Class Subordinate Judge, A. P., at Poona.

* Second Appeals, Nos. 111 and 112 of 1897.

(1) (1893) 20 Cal., 533.

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The plaintiffs in these two suits sued to recover possession of certain lands (Pot Nos. 1 and 2 of Survey No. 174) under the following circumstances :—

These lands were situated in the village of Govitri, the whole of which was the joint family property of four brothers, *viz.*, Damodar, Lakshman, Balvant and Parashram. By arrangement among themselves each had a portion of the property in his possession and management, but there had never been any formal partition. The lands in question (Pot Nos. 1 and 2) were a part of the land in the possession of Balvant.

In 1867 Balvant, without the knowledge of the plaintiff, mortgaged Pot Nos. 1 and 2, together with other land, to Gopal Vasudev Barve (defendant No. 1) for Rs. 2,800 with possession.

In 1886 Damodar brought a partition suit to recover his share of the whole village, and obtained a decree in 1887, by which, with other land, Pot No. 1 of Survey No. 174 was awarded as his share. To this suit the mortgagee (defendant No. 1) was not made a party, and the High Court found that at the date of suit the plaintiff had no notice of the mortgage.

In 1891 Lakshman brought a similar partition suit for his share and obtained a decree, which awarded him (*inter alia*) Pot No. 2 of Survey No. 174. The first defendant (the mortgagee) was not a party to this suit either, the plaintiff (as found by the High Court) having then no notice of the mortgage.

In execution of their respective decrees, Damodar and Lakshman endeavoured to obtain possession of Pot Nos. 1 and 2 of Survey No. 174, and being obstructed by defendant No. 1 (mortgagee) they applied under section 328 of the Civil Procedure Code (Act XIV of 1882) to have the obstruction removed; but their applications were refused under section 332.

Lakshman thereupon now sued to recover Pot No. 1 and Damodar sued to recover Pot No. 2. In both suits the first defendant was the mortgagee, the other defendants (Nos. 2 to 9) were the heirs of the mortgagor Balvant. In each suit the plaintiff prayed as follows :—

(*a*) for possession of the land sued for free from any mortgage lien, or

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(*b*) that the land sued for should be given over to the defendants Nos. 2 to 9 (the sons and heirs of Balvant) and in their stead other unencumbered lands should be given to the plaintiff out of the lands that had been allotted to the share of Balvant in the partition suits, or

(*c*) that the plaintiff should be allowed to pay off the mortgage-debt in proportion to the value of the land claimed by him, and that the sum so paid should be made a charge on the lands allotted to Balvant's branch of the family.

The Court of first instance dismissed both suits, holding that neither plaintiff could recover the land he sued for without paying off the whole of the mortgage-debt due to defendant No. 1 (the mortgagee).

This decision was confirmed, on appeal, by the First Class Subordinate Judge, A. P., at Poona.

Thereupon the plaintiffs preferred second appeals to the High Court. The appeals were consolidated and heard together.

M. B. Chaubal (with him *P. P. Khare*) for appellants (plaintiffs) :—The lands in dispute were joint family property. They were mortgaged by Balvant without plaintiffs' knowledge or consent. It is not pretended that the mortgage was effected for family purposes. That being so, the mortgage is not binding on the plaintiffs. A person taking a mortgage of joint property from one co-sharer takes it subject to the rights of the other co-sharers —*Byjnath Lall* v. *Ramoodeen*[1]. The lands in question have now been allotted to the plaintiffs by the partition decrees, and the plaintiffs are entitled to recover them free from the mortgage-debt. The lower Court finds that the mortgagor as well as mortgagee fraudulently kept the plaintiffs in ignorance of the mortgage. This acccounts for the fact that the mortgagee was not made a party to the partition suits. If the plaintiffs had been aware of the mortgage, they would have made the mortgagee a party to the suit. And in that case the Court, in decreeing partition, would have divided the family property among the co-parceners so as to allot the mortgaged lands to the share of the mortgagor : see *Pandurang* v. *Bhasker*[2]; *Udaram* v. *Ranu*[3].

(1) (1874) 1 I. A., 106. (2) (1874) 11 Bom. H. C. Rep., 72.
(3) (1875) 11 Bom. H. C. Rep., 176.

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What the Court would have done then, ought to be done now, especially as it is found, as a fact, that both mortgagor and mortgagee fraudulently concealed the mortgage. The plaintiffs are, therefore, entitled to ask that the partition should be re-opened. The mortgaged property should be assigned to the heirs of Balvant, who mortgaged it, and in its place an unencumbered portion of the property of equal value should be given to plaintiffs—*Hem Chunder* v. *Thako Moni Debi*[1]. The mortgagee can only enforce his lien against the share of his mortgagors.

N. V. Gokhale for respondents (defendants) :—The plaintiffs omitted to make the mortgagee (defendant No. 1) a party to their partition suits. They had full notice of the mortgage, for it was duly registered, and the mortgagee was in possession. That was sufficient notice to the plaintiffs and ought to have put them on inquiry. But they made no inquiry, and ignored the mortgage altogether. The partition effected by these suits was thus effected behind the back of the mortgagee (defendant No. 1). Such a partition cannot affect his rights. He cannot be treated as a trespasser, and must be paid his mortgage money before the plaintiffs can recover possession of the mortgaged lands. There is no evidence to show that the mortgagee has acted fraudulently or done anything to keep the plaintiffs in ignorance of the mortgage. The lower Court's finding on this point rests on mere surmise. The partition ought not, therefore, to be re-opened. The ruling in *Vinayak* v. *Ramkrishna*[2] applies to the present case.

PARSONS, J.:—In order to see what relief the parties to these consolidated appeals are entitled to, it will be necessary to set out the facts briefly.

The plaintiffs and the defendants Nos. 2 to 9 are the descendants of one common ancestor Dhondo. In several suits they obtained decrees for the partition of their ancestral estate, and in execution of those decrees the lands were divided off and the share of each separately assigned to him. Thus the plaintiff Lakshman got his ¼ share, the plaintiff Damodar got his ¼ share, the defendants Nos. 2 to 9 as the sons of Balvant got their ¼ share, and the other member Parashram got his ¼ share.

(1) (1893) 20 Cal., 533. (2) P. J., 1889, p. 180.

Among the lands assigned to the shares of the plaintiffs were Pot Nos. 1 and 2 of Survey No. 174. In taking possession of these fields, the plaintiffs were obstructed by the first defendant, who claimed to be in possession and to have the right of remaining in possession under a mortgage passed to him by Balvant. Orders having been passed adverse to the plaintiffs under section 332, they have now brought the present suits claiming either that they should be held entitled absolutely to the possession of the lands unencumbered by any mortgage lien, or that these lands should be assigned to the share of the defendants Nos. 2 to 9 and other unencumbered lands given to them out of the lands that have been assigned to the defendants Nos. 2 to 9.

The lower Courts have dismissed the plaintiffs' suits, holding that they cannot obtain possession of the lands, or any relief, unless they redeem the whole mortgage of the first defendant (which is for a large sum of money and covers not only the two pot numbers, the subject of these suits, but other lands also). The plaintiffs have appealed against this decree, and the first defendant alone has appeared before us to support it.

It is quite clear that the order is wrong. Balvant had power to mortgage his own share only in the ancestral estate, that is, one-fourth. According to the findings of the lower Courts, Balvant did no more than mortgage that share, and the shares of the plaintiffs were not at all affected by the mortgage, nor were the plaintiffs themselves in any way liable for the debt. It is impossible, therefore, to uphold the order that they are bound (before they can get possession of their own share of the lands) to pay a debt for which the sons of Balvant and their lands alone are liable. A proper provision would, of course, have been made for this mortgage charge, had the first defendant been a party to the partition suits, but he was not, and the whole of this litigation is due to this omission. Although the Subordinate Judge, A. P., is of opinion that the plaintiffs were not to blame for the omission, yet he has made them suffer for it by applying the case of *Vinayak* v. *Ramkrishna*[1]. I am of opinion that the principle of that case can only be applied where the partitioners combine together to ignore the existence of a mortgagee, and proceed to

(1) P. J., 1889, p. 180.

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partition behind his back fraudulently with the object of defeating his just claim. I do not think it can apply to the present case where the Judge finds that the defendants Nos. 2 to 9 were guilty of fraud in deliberately withholding all information about the mortgage through spite towards the plaintiffs. He adds that the first defendant appears to have withheld himself behind the other defendants. If such a state of things, *viz.*, fraud and collusion between the mortgagee and his mortgagors, were proved, the proper rule to apply would be that laid down in *Hem Chunder* v. *Thako Moni Debi* (1). I cannot, however, say that this is proved. All that can be said is that the plaintiffs are perfectly innocent and brought their suits without any notice of the mortgage. In that case I think that the mortgagee, who has not been made a party to the partition suit, has still the right to the relief that he would have had, if and when he had been made a party to the suit, namely, to ask the Court to so divide the property as to assign, as far as possible, the property mortgaged to the share of his mortgagor. I do not think that he can possibly have any greater right. In a somewhat analogous state of things, a right of redemption is always preserved to a puisne mortgagee not made a party to a foreclosure suit.

For these reasons, and also on the general ground of the equitable relief that the plaintiffs are entitled to against the fraud of the defendants Nos. 2 to 9, we have come to the conclusion that they are entitled to demand that the defendants Nos. 2 to 9 shall take the property which they have burdened with a mortgage, and give them unencumbered property of a similar value, and that the first defendant cannot resist this demand or ask for any other relief. If, as may turn out to be the case, the mortgaged lands cannot be fully exchanged for other lands, he must bear the loss of the security of these lands, falling back upon the defendants Nos. 2 to 9 for his remedy, taking, as he did in mortgage, the share only of Balvant in the lands in suit.

We, therefore, vary the decree of the lower appellate Court and order that the partition that has been effected between the plaintiffs and the defendants Nos. 2 to 9 be re-opened, and that, as far as possible, Pot Nos. 1 and 2 of Survey No. 174 be assigned to the

(1) (1893) 20 Cal., 533.

share of defendants Nos 2 to 9, and that in place thereof unencumbered land of a similar value to each pot number be given from their lands to the plaintiffs respectively. The plaintiffs must bear the costs of the first defendant and they can recover them and their own costs from the defendants Nos. 2 to 9.

RANADE, J.:—Both the lower Courts have held that the appellant (original plaintiff) was entitled to none of the reliefs claimed by him in this suit, and that his proper remedy was to bring a regular redemption suit against respondent No. 1 for an account of the mortgage of the land in dispute.

This land, together with other property, was mortgaged to respondent No. 1 by the ancestor of the other respondents Nos. 2 to 9, who were joint owners with appellant of the inám village of Govitri, where the land is situated. The facts are fully and correctly stated in the judgments of both the lower Courts; and it appears therefrom that the appellant has a 4-annas' share in the village, the remaining 12 annas were held in common by other sharers including appellant in Appeal No. 111 of 1898, and the respondents Nos 2—9. The present appellant sued the other sharers for partition, in which suit the mortgagee (respondent No. 1) was not made a party. The appellant obtained a decree in 1887 by which Pot No. 1 of the land in dispute was allotted to his share. Later on, some of the other sharers also brought a partition suit in 1891, and the decree therein settled their shares in the village, and, among others, Lakshman, the appellant in Appeal No. 111 of 1898, was allotted Pot No. 2 of this same land. When appellant in this appeal and Damodar, the appellant in Appeal No. 112 of 1898, went to take possession, they were resisted by the mortgagee (respondent No. 1), and his obstruction being upheld, these two appellants brought two separate suits claiming alternative reliefs, (1) actual possession of the two lands in dispute by the removal of the mortgagee's obstruction; or (2) a re-adjustment of the partition already made by an exchange for the lands in dispute of others of equal value out of those allotted to respondents Nos. 2—9's share. A third relief was also claimed for permission to pay off respondent No. 1's mortgage-debt in proportion to the value of the lands in dispute, with a declaration

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that the sum so paid should be made a charge on the shares allotted to respondents Nos. 2—9.

In so far as the first and third of these prayers are concerned, there can be no doubt that they were clearly inadmissible. A mortgagee of one of the co-sharers of joint property, who is not made a party to the partition suit brought by the sharers among themselves, cannot be ousted from his possession of any portion of the mortgage security unless his debt is fully paid off—*Vinayak* v. *Ramkrishna* [1]. No arrangement between the sharers which ignores his mortgage can adversely affect his rights. In respect of these two reliefs, the appellant's only remedy was, as held by the Courts below, to bring a regular redemption suit, and to pay off the balance of the mortgage-debt.

The second prayer of the appellant-plaintiff, however, stands on a different footing, and the equities of the parties in regard to it do not appear to have been sufficiently considered by the Courts below. It must be noted in this connection that the village was admittedly held in common by all the sharers. The mortgage bonds recite this state of things in clear terms. Some of the sharers for reasons of convenience held possession of portions of the village lands, but this kind of possession by the ancestor of respondents Nos. 2—9 of the land in dispute conferred no rights on his mortgagee which were not controlled by the equities represented by the common ownership of all the sharers. As held by their Lordships of the Privy Council in *Bijnath Lall* v. *Ramoodeen Chowdry* [2], where the owner of an undivided share in a joint estate mortgages his undivided share, he cannot by so doing affect the rights of the other sharers, and the mortgagee takes his security subject to the rights of those sharers to enforce a partition. In this case, where the mortgagor was allotted other lands for his share in a partition made by the Revenue authorities, the mortgagee was allowed to enforce his security on the lands so allotted, even though they did not form part of the original security. For the purpose of such re-adjustment, a partition once made is liable to be re-opened. The Courts below have distinguished this case on the ground that there was no possession given, while in the present case the mortgagee is in possession. This

(1) P. J. for 1889, p. 180. (2) (1871) 1 I. A., 106; 21 Cal. W. R., 233.

circumstance, however, does not appear to make any essential difference in the equitable rights of the parties, where, as in the present case, the estate was admittedly undivided and held in common. On the authority of the principal case noted above, the High Court of Calcutta held in *Sharat Chunder* v. *Hurgobindo*[1], that one co-sharer in a joint estate cannot deal with his share so as to affect the rights of the other co-sharers, and that the assignee of such co-sharer takes subject to those rights. In a later case decided by the same Court—*Hem Chunder* v. *Thako Moni Debi*[2]—a co-sharer had mortgaged his share in undivided property, and in a subsequent partition suit to which the mortgagee was not made a party, the mortgaged property was allotted to another co-sharer, and it was held that the mortgagee must enforce his debt against the property allotted to the share of his mortgagor. The mode in which this re-adjustment can be made is clearly laid down in *Ooma Dutt* v. *Hunooman*[3]. These decisions seem clear on the point in dispute in the present appeal.

It is true that the rulings on this side of India about the necessity of joining mortgagees of co-sharers as parties to partition suits are stricter than appears to be the practice in Bengal—*Sadu* v. *Ram*[4]. This circumstance, however, in no way affects the equitable principles which must govern cases where a partition is effected without making the mortgagee-creditor of a co-sharer a party to the partition suit. Even in the case of an auction-purchaser of the interest of a co-sharer, it was held in *Mahabalaya* v. *Timaya*[5] that he can take no more than the interest of the co-parcener as a member of a united family, and the manner in which the equitable adjustment and marshalling has to be made so as to give effect, as far as may be possible, to the rights of all parties, is laid down in *Pandurang* v. *Bhaskar*[6]. These equitable principles, which govern the rights of purchasers, equally govern the case of mortgagees—*Vinayak* v. *Ramkrishna*[7]. The circumstances of the case of *Sidasavant* v. *Balsavant*[8] were

(1) (1878) 4 Cal., 510.
(2) (1893) 20 Cal., 533.
(3) (1874) 22 Cal. W. R., 453.
(4) (1892) 16 Bom., 608.
(5) (1875) 12 Bom. H. C. Rep., A. C. J., 138.
(6) (1874) 11 Bom. H. C. Rep., 72.
(7) P. J. for 1889, p. 180.
(8) P. J. for 1893, p. 64.

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rather peculiar, but it is clear from the judgment recorded in that case that, as against the mortgagor-co-sharers who had redeemed their share, it was open to the plaintiffs in the partition suit to enforce their remedy by execution, even though they had failed to execute their decree against the mortgagee in possession.

On the whole, it appears to me that the appellant has a right to require the respondents Nos. 2—9 to take back the encumbered lands as part of the lands allotted to their shares, and in exchange make over to appellant land of equal value out of their share to make up his full share. This re-adjustment becomes more equitable in the present case, because, as held by the lower appellate Court, there is good reason to suspect that the mortgagee-respondent held back his claim fraudulently, and in collusion with the other respondents.

APPELLATE CIVIL.

Before Sir C. F. Farran, Kt., Chief Justice, and Mr. Justice Fulton.

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MANAGER HANMANT SANTAYA PRABHU (ORIGINAL DEFENDANT), APPELLANT, *v.* SUBBABHAT (ORIGINAL PLAINTIFF), RESPONDENT.*

Civil Procedure Code (Act XIV of 1882), *Secs.* 244, 258—*Agreement not to execute decree—Execution—Breach of contract—Suit to recover damages.*

The provisions of section 244 of the Civil Procedure Code (Act XIV of 1882) are no bar to a suit to recover damages for breach of a contract not to execute a decree.

APPEAL from a remand order passed by H. L. Hervey, District Judge of Kánara, against the decision of Ráo Sáheb T. V. Kalsulkar, Subordinate Judge of Honávar.

The plaintiff alleged that in 1889 the defendant had obtained a decree against him, and on the 26th June, 1891, agreed to accept Rs. 65 from him in full satisfaction of it; that he accordingly paid this sum and got a receipt from the defendant, who undertook to certify the same to the Court and promised not to claim any further sum under his decree. The defendant, however, did not certify the payment and subsequently applied for execution

* Appeal, No. 9 of 1898 from order.