APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

1907. *September 2.*

VRIJBHUKANDAS DWARKADAS (ORIGINAL PLAINTIFF), APPELLANT, *v.* DAYARAM JADAVJI (ORIGINAL DEFENDANT), RESPONDENT.*

Mortgage—Mortgage by a Hindu widow without legal necessity—Destruction of property by fire—Mortgagees re-building the property—Suit by reversioner at widow's death to recover possession of property—Mortgagee not entitled to claim repairs or to remove the construction before delivering possession.

A Hindu widow inherited a shop from her son and mortgaged it without any legal necessity recognised as such by Hindu law. The property having been destroyed by floods, the mortgagees re-built it with their own money. At the widow's death, the reversioner sued to recover possession of the property free from all incumbrances.

Held, that the mortgagees spent the money while holding the property under a mortgage not binding on the reversioner, and what they did must be presumed in law to have been done unauthorisedly so far as that reversioner was concerned.

Held, further, that the building having been treated by the mortgagees as property mortgaged to them by the widow without legal necessity, there was no equity arising in their favour as against the reversioner, who was entitled to recover it in the condition in which it was when the widow died.

Vinayakrao v. *Vidyashankar*(1), *Premji Jivan Bhate* v. *Haji Cassum Juma Ahmed*(2), and *Narayan* v. *Bholagir*(3), distinguished.

SECOND appeal from the decision of G. D. Madgavkar, District
lge of Broach, confirming the decree passed by B. B. Kunte,
rdinate Judge at Broach.

t to recover possession of property.

property in dispute was the same as that in dispute in
se reported at p. 26 *supra*. The plaintiff in both the
as the same.

63, the shop in question was destroyed by fire but
y Bai Mancha.

* Second Appeal No. 681 of 1906.

m. L. R. 404. (2) (1895) 20 Bom. 298.
(3) (1869) 6 Bom. H. C. R. (A. C. J.) 80.

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In 1873, Bai Mancha executed a deed of mortgage of the said shop for Rs. 675 in favour of Jadav, father of defendants 1 and 2, for a term of 99 years. Jadav on two occasions expended money on the re-construction of the shop, when it was damaged. Mancha died in 1900.

In 1904, the plaintiff claiming as the nearest male agnate of Vallabh, brought the present suit on the ground that Mancha had only a life-interest in the property, and that the defendant's mortgage was therefore void and the property must fall to him as the next reversioner.

The defendant contended *inter alia*, that Mancha had executed the deed of mortgage for a necessary purpose, and the alienation was therefore valid; and that the plaintiff could not obtain possession without repaying them Rs. 675, the mortgage amount, plus Rs. 1,300 spent by him on repairs.

The Subordinate Judge held that Mancha did not alienate the property for a necessary purpose, and that the plaintiff was entitled to its possession on payment of Rs. 800 spent by defendants on repairs, unless they elected to remove the building and vacate within a fortnight.

On appeal the District Judge arrived at substantially the same findings.

The plaintiff appealed, and the defendants filed cross-objections against the decree.

L. A. Shah, for the appellant:—The lower Court havin found as a fact that there was no necessity to alienate t property, the reversioner is not bound to pay the Rs. 800 bef recovering possession of the property. The mortgage was bi ing on the widow alone and not on the reversioner. If widow had spent any money on repairs, she could not claimed it from the reversioner: and the latter would be en to the property in the condition in which it was at the w death.

K. N. Koyaji, for the respondent:—I submit the pres is not one of mere repairs but one of entire destruction construction. If the mortgagees had chosen not to re-

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house, the reversioner could never have had the house with or without conditions. Moreover the plaintiff allowed the mortgagees to re-build the house on two occasions without uttering even a word of protest. The mortgagees had the right to construct the building during the life-time of the widow; and so he is entitled to the expenses thereof from the reversioner, who allowed the construction to be put up. See *Vinayakrao* v. *Vidyashankar*[1], *Premji Jivan Bhate* v. *Haji Cassum Juma Ahmed*[2], and *Narayan* v. *Bholagir*[3].

L. A. Shah, in reply :—The rulings last cited are distinguishable from the present case. In those cases, the buildings were constructed by the parties concerned in their own supposed right. Here the respondent has erected the building as a mortgagee.

CHANDAVARKAR, J.—The only question of law argued in support of this second appeal is whether the Courts below have rightly held appellant liable to pay the amount spent by respondents for "repairs" as a condition precedent to his right to recover possession of the property as the reversionary heir of the son of the deceased widow, Bai Mancha. It being found as a fact that the mortgage taken by the respondents from Bai Mancha was not for any legal necessity, justified by Hindu law, they cannot claim the amount spent by them for repairs, which must be, upon the facts found, treated as having been spent by them under the authority of the mortgage from Bai Mancha. That mortgage falling to the ground as not binding the plaintiff, here is no legal foundation for the claim for the amount spent repairs by the respondents unless they are able successfully nvoke some principle of equity which makes it obligatory on appellant to pay that amount to the respondent as a ition precedent to the recovery of possession. It is urged he repairs were necessary and the appellant is benefiting them, because had the respondents not effected them at own expense the property would have ceased to exist. has been held by the Privy Council in *Ram Tuhul Singh* v. *Lall Sahoo*[4], "it is not in every case in which a man fited by the money of another, that an obligation to

(1) (1907) L. R. 404. Bom. 298.

(3) (1869) 6 Bom. H. C. R. (A. C. J.) 80.

(4) (1875) L. R. 2 I. A. 131 at p. 143.

repay that money arises".....To raise an equity of that kind "there must be an obligation, express or implied, to repay." (See that decision followed in *Gadgeppa Desai* v. *Apaji Jivanrao*[1].) Here the respondents spent the money while holding the property under a mortgage not binding on the reversioners and whatever they did must be presumed in law to have been done unauthorisedly so far as those reversioners are concerned. It is urged that what the respondents did was to re-build the house after it had been destroyed by floods; but even then the respondents cannot claim higher rights than those which their mortgagor, Bai Mancha, could have claimed; and the amount spent by them on the new erection must be regarded upon the facts found by the lower Court as if it had been spent by the widow herself. Had she effected the repairs or rebuilt the property, she could not have claimed, and on her death her heir or any other person claiming under her would not have been entitled to claim, the amount from the reversioners. Had she re-built by borrowing the amount, it would have been binding on the reversionary estate only if there had been legal necessity for the purpose and the widow had mortgaged the estate therefor. But she did nothing of the kind: *Upendra Lal Mukerjee* v. *Girindra Nath Mukerjee*[2]. It is not suggested in the pleadings that she could not have re-built out of money in her own hands, or that it would have been necessary for her to borrow if she had re-built herself. The respondents, therefore, have to fall back upon the defence that the estate having benefited from what they did, the appellant should not be allowed to recover it without paying for the benefit they derive; and that because, "he who seeks equity must do equity." That maxim, however, is for the reasons given and on the authority of the decisions cited inapplicable here. So far we have looked at the merits of the case from the point of view presented by the decisions of the Privy Council binding on us and based on the general principles of equity. Is there anything in the Hindu Law to raise the equity invoked by the respondents in their favour in this case? In the chapter on mortgages, pledges and deposits, Vijnaneshwara points out, in commenting on a Smriti of Yajnayavalkya, that where mortgaged property in possession of a

(1) (1879) 3 Bom. 237.

(2) (1898) 25 Cal. 565 at p. 569.

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mortgagee is destroyed by fire or floods or any other act of God, the mortgagee is not responsible for its destruction and is entitled to sue at once, in spite of any terms to the contrary in the mortgage contract, for his money with interest. There is no authority, however, given to a mortgagee to re-build the property so as to bind the mortgagor against his will. Assuming that Bai Mancha assented to the re-building by the respondents, that could bind her only. But the question is—did the respondents assent? The lower Courts have answered that question in the affirmative merely on facts which raise no more than an inference of quiescence against the present appellant.

Failing on all these points, Mr. Koyajee, the learned pleader for the respondents, urges that in any event they must be allowed to remove the building they have erected before the appellant is given possession of the land. And he relies on the decisions of this Court in *Vinayakrao* v. *Vidyashankar*[1], *Premji Jivan Bhate* v. *Haji Cassum Juma Ahmed*[2] and *Narayan* v. *Bholagir*[3]. But those cases are plainly distinguishable from the present. In the first, a widow, having sold certain land in which she had only a Hindu widow's estate, the purchaser, treating the land as *his*, erected upon it a structure at his own expense. The second decision is founded on the same principle, following the decision in *Narayan* v. *Bholagir*[3]. But here the respondents erected the building not as their own but as belonging to the estate of the son of Bai Mancha, which that lady, as their mortgagor, could redeem. They must be regarded as having erected it as part of that estate; not as of their own ownership. Under those circumstances the erection having been treated by the respondents as property mortgaged to them by Bai Mancha without legal necessity, there is no equity arising in their favour as against the present appellant who, as reversionary heir to the estate, is entitled to recover it in the condition in which it was when the widow died. We must, therefore, substitute the following decree for that of the lower Court. The plaintiff do recover possession of the property in suit with costs throughout including the costs of the cross-objections.

R. R.

(1) (1907) 9 Bom. L. R., p. 404. (2) (1895) 20 Bom. 515.
(3) (1869) 6 B. H. C. R. A. C. J. 80.