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no doubt, as pointed out in *Rádhábái* v. *Anantráv*, a presumption against such an intention on the part of Government as creating a perpetuity, but we think it is sufficiently rebutted by the above evidence regarding these settlements in the Southern Marátha Country. In the present case there is no reason for inferring a contrary intention either from the contemporary documentary evidence bearing on the settlement, or from the *sanad* granted by Government in 1885 in pursuance of such settlement. We must, therefore, confirm the decree of the Court below, with costs on appellants.

Decree confirmed.

APPELLATE CIVIL.

Before Mr. Justice Birdwood and Mr. Justice Candy.

1890. *June* 10.

MORA JOSHI, (ORIGINAL PLAINTIFF), APPELLANT, *v.* RA'MCHANDRA DINKAR JOSHI AND OTHERS, (ORIGINAL DEFENDANTS), RESPONDENTS.*

Mortgage—Redemption—Right to sue—One of several joint mortgagors entitled to redeem the whole mortgage before partition, though mortgagee has acquired a share in the equity of redemption.

The owner of a share in the equity of redemption need not obtain partition before suing for redemption. He is entitled to redeem the whole mortgage, and the fact that the mortgagee has himself purchased a portion of the equity of redemption does not defeat that right.

Marakar Akath Kondarakayil Mamu v. *Punjapatath Kuttu*(1) dissented from.

SECOND appeal from the decision of Khán Bahádur M. N. Nánáwátty, First Class Subordinate Judge (A. P.), in Appeal No. 169 of 1887.

This was a suit for redemption.

One Rághoba Dádoba Náik was the owner of a 12-annas *taksím* (or share) of the *khoti* village of Vesrád. He mortgaged his *taksim* to the father of defendants 1 and 2, and grandfather of defendants 3, 4 and 5.

* Second Appeal, No. 47 of 1889.

(1) I. L. R., 6 Mad., 61.

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Rághoba died, leaving him surviving five sons—Sadáshiv, Antobá, Dádobá, Visobá and Rangobá.

In 1872 in execution of a decree against Sadáshiv and Dádobá, their right, title and interest in the mortgaged *taksím* was put up to sale, and purchased by one Sadáshiv Bápu Desái, who assigned his rights to defendant No. 1.

In 1877, Antobá, Visobá and Rangobá sold their three-fifths share of the equity of redemption of the *taksím* to the plaintiff.

In 1886 the plaintiff filed the present suit to redeem either his three-fifths share of the *taksím*, or the whole *taksím* if the defendants objected to the redemption of a portion.

The Court of first instance passed a decree in plaintiff's favour, ordering redemption of three-fifths of the *taksím* on payment of Rs. 1,104-9-7.

This decree was reversed, on appeal, by the Subordinate Judge with appellate powers, who held, on the authority of *Marakar* v. *Punjápatath*[1], that the five sons of Rághoba (the mortgagor) being joint and the property in dispute being undivided, the plaintiff, as the owner of an undivided three-fifths share, could not sue for redemption of a portion before partition.

The plaintiff's claim was, therefore, rejected with costs.

Against this decision the plaintiff appealed to the High Court.

Dáji Abáji Khare for appellant:—The plaintiff, as owner of a part of the equity of redemption, is entitled to redeem the whole mortgage—*Náro Hari Bháve* v. *Vithalbhat*[2]. He need not sue for partition before suing for redemption. The Madras ruling in *Marakar* v. *Punjápatath*[3] is dissented from by this Court in *Bhikáji Dáji* v. *Lakshman Balál*[4].

Mahádev Chimnáji Apte for respondent:—The plaintiff is now making out a case different from that which he set up in both the lower Courts. There he sought to redeem, not the whole, but his own share of the mortgage, and the lower Courts were right in refusing this relief. See *Alikhán Dáudkhán* v. *Mahamadkhán*

(1) I. L. R., 6 Mad., 61.
(2) I. L. R., 10 Bom., 648.
(3) I. L. R., 6 Mad., 61.
(4) P. J. for 1888, p. 291.

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Samsherkhán Deshmukh[1]. Having failed in this attempt he now for the first time offers to redeem the whole mortgage. This he should not be allowed to do.

Dáji Abáji Khare in reply :—The plaint shows that we have made an alternative case from the beginning, claiming redemption either of our own share or of the whole mortgage. The lower Courts have lost sight of this fact. We should, therefore, be given an opportunity to redeem the whole mortgage.

The judgment of the Court was delivered by

BIRDWOOD, J. :—The lower appellate Court has omitted to notice that the plaintiff set up an alternative claim in his plaint and expressed his willingness to redeem the whole of the mortgaged property if he could not be allowed to redeem his own share. As the owner of a share in the equity of redemption, he was clearly entitled to redeem the whole mortgage. Indeed, in the circumstances of the present case, there having been no separation whatever of any share, as in *Alikhán Dáudkhán* v. *Mahamadkhán Samsherkhán Deshmukh*[2], the plaintiff could only be allowed to redeem the whole. The circumstance that the mortgagees had themselves acquired a share in the equity of redemption could not defeat the plaintiff's right. The ruling of the Madras High Court in a similar case (*Marakar* v. *Punjápatath*[3]) has been dissented from by this Court (see *Bhikáji Dáji* v. *Lakshman Balál*[4]). The plaintiff cannot, in our opinion, be justly forced to sue for partition, in order that his own share in the mortgaged estate may be ascertained and in order that he may then sue to redeem that share only. All that the defendants acquired by their purchase was the right possessed by every other sharer in the equity of redemption to redeem the whole property and to sue for a partition if so advised. Having regard to the course of decisions in this Court, as set out in the case of *Vishnu Vithal* v. *Venkatráv Bhavánji*[5], we reverse the decree of the lower appellate Court which rejected the plaintiff's claim as not

(1) P. J. for 1881, p. 319.
(2) P. J. for 1881, p. 319.
(3) I. L. R., 6 Mad., 61.
(4) P. J. for 1888, p. 291.
(5) P. J. for 1889, p. 248.

maintainable, and we remand the appeal for a rehearing on the merits. Costs to abide the result.

Decree reversed.

NOTE.—The following is the judgment of Birdwood and Parsons, JJ., in *Bhikáji Dáji* v. *Lakshman Balál*(1) referred to in the above decision :—

The plaintiff sought to redeem certain mortgaged property, and obtained a decree from the Court of first instance. The lower appellate Court reversed the decree and dismissed the suit as not maintainable, because the plaintiff was not entitled to more than a one-fourth share in the mortgaged property. This decision is manifestly wrong, as the plaintiff, if he had any interest at all in the mortgaged property, could sue to redeem the whole: see *Náro Hari Bháve* v. *Vithalbhat*(2). As, moreover, the plaintiff was the sole mortgagor of the whole property, it was not open to the defendant to deny his title to redeem. It is, however, argued before us that as the defendant has purchased the shares of some of the co-owners of the property, the plaintiff cannot be allowed to bring this suit before he has, by partition, severed his share; and the decision in *Mamu* v. *Kuttu*(3) is cited as an authority for this contention. We are unable, however, to concur in that decision. If there are other co-owners of the equity of redemption, that circumstance does not bar the plaintiff's right to redeem. It is only necessary that the co-owners should be made parties to the redemption suit. The purchase by the defendant of the share of any of these co-owners cannot, we think, have the effect of depriving the plaintiff of any right to redeem that he would otherwise have. The right which the purchaser at a court sale of the share of a co-parcener in a Hindu family ordinarily acquires is the right to demand that share by a suit for partition; and the circumstance that the purchaser is also a mortgagee would not apparently affect that right, or confer on the purchaser any larger title, by releasing him from the necessity of suing for partition and imposing it on the members of the family. It was held in the case of *Santáji* v. *Bayáji*(4) that the defendant, (who was the purchaser from Rambháji, the alleged owner of the property), was estopped from denying that his mortgagor, Rambhaji's brother, Rághoji, had the right to mortgage, and after mortgaging, to redeem. It was held, further, that the defendant must, on receipt of the amount due on the mortgage, restore the property to Rághoji, and that it would then be open to him, in another suit, to establish any rights which he might have as assignee of Rambhaji. In the case of *Alikhan Dáudkhán* v. *Mahamadkhán Shamsherkhán Deshmukh*(5), it is said: "It is true that the defendant claims to be purchaser of Báwá's one-half share of the property; but the Assistant Judge has found that the purchase is not proved, and, therefore, in respect of this moiety, the defendant must be considered as being in possession solely as mortgagee; and, as mortgagee, he cannot resist the plaintiff's right to redeem. He must surrender Báwá's moiety; and if he has any claim to it as purchaser, he

(1) P. J. for 1888, p. 291.
(2) I. L. R., 10 Bom., 648.
(3) I. L. R., 6 Mad., 61.
(4) P. J. for 1876, p. 17.
(5) P. J. for 1881, p. 319.

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must establish such claim by separate suit." These remarks apply to the present suit. The defendant, on the plaintiff paying him his mortgage-debt, must give up the property mortgaged to him by the plaintiff; and then, if he has any claim by purchase, he must, if so advised, bring a suit on that claim. The only question, therefore, to be decided in the present suit is as to the amount to be paid by the plaintiff for redemption. As that question has not been considered by the lower appellate Court, which has erred in its decision on the preliminary issue of law decided by it against the plaintiff, we reverse its decree and remand the appeal, in order that a decree for redemption may be passed for whatever amount may be found due, with a proper proviso for foreclosure on default of payment. All costs hitherto incurred to be dealt with in such decree.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Telang.

1890. *June* 11.

HUSEIN AHMAD KA'KA', (ORIGINAL PLAINTIFF), APPELLANT, *v.* SAJU MAHAMAD SAHID, (ORIGINAL DEFENDANT), RESPONDENT.*

Decree—Execution—Practice—Procedure—Decree transmitted for execution to another Court—Power of such Court to decide whether execution is barred by limitation—Civil Procedure Code (Act XIV of 1882), *Sec.* 223 *et seq.*

Where a Court makes an order for execution of a decree and transmits the decree for execution to another Court, the latter Court has no power to determine whether execution is barred by limitation. The order for execution made by the transmitting Court is binding on the parties until reversed on appeal.

It is otherwise, however, where the transmitting Court has made no order for execution, but has merely transmitted the decree and the certificate of non-satisfaction.

THIS was a second appeal from a decision of S. Hammick, District Judge of Surat.

The facts of the case, as stated in the District Judge's judgment, were as follows :—

The plaintiff obtained a decree against one Hafisji Hasam Mahamad in the Court of Small Causes at Rangoon on the 3rd May, 1883. In December, 1883, Hafisji Hasam Mahamad died. No satisfaction having been obtained under the decree, a notice was issued on the 12th November, 1886, under section 248 of the

* Second Appeal, No. 732 of 1889.