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Hindu widows often are. We have heard all the arguments that could be addressed to us upon the somewhat meagre evidence recorded, and while on that evidence the scale of maintenance might appear to be unduly liberal, one cannot say that the learned Judge is wrong in conjecturing that the defendant has managed to conceal his true means which are very likely much more ample than is revealed in the evidence.

We do not, therefore, think it right to interfere upon that part of the case, and we would, with the slight variation suggested above, confirm the decree of the lower Court and dismiss this appeal with all costs.

Appeal dismissed.

R. R.

APPELLATE CIVIL.

Before Sir Stanley Batchelor, Acting Chief Justice, and Mr. Justice Marten.

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March 22.

NIJALINGAPPA NIJAPPA HALAGATTI (ORIGINAL DEFENDANT No. 1), APPELLANT *v.* CHANBASAWA KOM SATAVIRAPPA NESARI AND ANOTHER (ORIGINAL PLAINTIFF AND DEFENDANT No. 2), RESPONDENTS.*

Mortgagor and mortgagee—Redemption—Lasting improvements made by mortgagee—Right to recover costs of improvements—Transfer of Property Act (IV of 1882) sections 63, 72 and 76.

In a redemption suit, a mortgagee is entitled to recover from his mortgagor the reasonable and proper costs incurred in making lasting improvements.

Henderson v. *Astwood*(1), approved.

* Second Appeal No. 44 of 1917.

(1) [1894] A. C. 150 at p. 163.

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PER MARTEN, J.:—In allowing costs of improvements the Court must naturally be on its guard against extravagant or unfounded claims. It should inquire strictly into the *bona fides* and fairness of the claim in each particular case.

SECOND appeal against the decision of C. C. Boyd, District Judge of Belgaum, confirming the decree passed by G. V. Kalkot, Subordinate Judge at Gokak.

Suit for redemption.

The property in suit belonged to the joint family of one Dundeppa Virupaxappa and his sons Basappa, Virabhadrappa and two others. Basappa as the manager of the family mortgaged the property to defendant No. 1 for Rs. 600. Virbhadrappa was the last surviving member of the joint family. He died in 1905 leaving a minor son Dundeppa. Dundeppa also died a year later and on his death his mother Annapurni inherited the property. In 1907, she sold the property to defendant No. 1 and got herself remarried after the sale. The plaintiff, thereupon, as the heir of Dundeppa, the last male holder, sued to redeem and recover possession of the property mortgaged by Basappa, alleging that the sale made by Annapurni to defendant No. 1 was not for a legal necessity and that it was null and void.

Defendant No. 1 contended *inter alia* that the plaintiff was not the heir of Dundeppa; that Annapurni sold the property to the defendant for a proper consideration and for satisfying the ancestral debts of Dundeppa; and that he had improved the property after purchase by him in 1907 at a cost of Rs. 1,300 by sinking a well.

Defendant No. 2, Annapurni, did not appear.

The Subordinate judge allowed the plaintiff to redeem on payment of Rs. 600 to defendant No. 1. As to improvements he found that they were effected by the

defendant by sinking a well at a cost of Rs. 577-4-0, but disallowed the claim of the defendant for the same on the authority of *Vijbhukandas* v. *Dayaram*[1].

The District Judge, on appeal, confirmed the decree.

Defendant No. 1 appealed to the High Court.

Coyajee, with *A. G. Desai*, for the appellant:—We are entitled to the cost of the improvement effected. The improvement consists in sinking a well which is a necessary thing in this country for agriculture. The well is a lasting improvement. The improvement is not on such a high scale as to prevent the mortgagor from redeeming the land. We are mortgagee-in-possession and have expended money in permanent work on the property and are, therefore, entitled to be repaid the expenditure as the value of the property has increased. Fisher on Mortgage (6th Edn.), section 1783, p. 897 and *Shepard* v. *Jones*[2], referred to.

The character of the improvement is such that it makes the property more productive. Section 72 of the Transfer of Property Act does not expressly refer to improvements. Mere silence on the point in the section does not indicate that we are not entitled to the cost of the improvements. There is no express prohibition in the section to the granting of such costs. Ghose on Mortgage (4th Edn.), p. 550 and *Kadir Moidin* v. *Napean*[3].

[BATCHELOR, Acting C. J. referred to *Henderson* v. *Astwood*[4]].

The well is an accretion which is not unjustifiable and it is such as a prudent manager would make to increase the profits: see section 76 of the Transfer of Property Act, 1882.

(1) (1907) 9 Bom. L. R. 1181.
(2) (1882) 21 Ch. D. 469.
(3) (1898) 26 Cal. 1 at p. 7.
(4) [1894] A. C. 150 at p. 163.

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Sections 63, 72 and 76 of the Transfer of Property Act should be read together.

Dhirajlal K. Thakore, with *K. H. Kelkar*, for the respondent:—The appellant was a mortgagee-in-possession and subsequently purchased the land from Annapurnabai knowing that there was no legal necessity for the sale. He was not a *bona fide* purchaser and was, therefore, not entitled to the cost of the improvement. In virtue of the provisions of section 51 of the Transfer of Property Act, the person claiming the costs of improvements must have acted in the *bona fide* belief that he was absolutely entitled to the property: see *Nanjappa Gounden* v. *Peruma Gounden*[1].

A mortgagee-in-possession can only spend money for management or preservation of the mortgaged property or for supporting his or his mortgagor's title to the property or for renewing a lease. Section 72 of the Transfer of Property Act does not permit a mortgagee-in-possession to make improvements of any kind, permanent or temporary. Consequently in a suit for redemption, the costs of any improvements cannot be legally charged against the mortgagor seeking to redeem: see *Arunachella Chetti* v. *Sithayi Ammal*[2], *Rangayya Chettiar* v. *Parthasarathi Naickar*[3] and *Vrijbhukandas* v. *Dayaram*[4].

The case of *Kadir Moidin* v. *Nepean*[5] was not decided under the Transfer of Property Act and has, therefore, no application.

English decisions do allow costs of improvements to the mortgagee-in-possession under certain circumstances: but section 51 of the Transfer of Property Act, which is the law applicable in this country, does not.

(1) (1909) 32 Mad. 530.
(2) (1896) 19 Mad. 327.
(3) (1896) 20 Mad. 120.
(4) (1907) 32 Bom. 32.
(5) (1898) 26 Cal. 1 at p. 7.

The Legislature has thought fit not to allow the mortgagee-in-possession any costs of improvements in order that he may not go on making improvements and render redemption impossible. If he was allowed to charge for improvements the Courts would be exposed to all sorts of extravagant demands on the part of the mortgagees. The Legislature to prevent this evil has knowingly framed section 72.

Section 63 of the Transfer of Property Act refers to an accretion and not to improvements; and it has, therefore, no bearing on the point.

BATCHELOR, Acting C. J.:—This was a suit to redeem a mortgage. The mortgagee, who had gone into possession, claimed to be entitled to recover upon redemption the costs of a certain lasting improvement which, as he alleged, he had made in the property. The property mortgaged was agricultural land, and the lasting improvement claimed by the mortgagee was the sinking of a well in this land. Admittedly the well was sunk, and though the exact effect of the sinking of it on the character of the land has not been determined, it appears from the judgment of the trial Court that there is good reason to suppose that the profits of the land were increased by reason of the sinking of the well. The mortgagee's claim on this head has been disallowed by both the lower Courts, and this appeal is consequently brought by the mortgagee, who contends that, on the facts found, he ought to be held entitled to cast upon the mortgagor the reasonable costs incurred by him in the digging of the well.

The point is not perfectly clear by reason of the silence of the Transfer of Property Act upon the question of the mortgagee's rights to recover from his mortgagor the reasonable and proper costs of lasting improvements. It is consequently contended on behalf

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of the respondents that a mortgagee in India is not entitled to make any such claim. In support of that argument counsel cited the decision of the Madras High Court in *Arunachella Chetti* v. *Sithayi Ammal*[1]. No doubt if reference be made to the phraseology of section 72 of the Transfer of Property Act, there is room for the contention that the mortgagee is not entitled to improve the property, though he may spend money in preserving it, and in managing it, as a person of ordinary prudence would manage it, as he is required to do under section 76. I am also bound to admit that I do not think that the case before us can fairly be brought within the purview of section 63 of the Act, which makes provision for accessions to mortgaged property.

I think we are confronted with the plain question whether the silence of the Transfer of Property Act upon this point should lead the Court to decide that a mortgagee in India is never entitled to recover from his mortgagor the reasonable costs incurred in lasting improvements. In my opinion this question should be answered in favour of the mortgagee. If the Indian Statute had expressly deprived the mortgagee of this right, there would of course be an end of the matter. But the Statute has not done so, and from its mere silence I am not prepared to infer that the intention of the Legislature was that this right should never be recognised. The right was considered by the Privy Council in *Henderson* v. *Astwood*[2], where Lord Macnaghten, in delivering the judgment of the Board, in speaking of the then mortgagee, one Davies, says: "It would be contrary to common justice to deprive Davies of the benefit of the money laid out by him on those improvements, so far as they enhanced the value of the

(1) (1896) 19 Mad. 327,

(2) [1894] A. C. 150 at p. 163.

premises." Then reference was made by his Lordship to *Shepard* v. *Jones*[1], where the whole law on this subject, as it prevails in England, is expounded by the Court of Appeal. It seems to me probable that the silence of the Indian Legislature upon this point is to be ascribed rather to a desire to confine the codified law to broad general provisions than to a deliberate design to deprive the mortgagee in suitable cases of that which their Lordships of the Privy Council regard as common justice.

I think, therefore, that the lower appellate Court's decree must be reversed, and there must be a remand of the case to the District Court in order that all the requisite questions may be considered and decided. These questions of fact will be: (1) What sum of money was spent by the mortgagee on the digging of the well? (2) Was that a reasonable and proper sum for a mortgagee to spend, having regard to the total value of the property mortgaged? And (3) Was the well a lasting or permanent improvement enhancing the value of the property? If all these questions are answered in the mortgagee's favour, then, in my opinion, he is entitled to recover the fair amount of his expenditure from the mortgagor in so far as it has enhanced the value of the property, in addition to Rs. 600 found due at the foot of the mortgage. Costs costs in the suit.

MARTEN, J.:—I agree. As regards the point under the Transfer of Property Act, I think that the silence of the Act does not prevent us from doing what is spoken of by their Lordships of the Privy Council in *Henderson* v. *Astwood*[2], as common justice, namely, in a proper case to allow a mortgagee the benefit of money laid out by him, so far as it has enhanced the value of the mortgaged property.

(1) (1882) 21 Ch. D. 469. (2) [1894] A. C. 150 at p. 163.

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As regards the merits of the case, so far as we have them before us, I may repeat what Sir George Jessel said in *Shepard* v. *Jones*[1]: "All I can say is, that there being in my opinion a *prima facie* case that the property was increased in value, it is fair that there should be an inquiry to ascertain whether it was so increased. Of course that inquiry will be whether any and what sum ought to be allowed in taking the accounts of the defendant by reason of lasting improvements, and that will leave the whole case open." I, therefore, agree with the inquiries which my Lord the Chief Justice has directed to bring out these points.

I will only add that in allowing costs of improvements the Court must naturally be on its guard against extravagant or unfounded claims. It was said in argument that if we were to allow a mortgagee to charge for improvements, the Courts might be exposed to all sorts of extravagant demands on the part of mortgagees. The answer is that the Court should inquire strictly into the *bona fides* and fairness of the claim in each particular case.

Decree reversed and case remanded

J. G. R.

[1] (1882) 21 Ch. D. 469 at pp. 478, 479.