plaintiff, and there is no reason why we should deprive him of the right to redeem the mortgaged properties unless there is very clear authority against that being done. We think, therefore, that the decree of the lower appellate Court of the 5th of November 1914 must be set aside, and it be declared that the plaintiff is entitled to redeem. The case must go back to the trial Court to take the mortgage account. If any amount is found to be due on the mortgage, then the plaintiff will be allowed to redeem on payment of that amount. If nothing is found to be due, then that Court will lay down the terms on which the plaintiff should get possession. The plaintiff to pay the defendant's costs throughout.

*Decree set aside : case remanded.*

R. R.

## APPELLATE CIVIL.

*Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.*

DNYANU LAXUMAN GAIKWAD AND ANOTHER (ORIGINAL PLAINTIFFS), APPLICANTS *v.* FAKIRA WALAD EBRAM LOHAR (ORIGINAL DEFENDANT No. 4), OPPONENT*.

1921. *February* 24.

*Transfer of Property Act (IV of 1882), section 72—Lasting improvements by mortgagee.*

Though a mortgagee is entitled, apart from the provisions of section 72 of the Transfer of Property Act, to claim the value of lasting improvements, the claim will depend upon what are reasonable improvements.

A mortgagee should not be allowed to improve the property to such an extent as to deprive the mortgagor in effect of the right to redeem.

*Nijalingappa* v. *Chambasawa*[1], referred to.

APPLICATION under Extraordinary Jurisdiction praying for reversal of the decree passed by W. Baker,

*Civil Extraordinary Application No. 255 of 1920.

[1] (1918) 43 Bom. 69.

1921.

DNYANU LAXUMAN v. FAKIRA.

District Judge of Satara, in Miscellaneous Application No. 70 of 1918.

Suit for redemption.

The plaintiff sued to redeem a mortgage of plaint property made by their father and the deceased defendant No. 6 to the father of defendants Nos. 1 and 2 by a deed, dated 22nd July 1867 on payment of what may, on taking an account under the Dekkhan Agriculturists' Relief Act, be found due to the successors-in-title of the said mortgagee.

The defendant No. 4 contended that he had purchased the property from the heirs of the original mortgagee for Rs. 300 and *bona fide* believing that he was the owner had effected improvements on the lands at a cost of Rs. 4,500 and the same should be allowed to him before redemption.

The Subordinate Judge found that the defendants had improved the lands by sinking wells, erecting cattle sheds, &c., but he disallowed the claim for compensation, on the ground that the improvements were not made with the object of "preserving the property from destruction," under section 72 of the Transfer of Property Act, 1882.

On appeal, the District Judge held that the improvements made were reasonable and were of a lasting and permanent character. Relying on *Nijalingappa* v. *Chanbasawa*[1] he allowed the claim for the same by directing that plaintiffs do pay the defendants Rs. 2,346 as costs of improvements and take possession of the property.

The plaintiff applied to the High Court.

*Y. N. Nadkarni* for *K. H. Kelkar*, for the applicants :—Defendant being a purchaser from the mortgagee in possession cannot have higher rights than the

[1] (1918) 43 Bom. 69.

mortgagee himself. Under section 72, Transfer of Property Act, 1882, a mortgagee in possession is only entitled to moneys spent for management or preservation of the mortgaged property or for supporting his or mortgagor's title to the property or for renewing a lease. It does not provide for costs of improvement. I submit that it was so intended because, if the costs were allowed, there would be no limit to them. The property would be so far improved that redemption would be made wellnigh prohibitive. The decision of *Nijalingappa* v. *Chanbasawa*[1] is based upon English authorities which allow costs of improvement to the ortgagee in possession. But the law as laid down in section 72, Transfer of Property Act, 1882, which I submit is the law applicable in this country, does not. Even in those English decisions costs of improvement never exceeded the value of the mortgage. Here in this case the improvements were out of all proportion to the value of the mortgage. Assuming that *Nijalingappa's case*[1] correctly lays down the law even then I submit the Court has not properly applied the test laid down in that decision. At page 901 of the report, it is said that the question of fact to be determined is whether that was a reasonable and proper sum for a mortgagee to spend, having regard to the total value of the property. The Court below has distinctly found in the negative on this point. The mortgagee has improved the property to the extent of twenty-three times the mortgage amount.

*S. S. Patkar*, for the opponent:—We are *bona fide* purchasers for value. The improvements consist in erecting building sand a cattleshed and constructing a Pucca well at a cost of over Rs. 3,000. All these were necessary improvements. The appellants will be immensely benefited by them. No doubt section 72 of the

[1] (1918) 43 Bom. 69.

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Transfer of Property Act does not expressly refer to improvements; but mere silence on the point does not indicate that mortgagee in possession is not entitled to them. The Transfer of Property Act nowhere lays down that the costs of improvement are not to be paid to the mortgagee. Moreover we say that the applicants are estopped as all the improvements had been made to the knowledge of the applicants.

MACLEOD, C. J. :—This rule was granted under section 115 of the Code of Civil Procedure. The suit was filed by the plaintiffs to redeem the plaint property. The trial Court ordered defendants Nos. 4 and 5 to deliver possession of the plaint lands in their respective possession free of all incumbrances and charges after removing therefrom the houses and cattle-sheds erected by them. This decree in revision before the District Judge was varied by directing that plaintiffs should pay the amount of Rs. 2,346 as costs of improvements made by defendants with costs within six months from the date of the decree and then take possession of the property, Survey No. 738.

The principal question in dispute was whether the defendants who purchased from the original mortgagee should be allowed the cost of the improvements. They had improved the property by erecting buildings and a cattle-shed and constructing a Pucca well at a cost of over Rs. 3,000, and it is contended that this sum of Rs. 2,346 mentioned in the decree should not be allowed. Assuming for the purpose of argument that the decision in *Nijalingappa* v. *Chanbasawa*[1] is correct and that the mortgagee was a *bona fide* purchaser and therefore he is entitled to what has been spent on reasonable lasting improvements apart from the provisions of section 72 of the Transfer of Property

[1] (1918) 43 Bom. 69.

Act, it becomes a question what are reasonable improvements. To begin with, there is the principle of equity that the mortgagee should not be allowed to improve the property to such an extent as to deprive the mortgagor in effect of the right to redeem. In the case referred to, the improvement which the mortgagee asked for was less than the value of the mortgage and in the case of *Shepard* v. *Jones*[1], the case relied upon in *Henderson* v. *Astwood*[2], the cost of the improvements asked for was £83 on a mortgage of £4,000. I do not think that this aspect of the question was properly considered by the Court below. We have no doubt that it is unreasonable that a mortgagee could ever be allowed to improve the mortgaged property to the extent of twenty or twenty-three times the mortgage amount, which would have the result in most cases of depriving the mortgagor of his right to redeem. Admittedly, the plaintiffs in this case are in a very humble position. One of the arguments of the defendants was that they knew about the improvements because they were working in this field as labourers. It is quite impossible to imagine that the sum demanded can be raised within six months and therefore considering how this case has been dealt with in the lower Court, we think it is one in which we are entitled to interfere.

The defendants have had the advantage of their improvements for a considerable number of years and to some extent they must have been paid for the cost of their improvements. We might either make the sum which was awarded by the District Judge payable in small instalments or we might reduce that sum and make it payable within a shorter time. Looking at the case in the most favourable way for the defendants, we do not think that a larger sum than Rs. 1,200 should be allowed for the costs of the improvements, though

[1] (1882) 21 Ch. D. 469.

[2] [1894] A. C. 150.

1921.

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we should not like to be considered as thinking in any way that really Rs. 1,200 was a reasonable amount which the mortgagee could spend in improving property which had been mortgaged for Rs. 100. Still in the circumstances of the case, the plaintiff mortgagor after he has paid off this amount will have the benefit of the increased value of his property, and we think the following order will meet the equities of the case.

We set aside the decree of the District Judge and direct that the plaintiffs be put in possession of the mortgage property and that he should pay a sum of Rs. 1,200 to the defendants on account of the improvements effected on the property to be paid off by six annual instalments, the first instalment being payable on the 15th of January 1922. In default of any one payment, the defendant can take action under section 15B of the Dekkhan Agriculturists' Relief Act.

*Decree reversed.*

J. G. R.

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## CIVIL REFERENCE.

*Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.*

1921.

*February* 28.

IN RE THE INDIAN INCOME TAX ACT (VII OF 1918).

IN RE TATA IRON AND STEEL COMPANY, LIMITED*.

*Indian Income Tax Act (VII of 1918), section 9, clause 2, sub-clause (*ix*)—Joint Stock Company—Increase of capital—Issue of new shares—Commission paid to underwriters whether allowable deduction—Assessment.*

Where a joint stock company increases its capital by the issue of new shares for which it pays commission to the underwriters of the shares, the amount of the commission so paid cannot be allowed as an item of expenditure under section 9, clause 2, sub-clause (*ix*) of the Indian Income Tax Act (VII of 1918).

* Civil Reference No. 5 of 1921.