

regard to the party wall. It is clear that the plaintiffs would be entitled to block the suit windows from their own side of the premises, and if the occasion arose they would be entitled to an injunction restraining defendants from making any new openings in the common wall.

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IMAMBHAI  
KANRUI-DIN  
v.  
RAHIMBHAI.

*Decree confirmed.*

R. R.

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APPELLATE CIVIL.

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

GAFUR IMAM (ORIGINAL DEFENDANT NO. 3), APPELLANT v. AMIR ISAB SAUDAGAR AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS <sup>o</sup>.

1925.

February 5.

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*Mortgage—Redemption—Redeeming Co-mortgagor—Contribution—Interest—Transfer of Property Act (IV of 1882), section 95.*

Where one of several mortgagors alone redeems the mortgaged property, he is not *prima facie* entitled under section 95 of the Transfer of Property Act to claim interest against his co-mortgagors on the amount of their proportion of the expenses so incurred.

His claim, if any, to interest must be based on some ground outside the section,—as, for instance, on notice given to his co-mortgagors that he would claim interest against them on the expenses so incurred if they wished to redeem their shares.

SECOND appeal against the decision of M. H. Wagle, First Class Subordinate Judge, A. P., at Nasik reversing the decree passed by G. V. Jadhav, Joint Subordinate Judge at Nasik.

Suit to recover possession.

The property in suit, consisting of two houses in Nasik City, belonged to one Khadirkhan. He had one son Mahomedkhan and a daughter Chandubi. The son owned a two-third share and daughter the remaining one-third.

<sup>o</sup> Second Appeal No. 817 of 1923.

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On January 21, 1894, the houses were mortgaged to one Rajendra by Mahomedkhan's son, Yasinkha (defendant No. 1) and Chandubi for Rs. 100.

On September 21, 1894, the houses were again mortgaged by the same persons to the same mortgagee for Rs. 125.

In 1897, Yasinkha sold the houses to one Gulabkha, a brother of defendant No. 2, who sold them to defendant No. 3 in 1921.

On June 26, 1920, Amir Isab Soudagar (plaintiff No. 1) as heir of Chandubi paid Rs. 100 to the mortgagee in full satisfaction of the mortgage money.

In 1922, Amir Isab Soudagar and the other heirs of Chandubi sued for possession of the entire property in their right as mortgagors, or for partition of their one-third share and payment by the defendants of Rs. 66-10-8 being two-thirds of the amount of Rs. 100 paid by plaintiff No. 1, together with interest thereon as from the date of redemption.

Defendant No. 3 contended that he was lawfully in possession of the property as purchaser and that he had spent Rs. 350 in effecting repairs.

The Subordinate Judge held that plaintiff No. 1 had obtained possession after he had paid the amount of Rs. 100; that he was entitled to claim two-thirds contribution, viz, Rs. 66-10-8 from defendant No. 1 without any interest. He further held that defendant No. 3 had repaired the house at a cost of Rs. 350; that the plaintiffs were liable to pay one-third of this amount to the said defendant. He, therefore, ordered that on payment of Rs. 50 to defendant No. 3 by plaintiff No. 1, the plaintiffs do take possession by partition of their one-third share in the property.

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On appeal, the decree was varied by disallowing the claim of defendant No. 3 for repairs and allowing the plaintiff's claim for interest on the amount of defendant No. 1's contribution, viz., Rs. 66-10-8 as from the date of redemption. It was, therefore, decreed that the defendant No. 3 do pay to plaintiff No. 1 Rs. 154 as his share of the mortgage money with interest at six per cent. from the date of suit till payment.

The defendant No. 3 appealed to the High Court.

*S. Y. Abhyankar*, for the appellant.

*S. R. Golchale*, for the respondents.

MACLEOD, C. J.:—The plaintiffs sued to obtain possession by partition of their one-third share in the suit property, and for recovering contribution from the defendants for money paid by the plaintiffs for redeeming the other two-thirds in the same.

The trial Judge held that the plaintiffs could claim one-third share in the suit property; that they had redeemed the mortgages on the property and obtained possession; and that the plaintiffs were entitled to a sum of Rs. 66-10-8 from the defendants as their contribution towards the expenses incurred in redeeming the property. He did not allow the plaintiffs any interest on that amount.

The 3rd defendant alleged that he had repaired the house at a cost of Rs. 350 after he had purchased the interest of the 1st defendant, one of the original mortgagors. The Judge found that he had spent Rs. 350, and held that the plaintiffs were liable to pay one-third of that amount.

In appeal the appellate Judge held that plaintiffs were entitled to interest on the amounts which they had spent in paying off the mortgagee, and considered twelve per cent. as a reasonable rate, but he differed from the Court below with regard to the money spent by the 3rd

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defendant in making repairs, and found he could not be considered a *bona fide* purchaser, and consequently passed a decree for the plaintiffs that their one-third share should be equitably separated and given in their possession and the 3rd defendant should pay to the plaintiff No. 1 Rs. 154 as his share of the mortgage money with interest at six per cent. thereon from the date of suit till payment within two months from the date of the decree.

The 3rd defendant has appealed. He contends that he ought to have been allowed proportionate costs of repairs made by him to the house situated in the suit land, and that the Judge erred in law in awarding interest to the plaintiff on the amounts spent by him in redeeming the property. We do not think that the 3rd defendant in the circumstances of the case is entitled to charge the plaintiff with his proportion of the cost incurred by him in executing repairs to the property.

On the question whether he is liable to pay interest to the plaintiffs on his proportion of the expenses properly incurred in redeeming the property, there is no direct authority. Section 95 of the Transfer of Property Act says:—

“Where one of several mortgagors redeems the mortgaged property and obtains possession thereof, he has a charge on the share of each of the other co-mortgagors in the property for his proportion of the expenses properly incurred in so redeeming and obtaining possession.”

In a note in Mitra's work on the Transfer of Property Act (2nd Edition) to section 95 we find the following passage at page 511:—“The redeeming co-mortgagor has a right to claim interest on the money paid by him. The rate of interest must be reasonable. The fact that he had to borrow redemption money at a high rate of interest is not a ground for charging the same rate from the other co-mortgagors.” The authority for that

proposition is *Jago v. Arjun*<sup>(1)</sup>. "In *Raushan Ali Khan Chowdhury v. Kali Mohan Moitra*<sup>(2)</sup> the Court allowed interest at twelve per cent.". We have been referred, however, to the case of *Malik Ahmad Wali Khan v. Musammat Shamsi Jahan Begam*<sup>(3)</sup>. The principal question argued was whether the redeeming co-mortgagor could claim contribution from his co-mortgagors if he had not obtained possession of the mortgaged property. The Privy Council held that the section should be construed distributively, and that the charge followed on redemption; the condition of obtaining possession applied only to cases in which its fulfilment was from the nature of the mortgage possible. The plaintiff claimed during the argument that he was entitled to recover two-thirds of the amount paid by him, with interest at the stipulated rate, and to have a charge declared in his favour on the respondents' interests in the mortgaged property. The judgment of their Lordships does not deal with this contention. But the decree passed by them declared that the plaintiff was entitled to recover against the defendants two-thirds of the sum paid by him to redeem the mortgage, with interest at six per cent. per annum from the date of the institution of the suit. We must take it, therefore, that the claim for interest from the date of redemption was disallowed. It seems to us reading section 95, that the redeeming co-mortgagor is only given a charge for the proportion of the expenses properly incurred by him in so redeeming and obtaining possession of the mortgaged property. Consequently his claim to interest on the expenses so incurred must arise, if at all, not from the section, but from some other ground. If, for instance, he gave notice to the co-mortgagors that he had redeemed the property, and that he had a statutory charge for the

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<sup>(1)</sup> (1918) 49 I. C. 230.

<sup>(2)</sup> (1906) 4 C. L. J. 79.

<sup>(3)</sup> (1905) L. R. 33 I. A. 81.

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proportion of the expenses so incurred, he might also give them notice that he would claim interest against them on that amount if they wished to redeem their shares. But if no such notice is given, it is difficult to see on what the claim for interest could be founded, or from what authority the Court could derive the power to exercise a discretion to allow interest.

We think, therefore, that we must allow the appeal to this extent, that defendant No. 3 must pay the plaintiff Rs. 66-10-8 as his share of the mortgage money with interest at six per cent. thereon from the date of suit till payment. Defendant No. 3 can have three months to pay the amount from the time the proceedings are returned to the trial Court.

No order as to costs of the appeal.

*Decree varied.*

J. G. R.

## APPELLATE CIVIL.

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

1925.

February 10.

GANAPA PUTTA HEGDE (ORIGINAL DEFENDANT), APPELLANT v. HAM-  
MAU SAIRA VALLAD ABDUL SAIB (ORIGINAL PLAINTIFF), RESPONDENT<sup>o</sup>.

*Indian Limitation Act (IX of 1908), Schedule I, Article 116—Claim for a sum certain—“Compensation”—Implied covenant of title—Transfer of Property Act (IV of 1882), section 55 (2).*

The plaintiff, having been prevented by the true owners from taking possession of certain immoveable property purchased by him *bona fide* from one who had in fact no title thereto, sued his vendor, within six years of the date of the sale deed, for the recovery of the purchase money ;

*Held*, that, inasmuch as the vendor must be deemed, under section 55 (2) of the Transfer of Property Act, to have contracted that he had power to transfer the property, the suit was a suit for compensation for breach of contract, to which Article 116 of the Limitation Act was applicable, and was, therefore, within time.

\* Second Appeal No. 640 of 1923.