

The above order regarding the restoration of the property to be carried out by giving it to the father of the appellant, Raghunath Narayan, as the appellant himself will be in jail for a lengthy period.

Appeal dismissed.

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RAGHUNATH
v.
EMPEROR

Baker, J.

APPELLATE CIVIL.

Before Mr. Justice Baker.

SHANKAR MAHADEO JADHAV (ORIGINAL PLAINTIFF), APPELLANT v. BHI-KAJI RAMCHANDRA GHANEKAR AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

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November 7

Mortgage—Redemption—Equity of redemption—Sale of fractional interest in equity of redemption—Purchaser buying up mortgagees' rights—Purchaser becomes charge holder with reference to other mortgagors—Subrogation of mortgagees' rights—Transfer of Property Act (IV of 1882), section 95—Dekkhan Agriculturists' Relief Act (XVII of 1879), section 15-D.

B's father originally owned eight annas' share in a Khoti Village, the other eight annas belonging to the family of Jadhav. In 1861 B's father sold half of his share (four annas' share) to the Jadhavs. In 1894 certain five members of the Jadhav family mortgaged the four annas' share to one G. In 1895 B filed a suit for partition and possession of his four annas' share out of the whole village against the Jadhavs and their mortgagees. A decree was passed in B's favour. G appealed, and during the pendency of the appeal in 1897 B purchased the equity of redemption of three of the five original mortgagors. After this there was a compromise between B and the mortgagee G under which on payment of Rs. 1,500 by B, G's rights in the property were sold to him. The terms of compromise were incorporated in a decree. In 1919 the plaintiff, a member of Jadhav family, sued for redemption of the mortgage of 1894 and for accounts under section 15-D of the Dekkhan Agriculturists' Relief Act :—

Held. (1) that B, who had already purchased a portion of the equity of redemption, was not by his purchase of the mortgagee rights subrogated to the position of the mortgagee, but was in the position of a charge holder under section 95 of the Transfer of Property Act, 1882 :

Vasudev v. Dalaji,⁽¹⁾ *Tangya v. Trimbak,*⁽²⁾ *Rugad Singh v. Sat Narain Singh,*⁽³⁾ referred to ;

(2) that the suit for accounts did not lie ;

(3) that the plaintiff's remedy was a suit for partition and possession of his share on paying his quota of the redemption money.

*Second Appeal No. 820 of 1925.

⁽¹⁾ (1902) 26 Bom. 500.

⁽²⁾ (1916) 18 Bom. L. R. 700.

⁽³⁾ (1904) 27 All. 178.

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THE facts are set out in the Judgment.

P. B. Shingne, for the appellant.

A. G. Desai, for the heirs of deceased respondent
No. 8.

Coyajee, with *P. V. Kane*, for respondent No. 4.-

BAKER J.:—This appeal, which comes from the Ratnagiri District, involves questions of some difficulty. There were 138 defendants, but fortunately we are not concerned with all of them in appeal. The facts are that defendant No. 4's father originally owned 8 annas' share in the khoti village of Panhale, the other 8 annas' belonging to the family of Jadhav. In 1861 defendant No. 4's father sold that share to certain members of the plaintiff's family, the Jadhavs, and on the same day by a reconveyance he purchased back 4 annas' out of it, the net result being the sale of a 4 annas, or half his share, to the Jadhavs. In 1894 certain members of the Jadhav family mortgaged this 4 annas' share in the khoti to one Ghanekar by Exhibit 144. The khoti share was undivided.—I use that expression in preference to the word joint, because the plaintiff and his family are Hindus, Marathas probably, and defendant No. 4 is a Mussulman, but the respective shares were not divided between the parties. In 1895 defendant No. 4 sued for partition and possession of his 4 annas' share out of the whole village, the defendants being the Jadhavs, who were the owners of a twelve annas' share in the village, and their mortgagee Ghanekar. A decree for partition and separate possession of his 4 annas' share was passed in favour of defendant No. 4, Abdul Aji. The mortgagee Ghanekar appealed. The Jadhavs did not appeal. During the pendency of the appeal in 1897 defendant No. 4 purchased the equity of redemption of three of the five original mortgagors by Exhibit 168. The plaintiff was not a party to this

document, but it is now admitted that he is a sharer in the khoti. To add a further complication to the case, the sale deed passed by these three co-sharers expressly excludes the share of one Amruta Lokhande which is valued at Rs. 6-1-6. This appears to be the assessment leviable on the land. After this there was a compromise between defendant No. 4 and Ghanekar the mortgagee, and this compromise was incorporated in a decree. The present appeal turns principally on the question of what was the position of defendant No. 4 after this compromise with Ghanekar, whether after paying off Ghanekar's mortgage, as he did under the compromise, he becomes a co-mortgagor who has redeemed the mortgage and is therefore entitled to a charge on the property under section 95 of the Transfer of Property Act, or whether he acquired the mortgagee's rights of Ghanekar and thereby stands in the shoes of the mortgagee and is liable to be redeemed. The plaintiff, on the basis that defendant No. 4 stands in the shoes of the mortgagee Ghanekar, brought the present suit for accounts of the mortgage under section 15D of the Dekkhan Agriculturists' Relief Act. Defendant No. 4 contended that he was not liable to be redeemed, that the mortgage was extinguished, and he had a charge on the shares of the other co-mortgagors in the property for his proportion of the mortgage money. Both the Courts below have found in the defendant's favour, and have dismissed the plaintiff's suit, and the plaintiff makes this second appeal.

The learned pleader for the appellant has contended that on the plain construction of the documents in this case, viz., the compromise application and the decree and the sale deed, that is to say, the documents evidencing the arrangements between defendant No. 4 and Ghanekar, the mortgagee, the position of defendant No. 4 is that of a mortgagee who is liable to be redeemed.

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The compromise application, which is Exhibit 162, is at page 29 of the Record, and reference is made to page 30, where it is stated:—

“The plaintiff respondent (*i.e.*, the present defendant No. 4) having purchased the equity of redemption from the sharers who have mortgaged the Thikans to the appellant by a mortgage deed, the plaintiff-respondent is entitled to redeem the mortgage after the expiration of the mortgage period, that is to say, the appellant Ghanekar is not entitled to the ownership of the property but he is entitled to the mortgage right only. Therefore the appellant has sold to the plaintiff-respondent his mortgage right for Rs. 1,500.”

The terms of this compromise are embodied in the decree, and it is contended that by this defendant No. 4 stands in the place of the mortgagee. A sum of Rs. 1,500 which was the amount due on the mortgage was paid by defendant No. 4 to the mortgagee, and the question arises whether by this payment defendant No. 4 became a transferee of the mortgagee's rights or merely a charge holder. Both the Courts below have held that he merely became a charge holder. The first Court relied on *Vasudev v. Balaji*,⁽¹⁾ which merely enunciates the principle laid down in section 95 of the Transfer of Property Act. It is also an extremely simple case where one of two co-mortgagors pays off the whole of the mortgage. In the absence of a formal document setting forth the intentions of the parties, it appears to me to be extremely difficult to decide whether the payment to the mortgagee of the mortgage amount would amount to a transfer of the mortgage rights or a redemption of the mortgage, unless we are governed by some general principles, and it seems to me that in such a case we must be governed by the consideration whether the person making the payment is himself a person entitled to redeem or a stranger. Now it is manifest that a person who is a stranger to the mortgage and has no right to any part of the equity of redemption cannot redeem, and therefore any payment made by him to the mortgagee of the mortgage money would *prima facie*

amount to a transfer of the mortgagee rights, and, as has been laid down in *Tangya v. Trimbak*,⁽¹⁾ being a stranger, he would be entitled to be subrogated to the position of the mortgagee. That is not the position of defendant No. 4. By his purchase of the shares of three out of the five mortgagors, defendant No. 4 became interested in the equity of redemption. Any interest, however small, in the mortgaged property, would entitle the person holding it to redeem under section 91 of the Transfer of Property Act, and hence the payment made by defendant No. 4 to the mortgagee Ghanekar must, in my opinion, be considered as a redemption of the mortgage. Otherwise the rights of the mortgagor and the mortgagee would be vested in the same person, which would have the effect of extinguishing the mortgage. In any case, therefore, there would not now be any question of redemption of a mortgage, and the position of defendant No. 4 would be that of a charge holder under section 95 of the Transfer of Property Act, and it seems to me that in all cases where the mortgage money is paid off by a person who is interested in the equity of redemption, there can be no question of his acquiring the rights of the mortgagee and being liable to be redeemed by the other co-mortgagors. The mortgage can only be redeemed once. In the present case it has been so redeemed, and, therefore, the present suit for accounts under section 15 D of the Dekkhan Agriculturists' Relief Act will not lie. The remedy of the plaintiff, as is conceded by the respondent, would be a suit for partition and possession of his share on paying his quota of the redemption money. But we are not yet quite finished with the matter. The learned pleader for the appellant has based certain arguments on a fact which I have already

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⁽¹⁾ (1916) 18 Bom. L. R. 700.

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referred to earlier in this judgment, viz., that the share of Amruta, that is, the portion of the property included in the khata of Amruta is expressly excluded in the sale deed passed by three out of the co-sharers to defendant No. 4, and it is contended that so far as this portion of the mortgaged property is concerned, defendant No. 4 has no interest in the equity of redemption. This contention, however, in my opinion, is untenable. Under section 91 of the Transfer of Property Act the smallest interest in the equity of redemption will entitle a person to redeem, and it is impossible to hold that he would be entitled to redeem part of the property and not the other part. A mortgage cannot be split into two parts or redeemed piecemeal. It is impossible to say that defendant No. 4 was a holder of part of the equity of redemption, and entitled to redeem such portion of the mortgage as is covered by the shares of the three co-sharers who have sold to him, but that he holds a different position as regards the mortgage so far as it is concerned with the khata of Amruta. It has been argued by the learned counsel for the respondent that this point was not taken in the Courts below, and the Courts below do not seem to have gone into it. However I am quite clear that the mortgage must be treated as a whole and the mortgage property must be treated as a whole, and it is quite impossible to draw any distinction between the khata of Amruta and the rest of the property which is covered by the mortgage deed. Either defendant No. 4 has redeemed the whole of it, or he has redeemed none of it. I need hardly quote any authority, but as this point has been raised, I may refer to *Rugad Singh v. Sat Narain Singh*,⁽¹⁾ where it is stated (p. 182) :—

“The plaintiff as a part owner of the equity of redemption was fully justified by law in redeeming the whole mortgage; in fact it is doubtful whether he could have done otherwise than redeem the whole.”

⁽¹⁾ (1904) 27 All. 178.

and further on it is stated (p 182):—

“As to that property he will of course hold as absolute proprietor, whatever may have been his fractional interest in the equity of redemption, and as to the rest he will hold, as laid down by this Court, as lienor, liable to be paid off in respect of it by anyone entitled to the equity of redemption on payment of an amount of the mortgage money proportionate to the share of that person and of the expenses properly incurred by the plaintiff in redeeming and obtaining possession, as is provided by section 95 of the Transfer of Property Act.”

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Sections 91 and 95 of the Transfer of Property Act would, in my opinion, be quite unworkable if any other view were taken. So long as the plaintiff, in this case, defendant No. 4, has a fractional interest in the equity of redemption, it is quite immaterial that a portion of the property covered by the mortgage is property in which he has no interest.

I do not think there is any other point to which I need refer. The learned counsel for the respondent, quoting *Gordhandas v. Dhirajlal*,⁽¹⁾ argued that the findings of the lower Court were findings of fact. I am afraid that ruling does not apply to the present case, which not only involves questions of fact, but involves rather complicated questions of law. I, therefore, confirm the decree of the lower appellate Court, and dismiss the appeal with costs.

The cross-objections have not been pressed except as regards costs. But as the contending respondent had disputed certain questions of fact which have now been found against him, I do not think it necessary to make any alteration in the decree of the lower appellate Court as regards costs. Cross-objections dismissed with costs.

Decree confirmed.

J. G. R.

⁽¹⁾ (1925) 28 Bom. L. R. 467.