

Court which passed the decree had also so treated them.

The appeal was therefore dismissed with costs,—a result in which Shah J. concurred in a separate judgment.]

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Decree confirmed.

J. G. R.

APPELLATE CIVIL.

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

BAI KEVAL, DAUGHTER OF HEMCHAND KALYANCHAND AND OTHERS (ORIGINAL DEFENDANTS NOS. 1 TO 5), APPELLANTS v. MADHU KALA AND OTHERS (ORIGINAL PLAINTIFFS AND DEFENDANT NO. 6), RESPONDENTS^c.

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September 8.

Indian Limitation Act (IX of 1908), section 7—Redemption suit by two plaintiffs—Disability—Power to give discharge.

The plaintiffs sued to redeem the plaint property mortgaged by their father. The suit was brought more than three years after the first plaintiff came of age, but within three years after the second plaintiff attained majority. It was contended that the suit was barred by limitation under section 7 of the Limitation Act, as a valid discharge could have been given by the first plaintiff without the concurrence of the second and therefore time ran against both the plaintiffs from the date the first attained majority.

Held, that the suit was in time with reference to both the plaintiffs under section 7 of the Limitation Act, for there was nothing to show that the first plaintiff who was a major could have given a discharge without the concurrence of the second plaintiff who was a minor.

Bapu Tanya v. Bala Ranji⁽¹⁾, distinguished.

SECOND Appeal against the decision of M. J. Kadri, Assistant Judge of Surat, varying the decree passed by S. J. Yajnik, Subordinate Judge at Olpad.

Suit for redemption.

^a Second Appeal No. 399 of 1920.

⁽¹⁾ (1920) 45 Bom. 446.

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On the 19th July 1892, plaintiff's father Kala executed the mortgage in suit in favour of Kalyanchand (grandfather of defendants Nos. 1 and 2) for Rs. 600.

On the 3rd May 1898, Kala died leaving him surviving three sons : Shiva, and Madhu and Kika (plaintiffs Nos. 1 and 2). Shiva who was born on the 7th October 1889 died on the 18th October 1910. Madhu was born on the 27th March 1896. Kika who was the posthumous son, was born on the 8th October 1898.

Madhu alone filed the present suit, on the 22nd June 1917, to redeem the mortgage. Kika was added as plaintiff No. 2 on the 24th March 1918.

Defendants Nos. 1 and 2 were grand-daughters of the mortgagee, defendants Nos. 3 to 5 were alienees of portions of the mortgaged property.

The Subordinate Judge held that as section 7 of the Limitation Act did not apply, the right of plaintiff No. 1 to redeem the mortgage was barred, but the right of plaintiff No. 2 was not barred for the following reasons :—

In order to attract the operation of the former part of section 7 of the Limitation Act, two conditions that should be satisfied are : (1) that one of several persons jointly entitled to institute a suit or make an application for the execution of a decree is under any such disability and (2) that a discharge can be given without the concurrence of such person. Ordinarily a discharge can be given in absence for the recovery of debt by joint creditor or claimants. The present suit is of a peculiar nature. It is a suit by a debtor against a creditor (section 16 of the Dekkhan Agriculturists' Relief Act). A discharge can be given by a creditor and not by a debtor. On referring to the form of the decree in a redemption suit we find that the mortgagee has to give a discharge and not the mortgagor. The mortgagor has simply to pay the money, as directed by the Court, and when the payment is made, he has to get possession. It is the mortgagee who has to give a discharge, to pass a reconveyance deed, &c. So considering the nature of the suit I do not think that the present case is governed by section 7 of the Limitation Act.

On appeal the Assistant Judge varied the decree by holding that both the plaintiffs were entitled to redeem. His reasons were :

redemption being vested in all the heirs of Kala jointly, it is not necessary to grant a valid discharge without the concurrence of all the plaintiffs will be entitled to redeem under the "Act".

The High Court.

G. N. Thakor, for the appellants.

N. K. Mehta, for respondents Nos. 1 and 2.

MACLEOD, C. J. :—The plaintiffs sued to redeem the plaintiff properties on payment by instalments of the sum that might be found due on taking accounts under the Dekkhan Agriculturists' Relief Act of the mortgage of the 19th July 1892. These properties were mortgaged by the plaintiff's father Kala to the deceased Kalyanchand. Kala died about eighteen years ago leaving the plaintiffs and their brother Shiva, now deceased, as his heirs. The 1st and 2nd defendants are the representatives of Kalyanchand, while the other defendants are alienees from the mortgagee. There can be no doubt that the plaintiffs were entitled to redeem the properties still in the hands of the representatives of Kalyanchand. With regard to certain other properties which had been alienated, it was contended that the plaintiffs' suit was barred under Article 134 of Schedule I of the Indian Limitation Act. Admittedly the suit was brought more than three years after the 1st plaintiff came of age, but less than three years after the 2nd plaintiff came of age.

The trial Court in considering whether the provisions of section 7 of the Indian Limitation Act applied considered that on referring to the form of the decree in a redemption suit it is the mortgagee who has to give a

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discharge and not the mortgagor, therefore section 7 did not apply at all. He considered, however, that the suit of the 1st plaintiff was barred by limitation. So he gave a decree to the 2nd plaintiff only and directed that various amounts should be paid to the defendants as stated in the decree.

On appeal the learned Judge held that as the equity of redemption was vested in the heirs of Kala jointly, it was not open to the others to grant a valid discharge without the concurrence of Kika, the 2nd plaintiff. He did not agree with the view of the Court below that section 7 of the Indian Limitation Act did not apply. The decree of the lower Court was varied so as to make it in favour of both the plaintiffs while the amount payable to defendants Nos. 3 to 5 was increased by Rs. 200.

In the appeal before us it has been urged that section 7 of the Indian Limitation Act applied to the plaintiffs; the 2nd plaintiff was one of several persons jointly entitled to institute a suit, and was under the disability of minority, but as a discharge could have been given without the concurrence of the 2nd plaintiff by the 1st plaintiff, therefore time ran against both plaintiffs from the date the 1st plaintiff attained majority.

No doubt there is some foundation for the difficulties which the learned Subordinate Judge thought existed in applying the provisions of section 7 of the Indian Limitation Act to a redemption suit, because it is difficult to say that the plaintiff seeking redemption gives a discharge to the mortgagee, but if the word "discharge" is given a wider-meaning as including any form of quittance whereby the rights and liabilities between two parties are put an end to, it could be said that the plaintiff seeking redemption gives a discharge when

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he pays the mortgage debt and recovers possession of the mortgaged property from the mortgagee, thus putting an end to all rights and liabilities between the parties, so that no further proceedings could be taken. But even assuming that the two plaintiffs were jointly ^{file} a suit for redemption, there is nothing to show that the 1st plaintiff came of age, that the 2nd plaintiff had given a discharge without the concurrence of the 2nd plaintiff. It is provided by the Civil Procedure Code that all parties interested in a mortgage must be parties to a suit on a mortgage; and certainly when the 1st plaintiff brought the suit for redemption, the 2nd plaintiff was a necessary party; the question whether the 1st plaintiff could have carried the suit to its proper end without the concurrence of the 2nd plaintiff, was never considered in the proceedings in either of the lower Courts. The case of *Bapu Tatyā v. Bala Ravji*⁽¹⁾, which was relied upon, was a suit of a different nature, as it was a suit by the sons of a Hindu mother to set aside alienations made by her during their minority, and it was found as a fact, when the case came before us in second appeal, that the plaintiff was the managing member of the family, and that he had a right, as soon as he attained majority and became such managing member, to bring a suit as such manager to recover not only his share of the alienated property, but the whole of the alienated property, including his minor brothers' shares. That being so, it was held that if the elder brother on attaining majority did not bring a suit to set aside the alienation within three years, then the other brothers would be barred. But in this case there is nothing on the record to satisfy us that the 1st plaintiff could have filed a suit to redeem the mortgage without the concurrence of the 2nd plaintiff; and to that extent I

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think the decision of the Assistant Judge was right, although he has not considered the question from the point of view of the 1st and 2nd plaintiffs being members of a joint Hindu family.

It must also be remembered that the right to redeem a mortgage of joint family property members of the family whoever is it is difficult to see how the right of the 2nd plaintiff to redeem, which was in existence during his minority, could be defeated by the fact that his elder brother did not file a suit to redeem within the period allowed to him.

There is also this further fact that the minor's mother was alive and was managing the property after her husband's death. There is no evidence to show that the 1st plaintiff took over charge from his mother. It seems to me, therefore, that the 2nd plaintiff would certainly be entitled *prima facie* to redeem the mortgage. The onus lay upon the defendants to show that he was barred, and they have not proved the facts that were necessary to create the bar. It follows that both plaintiffs are entitled to redeem and though we are not in agreement with either of the judgments in the Courts below, the decree of the lower appellate Court is correct and the appeal must be dismissed with costs.

SHAH, J.:—I concur.

Decree confirmed.

J G. R.