

APPELLATE CIVIL.

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

HARANBHAI JIVABHAI AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS
v. THE COLLECTOR OF KAIRA, THE COURT OF WARDS OF THE
 ESTATE OF NAHARSINGI MEHRAMASINGHJI (ORIGINAL DEFENDANT),
 RESPONDENT*.

1921.

July 13.

Gujarat Talukdars' Act (Bom. Act VI of 1888), section 29 B†—Mortgage by a Talukdar—Sub-mortgage by mortgagee—Failure to notify claim—One of the heirs of mortgagee a minor—Sub-mortgagee entitled to remain in possession so long as original mortgagee could claim his rights against Talukdar.

*First Appeal No. 158 of 1918.

†The section runs as follows :—

29B. (1) Where any Talukdari estate has been taken under management by Government officers under section 26 or 28, the managing officer may publish in the *Bombay Government Gazette*, and in such other manner as the Governor in Council may by general or special order direct, a notice, in English and also in the vernacular, calling upon all persons having claims against such Talukdar or his property, to submit the same in writing to him within six months from the date of the publication of the notice.

(2) Where the managing officer is satisfied that any claimant was unable to comply with the notice published under sub-section (1), he may allow his claim to be submitted at any time after the date of the expiry of the period fixed therein ; but any such claim shall, notwithstanding any law, contract, decree or award to the contrary, cease to carry interest from the date of the expiry of such period until submission.

(3) Every claim against such Talukdar or his property (other than a claim on the part of Government) not submitted to the managing officer in compliance with the notice published under sub-section (1) or allowed to be submitted under sub-section (2), shall, save in the cases provided for by section 29F, sub-section (2), clause (c) and by sections 7 and 13 of the Indian Limitation Act, 1877, be deemed for all purposes and on all occasions, whether during the continuance of the management or afterwards, to have been duly discharged, unless in any suit or proceeding instituted by the claimant, or by any person claiming under him, in respect of any such claim it is proved to the satisfaction of the Court that he was unable to comply with the notice published under sub-section (1).

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The property in suit belonged to a Talukdar. It was mortgaged to one Bapu. On Bapu's death his heirs mortgaged their mortgage rights to the plaintiffs. Neither the original mortgagee's representatives nor the plaintiffs notified their claim when the Talukdari Settlement Officer called on the creditors to notify their claims. The plaintiffs being thereupon ejected by the Talukdari Settlement Officer sued to recover possession on the ground that it did not lie on them to notify the claim. The lower Court found that one of the representatives of the original mortgagee Bapu was a minor and on account of his minority he was entitled to claim against the Talukdar in spite of the provisions of section 29B of the Gujarat Talukdars' Act, 1888, but the claim for possession was disallowed on the ground that the question between the minor mortgagee and the Talukdar did not arise in the plaintiffs' suit and that it was incumbent on the plaintiffs to notify their claim. On appeal,

Held, allowing the plaintiffs' suit, that as long as the mortgagee's rights were in existence the plaintiffs could sue the mortgagee for all those rights which the mortgagee would be entitled to claim against the mortgagor and they were entitled to remain in possession as long as the mortgagee who was their mortgagor could claim his mortgage rights against the Talukdar.

FIRST Appeal against the decision of B. C. Kennedy,
District Judge of Ahmedabad.

Suit to recover possession.

The lands in suit originally belonged to the Talukdar of Dehwan. They were not in his Talukdari village but were Sanadia lands situated in the village of Ras. In 1894 he mortgaged them with possession to one Bapu Hira for Rs. 1,500.

In 1900 the heirs of Bapu mortgaged these with other lands to the plaintiffs and the plaintiffs came into possession.

The Dehwan estate subsequently came into the hands of the Talukdari Settlement Officer as Manager, and on the 12th October 1905 the Talukdari Settlement Officer called on the creditors of the estate to notify their claims. Neither the plaintiffs nor the heirs of the original mortgagee notified their claim.

On the 3rd of July 1914 the defendant Court of Wards issued a notice to the plaintiffs requiring them

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to vacate. On their refusal to vacate they were ejected by the Talukdari Settlement Officer. The plaintiffs, therefore, sued to recover possession and claimed damages Rs. 100 for crops.

The defendant contended that the notification calling on creditors to come forward was duly published and that neither the mortgagee nor the sub-mortgagee came forward to prove the mortgage debt; that the debt of the estate of Bapu Hira was therefore extinguished and the defendant entitled to take possession.

The District Judge held that one of the representatives of the original mortgagee Bapu Hira was a minor and on account of his minority he would be entitled to claim against the Talukdar in spite of the provisions of section 29B of the Gujarat Talukdars' Act; but he dismissed the plaintiffs' claim for possession on the ground that the question between the minor mortgagee and the Talukdar did not arise in the plaintiffs' suit and that as between the Talukdar and the plaintiffs it was the duty of the plaintiffs to notify their claim against the property and as they had not done so they were not protected in respect of their sub-mortgage. He therefore, allowed only the plaintiffs' claim for Rs. 100

Plaintiffs appealed to the High Court.

Coyajee, with *G. N. Thakor*, for the appellants.

N. K. Mehta, for the respondent.

MACLEOD, C. J.:—The plaintiffs filed this suit to recover possession of the plaint property with Rs. 100 for damages for crops. Their claim to recover possession was disallowed by the learned District Judge, and they were only given a decree for Rs. 100. The plaint property belonged originally to the Talukdar of Dehwan. But it was not strictly speaking Talukdari land but Sanadia land situated in the village of Ras which happened to belong to the Talukdar.

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The question might arise whether the provisions of the Gujarat Talukdars' Act VI of 1888 would apply to such land. But that question need not be considered because on other grounds we think the plaintiffs are entitled to recover possession. The lands were mortgaged by the Talukdar to one Bapu Hira. Bapu Hira died and his heirs mortgaged their mortgage rights in these and other lands to the present plaintiffs. When the Talukdari estate came into the possession of the Talukdari Settlement Officer as manager in 1905, that officer called on the creditors of the estate to notify their claims. The plaintiffs though not creditors of the Talukdari estate would certainly be interested in their debtor, who was a creditor, notifying his claim to the Talukdari Settlement Officer. But neither the plaintiffs nor their debtors, the original mortgagees, notified the claim. If there had not been a question that the representative of the original mortgagee, or one of the representatives, was a minor, then we should have to consider whether the Act applied to these private lands. But the Judge has found that one of the representatives of the original mortgagee, Bapu Hira, was a minor and was still a minor, so that on account of his minority he will still be entitled to claim against the Talukdar in spite of the provisions of section 29B of the Gujarat Talukdars' Act. But the learned Judge has dismissed the plaintiffs' claim to possession on the ground that the question between the minor mortgagee and the Talukdar does not arise in the plaintiffs' suit, and that as between the Talukdar and the plaintiffs it was the duty of the plaintiffs to notify this claim against the property and as they have not done so they are not protected in respect of their sub-mortgage. That, I think, was a wrong conclusion because the plaintiffs claimed under the mortgagee, and as long as the mortgagee's rights are in existence

the plaintiffs can sue the mortgagee for all those rights which the mortgagee will still be entitled to claim against the mortgagor, and they are entitled to remain in possession as long as the mortgagee, who is their mortgagor, can claim his mortgage rights against the Talukdar. The appeal, therefore, must be allowed, and in addition to the decree for Rs. 100 for damages, there must be a decree in favour of the plaintiffs to recover possession of the plaint property, with costs throughout. There must be an inquiry as to mesne profits from the date of suit until possession is restored or three years from to-day.

SHAH, J. :—I agree.

Appeal allowed.

J. G. R.

APPELLATE CIVIL.

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

GUMANJI DHIRAJI MARWADI (ORIGINAL PLAINTIFF), APPELLANT v.
VISHVANATH PARBHU HINGMIRE (ORIGINAL DEFENDANT No. 1)
RESPONDENT^a.

1921.

July 15.

Decree—Execution—Decree varied in appeal—Interest of defendant not party to appeal affected—Executing Court not to go behind the decree—Practice and procedure.

In a mortgage decree defendant No. 2 was impleaded because the debt was said to have been incurred for his benefit by the father of defendant No. 1, and his property No. 3 among other properties of the family was primarily made liable for the decretal amount. Defendant No. 2 appealed from the decree making plaintiff the only respondent and the appellate Court set aside the order of the lower Court against defendant No. 2 and against property No. 3. In execution of the decree, defendant No. 1 contended that as he was not a party to the appeal, the order of the appellate Court could not bind him and he was, therefore, entitled to insist upon the plaintiff first recovering his debt from the sale proceeds of property No. 3.

^a Second Appeal No. 744 of 1920.