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Judge's discretion which may have caused a defeat of justice; but a new trial will not be ordered except in special cases.

[After going into the merits, the Court confirmed the convictions, and directed the prisoners to be transported for life.]

.....

[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 85 *of* 1874.

October 5.

LILA MORJI, deceased, by his son and heir RAVI.... } *Defendant and Appellant.*

VASUDEV MORESHVAR GANPULE..... } *Plaintiff and Respondent.*

Hindu law—Joint family property—Mortgage—Onus probandi—Redemption—Cause of action.

Where joint family property is mortgaged by one parcener, in order that it may bind the other co parceners, the mortgagee must prove *affirmatively* that the mortgage was assented to by the other co-parceners, or was necessary for family purposes.

A mortgage deed, which was executed in March 1858, provided for the redemption of the mortgaged property after the expiration of fifteen years from date. In a suit brought in 1867 to recover part of this property, the Appellate Court held the plaintiff entitled to recover, because on the 29th November 1873, when that Court passed its decision, the time fixed for redemption in the mortgage deed had already expired:

Held, in special appeal in reversal of the decree of the lower court that in 1867, when the suit was brought, the right even to redeem the mortgaged property even as a whole had not accrued, and that, therefore, the action was premature.

THIS was a special appeal for the decision of E. Cordeaux, Assistant Judge at Ratnágiri, affirming the decree of the Subordinate Judge of Chiplun.

The case had originally come before the High Court in special appeal No. 185 of 1872, against the decision of H. J. Parsons, Assistant Judge at the same place.

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The facts, so far as they are material to the present report, are these:—

The plaintiff, Vásudev, brought this suit (No. 442 of 1867) to obtain partition of a fourth part of an eight-anna share in a certain field, and claimed possession thereof as purchaser from three persons, namely, Bábáji, Abá, and Bálu, who were members of a joint family. The defendant Lilá pleaded that he had been in possession of the whole field since 1840 under four mortgage deeds, of which the more recent were exhibits Nos. 97 and 26, dated respectively the 19th March 1858 and 17th November 1862. Both these mortgages were executed by Hábáji and Tátia, who were undivided members of the family of the plaintiff's vendors. The mortgagee, Lilá, was to remain in possession of the field for fifteen years under the mortgage deed No. 97, and for twenty-two years under No. 26. The first court held both the mortgages proved, and decreed plaintiff not entitled to redeem till A. D. 1884, according to the terms of the last mortgage No. 26. In appeal, the plaintiff (Vásudev) contended that the mortgages in question did not bind him, as they were not executed by his vendors, and not shown to have been passed for any common family benefit. The Assistant Judge held the mortgages to be binding on the plaintiff, because he considered that most of the family had joined in the original mortgage; that the other mortgages had been mere enlargements of the former one; that no objection to any one of them had ever been made by any of the persons through whom the plaintiff claimed; and lastly, that there was "no evidence at all on the side plaintiff that the mortgages were not entered into with the consent of the whole family, or that the purposes for them were not necessary."

The case coming on in special appeal before SARGENT Acting C. J., and MELVILL, J., on the 5th September 1872.

Vishnu Ghanasham, for the plaintiff (who was then appellant), contended that the lower court had wrongly placed on Vásudev the burden of proving *negatively* that the land in

dispute had not been mortgaged to the defendant, Lilá, with the consent of the whole family, or that the money borrowed was not necessary for family purposes, whereas the defendant, as mortgagee, was bound to show *affirmatively* that the mortgage debt had been contracted by a managing member of the family, either for necessary purposes or with the assent of the whole family, as held in *Gane* v. *Kane* (*a*).

Ghanasham Nilkantha Nadkarni (for *Shantaram Narayan*), for the respondent, argued that the Assistant Judge had distinctly found that most of the family had joined in the first mortgage, and that the others were renewals of the first one, and that, therefore, the mortgages bound the plaintiff, as they bound his vendors.

The High Court remanded the case for a fresh trial under the following order :—

"The mortgage No. 26 was to secure Rs. 475, the due on the mortgage No. 97, and a further advance of Rs 525, making in all Rs. 1,000. Neither of the mortgages Nos. 26 and 97 was executed by any one of the persons through whom the plaintiff claims. The Assistant Judge says : "There is no evidence at all on the side of the plaintiff that the mortgages were not entered into with the consent of the whole family, or that the purposes for them were not necessary." But in thus laying the *onus* upon the plaintiff instead of the defendant, the Assistant Judge was clearly wrong. The decree must, therefore, be reversed and the case remanded for the Assistant Judge to pass a new decree, having regard to the above remarks.

On remand, the Subordinate Judge of Chiplun decreed the plaintiff's claim in his favour, on the ground of the defendant's failure to prove that the land had been mortgaged with the consent of the whole family, or that the mortgages were necessary. In appeal, however, Mr. Cordeaux (who, in the mean time, had succeeeded Mr. Parsons,) held the mortgages to have been executed by the managing members of the family and for necessary purposes. He decided however, that No. 26 was null and void as against the plaintiff, under Section 240

(*a*) 4 Bom. H. C. Rep. 169, A. C. J.

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of the Civil Procedure Code, because the land was under attachment at the instance of one of the plaintiff's vendors when that deed was passed. He, nevertheless, held the plaintiff entitled to recover a fourth part of the land as claimed by him, because the term of the mortgage, No. 97 (dated 19th March 1858) had already expired in March 1873, the Assistant Judge giving his judgment on the 29th November 1873.

In special appeal, it was contended, among other things, that if the time of the mortgage No. 97 expired in March 1873, the plaintiff had no cause of action in 1867, when the present suit was instituted,

The special appeal was argued before WEST and NÁNÁBHAI HARIDÁS, JJ., on the 5th October 1874.

Shivshankar Govindram for the appellant.

Vishnu Granasham for the respondent.

WEST, J.:—The Assistant Judge has found that the document No. 97 was Passed by the managing members of the family for a common family necessity. Rejecting the more recent deed, No. 26, as executed, while the property was under an attachment, to the benefit of which the plaintiff is entitled, he considered that the document No. 97 had entitled the defendant, Ravi Lilá, to retain possession for 15 years or till 1873 and as this time had elapsed at the time of his own judgment, he awarded possession to the plaintiff. But putting aside the question of the plaintiff's right to recover possession at all without payment of land properly mortgaged, and of his right to redeem a fraction of what was mortgaged as a whole, it is clear that in 1867, when the suit in this case was instituted, the right even to redeem the whole had not accrued. The plaintiff, representing the coparcener, Babaji, was bound by what bound Babaji, by the mortgage therefore; and could not claim possession of Babaji's share on any terms until 1873.

We must, therefore, reverse the decree of the lower courts, and reject Vásudev's claim with costs throughout.