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JOTI NIMBA'JI *et al.* v. SOMA'JI BA'PUJI *et al.*

The case was heard by FORBES and TUCKER, JJ.

Mádhavráv Krishṇa Kharkar, for the appellants, contended that if the appellate court were not disposed to attach any weight to exhibit No. 3, which contained the grounds in full of the Munsif's first judgment, and in which were also recorded other exhibits, showing that the land in dispute was the plaintiff's *mirás*, it should have remanded the case in order that all the evidence in the former case might be recorded in the present one.

Vishvanáth Náráyaṇ Mandlik, for the respondents:—The defendants were in possession of the *mirás* land, and they could not be deprived of their property unless a better title were established by the appellants, on whom the *onus* of so doing lay. They had not done so, and ought to suffer for their neglect.

PER CURIAM:—The Court considers that, under the peculiar circumstances of this case, the Judge, not being statisfied with the evidence recorded by the Munsif at the present trial, should have allowed the plaintiffs the opportunity of putting in afresh the evidence which was recorded in the former suit on the same subject between the parties, No. 452 of 1858, in which no final decision respecting the plaintiffs' right was come to.

The Court reverses the Judge's decree, and remands the suit in order that the Judge may allow the evidence above mentioned to be recorded, and may pass a fresh decision on the merits, awarding costs.

Decree reversed.

Special Appeal No. 395 of 1862.

March 16.

KONER MANOHAR MAHA'JAN A'MBEKAR, deceased, his son and heir, Vámanáji Mahájan ..... *Appellant.*

NA'RO HARI DA'SPUTRE ..... *Respondent.*

Mortgage—Equity of Redemption—Power of Sale by Mortgagor—Reasonable Time—Attachment.

Claim by a mortgagee to remove an attachment from certain property placed on it by a judgment creditor of the mortgagor, on the ground that the entire ownership of the property had passed to him at the date of the attachment. The mortgagee had never had possession of the mortgage-property, and by the stipulations of the deed the mortgagor had a power

of sale after the expiration of the time fixed for the payment of the debt, and it was only on the failure to exercise this power that the proprietory title would pass to the mortgagee.

Held—That, under a condition of this character, a reasonable time must be allowed for the exercise of the power of sale, and that the fact that no sale had taken place within an interval of twenty-three days from the date fixed for payment could not equitably be held to divest the mortgagor of the equity of redemption. That consequently, at the time of attachment, the defendant was only a mortgagee, and the suit to remove the attachment could not be maintained.

THIS was a Special Appeal against the decree of the Dis- Judge of Ahmednagar, in Appeal Suit No. 365 of 1858, reversing the decree of the Munsif of Pimpalgáon, who had found for the original plaintiff.

The Appeal was argued before FORBES and TUCKER, JJ.

Shántárám Náráyan for the appellant.

White and *Dhirajlál Mathurádás* for the respondent.

The facts of the case are sufficiently described in the following minute by TUCKER, J. :—

This action was brought by Náro-Hari Dásputre to remove an attachment placed on certain houses, with their sites, out-buildings, &c., and other *mirási* and *inám* lands, which formed the estate of the late Trimbakráv Mahádev Rája Bahádur by Vámanâji Koner, who had obtained a decree against the said estate.

The plaint set forth that the proprietory right in the property had passed to the plaintiff by virtue of two deeds executed by Anpurṇábái, widow of Trimbakráv Mahádev, the one as guardian to her infant son, and the other in her own name after the death of the said son, by which she mortgaged the said propertyto the plaintiff for terms which severally expired on the 6th of October 1855, with a stipulation that if the mortgage-debt were not paid off within the prescribed term, the entire proprietory right in the property was to pass to the plaintiff without further conveyance.

The defendant pleaded that the plaintiff was the uncle of the widow Anpurṇábái, and that the alleged transfer of the property was fraudulent and collusive, and made with the intent of defeating the just claims of her husband's creditors.

The property was found in the possession of the widow.

The Munsif, who held the original trial, found that the genuineness of deeds on which the plaintiff relied had not

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been satisfactorily established, and he decreed for the defendant.

This decision was upheld by the District Judge, C. M. Harrison, on appeal.

On a special appeal to the late Ṣadr Adálat, the case was remanded for re-trial, the Court being of opinion that the Judge had founded his judgment on precedents which had been overruled, and had recorded no opinion on the evidence.

At the new trial the same Judge reversed the Munsif's decree, and gave judgment for the plaintiff, on the following ground :—

"I find the bond No. 2 to be proved by the evidence of witnesses Nos. 38, 39, and 70, and No. 3 by the evidence of witnesses Nos. 38 and 39, 40 and 79, and also by the evidence regarding the payment of the amount of the same, Nos. 60 and 62, and as Vámaṇáji Koner has not brought forward any evidence to shake the above, I reverse the decree, with all costs on Vámaṇáji Koner."

In special appeal it has been urged on behalf of the defendant—

1*st*—That the Judge had not determined the issue of fraud and collusion which had been raised by the defence.

2*nd*—That, though admitting new evidence on behalf of the plaintiff, he had refused to allow the defendant to produce evidence which had been tendered to the Munsif, but which that officer, satisfied of the unsatisfactory character of the plaintiff's case, had not deemed it necessary to receive.

3*rd*—That, under the terms of the deed, the proprietory right to the property had not passed to the plaintiff, and that no Court of Equity would hold a mortgagee who had not obtained possession of the mortgaged property to have acquired an absolute proprietory title under such deeds; that the plaintiff had admitted that he had received part of the mortgage-debt, and that, under the ruling of the Court of Ṣadr Diváṇi Adálat No. 2890 dated 15th January 1853, this would bar foreclosure through mere lapse of time.

On the other hand, it has been contended for the plaintiff that the Judge had substantially determined that the deeds were executed for a good consideration, and were valid. That he had formed an opinion on all the evidence adduced

by the defendant, and that it was within his discretion to receive or refuse additional evidence in appeal. That, by the special agreement between the parties, the ownership of the property vested in the plaintiff on the expiration of the term specified in each deed, and that such agreements had been always given effect to by the late Ṣadr Adálat and present High Court, and that the doctrines of English Courts of Equity with respect to English forms of conveyance could not be applied to Indian deeds of mortgage and conditional sale, which were governed by the special usage of the country, which had been recognised and acted upon for a great number of years.

We are of opinion that it was the intention of the Judges, who remanded this cause to the lower appellate court for re-trial, that all the issues raised by the statements of the parties should be determined in accordance with the District Judge's view of the evidence; and we consider that the Judge has not recorded any clear finding with respect to the alleged collusion between the plaintiff and his niece Anpurnábái, and that so far the Judge's decision is defective.

We do not, however, remand the suit for a decisive finding on this point, as we are of opinion that at the time the attachment was made the mortgagor had not lost the equity of redemption, and that at the time the suit was brought the plaintiff was at the most only a mortgagee, and not in a position to demand the removal of the attachment. The term fixed by each deed expired on the 6th of October 1855, and, in conformity with the stipulations of either document, it was competent to the mortgagor, on the expiration of that term, to sell the property, and to apply the proceeds to the liquidation of the mortgage-debt, and it was only on her failure to adopt this course that the proprietory right in the property was to pass to the plaintiff. A contract of this nature implied that a reasonable time should be allowed to the mortgagor to dispose of the property, and the period of twenty-three days, which intervened between the date on which the payment of the debt could be demanded and the date on which the attachment took effect, was not, in our opinion, sufficient for the exercise of the power of sale, which remained with the mortgagor, and the mere fact that no sale was made within this interval cannot equitably be held to operate as a foreclosure. We, therefore, reverse the decree of the District Judge, but give no order with regard to the

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re-imposition of the attachment, which it is stated has been removed in consequence of the temporary reversal of the execution-creditor's decree. All costs to be borne by the plaintiff. We consider that the mortgagor should have been made a party to the suit.

Decree reversed.

Special Appeal No. 720 of 1863.

March 17. PUJU' bin KA'DAN and another.....*Appellants.*

MALHA'RI bin RA'MA'.....*Respondent.*

Sanads—*Settlement Officers—Act (Bombay) II. of 1863.*

Sanads granted by Settlement Officers, under the Bombay Act II. of 1863, do not prejudice the rights of third persons.

THIS was a Special Appeal against a decree of the District Judge of Khándesh. The plaintiffs' case was that they and the defendant Malhári held in common certain *inám* land alienated for the remuneration of the office of "*Gurav*" at Chálisgám, of which the defendant, Malhári, had one half for his share, and they the other half; but that since 1861-62, the period when the land was entered in the name of Malhári under the Summary Settlement, he refused to give them (plaintiffs) their share of the *inám* land.

The defence was a total denial of the plaintiffs' right to the land, and an allegation that it had descended to the defendant as ancestral property.

The Munsif found that both the parties had been doing service as *guravs*, and holding the land in common for some time, and gave a decree in the plaintiffs' favour. Against this decision an appeal was made to the District Judge of Khándesh, who reversed the Munsif's decree. The following is an extract from his judgment, showing the grounds for the reversal:—

"It is not proved that either party is an original *watandár*, and the *inám* land attached to the office appears to have been entered at times in the joint names of the parties.