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this issue of fact was final. Under this view, it is not necessary that I should determine whether the Collector practically affirmed the Assistant Commissioner's award on this point, as I hold that the question was not properly within the cognisance of a court of special appeal.

Decree confirmed.

Special Appeal No. 46 of 1864.

April 14.

SHEK ABDULLA' valad SHEK HASS DIVEKAR..... *Appellant.*

SHEK MUHAMMAD valad MUHAMMAD JA'FAR GOTYE ..... *Respondent.*

Mortgage—Destruction of Deed of Mortgage by Mortgagees—Secondary Evidence.

In a suit to redeem a mortgage, it was proved that the mortgagees and their assignee had fraudulently destroyed the deed by which the property was mortgaged.

Held—That the mortgagees could not be permitted to prove the contents of the deed or the amount of mortgage debt by secondary evidence, and that the representative of the mortgagor should be allowed to recover the lands without any payment.

THIS was a Special Appeal against the decree of the Senior Assistant Judge of Ratnágirí, in Appeal Suit No. 219 of 1860.

Shek Abdullá Divekar preferred a plaint in the Court of the Munsif of Chiplun against (1) Azizá, wife of Shek Abbás valad Abdul Kádar, (2) Shek Usmán *alias* Dádá valad Tátyá, Desái, and (3) Shek Muhammad valad Muhammad Jáfar Gotye, to redeem and recover possession of a *dhára* consisting of *thikáns*, *wakani*, and *umarpati*, and alleged that the same was entered in the names of his ancestors in the survey of A.D. 1783-84, and belonged to him by a proprietory title; but that for the last fifty years it had been in the enjoyment of the Desais, in whose name it had been subsequently entered in the Government *Goshavára* register. He had heard from his father that it was mortgaged to the Desáis, but neither they nor their manager, Gotye, would show how much was due to them. He claimed to recover the aforesaid *thikáns* on the payment of such sums as might be found due.

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The case made by defendant No. 3, Gotye, was, that the two *ṭhikáns* were the property of Gotye's family, who had mortgaged them to the Desáis, but, the mortgage having been paid off, the land was now absolutely in their possession; that neither the Desáis nor the plaintiff ever had possession; and that he (Gotye) held a release from defendant No. 1, Azízá, who has received the amount of the mortgage.

Defendant No. 1, Azízá, alleged that the disputed land belonged to the Gotye; that Gotye's ancestors had mortgaged it to her father-in-law, Abdul Kádar Desái; that she used to give for some time the annual *kabuláyat* (agreement) for the fields, which, however, were never in her possession, but were managed by the Gotyes, and that on payment of Rs. 240 to her by the defendant's brother, she gave him a release abandoning all her claims to the said lands.

Defendant No. 2 did not appear, but being examined as a witness stated that the *ṭhikáns* in dispute were mortgaged to Abdul Kádar Desái (deponent's grandfather) by the plaintiff's father, Alíbá Divekar, as per mortgage bond for Rs. 200, which was in the deponent's possession, but was stolen by the defendants Azízá and Gotye, and that the defendant Gotye had possession of the aforesaid *ṭhikáns* as manager on behalf of the defendants, Desáis.

The Munsif found that the proprietory title of the plaintiff was fully established; that the land in dispute was mortgaged by the plaintiffs' ancestors to the Desáis, but for what amount the defendants had not proved; and that the alleged release granted by the defendant Azízá to the defendant Gotye was collusive and fraudulent. He, therefore, decreed that the land be delivered to the plaintiff with costs.

Defendant Gotye appealed against this decision to the Senior Assistant Judge at Ratnágirí, alleging that the plaintiff had proved neither his own nor the Desáis' possession either within thirty or sixty years, that the Munsif had misappreciated the evidence, and that he had actually awarded beyond the plaint.

The Senior Assistant Judge, A. T. Crawford, passed the following judgment:—

"The Court has to decide—1*st*, whether the land is proved to be the property of the Divekar family; 2*nd*, whether a

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mortgage by the Divekar family to the Desáis has been proved; and 3*rd*, if so, at what amount Divekar can redeem.

"That the land is the property of the Divekar family and mortgaged to the Desáis is abundantly proved by evidence, and by the admission of the Desáis and Gotye in their mutual transactions regarding this very property, by the transactions of other parties with the Desáis and Divekars regarding this very land, and the other half of the *dhárá* (*vide* exhibits 45, 48, 49, 51, 74, 75, 106, 107), and by the *botkhat* for 1783 A.D. (No. 59), in which this very land is entered as Divekar's *dhára*. The chain of evidence produced by Divekar has but one break, and this it was not in his power to supply—it was the mortgage-bond itself, executed by his father to the Desáis.

"On the part of the appellant Gotye and the Desáis there is no real evidence whatsoever; there is but a *phárkhat* or deed of release purporting to have been passed by defendant No. 1, Azízá, a woman of the Desái family, to Gotye when he redeemed his alleged but not proven mortgage. It is pretty clear that Azízá would have no authority to pass such a document by herself, though she is the nearest heir, and the document itself bears date February 1859, while this suit was filed in August of that year. There are strong reasons, therefore, for believing (*vide* statement on solemn affirmation of defendant No. 2, No. 45, a Desái and exhibit No. 52, his petition) that directly Divekar began to move in the matter and make advances towards the redemption, Gotye got hold of the original bond through Azízá and destroyed it, and then got from her a paper settlement to meet his assertion that the Desáis were mortgagees from him, Gotye. The Court believes the whole transaction to be a fiction. As to the amount at which Divekar can redeem, the Court takes as the basis of its decision the statement of original defendant No. 2 when examined on solemn affirmation (No. 45), in which he states the mortgage was for 200 rupees. It is to be observed also that the other half of the same *dhára* was mortgaged by the Divekar to other parties for Rs. 205 (*vide* exhibits 106, 107). As to the allegation in appeal that there has been an error in the decree of the Munsif, inasmuch as he has awarded a plot of land not belonging to the Divekar *dhára*, the Court cannot see that this is the case. If so, when the decree is executed, any person aggrieved will have his remedy.

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"The Court, in amendment of the Munsif's decree, decrees that Divekar redeem the mortgage, and be put in possession of the land claimed on payment to Azízá of Rupees 200.

Against this decision the plaintiff presented a special appeal, on the ground that the Judge ought not to have ordered him to pay a large sum for the redemption of the mortgaged *thikáns*, until the defendants, one of whom was believed to have destroyed the original bond, had proved by reliable evidence what sum was due to him.

The Appeal was heard by FORBES and TUCKER, JJ.

Ganesh Hari Patvardhan for the appellant.

PER CURIAM :—We are of opinion that the Munsif's decision was correct, and that the lands should be restored to the plaintiff without any payment. The lower courts have found it proved that the mortgagees (the Desáis) and their assignee (the defendant Gotye) have been guilty of fraud, and that with the view of depriving the plaintiff of the equity of redemption they have destroyed the deed by which alone the exact amount of any debt now due could have been correctly determined. Under these circumstances, secondary evidence to prove either the contents of the deed or the amount of the debt was not admissible, and the statement of the second defendant, which the Senior Assistant Judge has relied upon in fixing a sum to be paid prior to redemption, should not have been taken into consideration for this purpose. We reverse the decree of the Senior Assistant Judge with costs, and affirm the decree of the Munsif.

Decree reversed.