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GIRJOJI BHIKA'JI v. KESHAVRA'V N. HINGE.

"I, therefore, reverse the Munsif's decree, and award Keshavráv Rs. 480 : costs in proportion."

The grounds of objection taken in special appeal were: (1) That the Assistant Judge had not allowed interest on the amount proved by him to have been realised by the plaintiff, although he allowed him interest equal in amount to the principal sum advanced; and (2) that he was in error in holding that a mortgagee in possession was not bound to cultivate garden land with its ordinary crop.

The case was heard before ARNOULD, Acting C.J., and NEWTON, J.

Dhirajlál Mathurádás for the appellant.

Shántárám Náráyaṇ for the respondent.

PER CURIAM :—We hold that Keshavráv, having obtained possession of the land, was bound to cultivate the ordinary crop which it was capable of yielding. We, therefore, reverse the Assistant Judge's decree; and confirm that of the Munsif, with costs.

Appeal allowed.

Oct. 5.

Special Appeal No. 717 *of* 1863.

A'NANDRA'V and DEVRA'V, sons of SADA'SHIV. *Appellants.*
RA'VJI, son of DASHRATH ..... *Respondent.*

Mortgage—Redemption—Directions for an Account.

The rule of Courts of Equity in England as to allowances to a mortgagee in possession not applied; because the mortgagee was led into a belief, by the course of decisions in the late Sadr Adálat, and the general understanding caused by those decisions, that upon the non-payment, by the mortgagor, of the money at the time fixed, he had, according to the terms of the mortgage instrument, become the absolute owner of the property.

Mortgagee allowed benefit for buildings erected, or permanent improvements made, by him upon the mortgaged premises.

THIS was a special appeal against the decision of the Acting Judge of the Konkaṇ, in Appeal Suit No. 488 of 1862, confirming the decree of the Munsif of Alíbág.

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The plaintiffs, A'nandráv and Devráv, sued the defendant to recover possession of some land, and clear the same of buildings which the defendant had built thereon, and also for Rs. 225, the value of a house which the defendant had destroyed. The plaintiffs alleged that the said land had been mortgaged by their father to the father of the defendant on the 16th of March 1829, on a bond for Rs. 225, but that Rs. 186 only had been received by the mortgagor. The latter sum the plaintiffs expressed their willingness to repay.

The defendant, Rávji, answered that the plaintiff's father had received, in three items, Rs. 225; and mortgaged the land in dispute, as security for Rs. 100 out of that sum, with the condition that, on non-payment of Rs. 100 within ten years, the mortgage was to be foreclosed. The payment not having been made, the defendant was now the owner of the property, and he had spent Rs. 6,000 in erecting buildings on the land.

The Munsif found that the property had become sold to the defendant's father for Rs. 100, agreeably to the terms of the mortgage instrument. The plaintiffs' claim was, therefore, thrown out with costs.

The District Judge, though differing from the Munsif in his interpretation of the mortgage bond, affirmed his decision in appeal.

The following is an extract from his judgment:—

"The Court holds that, though defendant cannot prove that the mortgagee advanced the whole consideration for which the bond was passed, and though it appears that he failed to do so by Rs. 39, still this fact does not affect the transfer of the property from the plaintiffs to the defendant on their failing to pay, within ten years after the bond, *whatsoever sum might have been due by them.*

"The question is reduced to a case of sale, in which the whole purchase-money was not paid at the time of sale. The plaintiffs have remained with a right to receive the unpaid portion of the purchase-money, but the defendant has

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become the owner of the property. Whether the plaintiffs can now realise their right or not, the defendant's possession of the property cannot be interfered with."

The case came on for hearing before COUCH and NEWTON, JJ., on the 7th of March 1864.

Dhirajlál Mathurádás for the appellants :—The appellant had not received the full amount, viz., Rs. 225, mentioned in the mortgage bond; and such being the case, the Acting Judge had erred in ruling that the property was foreclosed for a portion of the mortgage money. A sale or foreclosure of mortgage property is not complete, unless the full consideration money is paid. By Reg. V. of 1827, Sec. 8, no length of time prevents courts from entertaining suits brought for recovering property held in mortgage, pledge, pawn, or deposit, or by other title conferring only a right of possession, and not a right of ownership; and the decision of the District Judge was opposed to the principle laid down in Special Appeal No. 100 of 1861.

Vishvanáth Náráyan Mandlik (with him *Ganpatráv Bháskar*, and *Ganesh Hari Patvardhan*) for the respondent :—One of the appellants has become an insolvent, and has no standing in the court.

Postponed to enable Official Assignee to become a party. (*a*)

Sep. 14. *Dhirajlál* :—By Special Appeal No. 299 of 1864 (*b*), it was decided that a mortgagor could redeem his property any time within sixty years, even if the period stipulated for repayment of the money had elapsed, and the mortgagee had become the absolute owner of the property, according to the terms of the mortgage instrument.

White, contra :—The respondent has become the absolute owner of the property, in virtue of a stipulation in the

(*a*) He was not, however, made a party, as he ceased to have an interest in the estate before the appeal again came on for hearing.

(*b*) *Rámji* v. *Chinto*, decided 31st August 1864, by ARNOULD, Acting C.J., NEWTON and JANA'RDAN VA'SUDEV, JJ., and since reported in 1 Bom. H. C. Rep 199.—ED.

mortgage bond. The decision in S. A. No. 299 should not be made applicable to this case. In this suit the mortgagee (respondent) has been in possession of the property for more than twenty years; and, by the uniform decisions of the late Sadr Court since 1820, mortgagees have been declared to become absolute owners of property on the mortgagors not paying the money at the appointed time, and the mortgagors debarred of their right of redemption. There is nothing peculiar in the circumstances of this case which would compel the court to apply the English rule of the equity of redemption of mortgagor; and the point was not raised in the memo. of special appeal. A considerable portion of the landed property in the Mofussil is held by mortgagees, and that inconvenient precedent would revolutionise their tenures, and unsettle the minds of the people. The respondent has erected buildings on the land at a very large expense, and the adoption of the precedent in this case would deprive him of the property, which unquestionably has become his, according to the law as it has hitherto prevailed. If there is any hardship inflicted on mortgagors, the Legislature ought to be moved, and the people given ample time before the new law is enforced.

The Court took time to consider its judgment, which was this day (Oct. 5) delivered by NEWTON, J. (*c*)

JUDGMENT:—The instrument of mortgage in this case was made in 1829, and purported to be a security for Rs. 225, lent by the mortgagee to the mortgagor. Of this sum, Rs. 39 were not, in fact, advanced, but the mortgagee was let into possession of the premises, and the mortgagor, in 1833, brought a suit against him, and obtained a decree, declaring that the Rs. 39 had not been paid to him.

If the mortgagee had had to bring a suit to obtain possession of the mortgaged premises, it might have been necessary for him to show that he had advanced the whole of the money, and the decision of the Sadr Court, No. 100

(*c*) In the absence of COUCH, J., who was sitting on the Original Side of the Court.

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of 1861, which has been cited for the appellants, would have been applicable; but, the mortgagee having been let into possession, we are of opinion that the mortgage must be considered as having become a security for the sum actually lent, and not for the whole Rs. 225, as held by the Assistant Judge; and that the property became bound by its provisions.

According to the law applied by the late Ṣadr Court to such instruments as this, the money not having been paid at the time appointed, the right of the mortgagee became absolute; but since the decision of this court in S. A. No. 299 of 1864, *Rámji* v. *Chinto*, we feel bound to hold that the plaintiffs in this suit (the heirs of the mortgagor) are entitled to redeem the property, although this point was not raised by the grounds of appeal to this court. All we have, therefore, now to determine is, what account shall be taken between the parties.

The right of redemption, being the creature of equity, must be subject to the rules of equity. The course of decision in the late Ṣadr Court, and the general understanding of the law caused by those decisions, as well as those of subordinate courts, may reasonably have led the mortgagee to believe that upon the non-payment of the money at the time fixed, he had become the absolute owner of the property, and might deal with it in any way he thought fit. This circumstance, we think, renders it inequitable to apply to the present case, as was done in Special Appeal No. 299 of 1864, a rule of Courts of Equity in England as to allowances to a mortgagee in possession, in the making of which regard must have been had to the fact that the mortgagee would be aware of the nature of his interest in the property, and that he was liable to have the land redeemed. We ought to make an allowance to the defendant for an expenditure made *bonâ fide*, and under a reasonable belief caused by the decisions of the courts that he was entitled to make it. Being of opinion, as we are, that the provisions of the instrument of mortgage apply, although the whole of the money was not paid, the mortgagee was, according to the state of the

law in 1859, when the notice to him not to build was given, entitled to disregard it, and he ought to be allowed for the building then erected, as well as for the two granaries built in 1844. As the defendant is not charged with the rents and profits, or an occupation rent, we think no allowance should be made for necessary repairs.

We, therefore, reverse the decree of the Assistant Judge; and refer the suit to him, to take an account of what is due to the defendant for the principal sum of Rs. 186, and interest at eighteen per cent. per annum on Rs. 86, the part of it that carried interest, from the period of six years before the filing of the plaint, to the time of taking the account, and an account of all sums of money laid out or expended by the mortgagee or the defendant in buildings or other permanent improvements upon the mortgaged premises, making all fair and reasonable deductions from the cost thereof for depreciation by lapse of time or other causes; and to pass a decree that, on payment by the plaintiff to the defendant of what shall be found due on taking such account, with interest at six per cent. to the time of payment, and the costs of this suit, including the costs of the appeal and special appeal, within six months from the date of the decree, the defendant shall reconvey the mortgaged premises to the plaintiff free from incumbrance, and deliver up all writings in his custody or power relating thereto; but in default of the plaintiff paying the same within the time aforesaid, the suit shall be dismissed with costs, including the costs of the appeal and special appeal, and the plaintiff shall be foreclosed of all right or equity of redemption in or to the mortgaged premises, unless the plaintiff shall, within the said six months, elect to have the property sold, and apply to the Assistant Judge for that purpose, in which case he is to pass a further decree, decreeing that the mortgaged premises shall be sold under his directions, and, after payment of what is due to the defendant as assessed, that the balance of the proceeds thereof shall be paid to the plaintiff.

Decree reversed and suit remanded.