1871.
Aug. 18.

Special Appeal No. 498 *of* 1870.

RA'MSHET BACHA'SHET .....*Appellant.*

PANDHA'RINA'TH, son and heir of Krishṇáji Bháu.....*Respondent.*

Mortgage—Equity of Redemption—Foreclosure—Lâches—Improvements—Repairs—Interest—Accounts.

R. mortgaged certain land to A. in 1844, stipulating that if he (R.) failed to pay a moiety of the mortgage-money within three years, or wholly redeem within five years, from the date of the mortgage, the property mortgaged should be considered as sold to A. The property remained in the possession of R. till 1847, at the end of which he gave it into the possession of A., R. then believing that he had thereby lost all right to the property. Subsequently to 1847 the property changed hands. The absolute right was first sold in 1855, and then on two occasions in 1862. At this time R. did not raise any objection to the property being sold, although he was fully aware of the fact.

R. had also admitted, in a suit brought against him in 1850 by A., that he had sold the land to A.

In a suit brought by R. against A. in 1867 to redeem the mortgaged property—

Held (following the decision in Special Appeal No. 299 of 1864) (*a*) that R. was entitled to redeem the property.

Held also that, under the peculiar circumstances of this case, the court would not be justified in calling upon the mortgagees to furnish accounts of the rents and profits on the one hand, and of the principal and interest on the other.

Interest on the value of improvements made since the time the property came into the hands of A. disallowed.

THIS was a special appeal from the decision, on remand, of W. M. P. Coghlan, Acting District Judge at Tháṇá, in Appeal Suit No. 363 of 1868.

The special appeal was argued before GIBBS and WEST, JJ.

Shántárám Náráyaṇ for the appellant.

Dhirajlál Mathurádás for the respondent.

The facts of the case, so far as material, appear from the judgment of the Court, delivered by

WEST, J.:—This was an action to redeem from mortgage, and recover possession of, a field alleged to have been mortgaged to the defendant. It was tried in the first instance by

(*a*) *Rámji* v. *Chinto*, 1 Bom. H. C. Rep. 199.

1871.

RA'MSHET BACHA'SHET v. PANDHA'RINA'TH.

the Munsif of Alibág, who dismissed the claim, and his decree was confirmed by the District Judge at Thánáá, Mr. A. Bosanquet. Both these courts being of opinion that the plaintiff had admitted, twenty years before the institution of his present suit, that the proprietary title in the field had passed from him, and that the field had, to his knowledge, changed hands twice, he lying by without making any objection; and that, therefore, the doctrine of equity, "once a mortgage always a mortgage," first recognized by this court in the case of *Rámji* v. *Chinto* (1 Bom. H. C. Rep. 199) should not be applied. A special appeal having been preferred to the High Court, WARDEN and LLOYD, JJ., considered that "the lower courts were in error in holding that the plaintiff had forfeited the equity of redemption, because he had in another suit, in which the subject of the mortgage was not at issue, made an admission that the mortgaged property had been sold to the mortgagee; their decisions being based solely upon this admission, and not on any proof of there having been any *bonâ-fide* sale of the property by any special agreement between the parties. The admission of the plaintiff was merely in accordance with the interpretation given to the law of mortgages at that time by the court in this Presidency, namely, that if property was not redeemed within the period fixed for foreclosure, the mortgagee acquired a proprietary title to it. In accordance with the decision in Special Appeal No. 299 of 1864, the court are of opinion that the plaintiff is entitled to redeem the property. The decrees of the lower courts are, therefore, reversed, and the case remanded for the investigation of the second and third issues framed by the Munsif. In trying these issues the principle laid down in Special Appeal No. 717 of 1863, Vol. II., p. 214, 2nd ed., should be borne in mind." These issues were: whether (1) the defendant A'tmárám has expended any money in improving the land; and (2) if the plaintiff be allowed to redeem the land, what amount should he pay, and to which of the defendants.

It is to be observed that the mortgage was effected in 1844 for Rs. 300, and that there was a stipulation that if the

1871.

RA'MSHET BACHA'SHET v. PANDHA'RINA'TH.

mortgagor failed to pay a moiety of the mortgage-money within three years, or wholly to redeem within five years, the property mortgaged should be considered as sold to the mortgagee. Possession of the mortgaged property remained with the mortgagor for three years, at the end of which it passed to the hands of the mortgagee, who then, according to the law of mortgage as recognised at the time, became the absolute owner. Subsequently to 1847 the property changed hands. The absolute right was first sold in 1855, and then on two occasions in 1862, and it is the representative of the latter purchaser of 1862 who is the defendant in the present suit.

The case in its present shape comes before us fettered to a certain extent by the decision of a Division Bench of this court. Had it come now before us for the first time, we might have dealt with it on other grounds, such as limitation; but as it is we are called upon to dispose of the case only so far as the new decree of the lower court requires us to do so. We say this because we might otherwise be considered to have passed over points which obviously would arise in such a case.

Mr. Shántárám has urged that the lower court ought to have directed an account to be taken of the rents and profits on the one hand, and of the principal and interest according to the mortgage-deed on the other. The effect of the case of *Rámji* v. *Chinto*, he urged, is not to create, in cases like the present, a new contract. It only wipes out the title which the mortgagee would, under the law as interpreted before that case, have acquired under his possession. He adds that though it might be impossible to obtain proper accounts from the year 1847 down to the institution of the suit, owing to the mortgaged property having changed hands, yet that we ought to direct the lower courts to arrive at an approximate result by an estimate of the profits realized on property situated in the neighbourhood of the property in dispute.

We think that under the peculiar circumstances of this case we should not be justified in calling upon the mort-

gagees to furnish accounts. This case differs from ordinary redemption cases in this, that here there was absolute delivery of possession to the mortgagee by the mortgagor, who, when he gave up that possession, fully knew that, as the law was then understood, he thereby lost all right to the property, and subsequently, though fully aware that the field was sold over and over again, he stood by in silence, and so led purchasers to believe that they were purchasing an unincumbered estate. After a lapse of twenty years he comes forward to take advantage of a new interpretation of the law of mortgage. In arriving at a decision on this question, all the facts of the case must be considered. It will be impossible to get proper accounts, and owing chiefly to the plaintiff's own lâches. On this point we may refer to Fisher on Mortgages, p. 881, where he says: "The account usually directed against the mortgagee in possession either of tangible property or of a business is of what he has, or without wilful default might have, received from the time of his taking possession. This, it is said, is the only instance in which the court directs an account in this form without any special case made for the purpose. And the mortgagee will not be subjected to it, unless it be shown, not merely that he was in possession, but that he was so in the character of mortgagee. If he enter and receive the rents under an agreement of tenancy, or in the real or supposed character of purchaser, or otherwise do not assume to receive them as mortgagee in possession, he will not be liable to this form of account."

Mr. Shántárám has also objected to the award of interest on the value of improvements. The Judge below calculated the improvements at their present value, and we think he was thus far right; but he was in error in awarding interest upon the sum so fixed. He was apparently led into this error by failing to see the distinction which exists between improvements and repairs. The case of *Rágho* v. *Anáji* (5 Bom. H. C. Rep., A. C. J. 116), cited by him in support of his decision, was a case of repairs. There the Chief Justice and Mr. Justice Newton, concurring with the ruling of the Bengal High Court in *Jogendronath* v. *Raj Narain* in 9

1871.

RA'MSHET BACHA'SHET v. PANDHA'RINA'TH.

Calc. W. Rep., Civ. R. 488, remanded the cause for the lower court to inquire and determine what sums had been expended by the mortgagee in the proper and necessary repairs of the mortgaged property, and directed the lower court to pass a new decree allowing the same to the mortgagee with interest. If the mortgagor had remained in possession of his own property, he would naturally have kept it in repair; and it is, therefore, fair that when the mortgagee is in possession and expends money upon it for necessary repairs, the mortgagor should pay interest upon it, as it is expended on his behalf. In the case before us the expenditure incurred by the mortgagee is not of this nature, but optional—made for his own benefit, which has been his proper compensation, and not necessary for the maintenance of the mortgaged property in the state it was when it came into his hands. However reasonably he may have acted in making improvements, and however justly he may be entitled to their precise value, he cannot, according to the old maxim, be allowed by the accumulation of interest otherwise repaid, or entering into the present value of the improvements, to improve the mortgagor out of his estate. We must, therefore, disallow this item on account of interest. Finally, with regard to costs, we think that, under the peculiar circumstances of this case, each party should bear his own.

Decree amended.