

[APPELLATE CIVIL JURISDICTION.]

1873.
August 19.*Special Appeal No. 263 of 1873.*

BAKSHIRA'M GANGA'RA'M... ..*Defendant and Appellant.*
 DA'RKU TUKA'RA'M*Plaintiff and Respondent.*

Mortgage—Improvements—Accretions—Redemption—Code of Civil Procedure—Sec. 7 of Act VIII. of 1859.

The holder of field, on the Survey tenure, mortgages it with possession, secured by a registry of the mortgagee's name as occupant. Certain fruit trees, coming under the operation of No. 3 of the Revised Survey Rules, are sold, by the Government, to the mortgagee as occupant:—

Held that the trees, by the sale, become a portion of the mortgaged estate, and, as such, liable to redemption, on payment of the amount of the mortgage money with interest, of the money laid out in purchasing the trees, and of other reasonable expenses.

Held also that a suit for redemption of land, without specification of details, includes a claim for restoration of all accretions and improvements which it may have received while in the hands of the mortgagee; and if the Court omits to adjudicate upon part of the claim, the mortgagor is not precluded, by Sec. 7 of Act VIII. of 1859, from bringing a second suit in respect of that part.

THIS was a special appeal from the decision of A. Bosanquet, District Judge of Ahmadnagar, confirming the decree of the Subordinate Judge of Sangamner.

The facts of the case are briefly as follows:—

The plaintiff, Dárku, mortgaged in 1846 a field, of which he was the holder under Government, to the defendant Bakshiráam. In December 1865 the latter being in possession of the field, and entered as occupant in the Collector's books, the Government sold to him, under the survey rules, some mango trees, which Dárku also had applied to purchase. At the beginning of the year 1866, Dárku sued Bakshiráam for redemption of his field, without specifically including, in his claim, the mango trees on the land which had been sold by Government to the mortgagee while he was the registered occupant of the land.

In August of the same year a decree was made in the plaintiff's favour for the land only. Dárku, therefore, in

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November 1870 brought the present suit to recover the mango trees also. The defendant, *inter alia*, pleaded that the suit was barred by Sec. 7 of Act VIII. of 1859, and that the trees were sold by the Government, who were the owners thereof, to him, independently of, and in preference to, the plaintiff. The Subordinate Judge as well as the District Judge awarded the plaintiff's claim.

The special appeal was heard by WEST and NA'NA'BHA'I HARIDA'S, JJ.

Ganpatráv Bháskar for the appellant :—When the plaintiff in 1866 brought his suit for redemption of his field, the trees had been sold to the defendant by the Government; and he should have asked for their restoration in that suit. Not having done so, his second suit is barred by Sec. 7 of the Civil Procedure Code: *Báloji v. Tamangoudá* (a). The plaintiff applied to Government for a purchase of the trees, but the Government refused to deal with him, and sold them to Bakshiráam, who thereby became the absolute owner.

Bahiravnáth Mangesh for the respondent :—The suit is not barred by Sec. 7: see *Kákáji v. Bápuji* (b). The mortgagee, when he bought the trees, was only entitled to an additional security, but on payment of the purchase money and other reasonable expenses, he was bound to deliver up possession of the trees.

WEST, J.:—We have no doubt that the appellant in this case, Bakshiráam, procured a sale of the mango trees to him in his character as occupant of the land which he held as mortgagee from the plaintiff Dárku. The third of the revised survey rules, published at page 109 of Mr. Nairne's compilation, says, "The survey tenure includes the right in all trees standing in occupied lands subject to the following exceptions. * * *

P. (iii) Fruit trees belonging wholly or partially to Government the property in which has not been specially assigned to the occupant or purchased by him."

(a) 6 Bom. H. C. Rep. A. C. J. 97.

(b) 3 Bom. H. C. Rep. A. C. J. 205.

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It is quite clear from this rule that the intention of Government was that its ownership should not be parted with, except to the occupant of the land in which trees, its property, might be standing. It is clear also that, on a sale to an occupant, the ownership was intended to coalesce with his right to the occupancy, and, thenceforth, become identical with it. There was no public sale in this case; and when Dárku, the mortgagor, applied for a sale of the trees to him, he was told that he could not be dealt with until he recovered the land. Bakshirám was the registered occupant, and the sale could be made only to him; but having been thus made, the trees, the subject of it, became at once a portion of the holding in his hands. It was as mortgagee that he was occupant, and as mortgagee he got possession of the trees which could be sold to him only as occupant.

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The estate, therefore, including this accession to it of the trees, was liable to redemption by Dárku. If, as appears, the instalment of payment for the trees had still in part to be made good, an account might be taken between Dárku and Bakshirám on that footing. Bakshirám could not, as mortgagee, equitably claim more than the benefit as a security of the addition to the property. He could not use his position to obtain an advantage, whose precise measure would be the loss thus occasioned to the mortgagor in whose stead he had dealt with Government (Fisher on Mortgage 337, 887). On payment to him of the mortgage money and interest, of the money expended by him in purchasing the trees, and of reasonable expenses, he was bound to deliver up possession of the improved estate to Dárku.

In this posture of affairs, Dárku sued to redeem the land. He did not specifically refer to the trees, nor, as we understand, did Bakshirám. But in suing for redemption of his estate, a mortgagor sues for it, without specification of all conceivable details in the state in which it exists at the time. If it has received accretions, or improvements, he claims these in claiming a restoration of that with which they have blended, or to which they have become accessory. On the

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other hand, the mortgagee may demand, as a condition of the order for restoration, that all sums properly expended by him shall be made good. That the expenditure by Bakshirám in buying the mango trees was a proper one is acknowledged. The Court, therefore, might, in the redemption suit, have directed an account to be taken, including the price of the trees, and decreed redemption of the whole estate on payment of the sum thus ascertained to be due. Instead of this, it decreed redemption of the land only, on payment of the original mortgage sum, without the trees. It is now contended that no new suit will lie for the trees, as either they were omitted by the plaintiff from his plaint, or else should have been recovered in execution in the former suit; but, we think, that the claim in that suit might reasonably have been, and ought to have been, construed to include them, and that the Court having failed to adjudicate upon this portion of the claim, a fresh suit based on it is competent to the plaintiff: *Seddon v. Tutop* (c), 2 Ev. Poth. 347. There are many cases in the Courts in India which support this view, of which it is sufficient to refer to *Rádhábái v. Rádhábái*, (d), and the recent case of Special Appeal No. 10 of 1872, decided on the 10th June 1872, by Sir C. SARGENT and Mr. JUSTICE MELVILL.

The legal possibility of urging his claim being once admitted, the plaintiff is plainly entitled to retain the decree he has obtained in the District Court. We, therefore, confirm that decree with costs.

(c) 6 T. Rep. 607.

(d) 4 Bom. H. C. Rep. . C. J. 181.