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1880
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APPELLATE CIVIL.

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Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Mr. Justice M. Melvill.

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LAKSHMAN BHISAJI SIRSEKAR (*Original Plaintiff*), *Appellant v.* HARI DINKAR DESAI AND OTHERS (*Original Defendants*), *Respondents.**

[17th March, 1880.]

Mortgage—Redemption suit—Accounts—Costs of repairs—Civil Procedure Code (Act X of 1877), s. 53—Practice—Variance—Cause of action.

The plaintiff sued to redeem a mortgage, alleging that it was made in the year A.D. 1821 for Rs. 25. The defendant admitted the mortgage, but alleged [585] that it was made in A.D. 1791 for Rs. 110, and contended that the suit was barred by limitation. The Subordinate Judge held that the mortgage had been made for the amount and at the date alleged by the defendant, but that the suit was not time-barred, as the mortgagor's title had been acknowledged by the mortgagee within the period of limitation. He, accordingly, made a decree for redemption on terms consistent with the plea of the defendant, but opposed to that of the plaintiff. In appeal the Assistant Judge agreed with the first Court as to the merits of the case, but reversed its decree on the ground that the plaintiff was not entitled to succeed on state of facts inconsistent with the case set forth in the plaint, observing that a plaintiff ought not to be allowed to change his cause of action.

Held, by the High Court on second appeal, that the decree made by the first Court in favour of the plaintiff, did not in any way proceed upon a cause of action different from that made in the plaint, and that the cause of action remained the same, namely, the right of the mortgagor to redeem from a mortgagee.

A plaintiff ought not to be allowed to alter his case, so as to convert a suit of one character into a suit of another and inconsistent character.

In a redemption suit a mortgagee is entitled to credit for reasonable costs of repairs, if he renders an account of rents and profits.

[**Diss.**, 18 A. 403=A.W.N. (1896) 132; **Appr.**, 27 B. 271; **R.**, 17 B. 365 (368); L.B.R. (1893—1900) 73 (74); 3 O.C. 173.]

THIS was a second appeal from the decision of J. L. Johnston, Acting Assistant Judge at Ratnagiri, reversing the decree of A. K. Kothere, Subordinate Judge (Second Class) at Rajapur.

This suit was brought by the plaintiff, who sued for the redemption of the half share of a field. He alleged that the field in question had been mortgaged by his father and two other persons to Dinkar, father of defendant No. 1, for Rs. 25 on *Jyesth Vadya* 1, *Shaka* 1743 (A.D. 1821); that half of the field having been redeemed by the son of one of the mortgagors, the present suit was brought for the redemption of the remaining half. The plaint was filed in March 1873. The defendant No. 2 was made a party to the suit, because he held the land in dispute along with other property as a mortgagee from defendant No. 1.

Defendant No. 1 answered (among other things) that the mortgage of the field had been effected in *Shaka* 1718 (A.D. 1791) and not *Shaka* 1743 (A.D. 1821); and that the original loan was Rs. 110, and not Rs. 25, as alleged by the plaintiff. He contended that the suit was barred by limitation; and that, if it were held not barred, he was entitled to Rs. 1,130-7 on account of principal, interest, and repairs. Defendant No. 2 submitted [586] that plaintiff was not entitled to redeem without payment of the money due to him as mortgagee from defendant No. 1.

* Second Appeal No. 450 of 1879.

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The Subordinate Judge held that the allegations of the defendant, as to the date and amount of the mortgage, were proved. He, however, held the suit not barred by limitation, inasmuch as the title of the mortgagors had been acknowledged, in writing, by the mortgagee before the expiration of the period of limitation. He, therefore, made a decree in favour of the plaintiff for redemption on payment of Rs. 84-11-3 to the defendant No. 2 within six months after which the right to redeem was foreclosed.

From this decision both the plaintiff and defendant No. 1 appealed to the District Court of Ratnagiri. One of the issues in appeal was, whether the plaintiff, after having failed to prove the case set up in the plaint, was entitled to a decree on another and a different ground. The Assistant Judge, in appeal, held that the suit was not barred by limitation, but dismissed the claim of the plaintiff, on the ground that, having failed to prove his case as stated in the plaint, he was not entitled to an award upon another and a different ground. The plaintiff thereupon appealed to the High Court.

Rao Saheb *V. N. Mandlik*, for the appellant.—Both the lower Courts have held the mortgage proved, and defendant No. 1 to be a mortgagee. The Assistant Judge, therefore, was wrong in throwing out the plaintiff's claim, simply because the terms of the mortgage, as stated by the plaintiff, were not proved. The plaintiff did not change his cause of action. The cause of action in the suit is the right to redeem.

Shivshankar Govindram, for respondent.—The plaintiff failed to prove his case as alleged in the plaint. He tried to prove it by forging Ex. No. 39 as the deed of mortgage. The Courts below have held it not proved. The real deed of mortgage is Ex. 9, produced by defendant No. 1. The Assistant Judge, therefore, was right in holding the plaintiff not entitled to succeed on a case different from his own. Defendant No. 1 has redeemed the sub-mortgage held by defendant No. 2. The Subordinate Judge, notwithstanding this, paid him the money which plaintiff had paid into Court. This was a mistake, and ought to be rectified.

JUDGMENT.

[587] MELVILL, J.—In this case the plaintiff sued to redeem a mortgage, and the plaint alleged that the mortgage was for the sum of Rs. 25, and was made in the year A.D. 1821. The first defendant, in his written statement, admitted that he held as mortgagee, but alleged that the mortgage was for Rs. 110, and made in the year 1791; that the suit was, consequently, barred by limitation, but contended that, if the Court should hold otherwise, he was, at any rate, entitled to a much larger sum than was offered by the plaintiff.

The Subordinate Judge found that the mortgage had been made for the amount and at the date alleged by the defendant, but that the suit was not time-barred, inasmuch as there had been an acknowledgment of the mortgagor's title within the period of limitation. He, accordingly, made a decree for redemption on terms consistent with the plea of the defendant, but opposed to that of the plaintiff.

In appeal, the Acting Assistant Judge concurred in the view taken by the Subordinate Judge as to the merits of the case, but reversed this decree, and rejected the claim, on the ground that the plaintiff was not entitled to succeed on a state of facts which was inconsistent with the case made in the plaint.

The judgment of the Acting Assistant Judge is, from his point of view, a well-reasoned judgment; but it appears to us that such a point of

view is not that from which he ought to have regarded the case. He says: "The original mortgage-deed, Ex. 9, being naturally in the hands of the defendants, the mortgagees, what was plaintiff to do? He got Ex. 35 forged, and thus forced his adversaries' hand, and in self-defence Ex. 9 was produced by them. So far plaintiff has been successful; but is it right that he should win on a point not mentioned in his plaint, and of which defendants had no notice?" He then goes on to refer to several cases, as showing that a plaintiff ought not to be allowed to change his cause of action, or to make a case opposed to that stated in his plaint.

We agree with the Acting Assistant Judge, that a plaintiff ought not to be allowed (to use the words of s. 53 of Act X of 1877) to alter his case "so as to convert a suit of one character into a suit of another and inconsistent character." But has he been allowed to do this in the present instance?

[588] The matter stands thus:—The plaintiff alleged that the first defendant held the property in dispute as mortgagee, and that he, as representative of one of the mortgagors, was entitled to redeem. The first defendant admitted that the relations between the plaintiff and himself were those of mortgagor and mortgagee, but contended that the right to redeem was barred by limitation. This contenton was decided in favour of the plaintiff and against the defendant. The question of limitation being thus eliminated, the plaintiff became entitled to a decree, founded upon the cause of action stated in the plaint, and upon no other. Up to this point it was immaterial to consider whether the mortgage had been made for the amount and on the date stated by the plaintiff, or for the sum and at the time alleged by the defendant. When it became necessary to determine what amount the plaintiff had to pay, then and not before, these questions became material. It was then found that the defendant's allegations on these points were true and those of the plaintiff false; and it followed that the plaintiff could only have the decree, to which he was entitled, upon payment of a larger sum than he would have had to pay if the allegations contained in his plaint had been true. But the decree so made, did not in any way proceed upon a cause of action different from that made in the plaint. The cause of action remained the same, namely, the right of a mortgagor to redeem from a mortgagee. The case was not that of a plaintiff setting up a false cause of action, and, when that failed, trying to succeed upon another and inconsistent cause of action; but it was rather the every-day case of a plaintiff who has a good cause of action, but exaggerates his claim, or (which is the same thing) underrates his own liabilities, and brings false evidence to prove that he is entitled to more, or liable for less, than he is really entitled to, or liable for. It might promote honesty among litigants if every plaintiff who demanded more than his due, and who supported his demand by perjury or forgery, were made to forfeit the whole of his claim; but it is almost needless to say that that is not the law: *Ranee Surnomyee* v. *Maharajah Sutteeschunder Roy Badadur* (1). Such a plaintiff may properly be mulcted in costs, or he may be punished in a Criminal Court; but, if he have a good cause of action, a Civil Court must give him a decree for so much of his claim as he succeeds in establishing.

[589] It follows that we must reverse the decree of the Acting Assistant Judge, and restore that of the Subordinate Judge, though with certain variations. It appears from Ex. 63 that Govind, the representative of one of the mortgagors, redeemed his share of the mortgaged property on

(1) 10 M.I.A. 123.

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payment of Rs. 8-1-0, which is stated in the document to have been the portion of the debt which had been incurred by Govind's predecessor in title, and which was secured on Govind's share of the property. As the plaintiff relies on this document as saving him from the operation of the statute of limitation, he cannot dispute the correctness of the statements contained in it. It follows that the balance of the whole debt of Rs. 110, after deducting the Rs. 8-1 secured on Govind's share, must be taken to be the debt secured on the remainder of the property which remains unredeemed; and the plaintiff can only redeem upon payment of this sum.

As the mortgagee has been all along in possession of the mortgaged property, it would seem that there ought to have been an account of rents and profits on the one side and of interest on the other. Both parties, however, appear to have been willing to dispense with an account, and to have acquiesced in the course adopted by the Subordinate Judge, namely, that of allowing interest for six years on the principal sum found due. We shall not, therefore, interfere with the Subordinate Judge's order in this respect: but, in the absence of any provision for taking an account, we cannot hold the defendants entitled to any allowances on account of the cost of embanking the land. If the mortgagee had rendered an account of rents and profits, they would, of course, have been entitled to credit for reasonable costs of repairs; but such costs were necessarily incident to the enjoyment of the profits, for which they have not been called upon to account.

The pleader for the first defendant complains that moneys paid by the plaintiff into Court, under the Subordinate Judge's decree, have been improperly paid out to the second defendant, who is a sub-mortgagee, notwithstanding that the sub-mortgage has been redeemed, in execution of a decree obtained by the first against the second defendant, during the pendency of the present suit. He is unable to point to any evidence that such has been the case; and we observe that an allegation to that effect, made in the memorandum of appeal to the District Court, was struck out by [590] the plaintiff's pleader. We shall, however, in our decree call the attention of the Subordinate Judge to the alleged circumstance, in order that he may inquire into the rights of the defendants *inter se*, and adjust them as the equities of the case require.

Decree reversed.

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APPELLATE CIVIL.

Before Mr. Justice M. Melvill and Mr. Justice Kemball.

FAKI (*Original Plaintiff*), *Appellant v.* KHOTU (*Original Defendant*), *Respondent.** [22nd June, 1880.]

Registration—Act XX of 1866, *s.* 17—*Act XV of* 1877, *s.* 20—*Receipt—Declaration of title.*

The defendant passed to the plaintiff a document worded, in substance, as follows:—

"Your fields * * * * * are entered in my name. Ever since they came into your possession I have received from you the assessment due upon them. I have now no claim upon you for any balance of assessment.

* Second Appeal, No. 108 of 1880.