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APPELLATE CIVIL.

*Before Sir Michael Roberts Westropp, Kt., Chief Justice, and
Mr. Justice Kemball.*

VADJU (*Plaintiff*), *Appellant v. VADJU AND ANOTHER (Defendants),
Respondents.** [21st September, 1880.]

Mortgage—Redemption before expiration of time—Cause of action.

The general principle as to redemption and foreclosure is that, in the absence of any stipulation, express or implied, to the contrary, the right to redeem, and the right to foreclose are co-extensive.

A mortgage deed, dated the 30th April, 1870, stipulated that the mortgagor would pay the debt, with interest, within ten years and redeem the mortgaged [23] property. In a suit instituted on the 30th July, 1877, for the redemption of the property, the mortgagees contended that the time had not expired.

Held that the suit was unsustainable, because prematurely instituted, the mere use of the word "within" not being a sufficient indication of the intention of the parties that the mortgagor might redeem in a less period than ten years.

[N.F., 201 P.R. 1889; 137 P.W.R. 1908; F., 8 A. 95; Rel., 8 Ind. Cas. 707 (708); R., 29 A. 471 (478) = 4 A.L.J. 375 = A.W.N. (1907) 133; 20 B. 677 (684); 39 C. 823 (830) = 17 C.W.N. 149 = 15 Ind. Cas. 287; 16 M. 486; 16 C.P.L.R. 59 (63); 18 M.L.J. 235 (238); Cons., 10 A. 602 (609); 23 M. 33.]

THIS was a second appeal from the decision of R. F. Mactier, Judge of the District Court of Satara, reversing the decree of P. S. Banivali, First Class Subordinate Judge at the same place.

The plaintiff brought this suit against (1) Narhar, and (2) Vadju, and sought to recover possession of certain land, alleging that he had purchased it for Rs. 100 from defendant No. 1 (Narhar) under a deed of purchase, dated the 21st February 1876, and that he was obstructed by defendant No. 2 (Vadju) in obtaining possession. The plaintiff also claimed mesne profits from the date of purchase until the date of the institution of the suit. The plaint was filed on the 30th July 1877.

Defendant No. 1 (Narhar) admitted the sale, and stated that he had no objection to give possession of the land to the plaintiff; that the land had been mortgaged to defendant No. 2 who refused to accept payment of his mortgage-debt and to re-convey the land. Defendant No. 2 (Vadju), among other things, answered that the land had been mortgaged to him by defendant No. 1 for a period of ten years, under a deed (Exhibit No. 11), dated the 30th April, 1870, and that it could not be redeemed before the expiration of that time.

The mortgage-deed stipulated that the mortgagor would pay the mortgage-debt *within ten years*, and redeem the mortgaged property from the mortgagees.

The Subordinate Judge found the mortgage proved, but held the plaintiff entitled to recover the land on payment of the mortgage debt. He made a decree accordingly and gave the plaintiff mesne profits against Narhar (defendant No. 1).

In appeal, the District Judge reversed the decree of the first Court on the ground that the plaintiff had no right to redeem before the expiration of the time fixed in the mortgage-deed.

The plaintiff appealed to the High Court.

* Second Appeal No. 4 of 1880.

[24] *Manekshah Jehangirshah*, for the appellant.—The plaintiff is entitled to sue for possession of the land, although ten years from the date of the mortgage have not elapsed. He has a right to redeem at any time within that period, as stipulated in the said deed.

G. R. Kirloskar, for the respondent.—The present case is not an exception to the general rule of law, that the right to redeem and the right to foreclose are co-extensive. The mortgagee would not be permitted to sue for a foreclosure of the mortgage before the expiration of ten years. No suit therefore, would lie for redemption before the expiration of that time.

JUDGMENT.

WESTROPP, C.J.—The general principle as to redemption and foreclosure is that, in the absence of any stipulation, express or implied, to the contrary, the right to redeem and the right to foreclose must be regarded as co-extensive: *Sakharam v. Vithul Lakha Gouda* (1), *Lila v. Vasudev* (2), *Brown v. Cole* (3), (and see per Lord Kingsdown in 7 Moore's Indian Appeals 355.) It is admitted that, under the mortgage to the second defendant Vadju Raghu, he could not foreclose that mortgage until the expiration of ten years from its date (the 30th of April 1870) and we think that the mere use of the Marathi word "*ant*," which signifies "within," is not a sufficient indication of an intention of the parties that the ordinary principle should not prevail with respect to the mortgagor, and that he might redeem in a less period than ten years. We should expect some stronger expression than that word, if the intention were that the mortgagor's position was to be more favourable than that of the mortgagee. The plaint was filed on the 30th July 1877, *i.e.*, about two years and nine months before the expiration of the ten years. This suit was, therefore, prematurely instituted, and is accordingly unsustainable. That being so, the decree of the Subordinate Judge was wrong, not only so far as regards the defendant Vadju Raghu, but also as regards the defendant Narhar, against whom no mesne profits were recoverable, inasmuch as the plaintiff could not redeem until the ten years had elapsed. [25] The decree of the District Judge is affirmed. The plaintiff must pay to the defendant Vadju Raghu his costs of suit and of both appeals, and to the defendant Narhar's son his costs of the second appeal only. The conduct of the deceased defendant Narhar himself has been such that his son and heir must bear his own costs of the suit and of the regular appeal.

Decree affirmed.

(1) 2 B.H.C.R.A.C.J. 225.

(2) 11 B.H. C. R. 283.

(3) 14 Sim. 427.