

1882

GANGA
MULIK
v.
BATAJI.

plaintiff was bound to pay the amount of the mortgage admitted by him, the mortgage-deed being inadmissible in evidence on account of the refusal of the defendant to pay the penalty and additional stamp duty.

There was no appearance of parties in the High Court, either in person or by pleader.

Per Curiam.—The defendant having admitted that he is in possession of the property as a mortgagee under the plaintiff, the latter is entitled to redeem it, on paying what is found due from her on the mortgage, together with the costs of this suit. In taking the account it lies upon the mortgagee to prove what is due from the plaintiff in respect of principal and interest. If, therefore, he refuses to pay the penalty and put the mortgage-deed in evidence, he can only be credited in the account with the sum of Rs. 49, which the plaintiff admits was the amount of the principal. On the other hand, he would have to be debited with the income derived from the property since he has been in possession, for which he must account. If the latter exceeds the Rs. 49 and costs of this suit, possession should at once be given to the plaintiff. If, on the other hand, it falls short of the Rs. 49 and costs of the suit, then she must be put in possession, in case she pays the balance within six months after the said balance has been ascertained, and in default she must stand foreclosed.

APPELLATE CIVIL.

Before Sir M. R. Westropp, Kt, Chief Justice, and Mr. Justice E. D. Melvill.

NILKANTHAPA MALKAPA (ORIGINAL PLAINTIFF), APPELLANT, v. THE MAGISTRATE (FIRST CLASS) IN CHARGE OF THE SHOLAPUR TALUKA (ORIGINAL DEFENDANT), RESPONDENT.*

1880
April 13.

Civil Procedure Code (Act X of 1877), Section 416—Bombay Act V of 1879, Section 37—Practice—Procedure—Amendment of plaint—Substitution of parties—Criminal Procedure Code Act X of 1872, Section 521—Order by Magistrate for removal of obstruction from a public thoroughfare—Suit against Magistrate to establish right.

Under section 521 of the Criminal Procedure Code, Act X of 1879, a First Class Magistrate in charge of a taluka made an order, declaring certain land to be part

* Appeal, No. 8 of 1880, from original decree.

of a public thoroughfare, and directing the plaintiff to remove the obstruction caused by him to it. The plaintiff sued the Magistrate to establish his right to the land, alleging that it was his private property, and that the Magistrate's order was wrong. The Assistant judge, who tried the suit, dismissed it, holding that it did not lie against the Magistrate. On appeal to the High Court

Held that the Assistant Judge might have properly permitted the plaintiff to amend his suit by striking out the name of the First Class Magistrate as defendant, and substituting in that capacity the Secretary of State for India in Council.

The High Court, accordingly, reversed the decree of the Assistant Judge, and remanded the suit for retrial on the merits, after making the amendment directed.

THIS was an appeal against the decision of J. W. Walker, Senior Assistant Judge at Sholapur, in the District of Poona.

The plaintiff sued to establish his right to two plots of land, alleging that they belonged to him, and were wrongly held by the defendant, as a Magistrate in charge of Sholapur Taluka, to be part of a public thoroughfare, under section 521 of the Criminal Procedure Code, Act X of 1872. The defendant answered (*inter alia*) that he was not the proper person to be sued, and that the land did not belong to the plaintiff.

The Assistant Judge raised the issue, whether the suit was maintainable; and, deciding it in the negative, dismissed the plaintiff's claim.

The plaintiff appealed to the High Court.

Ghanasham Nilkanth Nadkarni for the appellant.—The lower Court was wrong in dismissing the suit. The plaintiff asserts a right to the ground which has been declared by the defendant not to belong to him. If the suit is wrongly brought against the Magistrate, I ask that it may be allowed to be amended by substituting the Secretary of State for India, as defendant, under section 416 of the Civil Procedure Code, Act X of 1877.

Nanabhai Haridas, Government Pleader, for the respondent.

The following is the judgment of the Court:—

WESTROFF, C. J.—This Court being of opinion that the Senior Assistant Judge might properly have permitted the plaintiff to amend his suit by striking out the name of the First Class Magistrate in charge of Sholapur Taluka as defendant, and substituting in that capacity the Secretary of State for India in

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Council (see Civil Procedure Code, Act X of 1877, section 416, and Bombay Act V of 1879, section 37), reverses the decree of the Senior Assistant Judge, and remands this suit for retrial on the merits, after making such an amendment as aforesaid, which this Court hereby permits, and due service of process on the local Government Pleader on behalf of the said Secretary of State pursuant to section 419 of Act X of 1877, and such other proceedings as may be necessary. The plaintiff must pay all costs of the suit and appeal up to the present time.

Decree reversed and case remanded.

APPELLATE CIVIL.

Before Mr. Justice Melvill and Mr. Justice West.

1880
 June 20.

BALARAM CHATRUKALAL (ORIGINAL PLAINTIFF), APPELLANT, v. THE FIRST CLASS MAGISTRATE IN CHARGE OF TALUKA IGATPURI (ORIGINAL DEFENDANT) RESPONDENT.*

Civil Procedure Code (Act X of 1877), Section 416—Practice—Procedure—Amendment of plaintiff—Substitution of parties—Act X of 1872, sections 523 and 526—Order by Magistrate for removal of obstruction from public thoroughfare—suit to establish right.

On the 11th August, 1879, the defendant, as a Magistrate in charge of a taluka, made an order under sections 523 and 526 of the Criminal Procedure Code (Act X of 1872), directing the plaintiff to remove a certain "ota", on the ground that it had been built upon a public thoroughfare. The plaintiff thereupon sued the Magistrate for a declaration that the "ota" and site belonged to him, and prayed for a reversal of the Magistrate's order. The Assistant Judge, who tried the suit, dismissed it, holding that it did not lie against the defendant.

On appeal, the High Court, following the decision in *Nilkanthapa Malkapa v. The Magistrate (First Class) in charge of Sholapur Taluka* (1), reversed the decree of the Assistant Judge, and remanded the case, in order that the plaintiff might amend his suit by striking out the name of the First Class Magistrate as defendant, and substituting in that capacity the Secretary of State for India in Council, and directing the lower Court to determine the suit upon its merits after the above amendment and due service of process.

THIS was an appeal against the decision of H. F. Aston, Assistant Judge at Nasik, in the District of Thana.

* Appeal, No. 56 of 1881, from original decree.
 (1) *Supra*, p. 670.