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conveyance, there can be no doubt that the rents and profits were equivalent to a high rate of interest. The plaintiff must therefore, be allowed to redeem on payment, within six months, of Rs. 300.

The parties should bear their own costs throughout.

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(28)

APPELLATE CIVIL.

Before Mr. Justice Kemball and Mr. Justice Pinhey.

1883
January 22.

SANKANA KALANA (ORIGINAL DEFENDANT NO. 2), APPELLANT, *v.* VIRUPAKSHAPA GANESHAPA (ORIGINAL PLAINTIFF) AND NINGANA (ORIGINAL DEFENDANT NO. 1), RESPONDENTS.*

Mortgage—Redemption—Prior mortgagee—Puisne mortgagee—Foreclosure—Discharge of surety—Contract Act IX of 1872, *Secs.* 134 *and* 137.

A surety liability to pay the debt is not removed by reason of the creditor's omission to sue the principal.

A puisne mortgagee is entitled to redeem from the prior mortgagee who obtains a foreclosure decree in a suit to which the puisne mortgagee is not made a party or from the purchaser in the foreclosure suit; and it is immaterial whether the puisne mortgage is or is not registered, or whether the prior mortgagee at the date of the suit had or had not notice of the puisne mortgage.

The plaintiff charging the defendants with collusion sued to eject them, but the Court found he was only a puisne mortgagee, and one of the defendants a prior mortgagee. The Court, however, allowed the plaintiff to change his case, and in the same suit permitted him to redeem the defendant.

Quære—whether the account arrived at in the decree obtained by the prior mortgagee against the mortgagor only is binding on the puisne mortgagee who had no notice of the subsequent incumbrance.

THIS was a second appeal from the decision of C. F. H. Shaw Judge of Dharwar, varying the decree of A. M. Cantem, Subordinate Judge of Dharwar.

The facts of the case, in so far as they are material, are as follows :—

The plaintiff Virupakshapa sued gingana (defendant No. 1) and Sankana (defendant No. 2) to recover possession of a piece of land. He alleged that Ningana, the original owner, mortgaged it with possession on the 12th of July, 1874, for Rs. 98 to him (the plaintiff) for fourteen years under an instrument which stipulated that Ningana was to pay the Government assessment, and that

* Second Appeal, No. 102 of 1882.

if he failed to pay it the mortgage was to be foreclosed; that Ningana did make default, and the mortgage was, under the terms of the instrument, foreclosed; that the plaintiff after the foreclosure, continued in possession as owner till 30th May, 1880, when Ningana in collusion with Sankana, the second defendant, wrongfully dispossessed him of it.

Ningana admitted the mortgage.

Sankana answered that on the 2nd September, 1869, five years earlier than the plaintiff's alleged mortgage, Ningana had become surety to him for the debt of one Mohidin, and that as security he had mortgaged the land in question to him (Sankana), with a proviso of conditional sale; that he (Sankana) sued Mohidin and Ningana in 1878, after his claim against Mohidin had become time-barred, and obtaining an *ex-parte* decree executed it in 1880.

The Subordinate Judge held the plaintiff's mortgage deed to be suspicious, the defendant's deed to be proved, and decreed that the defendant Sangana had a better claim to remain in possession, and, therefore, rejected the claim of the plaintiff.

The District Judge differed from the Subordinate Judge. He held the plaintiff's mortgage proved, as well as the mortgage of the defendant Sangana as security for Mohidin's debt; but he said that as Sankana did not proceed against Ningana till after the claim against Mohidin had become time-barred, Ningana by the operation of section 134 of the Contract Act IX of 1872 became discharged from his obligation of suretyship. The Judge varied the decree of the Subordinate Judge, and directed that the plaintiff should recover the land claimed from the second defendant, Sankana. The defendant Sankana appealed to the High Court.

Ganesh Ramchandra Kirloskar for the appellant.—Sections 134 and 137 of the Contract Act should be read together. The omission of Sankana to sue Mingana till the claim against Mohidin had become time-barred, did not discharge Ningana. The Judge erred in questioning the correctness of a decree which had been fully executed, and had not been reversed or set aside. He also erred in giving priority to the plaintiff's deed, which was neither registered nor accompanied with possession

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over the earlier mortgage of the defendant—followed, as it was, by foreclosure and possession. The defendant Sankana had no notice of the plaintiff's subsequent incumbrance, and his fellow defendant and the plaintiff had colluded to defraud him. The plaintiff sued to eject, and could not be allowed to redeem.

Ningana did not appear.

Ghanasham Nilkanth Nadkarni for the respondent (the original plaintiff).—The arguments urged and cases cited by him appear from the following judgments :—

KEMBALL, J.—Assuming that the District Judge was justified in going behind the decree obtained by Sankana against Ningana it is clear that he was wrong in holding under section 134 of the Contract Act that Sankana's omission to sue the principal Mohidin discharged the surety Ningana. Section 134 is qualified, as held in *Hajarimal* v. *Krishnaram* (1), by section 137, which obviously governs the present case.

It is contended, however, on behalf of the respondent Virupakshapa that the decree obtained by Sankana was not binding on him, he not having been a party to the suit, and that on the authority of the numerous decisions of this Court—see the cases of *Pandubhat* v. *Balaji*(2); *Ganesh Sadashiv* v. *Balkrishna Gopal*(3); *Radhabai* v. *Shamrav Vinayak*(4); *Dayabhai Jaichand* v. *Maganlal Kalidas* (5); *Wasudev Balaji* v. *Narayan Krishna*(6); *Rupchand Dugdusa* v. *Davlatrav Vithalrav*(7); *Mansukh Pitambar* v. *Tarbhovan Parshotam*(8); and *Shivram* v. *Genu*(9)—he should be allowed even in this suit to redeem the defendant. In most of these cases, it is urged on the other side, there was actual or constructive notice of the existence of other incumbrances: apparently this was so, but it is clear upon the authorities that the question of notice cannot possibly affect the right of a subsequent incumbrancer to redeem. It is well established (10) that, in order to obtain a complete title, the first or

(1) I. L. R, 5 Bom., 647.
(2) Printed Judgments for 1878, p. 54.
(3) Printed Judgments for 1879, p. 28.
(4) Printed Judgments for 1881, p. 219.
(5) Printed Judgments for 1881, p. 232.
(6) See *supra*, p. 131.
(7) I. L. R., 6 Bom., 495.
(8) Printed Judgments for 1882, p. 213.
(9) I. L. R., 6 Bom., 515.
(10) See Sepence's Equity Jurisprudence, Vol. 2, Sec. 5, and Fisher on Mortgages, secs. 1439, 1440 and 1441.

any subsequent mortgagee or incumbrancer who files a bill for foreclosure or sale must make all persons who have incumbrances at the time of the institution of the suit, posterior in point of time to his mortgage, parties to his suit; and that if such plaintiff should foreclose the mortgagor and such incumbrancers as he has made parties, yet he will be liable to be redeemed by any incumbrancer who might have been, but was not, made a party to his suit, whether he had any notice of that incumbrance or not. It might be a question whether the judgment so obtained by the plaintiff without having received notice of the subsequent incumbrance would bind such incumbrancer as to the accounts; but we are saved the necessity of considering this point in the present case, as we understand Mr. Ghanasham, on behalf of his client Virupakshapa, to express his willingness to accept the sum fixed in the decree obtained against Ningana and to be ready to redeem Sangana's mortgage on the footing of that decree. It is true that the plaintiff has in this suit sought an entirely different remedy; but this was probably rather the fault of his adviser than of himself, and it seems unnecessary to put him to the expense and trouble of another suit. We, accordingly, vary the decree of the District Judge and direct that on payment to Sankana of the amount of his decree obtained against Ningana, within three calendar months from this date the plaintiff Virupakshapa do have possession of the land in dispute, and that, in default of such payment within the time specified, he be for ever foreclosed. As to costs we think the proper order to make is, that each party do bear his own costs throughout.

Decree varied.

PINHEY, J.—Reading section 134 of Act IX of 1872 with section 137 of that Act, and referring to the decision at Indian Law Reports, 5 Bombay, 647, it is impossible to uphold the decree of the District Court, and the simplest way of disposing of this second appeal would have been to reverse the decree of the District Court and to restore that of the Subordinate Court.

But the pleader of the plaintiff Virupakshapa in this Court seeing the that decree of the District Court could not be sustained, has now made an entirely different case for his client

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to that made in the Courts below, and my brother Kemball considers that we should deal with and dispose of this new case on its merits. Concurring, as I do, fully in the observations made by Field, J., in *Joytara Dasi* v. *Mahamad Mobarak* (1) I do not myself think that a plaintiff should be allowed to make an entirely new case in the High Court on second appeal. The thing has, however, been allowed so often in the Bombay High Court that I do not consider it either necessary or advisable to formally differ from my brother Judge on this point in the present case.

What plaintiff now says is, I no longer charge the two defendants with collusion and fraud, and I no longer sue to eject them or either of them; but I accept the District Court's finding that defendant No. 2, Sankana, is a prior mortgagee of the property; and, as the District Court has found me to be a puisne mortgagee, I claim to redeem Sankana. This, of course, he would have been entitled to do, if he had framed his suit with that professed object, and I, therefore, agree to the decree proposed by my brother Kemball.

The question of notice does not arise, as Sankana is a prior mortgagee in possession; but it would have been important if Sankana had, without notice of any puisne mortgage, brought the property to sale, and the property had passed into the possession of a third party as purchaser. If this had been done, the rights of Virupakshapa would have been defeated—*Khubchand* v. *Kalyandas* (2) and *Ali Hasan* v. *Dhirja* (3).

(1) I. L. R., 8 Calc., 980. (2) I. L. R., 1 All., 240. (3) 4 *Id.*, 518