APPELLATE CIVIL.

1883
September 4.

Before Mr. Justice West and Mr. Justice Nanabhai Haridas.

NARAYAN VENKOBA (ORIGINAL PLAINTIFF), APPELLANT, *v.* PANDURANG KAMAT (ORIGINAL DEFENDANT), RESPONDENT.*

Mortgage—Tacking—Redemption.

The owner of a house in 1861, in consideration of Rs. 190, mortgaged it to the defendant, and put him into possession. The mortgage deed needed no registration, and was not registered. The mortgagor next mortgaged the house in 1873 to the plaintiff for Rs. 300 by a deed duly registered. He again in 1874 borrowed on the same security a further sum of Rs. 500 from the defendant, and executed in his favour a deed of mortgage which was duly registered. The plaintiff in 1876 sued the mortgagor for possession, and obtained a decree, the execution of which the defendant resisted. The plaintiff now sued the defendant to eject him, and to obtain possession of the mortgaged property until payment of the amount due on his mortgage. The defendant denied the plaintiff's mortgage, and set up his own to mortgages, and claimed to be paid the amount due on both of them before he could be called upon to render up possession.

Held that the English doctrine of tacking was of so special and technical a character, and so little founded on general principles of justice, that it ought not to be held applicable to the Mofussil of Bombay, but that the obligations arising out of the successive mortgages should be discharged in the order of their date.

Held, consequently, that the defendant's right as against the plaintiff was either to redeem the plaintiff's intermediate mortgage, or else to hold the mortgaged property until his own first mortgage was redeemed by the plaintiff; but that the defendant could not claim to retain possession, as against the plaintiff, until his second mortgage, as well as his first, was paid off, since plaintiff's mortgage was prior in date to, and, therefore, was to be preferred before the second mortgage of the defendants.

THIS was a second appeal from the decision of C. F. H. Shaw, Judge of Belgaum, confirming the decree of A. M. Cantem, Subordinate Judge (First Class) of Belgaum.

One Basaprabhu, the owner of a house, mortgaged it to the defendant for Rs. 190, and executed a deed of mortgage dated 11th of March, 1861. This deed was not registered, and did not require registration under the law then prevailing. The defendant was put into possession on the 16th of November, 1873. Basaprabhu mortgaged the same property to the plaintiff for Rs. 300, the mortgage deed being duly registered. Basaprabhu next borrowed on the same security a further sum of Rs. 500 from the defendant, and executed a deed of mortgage, also duly

* Second Appeal, No. 536 of 1882.

registered, dated the 24th of June, 1874. The plaintiff in 1876 sued Basaprabhu for possession of the property, and obtained a decree; but the defendant resisted its execution, and the plaintiff never got possession. He, therefore, in 1880 brought the present suit to eject the defendant, and to obtain possession of the mortgage property until payment of the amount due on foot of his mortgage. The defendant denied the plaintiff's mortgage, and set up his own mortgages of 1861 and 1874, and contended that till the amount due on both his mortgages was paid he could not be ejected.

Both the Courts below found all the three mortgages proved, and allowing the defendant's contention rejected the plaintiff's claim. The plaintiff appealed to the High Court.

Shantaram Narayan for the appellant argued that the doctrine of tacking was not applicable to mortgages made in the Mofussil.

Ghanasham Nilkanth Nadkarni argued that the plaintiff must fail in any case, as his suit was one for ejectment.

WEST, J.—For the appellant in this case the objection has been taken that the tacking of a later to an earlier mortgage was improperly allowed as against one of intermediate date. For the respondent it is urged that the suit having been brought for ejectment of the mortgagee in possession under the first and third mortgages, the decree now sought to enforce redemption or foreclosure cannot properly be made in such a case. We will deal with the latter question first.

The plaintiff, having succeeded in a suit against the original mortgagor, found he could not obtain possession under his decree by reason of the defendant's occupying the mortgaged house under two other mortgages. He sued him for possession until his mortgage money should be paid with damages for his exclusion and mesne profits during the pendency of the suit. The plaintiff denied both the mortgages of the defendant. The defendant denied the plaintiff's mortgage, and insisted that he must, at any rate, be paid the amount of both his mortgage claims before he was called on to give up possession.

A suit to eject the defendant as having no right to possession would, no doubt, have been one of quite a different character from a suit to enforce payment by sale or foreclosure—*Shridhar*

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Vinayak v. *Narayan valad Babaji*(1). From one point of view the suit might be regarded as of the former kind; but then the plaintiff inconsistently claimed a decree for possession until payment, not absolutely, though he had become mortgagee of the equity of redemption so far as this was vested in the original mortgagor, and entitled to possession as against him by means of his decree against that person. The inconsistency might have been objected to, and the plaintiff might have been called on to elect whether he wanted to be paid as a creditor by the defendant as subsequent mortgagee of the equity of redemption, or to oust the defendant as wrongfully holding under a false title, or to enforce redemption of the defendant's first mortgage while denying his alleged right under the second mortgage to him. These steps were not, however, taken, and the respondent, who failed to press on the Courts below the necessity of trying only one of the alternative causes of action, cannot now require that their decisions should be reversed on that ground if, in fact, the material questions between the parties have been investigated so as to afford the materials for a correct adjudication between them. Nor can he rest on the circumstance of the suit having been brought in an objectionable form in order to maintain the decree by which he would profit. If the objection is sufficient, it is fatal to the decree; if not, the decree must be examined on its merits, and affirmed, reversed, or amended, not according to the demerits of the pleadings, but according to the justice of the case as it appears on the record.

The Subordinate Judge, though he did not apprehend the case in exactly its true bearings, yet raised the questions of the genuineness and validity of the several mortgages, and of whether the plaintiff was entitled to possession as against the defendant, and on what terms. These issues, to use the language of the Judicial Committee in a recent case, "were exhaustive of the questions, and were intended to be exhaustive." The findings of fact on them are sufficient for the decision of the case, and the defects of form are not such as can have stood in the way of a complete investigation. As the objection then was not taken in the Courts below, we do not think we ought to entertain it and,

(1) 11 Bom. H. C. Rep., p. 224.

because the plaintiff must fail in a suit of simple ejectment, send him back to begin a new litigation to enforce redemption of his mortgage. Whatever his assertions might be, he sought only the relief that he thought due to him as a mortgagee. The Courts below considered that question, and we too may consider it without further waste of procedure.

The respondent obtained decrees in the lower Courts on the ground that he was a mortgagee in possession when the plaintiff took the second mortgage, and continued in possession after that mortgage, whereby defendant's second mortgage obtained a preference along with his first over the intermediate one to the plaintiff. By the Hindu Law, rights not enjoyed in the form of actual possession do not require a transfer of possession in order to give effect to an alienation or incumbrance—*Lalubhai Surchand* v. *Bai Amrit*(1); and as a pledge may be disposed of subject to the pledgor's right, so may the latter be dealt with subject to the pledgee's right. Here the three mortgages are all found to be genuine. The last two were duly registered; the first did not need registration. Hence the obligations secured by them ought to be satisfied in the order of priority, and the defendant's right as against the plaintiff is either to redeem his mortgage, if he will, or else to hold the mortgaged premises until his own first mortgage is redeemed by the plaintiff. The English doctrine of tacking arose from the mortgagee holding the complete legal estate. It was thought that equity could not compel him to part with it until all his claims on it were satisfied. The doctrine is inconsistent in principle with such cases as *Hopkinson* v. *Rolt*(2); and it has been condemned, though it could not be denied as English law, by Lord Blackburn—*Jennings* v. *Jordan*(3). A doctrine so peculiar and so objectionable is not one to introduce into the Mofussil on the ground of its manifest justice and utility. The defendant Pandurang may redeem the mortgage to Venkoba by payment of the sum due thereon within three months of the ascertainment of the sum in the Court below. Failing this, he must yield possession to the plaintiff on payment into Court, by the latter, within three months further of the sum due on foot of Pandurang's first mortgage, as ascertained in execution.

The parties severally are to bear their own costs throughout.

(1) I. L. R., 2 Bom., 299, 326. (2) 9 H. L., 514.
(3) L. R., 6 Ap. Ca., at p. 715.