

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Nánabhái Haridás.

1884
September 23.

RA'GHO SALVI (ORIGINAL PLAINTIFF), APPELLANT, v. BÁLKRIISHNA
SAKHA'RA'M (ORIGINAL DEFENDANT), RESPONDENT.*

Mortgage of property owned by co-sharers—Subsequent severance of interests—Suit by one co-sharer to redeem more than his share—Parties—Time of taking objection.

In 1805 a two-anna share in certain property held by co-sharers was mortgaged to the defendant. The mortgage was effected by the mortgagor as manager of all the co-sharers in union. In 1848 one of the co-sharers redeemed his share of two pies in the mortgaged property, and a further share of two pies therein was redeemed by a second co-sharer in 1867. The plaintiff was admittedly the owner of another two-pie share; but he now sued the defendant to redeem the whole of the property still unredeemed, viz., a one anna eight pies' share of the original mortgage. The defendant objected that the plaintiff could only redeem his own two-pie share, which had become separated from the rest. The plaintiff denied that the estate had been divided.

Held, that the plaintiff's claim being to redeem all that remained of the estate in the mortgagee's possession, the suit could not be maintained, unless all the other persons interested in the equity of redemption were before the Court either as co-plaintiffs or as defendants. Without their presence the suit could not be properly disposed of, and the excuse, that the defendant did not take objection at the right time, had, under such circumstances, no validity. As owner of a two-pie share, which by consent of all interested had become an estate wholly separated from the other parts of the original aggregate, the plaintiff would have been bound to set forth the transactions on which his right rested.

SUIT for redemption. The plaintiff sued to redeem a share of one anna and eight pies in the Khoti of Kheda, a village in the Ratnágiri District. It appeared that the original mortgage comprised a two-anna share which was held by co-sharers. The mortgage was effected in 1805 by one Bába Gungáji as manager of all the co-sharers in union. Subsequently, viz., in 1848, one Báji Yesu, a co-sharer, redeemed his share of two pies in the said property, and another co-sharer redeemed a further share of two pies in 1867. The plaintiff was admittedly the owner of another two-pie share, but he now sued to redeem the whole of the remaining unredeemed property, viz., a one anna eight pie share of the original mortgage.

The defendant objected that the plaintiff could only redeem his own two-pie share, which he alleged had become separated

*Second Appeal, No. 124 of 1883.

from the rest. The plaintiff denied that the estate had been divided.

The Subordinate Judge of Chiplán awarded the plaintiff's full claim on payment of Rs. 50 and also mesne profits.

He held that the plaintiff was entitled to sue as being admittedly owner of a two-pie share. On appeal by the defendant the Assistant Judge varied the decree, and held the plaintiff entitled to redeem only a two-pie share of the property. He rejected his claim to costs and mesne profits with the following remarks:—

“As to the amount of the original mortgage, there is no satisfactory evidence. In 1848 one of the co-sharers, named Bájí, redeemed a two-pie share for Rs. 35. The original mortgage appears to have been effected by Bábá Gungáji as manager of all the sharers in union. * * * * * The sharers, who, at the time of the original mortgage, were in union, must now have been divided, as Bájí has separately redeemed his share. I do not think, therefore, that, in the absence of any evidence on the point from defendant, it can be presumed that this debt, or any part of it, was on behalf of any of the sharers other than Hanmant.

“Besides Bábáji's share of two pies, Gan Paud's share of two pies has been redeemed and sold to defendant. Defendant also alleges that he has purchased the equity of redemption of another share, but of this he has not yet produced any evidence. But I think that, in any case, the joint character of the mortgage no longer subsists, and that plaintiff is not, therefore, entitled to redeem more than his own share against defendant's wish.”

The plaintiff appealed to the High Court.

Goculdás Kahándás Párek (*Shivshankar Govindrám* with him) for the appellant.—The appellant as owner of a part of the mortgaged property can insist on redeeming the whole. The mortgage was a joint mortgage, and each one of the joint owners has a right to redeem—Fisher on Mortgage, para. 1225. The severance of right to redeem would not affect anything in the mortgage itself. Severance of such right has been recognized to the extent of the share severed. Mutual assent of severance

1884

RÁGHO
SALVI
v.
BÁLKRISHNA
SAKHÁRÁM.

1884

RÁGHO
SALVI
v.
BÁLKRIŚHNA
SAKHÁRAM.

would extend to those parts which were separately redeemed, and not to the rest of the property—*Nawáb Azimut Alikhán v. Jowá-hir Sing*⁽¹⁾. The defendant could not resist the appellant's right to redeem which as a co-owner of the equity of redemption he possesses—*Alikhán v. Mahamadkhan*⁽²⁾. The question of severance was not raised in the Court of first instance, and cannot be raised on appeal—*Báji Yashvant v. Dhondo Atmárám*⁽³⁾. The original mortgage deed was not produced in evidence, but another one was produced. A mortgagee is not allowed to withhold evidence of the extent of liability from the Court—*Shek Abdulla v. Shek Muhammad*⁽⁴⁾.

Ráo Sáheb V. N. Mándlik for the respondent.—The plaintiff was a separated shareholder, and can only redeem his own share. Though the point of severance ought to have been raised in the Court of first instance, the Court of Appeal can raise it. The case of *Shek Abdulla v. Shek Muhammad*⁽⁵⁾ has no application.

WEST, J.—The present plaintiff, owner apparently of a two-pies sub-share in property consisting of a two-annas share in a *khoti* estate mortgaged in A.D. 1827, sued to redeem a one anna eight pies part of that two-annas share. He averred that four pies had been redeemed, in parts of two pies each, by two other sharers. Such redemption in *takshims* or separate fractions might imply that there had been a division of the interests in the equity of redemption in a partition amongst the mortgagor's family, and that the mortgagee had assented to this fragmentation of what in itself was an indivisible obligation entitling him to claim complete payment as the condition of releasing any part of the mortgaged property. But such a breaking up of the interests so recognized would not have left in the plaintiff Rágho a right to redeem more than his own two-pies share which is what the District Court has awarded to him on payment of a sum of Rs. 35. Whether, however, the share of the plaintiff Rágho in this particular part of the once common estate is really two pies, or whether the equity of redemption was, as is now contended, never divided, his suit could not be maintained, could

(1) 13 Moo. Ind. Ap., 404.

(3) Printed Judgments for 1883, p. 331.

(2) Printed Judgments for 1881, p. 319. (4) 1 Bom. H. C. Rep., 177.

(5) 1 Bom. H. C. Rep., 177.

not be properly tried, in the form in which he brought it. He sought to redeem a one anna eight pies share, and so suing, he was bound to bring all the other persons interested in the equity of redemption before the Court. As owner of a two-pies share, which by consent of all interested had become an estate wholly separated from the other parts of the original aggregate, he would have been bound to set forth the transactions on which this right rested, but his claim was really to redeem all that remained of the estate in the mortgagee's possession. In such a suit he was bound to make all his co-owners of the equity of redemption co-plaintiffs or defendants—*Norender Náráin Sing v. Dwárka Lál Mundar*^{(1) (2)}. Without their presence the suit could not be properly disposed of, and the excuse, that the defendant mortgagee did not take objection at the right time, has, under such circumstances, no validity.

We must reverse the decrees of the Courts below, and remand the cause for re-trial after the plaintiff has added the names as parties of the persons concerned according to the nature of the share and the right on which he intends to rely. Costs to follow the final decision.

Decrees reversed and case remanded.

(1) I. L. R., 3 Calc., 397.

(2) 3 Bea., 355.

REVISIONAL CRIMINAL.

Before Mr. Justice West and Mr. Justice Nanábhái Haridás.

QUEEN EMPRESS *v.* TRIBHOVAN MA'NEKCHAND AND OTHERS.*

Criminal Procedure Code (Act X of 1882), Secs. 517 and 523—Evidence of ownership—Evidence Act, I of 1872, Sec. 25—Confession made to police officer, admissibility of, for other purposes than as a confession.

Statements made to the police by accused persons as to the ownership of property which is the subject-matter of the proceedings against them, although inadmissible as evidence against them at the trial for the offence with which they are charged, are admissible as evidence with regard to the ownership of the property in an inquiry held by the Magistrate under section 523 of the Criminal Procedure Code (X of 1882.)

* Criminal Reference, No. 121 of 1884.

1884

RÁGHO
SALVI
v.
BÁLKRIŚHNA
SAKHÁRÁM.

1884
October 10.