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13 B. 42.

Transfer of Property Act, No. IV of 1882, is in force, transfers of actionable claims are expressly allowed. We reverse the decrees of the Courts below, and remand the case for a trial on the merits. Costs to abide the result.

*Decree reversed.*

13 B. 45.

[45] APPELLATE CIVIL.

*Before Sir Charles Sargent, Kt., Chief Justice and  
Mr. Justice Nanabhai Haridas.*

MORO RAGHUNATH (*Original Defendant*), Appellant v. BALAJI TRIMBAK (*Original Plaintiff*), Respondent. [1st March, 1888.]

*Mortgage—Joint owners—Mortgage of joint property by two co-owners—Subsequent mortgage of part of same property to same mortgagee by one co-owner—Suit by mortgagee on second mortgage and sale in execution—Purchase by mortgagee—Effect of such purchase on first mortgage—Subsequent suit by mortgagee on first mortgage—Apportionment of mortgage-debt.*

By a mortgage-deed, dated the 24th January 1878, Sakharam and Vishnu, two of three brothers constituting an undivided family, jointly mortgaged to the plaintiff Balaji a part of the family property. On the 28th July, 1878, Sakharam alone further mortgaged to the plaintiff for a fresh advance a portion of the property already mortgaged. Subsequently the three brothers effected a partition among themselves of all the undivided property, and the property jointly mortgaged by Sakharam and Vishnu fell, along with other property, to the share of Vishnu and the third brother Narayan.

In 1881, the plaintiff Balaji sued Sakharam on the second of the above mortgage, *viz.*, that of the 28th July, 1878. He obtained a decree, and at a sale held in execution of that decree himself purchased the property comprised in that mortgage.

In the meantime, on the 27th January, 1882, and on the 6th December, 1883, Vishnu and Narayan respectively mortgaged with possession to the defendant Moro, portions of the land comprised in the first mortgage of the 24th January, 1878.

In 1883 the plaintiff filed the present suit upon his first mortgage of 24th January, 1878, claiming to recover Rs. 316-14-0 from Sakharam and Vishnu personally. He also prayed that the defendant Moro, who had been in possession of the property in dispute, should be prevented from obstructing him in selling the property. Sakharam and Vishnu did not appear. The third defendant Moro alone appeared, and contended (*inter alia*) that the plaintiff, having sued upon his second mortgage without including the earlier one, was now barred from suing on the latter by ss. 13 and 43 of the Civil Procedure Code (XIV of 1892). He also contended that the plaintiff, having purchased part of the lands comprised in the mortgage now sued upon in execution of the decree obtained by him upon his second mortgage, could not now seek to burden the remaining lands included in the mortgage with the whole of the mortgage-debt, but that a proportionate part of that debt must be satisfied.

*Held*, (1) that the plaintiff's suit was not barred by his previous suit on the second mortgage under the provisions of ss. 13 and 43 of the Civil Procedure Code (Act XIV of 1892).

[46] *Held*, (2) that the plaintiff could not recover the first mortgage-debt from the remaining lands without deducting a proportionate part of that debt.

A mortgagee will not be allowed without special reason deliberately to execute his decree exclusively against one of the owners of the equity of redemption for the whole debt.

*Ram Dhun Dhur v. Mohesh Chunder Chowdhry* (1) approved.

[F., 36 M. 151=13 Ind. Cas. 458=22 M.L.J. 231=11 M.L.T. 63=(1912) M.W.N. 59; R., 21 B. 544 (547); 23 M. 377 (384).]

THIS was a second appeal from a decision of R. Courtenay, Acting Assistant Judge of Thana.

Sakharam, Vishnu, and Narayan were brothers and members of an undivided family. On the 24th January, 1878, Sakharam and Vishnu jointly mortgaged to the plaintiff, for a consideration of Rs. 199, a portion of the undivided property. On the 28th July of the same year, Sakharam alone for a further advance of Rs. 200 gave a further mortgage to the plaintiff of a part of the same lands already mortgaged to him by the mortgage of the 24th January, 1878.

Subsequently the three brothers partitioned the whole undivided property among themselves, and the property comprised in the mortgage of the 24th January, 1878, fell to the shares of Vishnu and Narayan.

In 1881 the plaintiff sued Sakharam upon the second of the above mortgages (dated 28th July, 1878). He obtained a decree, and at a sale in execution of that decree he himself purchased the property included in the mortgage.

In the meantime, *viz.*, on the 27th January, 1882, and 6th December, 1883, Vishnu and Narayan respectively mortgaged, with possession to the defendant Moro, some of the lands which had been comprised in the first mortgage of the 24th January, 1878, and which, as above stated, had come to them on partition.

In 1883 the plaintiff filed the present suit against the defendants upon his first mortgage of the 24th January, 1878, claiming to recover Rs. 316-14-0 from the mortgaged property and from Sakharam and Vishnu personally as mortgagors. He also prayed that the defendant Moro, who was in possession, should not be allowed to obstruct him in selling the mortgaged property.

Sakharam and Vishnu did not appear.

[47] The defendant Moro, the mortgagee in possession, as above stated, appeared, and contended that the plaintiff having sued upon the second mortgage without including the earlier one was now barred from suing on the latter by ss. 13 and 43 of the Civil Procedure Code (Act XIV of 1882).

He also contended that the plaintiff having purchased part of the lands comprised in the mortgage now sued upon in execution of the decree obtained by him upon his second mortgage, he could not now seek to burden the remaining lands included in the mortgage with the whole of the mortgage-debt, but that a proportionate part of that debt must be deemed to have been satisfied.

The Court of first instance rejected the plaintiff's claim.

The plaintiff appealed to the Assistant Judge, who gave a decree for the plaintiff for Rs. 280-11-9. His decision was as follows:—

"The plaintiff should recover altogether \* \* \* Rs. 280-11-9 by sale of the mortgage property mentioned in the plaint. If the proceeds of such sale prove insufficient, the balance may be recovered from defendants Nos. 1 and 2, Sakharam and Vishnu Putlaji, personally. But if within three months the defendant No. 3 pays the entire amount, the property should not be sold." \* \* \*

The defendant preferred a second appeal to the High Court.

*Ghanasham Nilkanth Nadkarni*, for the appellant.—The plaintiff ought to have included his claim under the first mortgage when he sued on the second: see *Kamini Sundari v. Kali Prosunno Ghose* (1). The mortgagee.

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by Narayan was not affected by the one made by the brothers in 1878 to which he was not a party. At all events, the appellant is entitled to redeem the property, and before he can so redeem the mortgage-debt should be apportioned. A mortgagee should not be allowed to execute his decree exclusively against one of the owners of the equity of redemption for the entire debt—*Ram Dhun Dhur v. Mohesh Chunder Chowdhry* (1). It is, therefore, necessary that [48] the case should be sent down for the determination of the apportionment of the mortgage-debt.

*Mahadeo Chimnaji, Apte*, for the respondent.—The lower appellate Court has given a complete remedy to the appellant. A mortgagee can throw his debt on any one of the mortgages—*Gaya Prasad v. Satik Prasad* (2). By the purchase in execution of his decree the respondent not only bought the equity of redemption, but extinguished the debt. The appellant must redeem both the mortgages, for his mortgage was subsequent to respondent's.

#### JUDGMENT.

SARGENT, C.J.—The plaintiff seeks to recover the principal and interest due on a mortgage-bond, dated 24th January, 1878, which was passed to him to secure Rs. 199 by Sakharam and Vishnu, two of the three sons of Putlajishet Potdar, deceased. Subsequently, on 28th July, 1878, Sakharam alone mortgaged some of the same property to plaintiff to secure Rs. 200 and interest to be repaid in five years. Subsequently a partition took place between the sons, and Vishnu and the third son Narayan respectively mortgaged portions of the lands comprised in the mortgage of 24th January, 1878, which fell to their share together with others, to the third defendant, on 27th January, 1882, and the 6th December, 1883.

In the meantime, the plaintiff had brought a suit on his second mortgage in 1881, and in execution of the decree which he obtained, certain lands part of those mortgaged were put up at auction and purchased by himself, and satisfaction entered up of the mortgage-debt. We have already at the hearing expressed an opinion that the Assistant Judge was right in holding that the suit on the mortgage of 28th July, 1878, was not a bar to the maintenance of the present suit on the first mortgage, whether under s. 13 or 43 of the Civil Procedure Code; and it only remains to consider whether the appellant is right in his contention, that as the plaintiff by his present suit seeks to recover the mortgage-debt from the lands other than those purchased by him, a proportionate part of the mortgage ought to be deemed to have been satisfied.

[49] The Assistant Judge relying on *Vithal Nilkanth Pinjali v. Vishvasrav* (3) held that defendant would be entitled to relief for contribution, but that it must be by a separate suit, and that he could only redeem the property in the present suit by paying the entire mortgage-debt. The plaintiff by his purchase under the decree passed on the second mortgage acquired the equity of redemption in the lands included in that mortgage, and thus became, as regards the entire property included in the first mortgage, mortgagee as to the whole and mortgagor as to part.

*Ram Dhun Dhur v. Mohesh Chunder Chowdhury* (1) cited by Mr. Ganasham for appellant is an authority that a mortgagee will not be allowed, without special reason, deliberately to execute his decree exclusively against one of the owners of the equity of redemption for the whole debt,

(1) 9 C. 406.

(2) 3 A. 682.

(3) 8 B. 497.

and in that case the mortgagee was restrained by the Court from executing it pending an enquiry directed as to how the debt should be apportioned. The principle of equity upon which that case proceeds, and which we think is a correct one, more especially in this country, is applicable to the present case, where the mortgagee has himself become interested in the equity of redemption, and as all the parties are present, there is no reason, why a similar inquiry should not be made in this suit to determine the sum on payment of which the third defendant is to be allowed to redeem, and in default of which the property should be sold. The case of *Gaya Prasad v. Salik Prasad*; *Gaya Prasad v. Gaya Prasad* (1) cited by Mr. Apte differs from the present, inasmuch as there the sale was by private contract and there was nothing to show that the mortgagee did not pay the full value of the land without regard to the mortgage-debt.

We must, therefore, reverse the decree of the Court below, and refer it to the Court below to determine how the mortgage-debt, Rs. 280-11-9, as found by the Assistant Judge, should be apportioned between the property, the subject of the suit, and the property purchased by the plaintiff, and what portion of it should be charged upon the former property. In the event of the [50] defendants not paying the amount so found within six months after the Court below has recorded its finding, the property in suit to be sold and proceeds applied in or towards the payment of the sum so found, and in the event of the proceeds of the sale not being sufficient to satisfy the same, the first and second defendants to be personally liable for the balance of the debt. The defendants to have their costs of this appeal. Parties under the special circumstances of the case to pay their own costs in the Courts below.

13 B. 50.

## APPELLATE CIVIL.

*Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Nanabhai Haridas.*

HANMANT LAKSHMAN (*Plaintiff*) v. JAYARAO NARSINHA (*Defendant*).\*  
[19th March, 1888.]

*Minor—Contract Act IX of 1872, ss. 10 and 11—Suit on a bond passed to a minor.*

A money bond taken by a minor is good in law, and may be sued on.

[D., 19 B. 697; 20 C. 508; R., L.B.R. (1893—1900) 398; U.B.R. (1897—1901) 313.]

THIS was a reference from Rav Saheb Venkatrav R. Inamdar, Subordinate Judge of Bijapur, under s. 617 of the Code of Civil Procedure.

One Hanmant Lakshman alleging that he was nineteen years old sued to recover Rs. 32 with costs on a bond for Rs. 23-1-0, dated 24th July, 1883. When the case came on for hearing, the Court found him to be a minor much less than nineteen years of age, and allowed Bhimaji, his undivided uncle, to continue the suit on his behalf as his next friend. The bond sued on was passed in the name of the minor plaintiff himself, and he said that he himself obtained it from the defendant, to secure an old debt due by the latter to his deceased father.

\* Civil Reference, No. 5 of 1888.

(1) 3 A. 682.