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follows, however, that if the plaintiff cannot produce the receipt, he cannot recover his money. This he may possibly do by taking the proper steps in this Court, but the question I am discussing is whether the Bank was justified in refusing to pay him when he demanded his money from him in January, 1889, and that question I must decide in the affirmative and in favour of the Bank.

It must be remembered that the plaintiff here cannot allege that it is impossible for him to obtain this receipt. There is nothing to prevent him from suing the second defendant for it, and thus putting himself in a position to demand repayment from the Bank, according to the terms of the contract contained in that document.

[506] The money has been brought into Court by the Bank, and I shall order that it be paid to the plaintiff and that he shall have his costs of this suit paid by the second defendant. The plaintiff must pay the costs of the Bank, but he may add these costs to the costs to be recovered from the second defendant. I should not have made this order as to costs, but I understand that the Bank has expressed its willingness to pay to the plaintiff the interest on his loan up to the 11th April, 1890, at four and a half per cent. Under these circumstances I think the Bank is entitled to the costs of this suit. The Bank must, however, pay to the plaintiff the costs of preparing the deed of indemnity, *viz.*, Rs. 50.

Attorneys for plaintiff: Messrs. *Nanu and Hormasji.*

Attorneys for first defendant: Messrs. *Conroy and Brown.*

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APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Telang.

CHINTAMAN RAMCHANDRA AND ANOTHER (*Original Plaintiffs*), *Appellants v.* DAREPPA AND ANOTHER (*Original Defendants 2 and 3*), *Respondents.** [27th January, 1890.]

Mortgage – Mortgagee in possession not paying assessment during famine – Defendant paid arrears of assessment because registered as occupant and obtained conveyance from mortgagor—Moregagee lying by—Estoppel – Foreclosure, suit for, by the mortgagee.

The plaintiffs, as mortgagees under a mortgagee deed executed to them by the father of the first defendant, had actual possession of the land in question from 1872 to 1877, during which time they cultivated it, and paid the assessment upon it. In the years 1877 and 1878 they ceased to cultivate it, and paid no assessment. In 1879 the first defendant (his father the mortgagor having died) sold the land to the second defendant, who then paid the arrears of assessment upon it to the Mamlatdar, and took possession. The plaintiffs took no steps to prevent his taking possession, or cultivating the land.

In 1886 the plaintiffs brought this suit for foreclosure. They alleged that they had been dispossessed by the second defendant in 1879, and they claimed mesne profits for the years 1883, 1884 and 1885. The Court of first instance directed the defendant to redeem the mortgage within six months, in default whereof it **[507]** granted foreclosure to the plaintiffs. On appeal the District Judge reversed that decree, holding that the plaintiffs were estopped by their conduct from recovering the land from the second defendant, who had purchased it in good faith and for value. On appeal to the High Court,

* Second Appeal No. 630 of 1888.

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Held, restoring the order of the Court of first instance, that the plaintiffs were entitled to a decree. The second defendant only acquired by his purchase the mortgagor's interest in the land. Even if the mortgagor had been in actual possession, the registration of the mortgage would have been notice to the purchaser of the mortgagee's title. As to the question of estoppel, the mortgagees were under no obligation to do anything, as it was not suggested that they stood by while the second defendant was negotiating for his purchase, or had led him by so doing to suppose that they were not interested in the land. They lived at a distance from the land, and it did not appear that they ever knew of the sale. Nor was there any obligation upon them to move in the matter after the conveyance of the land to the second defendant, provided that they did not postpone doing so beyond the period prescribed by the Act of Limitation.

[Disappr., 7 C.W.N. 11 ; **D.**, 134 P.L.R. 1904.]

THIS was a second appeal from a decree of A. D. Pollen, District Judge of Belgaum.

Suit by mortgagees for foreclosure.

On the 3rd September, 1872, by a registered deed of mortgage the father of the first defendant mortgaged the said land to the plaintiffs with possession. The plaintiffs then took possession and cultivated the land, paying the assessment up to the year 1877. During the famine years 1877-78 the plaintiffs neither cultivated the land nor paid assessment upon it. In 1879 the first defendant (his father the original mortgagor having died) sold the land to the second defendant, who thereupon entered into possession as a registered occupant and paid the arrears of assessment for 1877 and 1878 to the Mamlatdar. The plaintiffs did not take any steps to prevent the second defendant getting possession of or cultivating the land.

In 1886 the plaintiffs (the mortgagees) brought this suit for foreclosure. They alleged that they had been dispossessed by the second defendant in 1879, and they claimed mesne profits for the years 1883, 1884, and 1885.

Defendant No. 1 admitted the mortgage, and did not resist the plaintiffs' claim.

Defendant No. 2 pleaded purchase for value without notice of the plaintiffs' mortgage. He stated that he had mortgaged the [508] land to defendant No. 3 in 1885, that he had expended Rs. 400 on improvement, and he pleaded that the plaintiff's suit was barred.

Defendant No. 3 alleged that he was a mortgagee from the second defendant, and relied upon the defences pleaded by defendant No. 2.

The Subordinate Judge, who tried the suit, decreed that the defendants Nos. 2 and 3 might redeem the mortgage by paying the plaintiffs Rs. 750 within six months from the date of the decree, in default of which he granted foreclosure. He also directed that defendant No. 2 should pay Rs. 28-7, and defendant No. 3 Rs. 70 to the plaintiffs for mesne profits for 1883, 1884 and 1885.

Defendants Nos. 2 and 3 appealed to the District Judge, who reversed the lower Court's decree.

The following is a portion of his judgment :—

"* * In 1879 he (defendant No. 2) paid the arrears to the Mamlatdar, and became the registered occupant of the land, in lieu of defendant No. 1, and he also took a conveyance of the land from defendant No. 1, the arrears of land revenue being specified as the purchase-money. Ever since then defendant No. 2 has been in possession and has improved the land.

The plaintiffs not only made no sign at the time, but from 1879 till October, 1886, the date of this plaint, they have not made any sign. They have not sought to pay the assessment or to recover possession of the land; but now when the land has improved in value they come forward, and with the help of defendant No. 1 they endeavour to oust defendant No. 2. I think they are clearly estopped. Their whole course of conduct clearly shows that they relinquished the land in 1877, it not being worth their while to keep it then. They allowed outsiders to believe that they were no more interested in it; they neglected to pay the assessment, which alone would keep their interest alive. They cannot now be allowed, in equity, to advance their claims. It is not proved to my satisfaction that defendant No. 2 had any notice of the mortgage or sale to the plaintiffs when he took up the land; but even if he had, it would not, in my opinion, affect the case * *. The conveyance from defendant No. 1 was [509] little more than a form. If the latter had relinquished his occupancy right by a separate *rajinama*, and defendant No. 2 had subsequently taken it up by a separate *kabulayat*, the same results would have followed * *. Under such circumstances I think the plaintiffs are not now entitled to recover possession from defendant No. 2 * *."

The plaintiffs preferred a second appeal to the High Court.

Ganesh R. Kirloskar, for the appellants.—The lower appellate Court was wrong in holding that the appellants were estopped from asserting their mortgage. There was not a *rajinama* by them in favour of another person. The circumstance that they had not cultivated the land since 1877 by itself cannot deprive them of their rights under the mortgage. Defendant No. 2 only purchased the equity of redemption. The mortgagees were under no obligation then to come forward. The mortgage still subsisted. The mortgage-deed was registered, and operated as a notice to subsequent purchases. The appellants were not estopped, unless they wilfully misled intending purchasers. But no such conduct is alleged or proved here.

Ghanasham Nilkanth Nadkarni, for the respondents.—The refusal by the plaintiffs to pay the assessment and also their ceasing to cultivate the land led the second defendant to believe that they had relinquished their title to the property. Their further conduct in remaining silent after his purchase was a confirmation of their relinquishment, and they cannot now be allowed to recover possession. The respondents were misled. Had the first defendant executed a *rajimama* in favour of the second defendant, who forthwith entered into possession as a registered occupant, it would have given him a good title. He further fortified his title by obtaining a deed of sale from the mortgagor.

JUDGMENT.

SARGENT, C. J.—The plaintiffs in this case, who were registered mortgagees in possession of the land in question, have been found by the District Judge to have ceased to cultivate it during the famine years and to have declined to pay the assessment for 1877 and 1878. That the defendant No. 2 in 1879 paid the arrears of assessment to the Mamlatdar and became the registered [510] occupant after taking a conveyance from the mortgagor and continued to cultivate this land without the plaintiff's "making any sign," either in 1879 or subsequently, that they claimed any interest in it until they filed their present plaint. Under these circumstances the District

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Judge considered that defendant No. 2 acquired a title to the land free from all incumbrances, but that, in any case, the plaintiffs were estopped from setting up their title. We are unable to agree with the District Judge in these conclusions. The defendant No. 2 could only acquire the mortgagor's interest by the conveyance. Even if the mortgagor had been in actual possession, the registration of the mortgage would have been notice to the purchaser of the mortgagee's title. The District Judge, however, says: "The conveyance from defendant No. 1 was little more than a form," and that "if the latter had relinquished his occupancy by a separate *rajinama* and defendant No. 2 had subsequently taken it up by a separate *kabulayat*, the same results would have followed." This view of the rights of the parties is distinctly opposed to the ruling in *Ramchandra Maneshwar* v. *Bhimrav Ravji* (1) that the execution of a *rajinama* by the mortgagor in the third person's favour could only operate to pass the equity of redemption. As to the question of estoppel, the District Judge says that "the mortgagees allowed outsiders to believe they were no more interested in the land." But the mortgagees were under no obligation "to make any sign," one way or the other, in this matter, as it is not suggested that they stood by whilst the negotiation with the mortgagor was going on, and by so doing led the purchaser to suppose they were not interested in the land. They lived fifteen miles away from the lands in dispute, and it is not even shown that they knew anything about the sale to the defendant No. 2. Nor were the mortgagees under any obligation to move in the matter after the conveyance to defendant No. 2, provided they did not postpone doing so beyond the period prescribed by the Statute of Limitations.

We must, therefore, reverse the decree of the Court below, and the parties through their pleaders having after this decision agreed to a decree being passed in the terms of the Subordinate [511] Judge's decree omitting the order for plaintiff to recover Rs. 28-7-0 from defendant No. 2 and Rs. 70 from defendant No. 3, this Court directs that such decree be passed, with costs on respondents.

Decree reversed.

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14 B. 511.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, Mr. Justice Birdwood and Mr. Justice Telang.

DULABH VANMALI (*Plaintiff*) *v.* REHMAN JAMAL (*Defendant*).*

[19th February, 1890.]

Stamp Act I of 1879, s. 3, cl. 4 (b)—Construction—Khata *in the name of the debtor, but in the hand-writing of another.*

A *khata* in the name of a debtor acknowledging the receipt of the amount advanced, and bearing the signature of the writer of the *khata* as writer of it merely.

Held to be an acknowledgment only, and not a bond, within the meaning of s. 3, cl. 4 (*b*) of the Stamp Act I of 1879.

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* Civil Reference No. 22 of 1889.

(1) 1 B. 577.