

1890
AUG. 11.APPEL-
LATE
CIVIL.

15 B. 183.

mortgage where there is a transfer of interest in immoveable property as provided by s. 58 of the Transfer of Property Act; but whether such be the correct view of that Act, as to which we express no opinion, we think that all the authorities in this Presidency point to such instruments being regarded as mortgages; and if so, there can be no reason why they should not fall under art. 147.

We must, therefore, reverse the decrees of the Court below and send back the case to be disposed of on the merits, so far as the same have not been already adjudicated on. Appellant to have his costs of this appeal.

Decree reversed.

15 B. 186.

APPELLATE CIVIL.

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

LAKSHUMAN GIRIRAYA NAIK (*Original Defendant*), Appellant *v.*
MADHAV KRISHNA SHENVI (*Original Plaintiff*), Respondent. *
[18th August, 1890.]

Mortgage by three sharers—Partition of equity of redemption—Redemption by two sharers—Excess payment—Suit for redemption by the third sharer—Set off.

Three undivided brothers, Janga, Rama and Narain, mortgaged certain land to the defendant. They afterwards separated and partitioned their property. [187] Rama and Narain redeemed their respective shares of the mortgaged land. Besides paying the defendant two-thirds of the sum due on the mortgage, they paid him Rs. 189-13-4, being two-thirds of a sum of Rs. 284-12-0, which he alleged he had been obliged to pay as assessment in respect of the mortgaged lands. Subsequently the plaintiff purchased the whole of the lands comprised in the mortgage, and he now sued to redeem the one-third share which remained in mortgage. The defendant claimed to charge the plaintiff with the remaining one-third of the sum which he alleged he had paid as assessment. The Subordinate Judge disallowed the defendant's claim, and ordered redemption on payment by the plaintiff of Rs. 570-10-8, being one third of the sum due on the mortgage. In appeal, the District Judge found that the defendant had not proved the alleged payment of assessment, and he allowed the plaintiff to deduct from the sum due on the mortgage Rs. 189-13-4 which had been paid to the defendant by the other two mortgagors. On second appeal by defendant.

Held, varying the decree of the District Judge, that the plaintiff was not entitled to the deduction. The three mortgagors had severed their interest. The plaintiff's right to redeem his one third was perfectly distinct from the redemption by the other two mortgagors, and there was no longer any joint account to which the sum previously paid could be credited.

[R., 6 C.L.J. 46 (53); 10 C.L.J. 150 (176); 14 C.L.J. 530=12 Ind. Cas. 155; 17 Ind. Cas. 337=23 M.L.J. 576=12 M.L.T. 484=(1912) M.W.N. 1168.]

SUIT for redemption and possession. Second appeal from the decision of G. McCorkell, District Judge of Kanara.

The land in question was a one-third share of certain land which had been mortgaged to the defendant by three brothers, Janga Naik, Rama Naik and Narain Naik, who were then living in union. Subsequently, however, they separated and partitioned their property, and Rama and Narain redeemed their shares from the defendant and got possession. The plaintiff afterwards bought the whole property at a Court sale, and he now sued

* Second Appeal, No. 481 of 1889.

to redeem the remaining one-third share from the defendant and to obtain possession. He also claimed mesne profits for two years, alleging that he had tendered the balance of the mortgage-debt to the defendant, but that it had been refused.

The defendant admitted the facts, as stated above, but he alleged that he had paid Rs. 284-12-0 as assessment on the lands comprised in the mortgage, and he contended that he was entitled to charge the plaintiff with one-third of that amount in respect of the one-third share of the mortgaged land which he now sought to redeem. He had made a similar claim against the other two mortgagors when they redeemed their shares, and [188] they had paid him Rs. 189-13-4, being two-thirds of the above sum.

The Subordinate Judge disallowed the defendant's claim to this sum and he made a decree for redemption on payment by the plaintiff to the defendant of Rs. 570-10-8, being the third part of the debt secured by the mortgage.

Both parties appealed. The District Judge held that the payment of Rs. 284-12-0 as assessment was not proved by the defendant, and he allowed the plaintiff to deduct from the Rs. 570-10-8 found due on the mortgage the above sum of Rs. 189-13-4 which had been paid to the defendant by the other two mortgagors. He, therefore, varied the decree by reducing the amount to be paid by the plaintiff to Rs. 380-12-0. He also allowed the plaintiff's claim for mesne profits which were to be determined in the execution proceedings.

Against the decree of the District Court, the defendant preferred a second appeal.

Shamrav Vithal, for the appellant.

Ghanasham Nilkanth Nadkarni, for the respondent.

JUDGMENT.

SARGENT, C. J.—It is not in dispute that after the mortgage had been executed by the three mortgagors there was a partition by the latter of their equity of redemption by which each became entitled to an undivided one-third share in the same. Two of the mortgagors then redeemed their two shares, on the basis of paying two-thirds of the principal and interest due and two-thirds of a sum said to be due on account of excess assessment, and took possession of their shares. The plaintiff now seeks to redeem the remaining one-third share; and it having been found that the payment by the mortgagee of the excess assessment in respect of which he claimed against the other mortgagors on the previous occasion and in the present suit was not proved, the mortgagor now claims, and the District Judge has allowed his claim to set off against the sum found due on the account against him the sum which the other mortgagors paid on account of such excess assessment.

[189] The case of *Chandika Singh v. Pohkar Singh*(1) was relied on by the District Judge; but that merely establishes that, where the mortgage is joint, the mortgagee cannot by settling with one of the mortgagors proceed by foreclosure against the interests of the other mortgagors, but must make the former a party, and the money so paid must be placed to the credit of their joint account. Here, however, the parties had severed

(1) 2 A. 906.

1890
AUG. 18
APPEL-
LATE
CIVIL.
15 B. 186.

their interests, and the mortgagee has chosen to recognize that partition as shown by his allowing two of them to redeem their two-third shares and by giving them possession. The plaintiff's right to redeem his one-third is, therefore, perfectly distinct from the former transaction, and there is no longer any joint account to which the sums paid on the former occasion can be credited.

We must, therefore, vary the decree by disallowing Rs. 189-13-4 which the District Judge has allowed the plaintiff in taking the account by way of set-off, and substituting the sum of Rs. 570-10-8 for the sum of Rs. 380-12 found due by the plaintiff by the District Judge and as a necessary consequence disallowing mesne profits. The time for redemption to be extended to three months from the date of this decree. Appellant to have his costs of this appeal in proportion. Parties to pay their own costs in the Courts below.

Decree varied.

15 B. 189.

APPELLATE CRIMINAL.

Before Mr. Justice Birdwood and Mr. Justice Parsons.

QUEEN-EMPRESS *v.* ABAJI RAMCHANDRA.* [3rd September, 1890.]

Penal Code (Act XLV of 1860), s. 475—Possession of papers bearing counterfeit marks or devices—Charge under s. 475 how to be framed—Misdirection—Evidence—Forgery.

During the course of a police investigation into a complaint of theft, the house of the accused was searched and a bundle of papers, about 58 in number, were found which were alleged to be forgeries or preparations for forgeries. The accused was thereupon committed to the Court of Session on a charge under s. 475 of the Indian Penal Code. A few days before the trial of the accused the [190] police searched the house of one Shivlingapa, who was a witness for the defence, and there discovered a batch of suspicious papers which were produced at the trial, and put in as evidence against the accused. The accused was convicted of the offence under s. 475 of the Indian Penal Code and sentenced to transportation for life.

Held, reversing the conviction and sentence, that the suspicious papers found in Shivlingapa's house were not admissible in evidence against the accused.

Held, further, that the Judge's direction to the jury regarding those papers, that they established a connection between the accused and many of the witnesses belonging to the same faction, and that they showed the extent to which the practice of forgery had gone in the village, and that in this way they were relevant to the question of guilty knowledge and intention—was a misdirection which prejudiced the accused.

In the trial of an accused person on a charge under s. 475 of the Indian Penal Code, the charge should be so framed as to specify distinctly that part of the section which is applicable to the case, and should distinctly specify the particular papers bearing a counterfeit mark or device which the accused was alleged to have had in his possession with the intent mentioned in the section.

APPEAL from the conviction and sentence recorded by Dr. A. D. Pollen, Sessions Judge of Belgaum, in *Queen-Empress v. Abaji Ramchandra*.

In consequence of a complaint by one Nagapa, charging the accused Abaji Ramchandra with theft of a stamp paper, the police searched the

* Criminal Appeal, No. 235 of 1890.