

1891
MARCH 16.
APPEL-
LATE
CIVIL.
15 B. 692.

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APPELLATE CIVIL.

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

NARAYAN VITHALMAVAL (Original Defendant No. 3), Appellant v. GANOJI AND OTHERS (Original Plaintiffs and Defendant No. 4), Respondents; AND GITABAI AND ANOTHER (Original Defendants Nos. 1 and 2), Appellants v. GANOJI AND OTHERS (Original Plaintiffs), Respondents.* [16th March, 1891.]

Mortgage—Sub-mortgage—Redemption suit—Accounts taken between mortgagee and sub-mortgagee—Practice—Procedure—Dehkan Agriculturist's Relief Act (XVII of 1879), s. 14.

In a suit for the redemption of land which has been sub-mortgaged by the mortgagee, in which suit the sub-mortgagees are co-defendants, the mortgagee is entitled to have an account taken of the sub-mortgage. The judgment should direct an account of what is due to the original mortgagee and then of what is due to the sub-mortgagee; and that upon payment to the latter of the sum due to him, not exceeding the sum found due to the original mortgagee, and on payment of the residue, if any, of what is due to the original mortgagee, both shall reconvey to the mortgagor.

[R., 28 A. 638=3 A.L.J. 548=26 A.W.N. 162; 20 M. 85 (88, 89); 5 Bom.L.R. 643 (646); 10 C.L.J. 470; 12 C.L.J. 137 (139)=5 Ind. Cas. 654; 5 O.C. 335 (341, 342); 30 P.R. 1900=1900 P.L.R. 219; U.B.R. (1906), Sub-mortgage, 1.]

THESE were appeals from the decision of L. G. Fernandez, First Class Subordinate Judge of Poona.

In 1876 one Ganoji mortgaged certain lands with possession to Vithal Sakharam for Rs. 13,000. In 1887 Vithal Sakharam sub-mortgaged the said lands (except a small portion) to Vithal Ramchandra for Rs. 5,000 and to Ramachandra Sadashiv for Rs. 2,000. In 1888 the sons of Ganoji (the mortgagor) filed this suit for redemption. The defendants were the representatives of the mortgagee, who was dead, and of the sub-mortgagees, who also were both dead.

[693] The representative of the mortgagee was the defendant Sonabai, who was the widow of the son of the original mortgagee, Vithal Sakharam. The defendant Narayan Vithal was the son of the sub-mortgagee Vithal Ramchandra, and the defendant Ganesh Ramchandra was the son of the other sub-mortgagee Ramchandra Sadashiv.

At the hearing the following issue was framed by the Subordinate Judge :—

Issue No. 5—Can accounts be taken between the defendants *inter se* in this case; if so, how much of amount that might be found due by the plaintiffs should be awarded to which of them; if not, what order should be passed regarding the payment of the redemption-money? This issue was found by him in the negative.

Shivram Vithal Bhandarkar, for Sonabai, the mortgagee (appellant in Appeal No. 46):—We say that the lower Court ought to have taken accounts between the mortgagee and the sub-mortgagee. A separate suit against the sub-mortgagees for that purpose should not be required. In a redemption suit the accounts between the mortgagee and the sub-mortgagee can be taken : Coote on Mortgages, p. 1178.

* Appeals Nos. 39 and 46 of 1889.

ORDER OF REMAND.

PER CURIAM.—The Subordinate Judge has directed that the sum found due on taking the account of the original mortgage should be paid to the sub-mortgagee, and that the accounts as between the defendant-mortgagees *inter se* should be left for a separate suit.

The mortgagee objects to this direction, and claims, as was claimed in the written statement, that an account should be taken of the sub-mortgage. We think that this claim of the mortgagee is well founded, and that the case must be remanded for an account of the sub-mortgage to be taken. This is the course followed in England. In the case of a derivative mortgage or sub-mortgage the judgment directs an account of what is due to the original mortgagee or his assignee, and then of what is due to the derivative or sub-mortgagee, and that upon payment to the latter of the sum due to him, not exceeding the sum found due to the original mortgagee, and on payment of [694] the residue, if any, of what is due to the original mortgagee, both of them shall reconvey to the mortgagor (Coote on the Law of Mortgage, 5th ed., pp. 1178—9; Seton on Decrees, 4th ed., p. 1153).

Case remanded.

15 B. 694.

APPELLATE CIVIL.

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

BAI AMTHI *alias* RUKSHMANI (*Decree-holder*), *Petitioner v.*
MADHAV MANOR (*Auction-purchaser*), *Opponent.**
[19th March, 1891.]

Decree—Execution—Sale in execution—Collector, Power of, to set aside sale and to order a re-sale.

A sale of certain property by the Collector in execution of a decree was set aside by the Collector on the application of the decree-holder, and a re-sale took place at which the decree-holder purchased the property for Rs 650. The purchase-money was duly paid into Court. Subsequently a third party applied to the Collector to set aside this sale, and offered Rs. 800 for the property. The Collector made an order setting aside the sale and ordering a re-sale; the biddings at such re-sale to commence at Rs. 800. The re-sale accordingly took place. The decree-holder applied to the Subordinate Judge to set aside the re-sale and to confirm the previous sale to her. On reference to the High Court,

Held, that the re-sale by the Collector was a nullity, and that the question with regard to the confirmation of the previous sale should be dealt with by the Subordinate Judge as if the Collector had issued no orders on the subject.

Ganpatram Motiram v. Isakji Adamji (1) followed.

[R., 19 B. 216; 23 B. 531 (533).]

THIS was a reference made by Rao Sahab Tribhuvandas Lakshmidas, Subordinate Judge of Vagra in the Broach District, under s. 617 of the Civil Procedure Code (Act XIV of 1892).

* Civil Reference No. 15 of 1890.

(1) 15 B. 322.