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APPEL-LATE CIVIL.

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## APPELLATE CIVIL.

*Before Mr. Justice Bayley, Acting Chief Justice, and Mr. Justice Candy.*

CHIMNAJI (*Original Plaintiff*), *Appellant v.* SAKHARAM AND OTHERS (*Original Defendants*), *Respondents.** [20th June, 1892.]

*Mortgage—Redemption—Suit for redemption by purchaser of equity of redemption—Evidence given by defendants of a mortgage other than the mortgage in respect of which suit brought—Right of plaintiff to have the question of latter mortgage determined—Practice—Procedure.*

The plaintiff as purchaser of the equity of redemption sued for redemption. He alleged a mortgage, dated A.D. 1849, for Rs. 175. The defendants admitted a mortgage, but alleged that it was executed at a different time and for a larger [366] sum. After the evidence was given, but before the judgment was delivered, the plaintiff applied to amend the plaint and to set up the mortgage admitted by the defendants. His application was refused, and the Court dismissed the suit on the ground that he had failed to prove the particular mortgage alleged in the plaint. The District Judge confirmed the decree, but observed that there probably was a mortgage for the larger sum as alleged by the defendants. On second appeal,

*Held*, reversing the decree and remanding the case, that the plaintiff was entitled to have the question of the mortgage for the larger sum inquired into.

[Diss., 18 A. 403 (409) ; 3 O.C. 173 (174).]

SECOND appeal from the decision of T. Hart-Davies, Acting Assistant Judge of Poona.

Suit to redeem a mortgaged house.

The plaintiff alleged that on the 1st February 1887 he had purchased the equity of redemption under a mortgage for Rs. 175, dated A.D. 1849, executed by one Rakhmaji to one Shiduji. He now sued to redeem the mortgage.

The first defendant (Sakharam) was a son of the deceased mortgagee Shiduji. He denied the mortgage alleged by the plaintiff, but admitted another mortgage of a different date and for a different amount, *viz.*, for Rs. 256. He further stated that a moiety of the house belonged to him as his share.

Defendant No. 2 (Babaji) was the second son of Shiduji. He denied the mortgage altogether, and claimed the house as his. He also alleged that his brother Sakharam (defendant No. 1) was in collusion with the plaintiff. He also pleaded limitation.

After the evidence was given, but before the judgment, the plaintiff applied to amend the plaint by alleging a mortgage for Rs. 256. The Court refused the application, but allowed the valuation of the claim to be increased to Rs. 256. It then dismissed the suit, holding that the particular mortgage alleged by the plaintiff was not proved. He was of opinion, however, that the evidence showed that the house had been mortgaged. On appeal the District Judge confirmed the decree, remarking that there probably had been a mortgage executed by the mortgagors to the mortgagee at some date prior to 1855 A.D. for Rs. 256, but as that was a different transaction from the one sued on, the plaintiff was not entitled to succeed.

[367] The plaintiff preferred a second appeal.

* Second Appeal No. 255 of 1891.

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*Mahadeo Chimnaji Apte*, for the appellant.—The Courts should not have dismissed the suit, both being of opinion that there was a mortgage by the plaintiff's assignors to the defendants' family. The evidence given by plaintiff was *prima facie* sufficient, and it lay on the defendants to displace it—*Hiru* v. *Bhikaji* (1); *Chinto* v. *Suga* (2); *Ganesh* v. *Vinayak* (3); *Raghunath Annaji* v. *Babaji* (4).

The plaintiff ought to have been allowed to amend his plaint, as the nature of the suit would not have been materially affected thereby—*Lakshman* v. *Hari* (5).

*Gangaram B. Rele*, for the respondent, (defendant No. 2).—The Subordinate Judge was right in not allowing the plaint to be amended. The application was made too late, *viz.*, about a year after the defendant No. 1 filed his written statement alleging the mortgage of Rs. 256, and five days before the judgment. The plaintiff failed to prove the mortgage he alleged in his plaint. He cannot be allowed now to prove another mortgage. When a particular instrument is sued upon, the plaintiff must establish his case on that particular cause of action and not on one similar to it—*Vithaldas* v. *Yedu* (6); *Narsapa* v. *Bhimangavda* (7); *Moro* v. *Dada* (8); *Lakshman Trimbak* v. *Bhagirathibai* (9); *Govindrao* v. *Ragho* (10).

## JUDGMENT.

CANDY, J.—The plaintiff sues as purchaser of the equity of redemption from certain Telis to redeem a mortgage which in his deed of assignment is recited as having been executed in *Shake* 1761 (A.D. 1839) for Rs. 175 to one Shiduji Mali. The first defendant, the elder son of the deceased Shiduji, pleaded that the mortgage was for Rs. 256, and not in *Shake* 1761; the second defendant, the second son of Shiduji, denied the mortgage altogether; and the third defendant, the sub-mortgagee under defendant No. 1, did not resist the claim.

**[368]** The Subordinate Judge included in the first issue framed by him the question whether the principal mortgage money was Rs. 175 or Rs. 256, and allowed the valuation of the claim to be increased to Rs. 256, but he rejected the claim (quoting the case at I.L.R., 8 Bom., 543), on the ground that the particular mortgage recited by plaintiff had not been proved.

The District Judge confirmed this decision, though he thought it probable that there was a mortgage for Rs. 256.

We are of opinion that both the lower Courts have erred. In the case of *Govindrav* v. *Ragho* (10) (on which the Subordinate Judge relied), the defendant pleaded that the lands were his ancestral property, and denied that there had at any time been any mortgage. Plaintiffs resorted to dishonest artifices to procure evidence of their case, and it was held that as a specific mortgage was sued on, and not proved, the Court was not authorized to give a decree on some indefinite, supposed mortgage, which by the hypothesis the plaintiff could not have sued on. That case is easily distinguished from such cases as those to be found at I.L.R., 4 Bom., 584; P. J. for 1888, p. 131; P. J. for 1890, p. 297. In *Lakshman* v. *Hari* (5) defendant admitted that the relations between the plaintiff and himself were those of mortgagor and mortgagee, but pleaded the bar of

(1) P. J. 1883, p. 131.
(2) P. J. 1886, p. 247.
(3) P. J. 1889, p. 370.
(4) P. J. 1890, p. 297.
(5) 4 B. 584.
(6) P. J. 1876, p. 270.
(7) P. J. 1877, p. 190.
(8) P. J. 1889, p. 159.
(9) P. J. 1892, p. 192.
(10) 8 B. 543.

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limitation; it was held that when the question of limitation was decided in plaintiff's favour, then the amount of the mortgage-debt was to be decided. The case of *Hiru* v. *Bhikaji* (1) is very similar to the present case, the defendants admitting that there was a mortgage, but pleading that it was for a different sum and of an earlier date. But the case of *Moro* v. *Dada* (2) was very different, for there the defendant referred to a mortgage only to show that it had been paid off, not to admit any liability upon it.

We think therefore in the present case that the plaintiff was entitled to have the question of the mortgage for Rs. 256 inquired into, and we reverse the decrees of the lower Courts and remand the case for a decision on the merits. All costs hitherto incurred to abide the result.

*Decree reversed and case remanded.*

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## [369] APPELLATE CRIMINAL.

*Before Mr. Justice Jardine and Mr. Justice Telang.*

QUEEN-EMPRESS *v.* KHODA UMA AND OTHERS.* [27th June, 1892.]

*Criminal Procedure Code (Act X of 1882), ss. 227 and 237—Charge—Alteration of charge—Conviction for an offence different from that with which accused is charged—Extradition*—Lex fori.

The accused were subjects of His Highness the Gaekwar of Baroda. They were extradited for committing dacoity in British India. The Magistrate, who held a preliminary inquiry into the matter, committed the accused to the Sessions Court on a charge under s. 398 of the Indian Penal Code (XLV of 1860). The Sessions Judge amended the charge to one under s. 395, on the ground that, as the accused had been extradited on a charge under s. 395, they could be tried and convicted only under that section, and no other. At the end of the trial, the Sessions Judge finding that the accused were guilty of theft, but not of dacoity, acquitted them.

*Held*, reversing the order of acquittal, that it was competent to the Sessions Judge to alter the charge under s. 227 of the Code of Criminal Procedure (Act X of 1882) and under s. 238 to convict the accused of the minor offence, which the evidence established.

*Held*, also, that the Code of Criminal Procedure was applicable as *lex fori*.

[R., Rat. Unr. Cr. Cas. 773 (774).]

APPEAL by the Local Government against an order of acquittal passed by the Sessions Judge of Ahmedabad.

The accused were subjects of His Highness the Gaekwar of Baroda. They were charged with committing dacoity in a village in the Ahmedabad District. Their extradition was obtained on the representation of the District Magistrate of Ahmedabad that there was evidence to prove a *prima facie* case of dacoity against them.

The Magistrate, who held a preliminary inquiry into the matter, committed the accused for trial to the Court of Session on a charge of attempting to commit dacoity when armed with deadly weapons, an offence punishable under s. 398 of the Indian Penal Code.

The Sessions Judge was of opinion that, as the accused had been extradited for dacoity under s. 395 of the Penal Code, they could be tried

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* Criminal Appeal No. 84 of 1892.

(1) P. J. (1888) p. 131. (2) P. J. (1889) p. 159.