

1893

SEP. 26.

APPEL-

LATE

CIVIL.

18 B. 679.

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

RACHAWA AND OTHERS (Original Defendants), Appellants v. SHIVAYOGAPA (Original Plaintiff), Respondent.* [26th September, 1893.]

Maintenance, mother's right to—Right to possession in virtue of claim to maintenance—Mortgagee's right to possession subject to mother's claim to maintenance—Practice—Procedure—Point of law raised for first time in second appeal.

After the death of S., who had mortgaged certain land belonging to him, his widow (defendant No. 2) mortgaged it again in consideration of the existing mortgage-debt and a further advance. The mortgage was afterwards assigned to the plaintiff, who sued the widow (defendant No. 2) and the mother (defendant No. 1) of S. for possession. The mother (defendant No. 1) contended that any right the widow (defendant [680] No. 2) had to mortgage the property was subject to her (the first defendant's) right to maintenance out of it, and, as her maintenance, she claimed to remain in possession. The lower Court held that the property should not be given to the plaintiff until a proper arrangement had been made by him for the maintenance of defendant No. 1, but stated that it imposed that condition on the supposition that there was no other family property out of which she could be maintained.

Held, that the decree was wrong in making the right of the first defendant to remain in possession dependent on there being no other property. Further, that as the mortgagees lent their money with full knowledge of the first defendant's possession in virtue of her claim to maintenance, the first defendant ought not to be compelled to accept from the plaintiff maintenance in some other form.

In a suit by a mortgagee for possession of mortgaged land, the mother of the deceased owner claimed to remain in possession of it in virtue of her right to maintenance. At the hearing of the second appeal a claim was made, on her behalf, not merely to maintenance, but to a share in the property as mother of the last owner. The point had not been taken in the lower Courts, nor was it one of the grounds of appeal.

Held, that it could not be taken for the first time in second appeal. It set up a new right differing in kind from that asserted throughout the trial, and not differing merely in degree, as was the case in *Nagesh v. Gururao* (1).

[R., 1 N.L.R. 1 (2).]

SECOND APPEAL from the decree of C. G. W. Macpherson, District Judge of Belgaum.

Suit by the assignee of a mortgage for possession of the mortgaged land, and for mesne profits.

The land in question had been mortgaged for Rs. 150 by Solbaya to one Balapa Bhandari. Solbaya afterwards died, leaving his mother (defendant No. 1) and his wife (defendant No. 2) him surviving. After his death his wife (defendant No. 2), in consideration of the mortgage-debt then due (Rs. 150) and of a further advance of Rs. 30, mortgaged the same land to Balapa Bhandari and one Shidapa. They transferred their interest to the plaintiff, who now sued.

The first defendant claimed a right to hold possession of the land for her maintenance unaffected by the second mortgage; she was willing to pay off the first mortgage made by her son.

The second defendant did not defend the suit.

The Subordinate Judge passed a decree for the plaintiff.

* Second Appeal No. 319 of 1892.

(1) 17 B. 303.

In appeal, the District Judge was of opinion that the second defendant's right to mortgage the land was subject to the first [681] defendant's right to maintenance, and that in making the second mortgage the second defendant was acting in fraud of the first defendant's right and that the mortgagees had notice of the fraud. He held that the plaintiff was entitled to possession of the land subject to the first defendant's right to maintenance, and he made the following order :—

" I reverse the decree of the lower Court and award plaintiff possession on an arrangement being made to the satisfaction of the Subordinate Judge in regard to the maintenance of defendant No. 1. This of course presupposes that there is not other property from which defendant No. 1 can be maintained. This point should be ascertained by the lower Court in execution proceedings, when also the mesne profits due to the plaintiff after making allowance for defendant No. 1's maintenance should be ascertained. What is a suitable maintenance for defendant No. 1 should be ascertained at the same time."

Defendants preferred a second appeal.

Vasudeo G. Bhandarkar, for the appellants (defendants):—(States that he is authorized to appear on behalf of both the defendants, but would press the appeal on behalf of defendant No. 1 only.) The first defendant is not only entitled to maintenance, but also has a right to retain possession of the property from which the maintenance is paid. The Judge was wrong in directing that an arrangement should be made in regard to her maintenance. Even if there is some other property, she cannot be compelled to give up the property from which she has been drawing maintenance. The right of a widow to retain property assigned for her maintenance is not dependent upon the existence or otherwise of any other property—*Lakshman v. Sarasvatibai* (1); *Imam v. Balamma* (2); *Vrandavandas v. Yemunabai* (3).

The maintenance of the defendants should be charged upon the property in dispute. Both the widows were in possession of the property and both of them paid interest to the mortgagee. The mortgagee had notice of our possession and right of maintenance. A Hindu widow cannot be made liable for mesne profits of the property from which she derives her maintenance. The Judge was wrong in making the order for mesne profits. Defendant No. 1 is the mother of the husband of defendant No. 2 [682] and as mother she is entitled to a share in the property—*Lakshman Ramchandra v. Satyabhamabai* (4); *Damodardas v. Utamram* (5).

[SARGENT, C. J.—That point was not taken in either of the lower Courts.]

But being a point of law, it can be taken for the first time in second appeal—*Nagesh v. Gururao* (6).

Balkrishna N. Bhajekar, for the respondent (plaintiff).—The claim of defendant No. 1 to a share should not be allowed. The point is now taken for the first time in second appeal. It is not taken in the memorandum of appeal, but is urged for the first time at the hearing. A mother is entitled to a share only when the sons effect a partition. But here there could be no partition, because there was an only son, and, therefore, there being no partition the appellant has no right to a share. Even if she had been entitled to a share, still as on her son's death the whole property

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(1) 12 B.H.C.R. 69.
(4) 2 B. 494 (522).

(2) 12 M. 334.
(5) 17 B. 271.

(3) 12 B.H.C.R. 229.
(6) 17 B. 303.

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devolved on defendant No. 2 as son's widow and heir, defendant No. 1 has lost her right.

The mortgage by defendant No. 2 was made from necessity,—that is, for maintenance and for payment of her husband's debt, and it was for this reason that the mortgage was held binding on both the defendants. Further, defendant No. 1 acquiesced in the mortgage made by defendant No. 2.

Bhandarkar in reply.

JUDGMENT.

SARGENT, C. J.—The first defendant by her written statement claimed to hold the land unaffected by the mortgage created by the second defendant; and the District Judge has held that the right of the second defendant to dispose of the land was limited by the right of the first defendant to maintenance, and it was not suggested that the mortgagees, through whom plaintiff claims, were not aware of the first defendant being in possession in respect of the maintenance.

It has, however, been argued before us, for the appellants, that the right of the first defendant as the mother of Solbaya, the [683] husband of the second defendant, was not merely to maintenance but to a half share in all the property. In the Courts below this point does not appear to have been taken, the right of the first defendant in both Courts being treated as one of maintenance only; nor is it one of the grounds of appeal to this Court. We do not think, therefore, that we ought to allow it to be taken now for the first time on second appeal. It sets up a new right in favour of the first defendant differing in kind from that asserted throughout the trial, and not merely in degree, as was the case in *Nagesh v. Gururao* (1).

The only question, therefore, for this Court's consideration is, whether the decree of the Court below can be objected to, assuming the right of the first defendant to the land to rest exclusively upon her right to maintenance. The decree provides for possession not being given to the plaintiff until a proper arrangement to the satisfaction of the Subordinate Judge has been made by plaintiff for her maintenance; but that condition is imposed on the assumption that there is no other family property out of which she can be maintained. Whether, if there was such property available for the purpose, the first defendant ought to be removed, it is not necessary to decide; there is no suggestion that there is any other, still less that the second defendant is ready to appropriate it to the first defendant for her maintenance, and the decree is therefore, in our opinion, wrong in making the first defendant's right to remain in possession dependent on there not being other property. Again, as the mortgagees lent their money with full knowledge of the first defendant's possession in virtue of her claim to maintenance, the first defendant ought not to be compelled to accept from the plaintiff maintenance in some other form in lieu of the land.

We must, therefore, pass the same decree as was passed by the Madras Court in *Imam v. Bamma* (2), dismissing the suit with the first defendant's costs throughout to be paid by the plaintiff.

Decree reversed and suit dismissed.

(1) 17 B. 303.

(2) 12 M. 334.