

APPELLATE CIVIL.

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

1895.

January 10.

PARSHOTAM BHA'ISHANKAR AND ANOTHER (ORIGINAL PLAINTIFFS),
APPELLANTS, v. RUMA'L ZUNJAR AND OTHERS (ORIGINAL DEFENDANTS),
RESPONDENTS.*

Practice—Procedure—Suit for ejectment turned into a redemption suit.

A Court can in its discretion pass a decree for redemption in a case in which the plaintiffs have sued in ejectment.

Nilakant v. Suresh Chunder(1) referred to and followed.

SECOND appeal from the decision of John FitzMaurice, Assistant Judge of Ahmedabad, confirming the decree of Ráo Sáheb B. Y. Gupte, Subordinate Judge of Umreth.

The plaintiffs brought this suit in 1892 to recover certain land from the defendants, alleging that they had bought it in 1891 from one Parshotam Liládhar, who had purchased it in the year 1880 in execution of a decree against the father of defendant No. 1.

Defendant No. 1 answered that his father had mortgaged the land to defendants Nos. 2 and 3.

Defendants Nos. 2 and 3 answered (*inter alia*) that they were mortgagees in possession, and that the plaintiffs were bound to pay to them the amount due under their mortgage before they (plaintiffs) could recover possession.

At the hearing the plaintiffs' pleader while stating his clients' case stated that the plaintiffs were willing to pay the amount properly due to defendants Nos. 2 and 3 on their mortgage.

The Subordinate Judge found that the sale to the plaintiffs was proved; that the mortgage relied on by defendants Nos. 2 and 3 was proved; and he held that the plaintiffs must bring a redemption suit before they could be allowed to obtain possession of the land in dispute. He, therefore, rejected the claim.

On appeal by the plaintiffs the Judge confirmed the decree, holding that as the plaintiffs had not amended their plaint by adding a prayer for redemption, they could not be allowed to

* Second Appeal, No. 456 of 1893.

(1) P. J., 1882, p. 21.

redeem now against the consent of defendants Nos. 2 and 3, but must be referred to a fresh suit.

The plaintiffs preferred a second appeal.

Gokaldás K. Párekh for the appellants (plaintiffs):—The Judge has fallen into an error in supposing that the defendants did not consent to our redeeming the land. Their written statement clearly shows that they were willing to allow redemption in this suit. Further on, pleader also stated, at the hearing, that we were willing to redeem. The question of mortgage was considered, and the mortgage was held proved. Therefore, it was wrong not to allow redemption simply on the ground that the suit was one in ejectment and not for redemption—*Vásudeo Bálaji v. Náráyan Krishna*⁽¹⁾; *Mansukh Pitámbar v. Tarbhovan Parshotam*⁽²⁾; *Nilakant Banerji v. Suresh Chunder Málík*⁽³⁾.

Chimanlál H. Setalvad for the respondents (defendants):—The plaintiffs having brought a suit in ejectment, it was rightly dismissed. In an ejectment suit, a plaintiff cannot be allowed to redeem—*Chandu v. Kombi*⁽⁴⁾. We did not say in our written statement that we were willing to allow redemption in the suit. We merely contended that the plaintiffs were not entitled to bring a suit for possession before the redemption of our mortgage.

SARGENT, C. J.:—It would be difficult after the decree passed by the Privy Council in *Nilakant v. Suresh Chunder*⁽³⁾ to hold that the Court cannot in its discretion pass a decree for redemption in a case in which the plaintiffs have sued in ejectment. In the present case the passage in the written statement, in which the defendants virtually admit they are ready to be redeemed, taken in connection with the statement of the plaintiffs' pleader at the hearing that his clients were ready to redeem, was virtually equivalent to an alternative case being made at the hearing, if not in the pleadings. As the Courts below were both under the impression that a decree for redemption could not be made, and exercised no discretion in the matter, we may, on second appeal, exercise that discretion in favour of the plaintiffs. We must,

(1) L. R., 12 Ind. Ap., 171.

(3) P. J., 1882, p. 21.

(2) P. J., 1882, p. 213.

(4) I. L. R., 9 Mad., 203.

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therefore, reverse the decrees, and send back the case for the Court to pass a redemption decree after ascertaining what (if any) amount may be found due on the defendants' mortgage or mortgages to which the plaintiffs may be subject. The parties to pay their own costs in this Court and in the lower Court of appeal. Defendants Nos. 2 and 3 to have their costs in the Court of the Subordinate Judge.

Decree reversed and case sent back.

APPELLATE CIVIL.

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

1895.
January 17.

SADA'SHIV GANPATRA'O, a MINOR (ORIGINAL PLAINTIFF), DECREE-HOLDER, v. VITTHALDA'S NANCHAND (ORIGINAL DEFENDANT), JUDGMENT-DEBTOR.*

Civil Procedure Code (Act XIV of 1882), Sec. 39—Act VI of 1892, Sec. 4—Application for execution of decree—Proceedings in the suit—Vakalatnāma.

Applications for execution of the decree are proceedings in the suit. A vakalatnāma remains in force until all proceedings in the suit are ended.

THIS was a reference by Ráo Sáheb Krishnáji Sadáshiv Risvadkar, Subordinate Judge of Párner in the Ahmednagar District, under section 617 of the Civil Procedure Code (Act XIV of 1882).

One Sadáshiv Ganpatráo got a decree against Vitthaldás Nanchand in the Court of the Subordinate Judge of Párner. Vitthaldás appealed against the decree to the District Court. The decree being confirmed in appeal, Sadáshiv's vakil, Váman Trimbak, who had been engaged in the Court of the Subordinate Judge to conduct the suit, presented an application for the execution of the decree, and got it fully executed according to the judgment in appeal. In the meanwhile, Vitthaldás preferred a second appeal to the High Court, which confirmed the decree of the District Court. After the disposal of the second appeal, Váman Trimbak presented an application for the recovery of the plaintiff's costs in second appeal. A question having arisen whether the vakalat-

* Civil Reference, No. 19 of 1894.