

APPELLATE CIVIL.

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

1895.
February 7.

SADA'SHIV A'BA'JI BHAT AND ANOTHER (ORIGINAL DEFENDANTS Nos. 5 AND 4), APPELLANTS, v. VYANKATRA'O RA'MRA'O SHINDE (ORIGINAL PLAINTIFF), RESPONDENT.*

Mortgage—Usufructuary mortgage—Sale of the mortgaged land—Regulation V of 1827; Sec 15, Cl. (3).

Where a mortgage provided that the mortgagee was to take possession of the land and enjoy the profits in lieu of interest, and the mortgagor was at liberty to recover possession in any year on payment of the principal amount,

Held, that the mortgage was a usufructuary mortgage, and under the circumstances of the case it was not the intention of the parties that the property should be sold, and that the mortgage-deed contained a special agreement which took the case out of the provisions of clause (3), section 15 of Regulation V of 1827 which was the law in force at the time the mortgage was effected.

SECOND appeal from the decision of C. E. G. Crawford, District Judge of Thána, confirming the decree of Ráo Sáheb K. S. Bodas, Subordinate Judge of Mahád.

The plaintiff sued to recover a sum due to him on a mortgage.

The following is a translation of the mortgage-deed:—

"We have taken from you for our own purposes Surti Rupees 700 in cash of Company's currency, in letters rupees seven hundred, and in security for this amount have mortgaged the following property:—"(Sets forth the property). "You should (therefore) carry on the *vahivat* of the said land by right of ownership (and) in accordance with the deed of partition in the same manner as we have (hitherto) done by right of ownership, and take every year the produce of the land whatever the land may yield in the dry season and in the rainy season (that is, throughout the year); and you should pay the Government assessment. Your money is not to run at interest, and as to the profits of our *takshim*, which you will take, you are not to pay any rent (to us) in respect of the same. At the harvest season in the month of Márgashirsh (or) Poush in the year in which we may (offer to) pay your money (*viz.*) Rupees seven hundred, you should accept the payment and deliver into our possession our mortgaged share as per deed of partition. Should any one cause obstruction to your *vahivat* we will answer for the same and will get the *vahivat* continued to you without interruption, in accordance with the terms stated above. Should an obstruction be caused to your *vahivat*, and should you (in consequence) sustain loss, we will make good the same. We have duly passed this deed of mortgage of our free will. * * * * *

Signatures."

* Second Appeal, No. 66 of 1893.

The defendants pleaded that the mortgage-deed did not provide for a sale of the property, and that the plaintiff was, therefore, not entitled to have it sold. The lower Courts allowed the claim. The defendants appealed to the High Court.

Macpherson. (with *Daji A'bjaji Khare*) for the appellants :— The mortgage is a usufructuary mortgage and does not give to the mortgagee the power of sale. There is no period fixed in the deed for the repayment of the debt. The mortgagee is to remain in possession and is to take the produce in lieu of interest. Under the terms of the deed he is bound to restore the property to the mortgagor on receipt of the principal to be paid by the mortgagor at his pleasure. It is, therefore, clear that the power of sale is not reserved to the mortgagee—*Shaik Idrus v. Abdul Rahiman* (1). Rs. 700 have been awarded for interest. The mortgage was with possession, and the mortgagee could recover possession if he was dispossessed. If, by his own laches he has not got produce by way of interest, he cannot claim damages in the form of interest from us. He may have his remedy against his mortgagors.

Máneksháh J. Taleyárhán for the respondent (plaintiff) :— The transaction in dispute cannot be said to be a usufructuary mortgage, because in a usufructuary mortgage the principal as well as the interest is paid out of the usufruct. Possession must, therefore, remain with the mortgagee till the principal and interest are paid off. In the present case we are not in possession. The transaction in dispute is, no doubt, a mortgage, and we as mortgagee are entitled to recover the debt by selling the mortgaged property. We should not be left to the mercy of the mortgagor, and should not be asked to receive the debt whenever the mortgagor may choose to pay. At present we do not get any produce or interest, and there is no chance of our recovering the debt if it be held that we are not entitled to sell the property.

SARGENT, C. J.:—The mortgage in question is a usufructuary one under which the mortgagee was to take possession of the land and enjoy the profits in lieu of interest, and the mortgagor

1895.

SADASHIV
A'BAJI BHAT
v.
VYANKATRA'O
RA'MRA'O
SHINDE.

(1) I. L. R., 16 Bom., 303.

1895.

SADA'SHIV
A'BA'JI BHAT
v.
VYANKATRA'O
RA'MBA'O.
SHINDE.

was to be at liberty to recover possession in any year on payment of the sum of Rs. 700. There was no promise by the mortgagor to pay the money. It was simply provided that until he did pay the amount, the mortgagee was to retain the property. Under these circumstances, we think it was not the intention of the parties that the land should be sold, and that the deed contained a special agreement which took the case out of the provisions of clause (3) of section 15 of Regulation V of 1827, which was the law in force at the time the mortgage was effected.

We must, therefore, reverse the decrees of the Courts below and reject the claim, with costs on the plaintiff throughout.

Decree reversed.

APPELLATE CIVIL.

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

PREMJI JIVAN BHATE, DECEASED, BY HIS HEIR AND EXECUTRIX OF HIS WILL HIS WEDOW MA'NEKBA'I (ORIGINAL PLAINTIFF), APPELLANT, v. HA'JI CA'SSUM JUMA AHMED (ORIGINAL DEFENDANT), RESPONDENT.*

Encroachment—Stranger building on land of another—Acquiescence of owner—Standing by—Delay of owner in suing for possession—Form of decree where owner succeeds in suit.

It is well established law in England that if a stranger builds on the land of another, although believing it to be his own, the owner is entitled to recover the land with the building on it, unless there are special circumstances amounting to a standing by so as to induce the belief that the owner intended to forego his right or to an acquiescence in his building on the land. This is also the law in India, with the exception that the party building on the land of another is allowed to remove the building.

Delay by the owner in bringing a suit is not in itself sufficient to create an equity in favour of the person spending money on the land so as to deprive the owner of his strict rights.

The decree made by the High Court was that the plaintiff should recover the land with liberty to the defendant forthwith to commence to remove his building and to restore the property to the condition in which it was when he took possession, the same to be completed within one year from date of decree. In default, the plaintiff to be at liberty to remove the building at the expense of the defendant.

* Second Appeal, No. 397 of 1893.

1895.

February 13.