

1895.
VINA'YAK
v.
BALU.

The applicant applied under the extraordinary jurisdiction urging (*inter alia*) that the Mámlatdár failed to exercise the jurisdiction vested in him by law. A rule *nisi* was issued calling on the opponents to show cause why the order of the Mámlatdár should not be set aside.

Dhondy P. Kirloskar appeared for the applicant in support of the rule:—Under the Mámlatdárs' Act (Bom. Act III of 1876) the only point to be considered is whether the tenancy had expired and whether the suit was instituted within six months from the determination of the tenancy.

There was no appearance for the opponents.

PARSONS, J.:—The fact that the opponent obtained possession on the 20th October, 1893, cannot affect the question as to the right of the opponent to be put in possession of the land leased to the opponent on the 27th October, 1893.

A fresh cause of action accrued to the applicant on the refusal of the opponent to give up possession on the expiry of that lease, and the Mámlatdár was wrong in declining to accept the plaint. We make the rule absolute and return the plaint to the Mámlatdár, for him to dispose of it according to law. Costs to abide the result.

Rule made absolute.

APPELLATE CIVIL.

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

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April 4.

KALA'PPA' BIN GIRIA'PPA' AND OTHERS, MINORS, BY THEIR GUARDIAN MOTHER TUNGA'VA (ORIGINAL DEFENDANTS), APPELLANTS, v. SHIVA'YA BIN SHIVLINGAYA (ORIGINAL PLAINTIFF), RESPONDENT.*

Mortgage—Mortgage with possession—Mortgagee to pay Government revenue—Sale for arrears of revenue—Purchase by mortgagee at sale—Subsequent suit by mortgagor for redemption—Government sale caused by default of mortgagee.

Where mortgaged property was sold at a Government sale for arrears of revenue,

Held, that if the sale took place owing to the mortgagee's default, it would not affect the mortgagor's right to redeem.

*Second Appeal, No. 36 of 1893.

The general rule, that a Government sale for arrears of revenue gives a title against all the world, is subject to the exception that if it is caused by the default of a mortgagee, it does not take away the mortgagor's right to redeem the mortgage to recover the land.

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SECOND appeal from the decision of J. L. Johnston, District Judge of Dhárwár, reversing the decree of Ráo Sáheb M. R. Soman, Subordinate Judge of Gadag.

Suit by mortgagor for redemption. The plaintiff alleged that in April, 1877, he mortgaged the land in question with possession to the defendants, and that by the terms of the mortgage-deed the defendants (mortgagees) were to pay the Government assessment out of the income of the property and to apply the balance in payment of interest on the mortgage. He now sued to redeem, and claimed mesne profits.

The defendants answered that they did not hold possession under the mortgage. They alleged that the mortgaged land produced no income, and that they could not, therefore, pay the Government assessment out of it as provided in the mortgage-deed. They further stated that on the 5th September, 1878, the land had been sold by auction for arrears of revenue, and that their uncle had purchased it, and that they had ever since been in possession as owners.

The Subordinate Judge found that the defendants were in possession as owners and purchasers and not under the mortgage-deed, and he dismissed the suit. In his judgment he said :—

“It appears further from the mortgage-deed that the mortgagee had not agreed to pay the assessment absolutely, but he had agreed to pay the same out of the profits of the property. I have held above that the mortgagee was not put in possession of the property under the terms of the mortgage. A mortgagee, in the absence of special agreement, is not under obligation to pay the assessment and save the property from paramount title. His obligation depends either on special contract or on his being in possession.”

On appeal by the plaintiff the Judge reversed the decree, holding that the defendants were mortgagees in possession and that the plaintiff had a right to redeem.

The following is an extract from his judgment :—

“What appears to have really happened was that the defendant got possession just at the beginning of the famine, and as he got no crop, he let the land be sold for the arrears of assessment, and as he was a kulkarni, his brother Gurappa

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ought it at the auction sale for default. In doing so the mortgagee in possession did not become owner. He was bound to preserve the property from forfeiture or sale—11 Moore's Indian Appeals, 241. He was in the present case the more bound, as it was part of his contract to pay the assessment out of the rent. The mortgagee in possession cannot buy the property and obtain an irredeemable interest therein—I. L. R., Madras 7, 3; *Jayanti v. Yerubandi*; Macpherson on Mortgage, pp. 278, 279. The mortgagee can only claim the amount paid by him, which, whether he intended it or not, has saved the estate for the mortgagor. This amount can be added on to the mortgage amount due before redemption in the accounts now to be taken at execution."

The defendants preferred a second appeal.

Naráyan G. Chandávarkar for the appellants (defendants):—The property yielded no income after it was mortgaged to us and, therefore, we could not pay Government dues. The mortgage-deed stipulated that we should pay the dues from the income of the property, and if the property yielded no income, and was sold, the sale cannot be attributed to our default in paying the assessment. The Judge has not taken this circumstance into consideration—*Sambhu bin Anáji v. Bábáji bin Rávu*⁽¹⁾; *Naváb Sidhee Nuzur Ally Khan v. Rajah Ojoodhyaram Khan*⁽²⁾.

Báldji A. Bhágvat for the respondent (plaintiff):—The view taken by the Judge is correct. A mortgagee in possession is bound to protect the interest of the mortgagor. There is no allegation in the case that the defendants tried to let out the land and failed.

SARGENT, C. J.:—The District Judge says that the mortgagee was bound to preserve the property from forfeiture or sale for arrears of revenue. If this were so, the sale would have been the result of the mortgagee's default, and the plaintiff would not lose his right to redeem. This was decided in *Sambhu bin Anáji v. Bábáji bin Rávu*⁽¹⁾ and is in accordance with the judgment of the Privy Council in *Naváb Sidhee Nuzur Ally Khan v. Rajah Ojoodhyaram Khan*⁽²⁾ where the right of the mortgagor to redeem is put on the ground that the mortgagee could not take advantage of his own wrong. It is an exception to the general rule that a Government sale for arrears of revenue gives a title against all the world.

(1) P. J., 1889, p. 160.

(2) 10 Moore's L. App., 540 at p. 559.

The District Judge, however, has apparently assumed that the mortgagee was in default, and has not considered the language of the mortgage-deed, which provides for the mortgagee paying the assessment out of the money derived from cultivating or letting the land, when taken in connection with the special circumstances as alleged by the defendants to have led to the sale by Government. We must, therefore, send down the following issue for a finding:—

“ Was the land sold owing to the default of the mortgagee ? ”

Finding to be transmitted to this Court within three months.

Issue sent down.

APPELLATE CIVIL.

Before Mr. Justice Candy and Mr. Justice Ranade.

TRIMBAK RA'MKRISHNA RA'NADE (ORIGINAL PLAINTIFF), APPELLANT,
v. LAKSHMAN RA'MKRISHNA RA'NADE (ORIGINAL DEFENDANT),
RESPONDENT.*

Jurisdiction—Religious endowment—Property in British India of a temple outside British India—Right to officiate in such temple—Right to share of such property—Partition.

The plaintiff was a member of a family which had the management and received the income of certain property situate in British India belonging to a temple situate at Ashta in the Nizam's territory. Part of the income was devoted to religious services and part to the support of the family. The plaintiff sued to recover by partition his share of the income and for an injunction restraining the defendant from interfering with the plaintiff in celebrating religious worship at the temple when his turn came to officiate. The defendant (his brother) resided at Ashta.

Held, that the right to share in the income followed the devolution of the office and that the Court could not grant the relief prayed for, as the Courts in British India could not execute their decree by putting the plaintiff in possession of his office when his turn came to officiate at the temple which was outside British India.

According to Hindu text-writers as regards public endowments, religious offices are naturally indivisible, though modern custom has sanctioned a departure in respect of allowing the parties entitled to share to officiate by turns and of allowing alienation within certain restrictions.

APPEAL from the decree of Rao Bahadur G. A. Mankar, First Class Subordinate Judge at Ahmednagar.

* Appeal No. 143 of 1893.

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April 8.