

Bench. But we think it would be absolutely wrong for us to do anything to disturb a rule of inheritance established so far back as 1879.

In our opinion, therefore, on the strength of the authorities in *Lakshmi v. Dada Nanaji*⁽¹⁾ and *Biru v. Khandu*,⁽²⁾ we must award preference to the sister and on that ground confirm the decree of the lower Appellate Court with costs.

Decree confirmed.

(1) (1879) 4 Bom. 210.

(2) (1879) 4 Bom. 214.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Jacob.

PURSHOTAM KRISHNAJI (ORIGINAL DEFENDANT 2), APPELLANT, v. SAGAJI VALAD MALJI AND OTHERS (ORIGINAL PLAINTIFFS AND DEFENDANT 1), RESPONDENTS.*

1903.

August 11.

Redemption suit—Mortgage by persons other than the real owner—Acquiescence of the real owner—Mortgagee's possession adverse to the real owner.

On the 24th October, 1873, one Durgan, widow of Govindji, mortgaged with possession certain land to Godaji, the husband of her daughter Rau. After Durgan's death in 1882, the plaintiffs, under a belief then prevalent, claimed as the nearest *Waras Bhaubands* of Govindji to have succeeded to the mortgaged property, to the exclusion of Govindji's daughter Rau, and disputed the validity of Durgan's mortgage. Godaji, thereupon, on the 22nd June, 1882, accepted a mortgage from the plaintiffs. Rau was aware of this transaction and acquiesced in it. In July, 1889, Rau sold her equity of redemption to one Savliaram who paid off Godaji's mortgage and recovered possession of the mortgaged property. The plaintiffs, in September, 1899, brought a suit against Godaji and Savliaram, defendants 1 and 2, to redeem the mortgage of the 22nd June, 1882.

Held, that the plaintiffs were entitled to redeem, Rau's claim to the equity of redemption having become time-barred. After the mortgage in suit Godaji held the property as plaintiffs' mortgagee and his possession must be attributed to a right derived from them, Rau being aware of what was being done and having acquiesced in it. Though Godaji's possession in its inception was not by virtue of a right derived from the plaintiffs, still his possession was from the 22nd June, 1882, under colour of a right derived from them and so adverse to

* Second Appeal No. 122 of 1903.

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Rau and that to her knowledge although Godaji took possession under a mistake common to all as to Rau's rights, still that circumstance did not make his possession any the less adverse.

SECOND appeal from the decision of F. C. O. Beaman, District Judge of Poona, confirming the decree of Ruttonji Mancherji, Subordinate Judge of Junnar.

Redemption Suit.

The land in suit belonged to one Govindji Harji, whose widow, Durgan, mortgaged it with possession to defendant 1, Godaji valad Sambaji, for Rs. 900 on the 24th October, 1873. Durgan died in the year 1882, leaving a daughter Rau, the wife of defendant 1. Some time after Durgan's death, the plaintiffs claiming to be the nearest *Watas Bhaubands* (heirs and relatives) of the deceased Govindji Harji to the exclusion of his daughter Rau, disputed the validity of the mortgage by Durgan to defendant 1 and caused obstruction to his possession. Defendant 1, thereupon, accepted a mortgage from the plaintiffs for Rs. 800 on the 22nd June, 1882. On the 29th July, 1899, Rau sold the equity of redemption to defendant 2, Savliaram valad Ganuji, who paid off the mortgage of defendant 1 and recovered possession of the property. On the 4th September, 1899, the plaintiffs brought the present redemption suit against defendants 1 and 2 on the mortgage of the 22nd June, 1882, alleging that they had on the 11th May, 1889, called upon defendant 1 to render an account and to allow redemption, but he failed to do so, and praying that if any balance of debt be found to be due by them, it should be made payable by annual instalments of rupees twenty-five each.

Defendant 1 contended, *inter alia*, that the plaintiffs were not the nearest heirs of Govindji Harji; that his nearest heir was his daughter Rau, the wife of the defendant, and that he was compelled to accept the mortgage in suit by fraud and coercion exercised in that behalf by the plaintiffs.

Defendant 2 relied on his purchase from Rau and the subsequent redemption and recovery of possession from defendant 1. He further contended that the mortgage in suit was fraudulent and, therefore, not binding on Rau and that as against him the plaintiffs were not entitled to redeem.

The Subordinate Judge found that defendant 1 was estopped from questioning the plaintiffs' title to redeem the land; that defendant 1 was not obliged to accept the plaintiffs' mortgage by fraud and force or coercion; that he was not justified in allowing redemption by defendant 2; that defendant 2 had no title to redeem and that as defendant 1 admitted having received the mortgage-money from defendant 2, the plaintiffs were entitled to redeem the land on payment of Rs. 800 to defendant 2 by three equal yearly instalments. With respect to the mortgage by the plaintiffs to defendant 1, the Subordinate Judge made the following observations:—

In the (mortgage) deed accepted by defendant 1, he has himself acknowledged that Durgan died leaving no male issue or other nearer heir, and that the plaintiffs were therefore her nearest *Varas Bhuubands* (blood relations) and were then in possession of Govindji's estate, except the land in suit, which was reserved and given by the plaintiffs to Durgan for her maintenance for life. Plaintiffs put in certain documents with their *darkhast* (Exhibit 19) to show that Durgan herself, while she was alive, acknowledged them as her nearest heirs, but in the absence of sufficient evidence in proof of them, I did not see any way to admit them upon the record. However, the cross-examination of defendants' own witnesses shows that Govindji had 30 or 25 bighas of land in addition to the land covered by the mortgage, and the whole of that land passed into plaintiffs' possession after Govindji's death and during Durgan's life-time. And this would not have happened if Durgan had not recognized the plaintiffs as the nearest heirs of her deceased husband. If Govindji left a daughter as alleged by defendant 1, her right to succeed to her father's estate after the death of her mother, appears to have been completely ignored, and several cases have come to my knowledge since I have been in charge of this Court, which showed that the general belief of an ordinary Hindu is that a daughter has no place in the order of inheritance or succession, and that when a man dies leaving a daughter and paternal relations, however, distant inheritance should go to the latter in preference to the former. The parties appear to have acted according to this general belief when the plaintiffs passed and defendant 1 accepted the mortgage now sought to be redeemed. Whether the said belief was well founded or otherwise I have nothing to do, but there can be no doubt that both the parties entertained the said belief honestly and sincerely. Defendant 1 now finds out that he was wrong in entertaining the said belief and tries to back out of the second mortgage transaction. But this he has apparently no right to do. He accepted the mortgage in the honest and *bona fide* belief that the plaintiffs were the nearest heirs of Govindji, and consented of his own accord to hold the land on their behalf, and he is therefore bound to allow redemption to them. If he thought his own wife had a preferential right to the property, and he committed

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a mistake in accepting a mortgage from the plaintiffs, he ought to have got his wife to institute a suit and to prove her title as against them. He ought never to have taken the decision of the question in his own hand, and I am of opinion that he is by his own conduct and action estopped from questioning plaintiffs' title to redeem the land from him.

The finding of the Subordinate Judge that defendant 2 had no title to redeem from defendant 1 was based on the following grounds :—

Rau is and has always been living with her husband. There is admittedly no ill-will or disagreement between them. She must have known from her husband how the matters stood. She must have had therefore constructive as well as actual notice that the plaintiffs laid claim to the equity of redemption and that the said equity of redemption had actually passed to them. For all that she remained quiescent for a period of more than eighteen years before she assigned the equity of redemption to defendant 2. But her claim to the equity of redemption had been by that time time-barred and extinguished. Defendant 2 can have therefore no title to redeem the land.

On appeal by defendant 2 the Judge confirmed the decree observing that :—

I gravely doubt whether short of actual redemption to the knowledge of the person entitled to redeem, there can be any adverse possession of an equity of redemption in this country, barring the remedy, yet in this case I should be inclined to support the judgment of the lower Court upon quite a different ground and one which seems to me more intelligible and secure, *viz.*, estoppel. It is conceded that when the plaintiff put himself forward as owner and incurred the liability of Rs. 800 under his renewal the true owner was perfectly aware of what he was doing, and acquiesced in it. It may very well be said now that she may not dispute the right which she then deliberately countenanced.

Defendant 2 preferred a second appeal.

Narayan V. Gohale, for the appellant (defendant 2).

Daji A. Khare, for the respondents (plaintiffs).

JENKINS, C. J.:—This is a suit for redemption based on a mortgage of the 22nd June, 1882, and the facts, which are the occasion of the dispute, are briefly as follows. On the 2nd October, 1873, Durgan, the widow of one Govinda, mortgaged to Godaji, defendant 1, with possession, the land in suit for Rs. 900. In 1882 she died leaving a daughter Rau, the wife of Godaji.

The plaintiffs, however, as the nearest *Waras Bhaubands* of Govinda, claimed on his widow's death to have succeeded to the land, and, in accordance with a notion which is said to have been then prevalent, they were accepted by those concerned as Govinda's heirs in preference to his daughter. This was an error, still even Godaji assented to this view, for by way of compromise, on their disputing the validity of the mortgage as against themselves, he accepted from the plaintiffs the mortgage, on which they now sue, in the place of Durgan's, and remitted in their favour Rs. 100, so that the amount secured under the new mortgage was Rs. 800.

In 1889, however, when possibly the true legal position had been ascertained, Rau sold to the 2nd defendant what was alleged to be her equity of redemption, and the 2nd defendant in his turn paid off Godaji the mortgagee, and so claims to have redeemed the property.

The Subordinate Judge decided in the plaintiffs' favour, holding that Rau's claim to the equity of redemption had become barred, and he passed a decree that the plaintiffs do recover possession of the mortgaged land, and pay the 2nd defendant Rs. 800 in complete discharge of the mortgage of the 23rd of June, 1882, as therein provided.

This decree was confirmed on appeal by the District Judge, but he rested his decision not on the bar of limitation but on estoppel. We agree with the conclusions of the lower Courts, but we prefer to support our view on the reasoning of the Subordinate Judge. Durgan's mortgage was voidable in the absence of justifying circumstances, and as between Godaji and the plaintiffs it was treated as having come to an end, so that for the future Godaji held the property as mortgagee from the plaintiffs, and his possession must be attributed to a right derived from them; for it has been found as a fact that Rau was aware of what was being done and acquiesced in it. Though therefore Godaji's possession in its inception was not by virtue of a right derived from the plaintiffs still, on the facts found, his possession was from the 22nd of June, 1882, under colour of a right derived from the plaintiffs and so adverse to Rau and that to her knowledge. It may be that Godaji thus took possession under a mistake common to all as to Rau's rights, but that did not make

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the possession any the less adverse to Rau: *Cholmondeley v. Clinton*.⁽¹⁾

Any title that Rau may have had thus became extinguished and as against the mortgagee Godaji and anyone claiming under him; the right to redeem the property is in the plaintiffs. The decree of the lower Appellate Court must, therefore, be confirmed with costs.

Decree confirmed.

(1) (1921) 4 BIRH N. S. 109.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Jacob.

1903.
August 12.

VINAYAK MAHADEV GHATE (ORIGINAL DEFENDANT NO. 2), APPELLANT, v. LAKSHMAN NARAYAN BHAGWAT (ORIGINAL PLAINTIFF), RESPONDENT.*

LAKSHMAN NARAYAN BHAGWAT (ORIGINAL PLAINTIFF), APPELLANT, v. VINAYAK MAHADEV GHATE (ORIGINAL DEFENDANT NO. 2), RESPONDENT.*

Inamdar—Arrears of assessment—Occupancy tenant—Purchaser from the occupancy tenant—Decree for assessment—Money decree against the occupants—Charge on land.

The plaintiff, an Inamdar, sued to recover assessment due for the years 1895-96 and 1896-97 from defendant 2 who came in as a purchaser from the original occupancy tenant on the 5th April, 1899. The lower Courts passed a personal decree against defendant 2 for the arrears of assessment.

Held, that defendant 2 was not liable, since an Inamdar suing for assessment was not entitled to a charge on the lands but only to a money decree against the occupants.

Ratanji v. Sakharam (1) followed.

CROSS-APPEALS from the decision of V. V. Phadke, First Class Subordinate Judge, A. P., at Thána, varying the decree passed by R. B. Chitale, Subordinate Judge of Pen.

The plaintiff, an Inamdar, brought this suit on the 10th December, 1897, to recover assessment due for the years 1895-96

* Cross-appeals Nos. 78 and 108 of 1902.

(1) (1884) P. J. p. 68.