

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice and Mr. Justice Heaton.

BUDHMAL KEVALCHAND AND OTHERS, LEGAL REPRESENTATIVES OF THE DECEASED AMOLAKCHAND KEVALCHAND (ORIGINAL PLAINTIFF), APPELLANT v. RAMA VALAD YESU SANGLE AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

1919.

August 28.

Mortgage—Equity of redemption—Different persons becoming interested in fragments of equity of redemption—Mortgagee not entitled to throw the burden of entire mortgage debt on a portion of the mortgaged property.

The property in suit was mortgaged to plaintiff. Subsequent to the date of the mortgage, M and K purchased the equity of redemption in half shares. Plaintiff sued to recover the entire mortgage debt by sale of half of the mortgaged property in the hands of M without adding K as a party to the suit.

Held, that it was contrary to the principles of equity that the plaintiff who by his own negligence had lost his remedy against the owner of half of the equity of redemption, should seek to throw the whole burden of the mortgage on the owner of the other half.

Imam Ali v. Baij Nath Ram Sahu⁽¹⁾, followed.

SECOND appeal against the decision of C. E. Palmer, District Judge, Nasik, confirming the decree passed by G. M. Pandit, Subordinate Judge at Sinnar.

Suit to recover mortgage debt by sale of the mortgaged property.

The lands in suit were mortgaged by Yesoo walad Hanmanta Sangle to plaintiff's assignors Chatrabhuji and Gumanchand Marwaris, for Rs. 500 by a registered deed, dated the 28th October 1870.

In 1871, Yesoo sold the lands to Ramji Satwaji and Krishnaji Trimbak.

In 1883, Krishnaji Trimbak and Ramji Satwaji's son sold the lands to Manaji Ganaji, father of defendant No. 5 and Ramji Bapuji Patil for Rs. 500. Manaj

*Second Appeal No. 142 of 1913.

(1) (1906) 33 Cal. 613 at p. 621.

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and Ramji Bapuji were bhaubands. They divided the lands in two equal portions between themselves. A moiety of the lands belonging to Manaji remained in possession of his son Mahadu, defendant No. 5; while a half of the other moiety falling to the share of Ramji Bapuji was sold by his son Kashi to one Dada Kashi by a sale deed, dated the 4th April 1896.

In 1910, the plaintiff brought a suit to recover Rs. 500 for principal and Rs. 500 interest, in all Rs. 1,000 by sale of the property mortgaged by deceased Yesu, against Yesu's son Rama (defendant No. 1), grandsons, defendants Nos. 2 to 4 and Mahadu *valad* Manaji, owner of half of the equity of redemption as defendant No. 5.

Defendants Nos. 1 and 2 contended that the lands were in possession of defendant No. 5; and that they were willing to pay the debt in case the lands were given into their possession.

Defendants Nos. 3 and 4 did not appear.

Defendant No. 5 contended that the lands were purchased by his father Manaji and Ramji Bapuji in May 1883 for Rs. 500; that a half portion thereof had been in his possession as owner since then and that the other half remained with Ramji Bapuji's heirs who were necessary parties to the suit; and that the claim was barred by limitation.

The Subordinate Judge held that Ramji Bapuji's heirs were necessary parties to the suit and that the plaintiff could not throw the burden of the entire debt on the property in the possession of defendant No. 5: *Imam Ali v. Baij Nath Ram Sahu*^(a). He decreed that defendant No. 5 do pay Rs. 250 and proportionate costs of the plaintiff within six months from the date of the decree, and in default of payment the plaintiff

(a) (1906) 33 Cal. 613.

do apply to the Court for an order for sale under section 15 B of the Dekkhan Agriculturists' Relief Act, as against the half share in the mortgaged property in the possession of defendant No. 5.

On appeal, the District Judge confirmed the decree.

The plaintiff appealed to the High Court.

K. H. Kelkar, for the appellant:—Subsequent to the date of the mortgage different persons had become interested in different payments of the equity of redemption. Dadu Kashi and Kashi Ramji each has become an owner of one fourth of the property and the defendants are owners of the remaining half. Dadu Kashi and Kashi Ramji are not parties to the suit and the claim against them is now barred. The property in their hands cannot be made liable to pay the mortgage amount, but the plaintiff can throw the entire burden upon the portion of the property which belongs to the defendants. Every part and parcel of the property which is the subject of the mortgage is liable to pay the whole of the debt. The mortgage debt is one indivisible whole. Sections 58, 60, 81 and 82 of the Transfer of Property Act referred to and discussed.

D. C. Virkar, for respondent No. 5 not called upon.

MACLEOD, C. J.:—The plaintiff sued to recover Rs. 500 for principal and Rs. 500 for interest, in all Rs. 1,000, by sale of the property mortgaged by the father of the 1st defendant and the grandfather of defendants Nos. 2 to 4 to plaintiff's assignors Chatrabhuj and Gumanchand Marwaris on the 28th October 1870. It appears that the equity of redemption was sold in 1883 to the father of defendant No. 5 and another. Those two purchasers separated. Half the equity of redemption came to the 5th defendant, one-fourth to Kashi Ramji.

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and one-fourth to Dada Kashi, by sale from Kashi Ramji. Kashi Ramji and Dada Kashi ought to have been made parties to the suit under Order XXXIV, Rule 1, of the Civil Procedure Code, but the plaintiff refused to make them parties, because as a matter of fact his claim against them had become time-barred. He now seeks to throw the whole burden of the mortgage on half the property, the equity of redemption in which came to defendant No. 5. An exactly similar case arose in *Imam Ali v. Baij Nath Ram Sahu*⁽¹⁾. Their Lordships there remarked: "In the case before us, all the properties comprised in the mortgage are liable for the satisfaction of the debt and after different persons have become interested in different fragments of the equity of redemption, the properties continue to be so liable; and all that the owner of any portion of the equity of redemption is legitimately entitled to ask is that not more than a rateable part of the mortgage debt should be thrown upon the property in his hands. This is manifestly just and the mortgagees cannot claim to throw the entire burden upon a portion of the mortgaged premises, because by reason of their own laches, they have lost their remedy as against the remainder."

This is what has happened in this case, and it is manifestly contrary to the principles of equity that the plaintiff, who by his own negligence had lost his remedy against the owner of half the equity of redemption, should seek to throw the whole burden of the mortgage on the owner of the other half. In our opinion, therefore, the appeal fails and must be dismissed with costs.

Decree confirmed.

J. G. R.

(1) (1906) 33 Cal. 613 at p. 621.