

1919.

MOTILAL
DAYABHAI
v.
HARILAL
MAGANLAL.

performed. Such being the case, as we have no evidence on the record adduced by the appellant to the contrary, it seems clear that for very many years it has been accepted as a fact in Ahmedabad that amongst Hindus a custom of pre-emption exists, and it is impossible for us on the evidence in this case, or rather in the absence of any evidence to the contrary, to hold that the appellant is right in his contention that there is no such custom. Therefore the appeal fails. The decree of the lower Court must be upheld with costs.

Decree confirmed.

J. G. R.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice.

1919.

December
11.

SATAGAUDA APPANNA ATAGOUDANAVAR (ORIGINAL PLAINTIFF)
APPELLANT v. SATAPA BIN DARIGAUDA GENAPNAVAR, DECEASED,
HIS HEIR DARIGOUDA BIN SATYAPA GENAPNAVAR AND OTHERS
(ORIGINAL DEFENDANTS), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), Order XXXIV, Rule 1—Mortgage—Redemption—Parties in possession claiming independently of the mortgage, whether necessary parties.

The plaintiff as a purchaser of the equity of redemption filed a suit for redemption of a mortgage in favour of defendant No. 1. To this suit defendants Nos. 2 and 3 were added as parties in possession under Order XXXIV, Rule 1, Civil Procedure Code, 1908. These defendants were not in possession through defendant No. 1 and they claimed independently of the mortgage. A question being raised whether defendants Nos. 2 and 3 were necessary parties;

Held, that as these defendants claimed independently of the mortgage and against both the mortgagor and the mortgagee they could not be proper parties to the suit which was a redemption suit.

* Second Appeal No. 1068 of 1918.

SECOND, appeal against the decision of A. Montgomerie, Assistant Judge of Belgaum, confirming the decree passed by R. G. Shirale, Subordinate Judge at Athni.

1919.

SATAGAUDDA
APPANNA
v. *
SATAPA.

Suit for redemption.

The property in suit originally belonged to one Santu Chambar. He mortgaged it to defendant No. 1 by a deed, dated the 17th July 1893.

The plaintiff was the purchaser from the mortgagor Santu.

Defendants Nos. 2 and 3 were the persons in possession of the property.

The plaintiff sued for redemption of the mortgage of 1893 and added defendants Nos. 2 and 3 parties to the suit. These defendants contended that the land did not belong to the mortgagor but to his brother and that his brother sold the land to them in 1904 and since that time they had been in possession.

The Subordinate Judge held that the defendants Nos. 2 and 3 were not necessary parties and therefore dismissed the suit against them. He gave the plaintiff an option of prosecuting the suit against defendant No. 1 only but as he was not willing, the suit was dismissed against him for want of prosecution.

On appeal, the Assistant Judge confirmed the decree holding that defendants Nos. 2 and 3 were not in possession through defendant No. 1 and therefore they were not necessary parties.

The plaintiff appealed to the High Court.

Nilkanth Atmaram, for the appellant:—It is an error to hold that defendants Nos. 2 and 3 are not necessary parties. No doubt this is a suit for redemption of the mortgage by Santu Chambar. The decree which the plaintiff as representative of the mortgagor

1919.

SATAGAUDA
APPANNA
v.
SATAPA.

is entitled to is one for possession on the amount of the mortgage being paid to the mortgagee, defendant No. 1. On that amount being paid the plaintiff is entitled to be put in possession. If, therefore, the defendants are in possession, they are necessary parties; for these are the persons who have an interest in the property which forms the mortgage security: see Order XXXIV, Rule 1. The object of joining them is to avoid multiplicity of suits which is the main object of the provisions of the said rule.

A. G. Desai, for the respondents, not called upon.

MACLEOD, C. J.:—The plaintiff purchased from one Santu Chambar what he thought was the equity of redemption in a certain property mortgaged by Santu Chambar to the first defendant in 1893. When the suit was launched defendants Nos. 2 and 3 were in possession claiming that they had purchased the property from a brother of Santu Chambar, and that Santu Chambar had no interest in the property. Therefore they were made parties by the plaintiff, who thought that it was necessary to make them parties under Order XXXIV, Rule 1. The record in the print is somewhat defective as it does not appear what were the issues raised in the trial Court. But I find that the following issues were raised:—

(1) whether the defendants Nos. 2 and 3 are in possession through the 1st defendant; (2) whether the suit could lie in its present form against them in view of the finding on issue no. 1; and (3) what order should be passed.

I do not find any decision of the trial Court on the 1st issue. All that appears is that the 2nd and 3rd defendants were not considered necessary parties to the suit. Therefore the suit was dismissed as against them. I can only presume that somewhere the Court recorded evidence and decided that defendants Nos. 2 and 3 were not in possession through the

1919.

SATAGAUDA
APPANNA
P. S.
SATAPA.

1st defendant. I find now that the first issue was decided in the negative for want of evidence, and as defendants Nos. 2 and 3 claimed independently of the mortgage and against both the mortgagor and the mortgagee they could not be proper parties to this suit which was a redemption suit. This suit was then dismissed as against the 1st defendant also because the plaintiff did not accept the option given to him of prosecuting the suit as against him. This decision was upheld in first appeal. In second appeal the result must be same. Before the passing of the Civil Procedure Code of 1908 it seems to have been doubted whether under section 85 of the Transfer of Property Act which enacted that all persons having an interest in the property comprised in a mortgage should be joined was meant to refer to parties who were not interested either in the mortgage security or the right of redemption. This obscurity was set aside by Order XXXIV, Rule 1 of the Civil Procedure Code of 1908. It is obvious that a suit for redemption is a suit between the mortgagor and the mortgagee, and only those parties can be joined who claim an interest in the mortgage security or in the right to redeem. For if you bring in outsiders who claim a title to the property independently of the rights of the mortgagor and the mortgagee, you are introducing entirely new matter into the suit, new matter which would be absolutely irrelevant to the issues which would be framed in the mortgage suit. The decree then of the lower appellate Court was perfectly correct and the appeal must be dismissed with costs.

Decree confirmed.

J. G. R.
