

1921.

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amount to be paid for the plaintiff's share of the mortgage debt, and as to what is due by the 1st defendant for the plaintiff's share of the mesne profits, in order to obviate the taking of accounts to ascertain such small amounts. An order will have to go to the Collector for partition. The plaintiff will get his costs throughout.

Decree reversed.

J. G. R.

APPELLATE CIVIL.

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

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July 5.

ANANDRAO PURSHOTTAM HATKAR (ORIGINAL PLAINTIFF), APPELLANT v. BHIKAJI SADASHIV VAISHEMPAYAN AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS*.

Mortgage—Redemption—Some of mortgaged lands lost through negligence of mortgagee—Liability of mortgagee to account for such lands to be determined in redemption suit—Practice—Procedure.

In a suit for redemption it was found that the mortgagee had lost through his negligence some of the property which was delivered into his possession at the time of the mortgage. The lower Court which decreed redemption was of opinion that it was not necessary to make third persons parties to the redemption suit to see if they had acquired indefeasible title to the lands in their possession and referred the mortgagor to separate suits against them :—

Held, reversing the order, that the question as to what the liability of the mortgagee was to account for the properties of which he was given possession should be determined in the suit for redemption by the mortgagor, and the mortgagee was liable for the restoration of such lands as had got into the hands of strangers.

SECOND Appeal against the decision of J. A. Saldhana, Assistant Judge at Thana, amending the decree passed by Beram N. Sanjana, Subordinate Judge at Panwel.

Suit for redemption.

* Second Appeal No. 175 of 1919.

The plaintiff sued for redemption of a possessory mortgage, dated the 28th March 1896, executed in favour of the defendant's ancestor by the plaintiff's father.

The defendants admitted the right of redemption but the dispute at the trial centred round three points :—First, the yield of the mortgaged land ; secondly the costs of repairs and thirdly, the responsibility of certain portions of the lands which though included in the mortgage were not with the mortgagee.

The Subordinate Judge found that Rs. 7,301-6-9 were due to the mortgagee on accounts being taken and that some of the lands mentioned in the mortgage had passed into the hands of strangers but were not lost through the negligence of the mortgagee. He passed a decree for redemption of the property mentioned in the mortgage deed.

On appeal, the Assistant Judge was of opinion that certain of the lands were lost through the negligence of the mortgagee and that the question as to whether the trespassers had acquired indefeasible title to those lands was one which could be settled by making the holders parties to the suit ; but he held that this course would complicate the suit and the matter would better be settled by separate suits. He, therefore, confirmed the decree.

The plaintiff appealed to the High Court.

G. S. Rao, for the appellant.

V. B. Virkar, for the respondents.

MACLEOD, C. J.:—The plaintiff sued for redemption of a possessory mortgage executed in favour of the defendants' ancestor by the plaintiff's father. Accounts were taken and it has been found that Rs. 7,301-6-9 are due by the plaintiff on the mortgage.

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The question arose whether the mortgagee was in a position to give back possession to the plaintiff of all the lands of which he had taken possession when the mortgage was executed. The trial Court held that no lands had been lost through the negligence of the mortgagee. The appellate Judge found that the mortgagee had been put in possession of all the mortgaged lands, but that the Commissioner appointed had found that eleven pieces of land were not in the mortgagee's possession at the time of his inquiry. Then the Judge said :—

“ Considering the precarious condition of the lands which required constant care and repairs, it is likely that some of the lands were neglected and this neglect opened the door to trespassers. Now the question as to whether these trespassers have acquired indefeasible title to these lands is one which could be settled only by making the holders parties to this suit. This would complicate the suit into a tangle which would be against the policy of the Civil Procedure Code to create. The matter will have to be fought out in separate suits, if necessity should arise hereafter.”

Now the liability of the parties to the mortgage in a redemption suit can only be decided once, and if this decree were to stand, the plaintiff would get back on payment of the mortgage money only the Survey Numbers in the mortgagee's possession. He would then, according to the decision of the lower appellate Court, be relegated to filing a number of suits against persons in possession of those lands which the mortgagee has not restored, and if he failed to get possession the question would arise whether he could have recourse to the mortgagee for damages. But certainly it is not the policy of the Code to allow such proceedings. The question what is the liability of the mortgagee to account for the properties, of which he got possession, must be determined in this suit, and if the mortgagee will not give back possession of the lands, of which he was given possession, then he must pay for them, for he is liable for the restoration of the lands which have got into the hands of strangers. Therefore, the suit

must go back to the lower appellate Court in order that it may determine the mortgagee's liability with respect to the lands mentioned in para. 3 of the judgment. It will then be in the mortgagee's interest to arrange with the persons who are in possession to restore possession to the plaintiff. But if those persons do not restore possession, then certainly the mortgagee will be liable. The Court will return its findings to this Court within six months.

The plaintiff must get his costs of the appeal here and in the District Court.

Case remanded.

J. G. R.

APPELLATE CIVIL.

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

VINAYAK DATTATRAYA JOSHI AND OTHERS (ORIGINAL DEFENDANTS NOS. 6 TO 9), APPELLANTS *v.* GANESH ANANT HASABNIS AND OTHERS (ORIGINAL PLAINTIFF AND DEFENDANTS NOS. 1 TO 5), RESPONDENTS^o.

Land Revenue Code (Bombay Act V of 1879), section 81†—Non-payment of assessment by registered occupant—Co-sharer of the occupant paying up arrears of assessment—Transfer of khata to co-sharer's name—Transfer does not affect occupancy rights of defaulter.

^oSecond Appeal No. 835 of 1918.

†81. If it shall appear to the Collector that a registered occupant has failed to pay land-revenue, and has thus incurred forfeiture with a view to injure or defraud his co-occupants or other persons interested in the continuance of the occupancy or that a sale (or other disposal) of the occupancy will operate unfairly to the prejudice of such co-occupants or other persons, it shall be lawful for him, instead of selling (or otherwise disposing of) the occupancy to forfeit only the said registered occupant's interest in the same and to substitute the name of any such co-occupant or other person as registered occupant thereof in the revenue-records, on his payment of all sums due on account of land-revenue for the occupancy; and such person so becoming the registered occupant shall have the rights and remedies with respect to all other persons in occupation provided for by section 86.

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