

APPELLATE CIVIL

Before Mr. Justice Gajendragadkar.

SAKHARAM JIVAJI KAMBLI AND OTHERS (ORIGINAL PLAINTIFFS),
APPELLANTS v. PANDURANG RAGHUNATH SHENAI AND OTHERS
(ORIGINAL DEFENDANTS), RESPONDENTS.*

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Sept. 18

Transfer of Property Act (IV of 1882), s. 91—Mortgage by landlord—Permanent tenant in possession of land since before mortgage—Right of permanent tenant to redeem mortgage—“Any interest in the property mortgaged,” meaning of.

A permanent tenant who has been in possession of the land since before the execution of a mortgage of the property by the landlord has no interest in the property mortgaged or in the right to redeem it so as to entitle him to sue for redemption under s. 91 of the Transfer of Property Act, 1882. The case of a permanent tenant who comes on the land subsequent to the mortgage, however, stands on a different footing. His rights having come into existence during the subsistence of the mortgage are affected by it, and therefore he may claim to redeem the mortgage.

Venkatesh v. Bhujaballi,⁽¹⁾ *Gafur Usman v. Sakharam Tanshet*,⁽²⁾ *Paya Matathil Appu v. Kovamal Amina*,⁽³⁾ and *Raghunandas Prasad v. Ambika Singh*,⁽⁴⁾ distinguished.

Tarn v. Turner⁽⁵⁾, referred to.

SECOND APPEAL against the decision of V. S. Desai, Esquire, Civil Judge (S. D.) with A. P. of Ratnagiri in appeal preferred from the decision of S. R. Joshi, Esquire, Civil Judge (J. D.) of Vengurla.

Suit for redemption.

Bayule and her brother were the owners of a piece of land S. No. 244, Pot Hissa Nos. 1 to 5, situate at Shiroda, taluka Vengurla, district Ratnagiri. By three mortgage deeds, dated October 19, 1863, January 3, 1865, and January 11, 1867, they mortgaged the property to one Raghunath. Both the mortgagors were dead at the date of the suit and had left no heirs. One Sakharam and his brothers (plaintiffs) were the permanent tenants of the land and their predecessors-in-title had come in possession of the land since long before 1863.

* Second Appeal No. 509 of 1949.

⁽¹⁾ (1932) 35 Bom. L. R. 60.

⁽²⁾ (1939) 41 Bom. L. R. 1199.

⁽³⁾ (1895) 19 Mad. 151.

⁽⁴⁾ (1907) 29 All. 679.

⁽⁵⁾ (1888) 39 Ch. D. 456.

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On July 25, 1942, the plaintiffs filed the present suit against the heirs of Raghunath (defendants) claiming to redeem the three mortgages and asking for accounts under s. 15D of the Dekkhan Agriculturists' Relief Act, 1879.

The defendants *inter alia* contended that the plaintiffs were not the permanent tenants and that even if they were so they were not entitled to ask for redemption under s. 91 of the Transfer of Property Act.

The trial Court negatived the defendants' contention and on June 22, 1946, it passed a decree declaring that nothing was due under the mortgages.

On appeal, the decree was reversed, and on August 31, 1948, the appellate Court dismissed the plaintiffs' suit.

The plaintiffs appealed to the High Court.

M. G. Chitale, for the appellants.

S. S. Kavlekar, with R. G. Samant, for the respondents.

GAJENDRAGADKAR J. The short question which arises for decision in this appeal is whether as permanent tenants of the land the plaintiffs are entitled to redeem the mortgage executed by the landlord in respect of the said land. The properties mortgaged consist S. No. 244, Pot Hissa Nos. 1 to 5, situated at Mouje Shiroda. Three mortgages have been created in respect of this property in 1863, 1865 and 1867 respectively in favour of the defendants' predecessors-in-title. It is common ground that the mortgagors have left no heirs and their line has become extinct. The plaintiffs claim to be permanent tenants on the ground that they have been on these lands since long before 1863. In the present suit they claimed to redeem the three mortgages and asked for accounts under the provisions of s. 15D of the Dekkhan Agriculturists' Relief Act. The defendants resisted their claim on the ground that the plaintiffs were not the permanent tenants of the land as claimed by them and, even if they were, they were not entitled to sue for redemption. A bar of limitation was pleaded, and it was urged that the suit was bad for want of necessary parties. The learned trial Judge rejected all these contentions and ordered accounts to be taken of the mortgages in suit. In the result he declared that nothing was due to the mortgagees under the suit mortgages and that they were satisfied. The defendants challenged this decree by an appeal and their appeal succeeded. The lower appellate Court confirmed the

finding of the trial Court that the plaintiffs are the permanent tenants of the land in suit ; but, in his opinion, they would not be entitled to sue for redemption even as permanent tenants under s. 91 of the Transfer of Property Act. That is how the only question which arises for decision in the present appeal is whether as permanent tenants of the land mortgaged the plaintiffs are entitled to sue for redemption.

It may be assumed in favour of the plaintiffs that by reason of their status as permanent tenants they have an interest in the land which is in their possessions as such tenants. It may be that the words, "any interest in the property mortgaged" are wide enough to include minor or smaller interests in the said property. But the question is whether the plaintiffs have such an interest *in the property mortgaged* as would entitle them to sue for redemption under s. 91. Section 91 deals with persons who may sue for redemption and it provides that besides the mortgagor, the persons falling under cls. (a), (b) and (c) may redeem, or institute a suit for redemption of, the mortgaged property. We are concerned with the persons falling in cl. (a). This clause refers to—

"any person (other than the mortgagee of the interest sought to be redeemed) who has any interest in, or charge upon, the property mortgaged or in or upon the right to redeem the same".

Have the plaintiffs any interest in the property mortgaged? If they have, they would be entitled to sue under s. 91. In dealing with this question it is necessary to bear in mind the fact that the plaintiffs have been in possession of the land as permanent tenants long before the mortgages were executed. In other words, the plaintiffs' right in the property mortgaged is unaffected by the mortgages themselves. What has been mortgaged by the landlord is the reversionary rights vesting in him. The mortgagee cannot dispute the permanent tenancy rights and in that sense the permanent tenants' rights are not affected by the mortgages at all. The rights of a person who has an interest in the property mortgaged would ordinarily be affected by the mortgage and a person whose interest is thus affected by the mortgage would also be a necessary party to a suit on mortgage under O. XXXIV, r. 1. It seems to me that in the case of a permanent tenant whose rights are outside the mortgage altogether, it would be difficult to hold that he has an interest in the property mortgaged as such. His interest is not covered by the mortgage and is permanent in the sense that it is not affected by redemption or foreclosure of the

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mortgage or by sale of the mortgaged property. A permanent tenant of this character would not, in my opinion, be a necessary party to a suit under O. XXXIV, r. 1. The case of a permanent tenant or a tenant for a number of years whose tenancy commences after the mortgage is executed would, however, stand on a different footing. If the mortgagor leases the mortgaged property on the basis of a permanent tenancy or for a number of years, it cannot be said that the tenant's rights are outside the mortgage and are not affected by it. In such a case the subsequent tenant may claim to have an interest in the right to redeem the mortgage. Therefore, in my opinion, in dealing with the permanent tenant's right to redeem under s. 91 it is necessary to distinguish between permanent tenants who were on the land prior to the mortgage and those who have come on the land subsequent to the mortgage. In the first case their rights are not affected by the mortgage, and in the second their rights have come into existence during the subsistence of the mortgage itself and they would, therefore, be entitled to claim a right to redeem the mortgage. If this be the true position, the plaintiffs in the present case, who, according to the findings, were the permanent tenants of this land even before the mortgages were executed, would not be entitled to sue for redemption under s. 91. It seems to me clear that it would not be open to the mortgagee to evict the permanent tenants on the ground that their rights as permanent tenants are not binding on him. The mortgagee has taken the mortgage subject to the permanent tenants' rights which had already been created in favour of the plaintiffs and those rights could not be challenged by the mortgagee. The mortgagee will be entitled to claim only such reliefs against the permanent tenants as the mortgagor could have. In this context and in a limited sense so far as the rights of redemption are concerned the position of the plaintiffs may be compared to that of prior mortgagees, whereas the position of lessees let in after the mortgage may be said to correspond to puisne mortgagees. Therefore, in my opinion, the lower appellate Court was right in holding that the plaintiffs were not competent to bring the present suit.

On behalf of the appellants Mr. Chitale has invited my attention to two decisions of this court, which I will now proceed to consider. In *Venkatesh v. Bhujaballi*,⁽¹⁾ Patkar and Murphy JJ. had to deal with a converse case. In the said case

⁽¹⁾ (1932) 35 Bom. L. R. 60.

the landlord had leased out a building site to his tenant on condition that the tenant was to build a house on it and to pay an annual rent to him. The lease contained a stipulation that so long as the house stood on the site the tenant and his bhaubhands should continue to pay the rent, and if the house was sold, the plaintiff should be informed of it and should be paid a quarter of the sale proceeds. The tenant built a house on the land demised to him and was in possession of the house during his lifetime. After his death his widow mortgaged the property to the predecessor of defendants Nos. 1 to 3. At the time when the widow died there were no heirs of the tenant and his line had become extinct. The plaintiff, thereupon, sued to redeem the mortgage from the defendants and the question was whether he was entitled to sue under s. 91 of the Transfer of Property Act. It was held that he was, and Mr. Chitale's argument is that by parity of reasoning the permanent tenants in the present case should be given the same right. In my opinion the case of the landlord stands entirely on a different footing. If the landlord had carved out an absolute transferable interest in favour of the tenant which under no circumstances could have reverted to the landlord, it would not have been possible for the Court to hold that he had an interest in the property mortgaged. That is in fact what Mr. Justice Patkar expressly says in his judgment. He, however, came to the conclusion that in the case of the landlord with whom they were concerned the rights of the permanent tenant would have reverted to the landlord in case he had denied the landlord's title or failed to pay the rent. Besides, there was an additional ground present in that case to which Mr. Justice Patkar has referred in his judgment. And this ground was that the landlord had an interest in the building itself created by the tenant on the land as the agreement had provided that in case the building was sold the landlord was entitled to a quarter of the sale-proceeds. Therefore, the landlord had not only an interest in the land, but he had an interest also in the building which had been mortgaged by the tenant. Since the landlord's right to redeem under s. 91 was recognized on these two specific grounds, I do not see how this case can assist Mr. Chitale to support his proposition that the permanent tenants are entitled to sue for redemption.

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The next case on which Mr. Chitale has relied is a judgment of Mr. Justice Lokur in *Gafur Usman v. Sakharam Tanshet*.⁽¹⁾ This case again arose on different set of facts altogether. The permanent tenant of some Kularag Khoti lands had mortgaged the land with possession for twenty years. The mortgagee had then assigned her rights to the predecessor-in-title of the defendants. Subsequently the plaintiffs purchased the lands from the permanent tenants and filed a suit for redemption. As a result of the operation of the material provisions of the Khoti Settlement Act it transpired that the purchasers from the permanent tenants ceased to be the permanent tenants of the lands, but became ordinary tenants within the meaning of s. 8 of the Act. Even so, it was held that the plaintiffs must be deemed to have some interest in the lands within the meaning of s. 91 and, therefore, their suit for redemption was competent. In other words, the plaintiffs had purchased the lands from the mortgagors themselves and the ground on which their right to redeem was challenged was that the sale in favour of the plaintiffs being unauthorized they did not occupy the same status in respect of the lands as the mortgagors did. Mr. Justice Lokur held that the change of status resulting from the provisions of the Khoti Act did not affect the purchasers' right to redeem, because even with the altered status the purchasers did continue to have an interest in the property mortgaged. In my opinion, this case can have no bearing on the point with which I am concerned in the present appeal.

There are some decisions in which the right of the tenant to redeem the mortgage has been recognized. But it is a significant feature which is common to all these decisions that the tenants in all these cases who were held entitled to redeem the mortgages had come on the mortgaged lands subsequent to the mortgages themselves. In *Paya Matathil Appu v. Kovamel Amina*,⁽²⁾ the Madras High Court held that the word 'interest' is not necessarily confined to right of ownership, but is sufficiently large to include any minor right such as that of a tenant or a person having a charge. It is clear from the facts mentioned in the judgment that the tenants had come on the land subsequent to the mortgage. Similarly, in *Raghunondas Prasad v. Ambika Singh*,⁽³⁾ a suit for redemption by the perpetual lessee of the mortgaged premises from the mortgagor was held

⁽¹⁾ (1939) 41 Bom. L. R. 1199.

⁽²⁾ (1895) 29 All. 679.

⁽³⁾ (1907) 29 All. 679.

to be incompetent. No case has been cited before me in which a permanent tenant or a tenant for a number of years has been held entitled to sue in redemption even though his rights as a tenant were prior to the mortgage sued on.

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Clause (a) of s. 91 was amended in 1929 and apparently the amendment was made with a view to follow the English rule under which the mortgagor and all persons having any interest in the property subject to the mortgage are allowed to redeem. This English rule has been laid down in the well known case of *Tarn v. Turner*.⁽¹⁾ I may conveniently cite two passages from the judgments of Cotton L. J. and Fry L. J. in this case. This is what Cotton L. J. has said (p. 464):—

“...Why is the tenant, who holds under an agreement such as I have mentioned not to be entitled to redeem, which is the only way of relieving himself from the effect of the mortgage.....Here is a man who has a certain interest in the equity of redemption, and he may be prejudiced by the action of the mortgagee insisting on his rights as legal owner of the property.....The interest which he got from the mortgagor makes him to a certain extent an assignee of the equity of redemption, and therefore entitled to all the rights which appertain to the owner for the time being, however small his interest in the equity of redemption may be with regard to duration of time. That, as I understand, is recognised in all the cases.”

The observations of Fry L. J. at p. 468 are to the same effect for, says Fry L. J.:—

“Therefore, it appears to me that according to the general law of the land a person who claims as lessee under a mortgagor after the mortgage, and has thereby derived an interest in the equity of redemption, has the right to redeem.”

Halsbury, in dealing with the question as to which persons are entitled to redeem a mortgage, has stated that the mortgagor and all persons having any interest in the property subject to the mortgage or liable to pay the mortgage debt can redeem, and he adds that the following persons claiming under the mortgagor can redeem: assignees of the equity of redemption, including volunteers; subsequent incumbrancers; a tenant for years under a lease made subsequent to the mortgage which the mortgagee refuses to confirm; a surety on payment by himself or refusal by the principal debtor to discharge the mortgage debt, or if he has mortgaged his own estate as security for the debt. (Halsbury's Laws of England, Second Edition, Volume 23, pp. 301-302, para. 453). It would thus be seen that in effect the present provisions of s. 91 correspond with this statement of the law contained in Halsbury.

⁽¹⁾ (1888) 39 Ch. D. 450.

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I, therefore, hold that the plaintiffs, who were in possession of the lands as permanent tenants prior to the execution of the mortgages in suit, have no interest in the property mortgaged or in the right to redeem the same. Therefore, in my opinion, the lower appellate Court was right in dismissing their claim for redemption on this preliminary ground.

The present suit is defective for another reason also. Even if the plaintiffs had the right to sue for redemption under s. 91 of the Transfer of Property Act the mortgagor or his heirs and legal representatives would be necessary parties to the suit under O. XXXIV, r. 1. It is true that the mortgagor's line has become extinct; but that would mean the mortgagor's estate has escheated to the Crown; and as such, the present suit would be incompetent without the State being on the record. This point has not been taken in the Courts below; but it is a point of law which clearly arises on the plaint as it is filed. But as I have already held, the plaintiffs are not entitled to sue in redemption under s. 91. Therefore, the appeal fails and must be dismissed with costs.

Appeal dismissed.

M. W. P.

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Before Mr. Justice Dixit.

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MAHAMAD SAHEB NABISAHEB ISMAIL MAGDUM (ORIGINAL PLAINTIFF), APPELLANT *v.* KAMAL *alias* BAPU SHIRAJSAHEB AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Indian Evidence Act (I of 1872), ss. 65, 68, 90—Presumption as to ancient document—Document required by law to be attested—Whether presumption regarding due attestation can be raised on certified copy—Indian Registration Act (XVI of 1908) ss. 58, 59, 60—Effect of.

In 1895 the predecessors-in-title of the plaintiff executed a deed of mortgage in favour of the predecessors-in-title of the defendants. In 1946 the plaintiff filed a suit for accounts under s. 15D of the Dekkhan Agriculturists' Relief Act, 1879, and prayed for redemption. The original deed was not forthcoming but as it was registered, a certified copy was produced by the plaintiff. On the question whether the presumption under s. 90 of the Indian Evidence Act, 1872, as to due execution and attestation of a document would apply to the certified copy of a document,

* Second Appeal Nos. 1004 and 1005 of 1949.