

(1920) 01 BOM CK 0025
In the Bombay High Court

Kalu Devba

APPELLANT

Vs

Rupchand Kisonadas and Others

RESPONDENT

Date of Decision : 06-01-1920

Acts Referred:

Citation : (1920) ILR (Bom) 848

Hon'ble Judges : Norman Macleod, C.J;Heaton, J

Bench : Division Bench

Judgement

Norman Macleod, C.J.—This suit was originally filed in 1910 by the plaintiffs who sued for redemption of a-mortgage dated 10th April 1885. The suit was dismissed in the trial Court. On appeal the case was remanded, and again on appeal from the order of remand it was held by the High Court that the one plaintiff Shivba had no right to redeem, and the suit would have to be dismissed as his interest in the equity of redemption had been sold. As regards the other plaintiff who represented Devba, the other mortgagor, the Court decided that he should be allowed an opportunity of redeeming the outstanding mortgage. The case therefore went back to the Subordinate Judge who directed that the plaintiffs should recover from the defendants possession of the properties in suit with the exception of Survey Nos, 54 and 87 of Bharadi and Survey No. 11 of Sarve free from the mortgage. This decree was upheld on appeal except that it was modified by substituting the word "plaintiff No. 2" for the "plaintiffs". The 2nd plaintiff Kalu Devba has now appealed against that part of the decision of the Assistant Judge which decided that he should not be entitled to recover Survey Nos. 54 and 87 of Bharadi and Survey No. 11 of Sarve.

2. With regard to Survey No. 11, that is now in the possession of an outsider, having been sold at a Court sale, and all that the 2nd plaintiff would be entitled to would be compensation from the mortgagee on the ground that when redemption was sought the mortgagee could not produce the property mortgaged. Both the Lower Courts have come to the conclusion that compensation should not be allowed, and we agree with ,the reasons given in the

judgment of the learned Assistant Judge.

3. But with regard to Survey Nos. 54 and 87, they stand on an entirely different footing as they are in the possession of the 1st defendant as representative of the original mortgagee. The original mortgagee purchased,, as he thought, the equity of redemption of both, the mortgagors at a Court sale. Then he sold the property to two outsiders, and after the period of six and ten years respectively bought back those properties from the persons to whom he had sold them. He now resists the plaintiff's claim to redeem on the ground that he is in possession, not as mortgagee, but as purchaser, and the plaintiff's claim to redeem is barred under Article 131 of the Indian Limitation Act if he could show that the suit to redeem has been brought more than twelve years after the original transfer. But the fallacy in that argument lies in this that the defendant was responsible for the original mistake. He ought to have seen that he had only bought the equity of redemption of one of the mortgagors, and he cannot derive any benefit from his negligence by purporting to sell the whole of the property to third parties, and then purporting to obtain a good title by repurchasing those properties from those parties. In my opinion the original mistake is revived by the properties coming back into the possession of the defendant, and he must be treated now as a mortgagee and not as an innocent transferee without notice. Therefore I think the--original decree must be modified by directing that the 2nd plaintiff should recover from the defendants possession of the properties in suit with the exception of Survey No. 11 of Sarve free from the mortgage. With regard to the successful appellant he pays his own costs up to the 13th November 1916 when the Subordinate Judge gave the judgment, and he will get his costs in this Court and in the first, appeal Court/from the defendants.