

(1907) 09 BOM CK 0005
In the Bombay High Court
Case No : Second Appeal No. 681 of 1906

Vijbhukandas Dwarkadas

APPELLANT

Vs

Dayaram Jadav

RESPONDENT

Date of Decision : 02-09-1907

Acts Referred:

Citation : (1907) 9 BOMLR 1181

Hon'ble Judges : Heaton, J;Chandavarkar, J

Bench : Division Bench

Judgement

Chandavarkar, J.—The only question of law argued in support of this second appeal is whether the Courts below have rightly held appellant liable to pay the amount spent by respondents for "repairs" as a condition precedent to his right to recover possession of the property as the reversionary heir of the son of the deceased widow, Bai Mancha. It being found as a fact that the mortgage taken by the respondents from Bai Mancha was not for any legal necessity, justified by Hindu law, they cannot claim the amount spent by them for repairs, which must be, upon the facts found, treated as having been spent by them under the authority of the mortgage from Bai Mancha. That mortgage falling to the ground as not binding the plaintiff, there is no legal foundation for the amount spent for repairs by the respondents unless they are able successfully to invoke some principle of equity which makes it obligatory on the appellant to pay that amount to the respondent as a condition precedent to the recovery of possession. It is urged that the repairs were necessary and the appellant is benefiting from them, because had the respondents not effected them at their own expense the property would have ceased to exist. But, as has been held by the Privy Council in *Ram Tuhul Sing v. Biseswar Lall Sahoo* (1895) L.R. 2 IndAp 138, "It is not in every case in which a man has benefited by the money of another, that an obligation to repay that money arises" ... To raise an equity of that kind "there must be an obligation express or implied to pay." See that decision followed in *Gadgeppa Desai v. Apaji Jinanrao* ILR (1879) 3 Bom. 237. Here the respondents spent the money while holding the property under a mortgage not binding on the

reversioners and whatever they did must be presumed in law to have been done unauthorisedly so far as those reversioners are concerned. It is urged that what the respondents did was to rebuild the house after it had been destroyed by floods; but even then the respondents cannot claim higher rights than those which their mortgagor Bai Mancha could have claimed; and the amount spent by them on the new erection must be regarded upon the facts found by the lower Court as if it had been spent by the widow herself. Had she effected the repairs or rebuilt the property, she could not have claimed and on her death her heir or any other person claiming under her would not have been entitled to claim, the amount from the reversioners. Had she rebuilt by borrowing the amount, it would have been binding on the reversionary estate only if there had been legal necessity for the purpose and the widow had mortgaged the estate therefor. But she did nothing of the kind. *Upendra Lal Mukerjee v. Girindra Nath Mukerjee* ILR (1898) Cal. 565. It is not suggested in the pleadings that she could not have rebuilt out of money in her own hands, or that it would have been necessary for her to borrow it she had rebuilt herself. The respondents, therefore, have to fall back upon the defence that the estate having benefited from what they did, the appellant should not be allowed to recover it without paying for the benefit they derive; and that because, "he who seeks equity must do equity." That maxim, however, is for the reasons given and on the authority of the decisions cited inapplicable here. So far we have looked at the merits of the case from the point of view presented by the decisions of the Privy Council binding on us and based on the general principles of equity. Is there anything in the Hindu Law to raise the equity invoked by the respondents in their favour in this case? In the chapter on mortgages pledges and deposits, *Vijnaneshwara* points out, in commenting on a *Sutr* of *Yajnyavalkya*, that where mortgaged property in possession of a mortgagee is destroyed by fire or floods or any other act of God, the mortgagee is not responsible for its destruction and is entitled to sue at once, in spite of any terms to the contrary in the mortgage contract, for his money with interest. There is no authority, however, given to a mortgagee to rebuild the property so as to bind the mortgagor against his will. Assuming that Bai Mancha assented to the rebuilding by the respondents, that could bind her only. But the question is—did the respondents assent? The lower Courts have answered that question in the affirmative merely on facts which raise no more than an inference of quiescence against the present appellant.

2. Failing on all these points, Mr. Koyajee, the learned pleader for the respondents, urges that in any event they must be allowed to remove the building they have erected before the appellant is given possession of the land. And he relies on the decisions of this Court in *Vinayakrao Ganpatrao Vs. Vidyashankar Bharati*, , *Premji Jivan Bhate v. Haji Cassum Juma Ahmed* ILR (1895) 20 Bom. 298 and *Narayan v. Bholayir* (1869) 6 B.H.C.R. A.C.J. 80. But those cases are plainly distinguishable from the present. In the first, a widow, having sold certain land in which she had only a Hindu widow's estate, the purchaser, treating the land as his, erected upon it a structure at his own

expense. The second decision is founded on the same principle, following the decision in *Narayan v. Bholagir* (1869) 6 B.H.C.R. A.C.J. 80. But here the respondents erected the building not as their own but as belonging to the estate of the son of Bai Mancha, which that lady, as their mortgagor, could redeem. They must be regarded as having erected it as part of that estate; not as of their own ownership. Under those circumstances, the erection having been treated by the respondents as property mortgaged to them by Bai Mancha without legal necessity, there is no equity arising in their favour as against the present appellant who, as reversionary heir to the estate, is entitled to recover it in the condition in which it was when the widow died. We must, therefore, substitute the following decree for that of the lower Court: The plaintiff do recover possession of the property in suit with costs throughout including the costs of the cross-objections.