

(1922) 08 BOM CK 0019

Bombay High Court

Case No: Second Appeal No. 673 of 1921

Bhau Daji Khade

APPELLANT

Vs

Patlu Malu Sable

RESPONDENT

Date of Decision: Aug. 25, 1922**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 2 Rule 2

Citation: AIR 1923 Bom 63 : (1922) 24 BOMLR 1157 : 73 Ind. Cas. 862**Hon'ble Judges:** Shah, J; Crump, J**Bench:** Division Bench**Final Decision:** Dismissed

Judgement

Lallubhai Shah, Acting C.J.

1. In this case the plaintiff sues to recover possession of one Survey Number, which along with two other Survey Numbers was mortgaged in 1869 to the defendants' ancestor. In 1911 the present plaintiff as a purchaser of the equity of redemption sued to redeem the mortgage of 1869. He mentioned only two Survey Numbers in that suit omitting the Survey Number now in suit. In that suit a compromise decree was passed as a result of which on payment of a sum of Rs. 75, he was to recover possession of the two Survey Numbers mentioned in that suit. He recovered possession of these two lands after paying the amount.

2. He has now filed the present suit on July 10, 1919, to recover possession of the remaining land alleging that the defendants were in wrongful possession of that Survey Number. Several issues were raised in the trial Court, but on the facts as stated above the trial Court dismissed the suit, holding that the land in suit had not been redeemed, and that the defendant's possession, therefore, was not wrongful.

3. The learned Assistant Judge in appeal confirmed the decree of the trial Court on the ground that the land now in suit not having been included in the previous suit

the plaintiff's claim could not be allowed.

4. In the appeal before us, it is urged by Mr. Shingne that after the mortgage amount fixed under the consent decree was paid by his client, the possession of this property by the defendants became wrongful, as the mortgage was satisfied. He is, therefore, entitled, he contends, to recover possession of the property. It seems to us that the contention is unsound. In the first place, it is difficult to say that when the sum fixed under the decree was paid, the whole mortgage was satisfied. It is quite possible that the parties might have fixed the amount at a lower figure in view of the fact that the plaintiff had omitted to sue in respect of the land now in suit. It is difficult to hold that the possession of this Survey Number which was rightful under the mortgage became wrongful when the decretal amount was paid.

5. Apart from that, however, it seems to us that it was incumbent upon the plaintiff to sue in respect of all the lands comprised in the mortgage, if he wanted to recover possession of all the lands. His omission to include the land in suit in the redemption suit seems to be fatal to his present claim for the possession of that land. In view of the provisions of Order II, Rule 2, he cannot be allowed to sue to recover possession of the land, in respect of which he must be deemed to have relinquished his claim by omitting to sue in respect of it. It is not suggested before us that the plaintiff was not aware of this land forming part of the mortgaged lands, nor is it suggested that the omission was due to any inadvertance or mistake on his part. He may have a remedy by applying to the Court which passed that decree to include that Survey Number in the decree, Whether that remedy is open to him under the circumstances of this case or not is a matter upon which we express no opinion, It is clear that his present claim for possession cannot be allowed according to law. We, therefore, dismiss the appeal with costs.