

In the High Court of Judicature, Bombay.

Wednesday, the 1<sup>st</sup> day of February 1865.

SPECIAL APPEAL No. 812.

of 1864.

Motilal Ramdas of the Konkan District

Appellant

(Original Defendants)

versus

Jumnadas Juvardas of the Konkan District

Respondent

(Original Plaintiff)

Rs. 2,177-4-10

The claim in the Original Suit was to recover on a mortgage.

In Appeal No. 542 of 1862 the Judge of the District of the Konkan at Baroda amended the Decree of the <sup>Chief</sup> Judge of Tanjur who had awarded the claim, <sup>in respect of the interest claimed, by awarding the full sum decreed.</sup>

A Special Appeal was preferred in the High Court on the grounds that (1) <sup>the decision of the District Judge</sup> it is contrary to law in that (a) the appellant being a purchaser with possession and the opposite party a mortgagor without possession the mortgage has been held to over-ride

ride the sale (b) the Section 271 of the Civil Code has been misapplied to the present case in as much as, under it, when any property is sold subject to a mortgage, the mortgagee is not entitled to share in any surplus, whilst in this case the mortgagee was decree-holder and had himself applied for execution and the sale was ordered upon his application as well as upon others, and in addition to all this the first attaching creditor (Mooly Bhoga) had applied (3) for execution after satisfying the mortgagee's claim - all this showing that the sale did not take place subject to the mortgage, (c) The Court below has misapplied the Maxim "Caveat Emptor" first because by the Hindoo Law, a mortgage without possession cannot affect a subsequent purchaser with possession even with notice; secondly because the proceedings of the Court which held the sale showed that it took place unburdened by the mortgage encumbrance and under ~~the~~ circumstances showing that the sale proceeds were to satisfy the mortgage claim as well as the other decrees (d) The Court below has drawn a distinction between a private sale and judicial sale which does not exist in law - the sale of the right, title and interest of the seller in the one case and the Defendant in the other being alike (e) the appellant having purchased the house under circumstances leading him to believe that the opposite party was to be paid out of the sale proceeds, he was in equity entitled either to a rescission of the sale or to relief against the claim of the opposite

site

site party in conduct as well as the proceedings of the Court  
having led him into that belief (F) the award of interest by  
the Court below will press harshly and unjustly against the  
Appellant, who though perfectly circumspect has been de-  
ceived into the purchase of the property even by the conduct  
of the opposite party himself; that (II) there has been  
a substantial error in law in the procedure of the case  
which has produced an error in the decision of the case up-  
on the merits that (a) though the mention of the Durbhast  
of Plaintiff was omitted from the notice of sale (No 18) and  
from the Nazir's Report of the sale (No 13), the warrant of  
sale to the Nazir (6) distinctly specifies the Durbhast of  
Plaintiff as being one of the five upon which the sale  
should take place, which fact as well as the fact that a  
portion of the sale proceeds were paid to the Plaintiff  
shews that the sale took place together with the mortgage  
(Vide No 13). (b) there is no evidence in the case that the  
house in question was sold for less than its proper  
value; and the Judge was in error in holding that the  
Appellant's objection on this ground was "contrary to the  
evidence in the case". (c) the plaint was illegally re-  
ceived by the District Judge instead of by the Principal  
Sudder Ameen; the Judge having the power of trying a  
suit before himself or transferring it to another competent  
Court after it is once filed in the Court of the lowest grade  
the Court of Principal Sudder Ameen not having at the  
time been open

The Court annuls the decree both of the Judge and of the Assis. Judge as having been made without jurisdiction.

Each party to bear his own costs in the Lower Court (that of the Assis. Judge)

Costs of <sup>Appeal and</sup> Special Appeal on Sp. Respondent,

R Couch

Plaintiff.

A J Ward

MEMORANDUM OF COSTS incurred in Special Appeal No. 812

of 186 A against the decision of the Judge \_\_\_\_\_ of the District of the *Konkan* and disposed of on the 1 February 1865 by annulling the decrees of both the lower Courts.

BY THE APPELLANT—

IN THE DISTRICT.

In the <i>Assist<sup>t</sup> Judge's Court</i> .....	67.3.9			
In the <i>Judge's Court</i> .....	171.1.3			
				238.5 "

IN THIS COURT.

Stamp for Memorandum of Special Appeal .....	100	..		
Stamps for copies of Decree and Judgment .....	3	..		
Stamp for Vukalutnama .....	2	..		
Stamp of an application to enter the name of the Appellant's heir .....	0	0	0	
Batta for Process and Postage .....	2	10	..	
Sectioner's Fee .....	3	1	..	
Vukeel's Fee .....	63	8	9	
				174.3.9

Rupees.... 412.8.9

BY THE RESPONDENT—

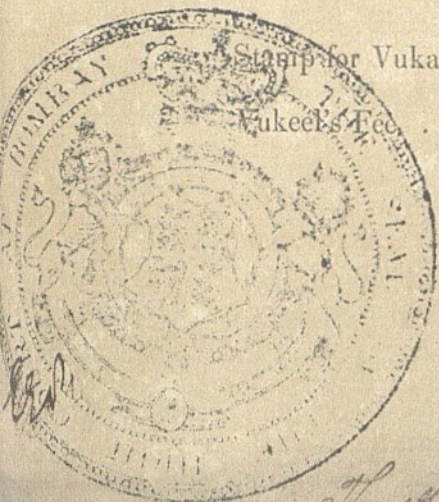
IN THE DISTRICT.

In the <i>Assist<sup>t</sup> Judge's Court</i> .....	202	10	1	
In the <i>Judge's Court</i> .....	70	9	3	
				273.3.4

IN THIS COURT.

Stamp for Vukalutnama .....	2	..		
Vukeel's Fee .....	63	8	9	
				65.8.9

Rupees.... 338.12.1



*W. J. ...*  
*Sealer*  
 The 1<sup>st</sup> day of February 1865.