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Feb. 8.

Special Appeal No. 584 of 1863.

YASHAVANT SU'BA'JI' KULKARNI' *Appellant.*
GOPA'L LA'DKO BHA'NDA'RKAR..... *Respondent.*

Mortgage—Equity of Redemption —Suretyship—Assignment—Parties—Remand.

A mortgaged to his brother B his twelfth-share in the immoveable estate of the family. C, at B's request, became surety for A to Government. A having become a defaulter, C became liable to Government in respect of his defalcations. B, with a view to indemnify C, transferred to him A's mortgage; C, at the same time, assigning to B a debt due by D to A, which had been previously assigned by A to C. Government sold A's interest in the twelfth-share, which was purchased at the sale by B's son, E.

In a suit brought by C against B to obtain possession of A's share :—

Held that the assignment by C to B of D's debt was a sufficient consideration for the transfer by B to C of A's mortgage; that the sale by Government of A's share was subject to such pre-existing valid charge; and that E, to whom the equity of redemption only passed by the purchase at the Government sale, was a necessary party to the suit, which was accordingly, remitted to the court below, in order that he might be made a defendant, and a new decree passed upon the merits.

THIS was a special appeal from the decision of A. T. Crawford, Acting Senior Assistant Judge of the Konkan District at Ratnágiri, in Appeal Suit No. 57 of 1860, reversing the decree of the Munsif of Málvan.

Yashavant, in his plaint, alleged that the defendant Gopál's brother, A'nandráv Ládko, being appointed to a situation in the Customs Department, he (Yashavant) stood surety for him on Gopál's bidding and assurance. A'nandráv was subsequently convicted of embezzlement; and, in order to indemnify Yashavant for the losses he would have to pay to Government on A'nandráv's account, Gopál mortgaged to Yashavant, for Rs. 1,000, A'nandráv's twelfth-share in the immoveable estate of the family, already mortgaged to Gopál by A'nandráv for Rs. 1,000. This suit was brought to compel Gopál to make over possession of that mortgaged property to the plaintiff.

The defendant, Gopál, answered that the document sued upon was not a mortgage deed; that he had received no

consideration ; that the plaintiff never paid up what was claimed by Government on A'nandrāv's account ; that Government sold the disputed property at the plaintiff's suggestion and representation ; and that the suit, therefore, did not lie.

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The Munsif decreed in favour of the plaintiff with costs, Gopál appealed : urging that the non-receipt of Rs. 1,000 by him was established ; that the Munsif had misconstrued the document (No. 2) sued upon ; that the deed No. 49 would show that no consideration was received ; and that the plaintiff himself caused the property now claimed to be sold.

The point laid down for decision by the Acting Senior Assistant Judge was, whether the deed No. 2 was binding against Gopál ; and on this he recorded the following judgment :—

“ The Court entirely dissents from the Munsif's view of this case and of the evidence. Gopál's brother A'nandrāv was a clerk in the Customs Department. The respondent, Yashavant, was his surety. A'nandrāv embezzled the public money ; and Government proceeded to recover from his surety, Yashavant, who is related to him and to Gopál. Gopál, to indemnify his relative for the losses on account of A'nandrāv's dishonesty, agreed to make up to him Rs. 1,500, *should* he have to pay so much. Gopál made up and covered the Rs. 1,500 thus :—He transferred to Yashavant A'nandrāv's right to a twelfth-share for Rs. 1,000, already mortgaged to him, Gopál, for that amount ; he paid Yashavant in cash on two occasions, in all Rs. 199 ; and he gave a bond for Rs. 370, payable if Yashavant had to pay so much as Rs. 1,500 ; in all Rs. 1,569.

“ Now, it is manifest that Gopál only transferred the mortgaged share to Yashavant to cover Rs. 1,000. He did not, and *could not*, have received Rs. 1,000 in cash from Yashavant, as Yashavant alleges. Such a supposition is flatly contradicted by the terms of the deed No. 2, and by deed No. 49. And how iniquitous is the subsequent conduct of Yashavant to Gopál, in return for Gopál's taking on his shoulders a responsibility, which legally fell on Yashavant himself as A'nandrāv's surety !

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“ He himself, as he admits (No. 51), instigated Government to attach and sell the very twelfth-share transferred to him. Government, accordingly, attached and proceeded to sell the property. Whereupon Gopál filed a suit against Government to stop the sale. His suit was unsuccessful in original and appellate courts, on the ground that the property had been mortgaged to Yashavant, and so Gopál must sue Yashavant to cancel the very deed on which this suit is brought. Gopál did file the suit ; but withdrew, with permission to sue again. In the mean time Government actually sold the property ; but were lenient enough to let Gopál's son buy it for about Rs. 700. And now Yashavant, having himself forced a sale of the property transferred to him, has the assurance to come into court on the original deed, and claim to be put in possession of this self-same property.

“ The Munsif's decree is reversed ; and Yashavant's claim thrown out, with costs on him throughout.”

The case was heard before WESTROPP and TUCKER, JJ.

Vishvanáth Náráyan Mandlik, for the appellant :—The lower court, although holding that the respondent, Gopál, engaged to indemnify the appellant, Yashavant, for his having become surety for Gopál's brother, yet did not enforce the transfer of the mortgage made by Gopál to indemnify the appellant ; the property was sold to Gopál's son, subject to the appellant's claim thereon ; and Gopál, having admitted that he was united in interest with the son, in whose name the property was purchased, was the proper party to be sued on the present occasion.

Shántáram Náráyan, for the respondent, contended, 1st, that there was no consideration for the document (No. 2) sued upon ; and, 2nd, that the respondent had no longer in his possession the disputed property, which was purchased by Sakháram Gopál.

WESTROPP, J. :—The Court is of opinion that the Senior Assistant Judge has not drawn the necessary distinction between the positions of Yashavant and Sakháram Gopál, with regard to the twelfth-share in the family estate. Gopál

Ládko was mortgagee of that share to the extent of Rs. 1,000 ; the equity of redemption in the share remaining in A'nandráv Ládko. Yashavant became surety for Anandráv to Government in the Customs Department. A'nandráv having become a defaulter, Yashavant became liable to Government in respect of the defalcations of A'nandráv.

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The Court refrains from expressing any opinion as to whether or not that pre-existing liability of Yashavant could alone constitute any valid consideration, such as would support the transfer of A'nandráv's mortgage by Gopál, the mortgagee, to Yashavant. (a) The transaction relating to that transfer is, however, evidenced by two documents: exhibit No. 2, produced by the plaintiff, Yashavant, and exhibit No. 49, produced by the defendant, Gopál Ládko. Exhibit No. 49 discloses a sufficient consideration to support the transfer, namely, the assignment, by Yashavant to Gopál Ládko, of the debt due from one Vithal Ládko Bhándárkar to A'nandráv, and which had been assigned by A'nandráv to Yashavant. Under these circumstances, the Court is clearly of opinion that the mortgage created by A'nandráv in favour of Gopál Ládko, was fully transferred by him to, and became vested in, Yashavant.

The sale by Government of A'nandráv's share would necessarily be subject to any pre-existing valid mortgage ; and the purchaser would only acquire the equity of redemption in that share, inasmuch as Government could sell only such interest as remained in A'nandráv. And this would be so whether or not Yashavant instigated Government to proceed to that sale.

Whether this suit be regarded as one in the nature of a suit to obtain possession of property as mortgagee, or of a foreclosure suit, the Court is of opinion that Sakhárám Gopál, or, if he be dead, his heir, must be made a party to it ; the

(a) NOTE.—If, as stated in the plaint, Yashavant became surety for Anandráv on Gopál's bidding and assurance, he would, according to the principles of the civil law, have a right as mandatary to call upon Gopál, to indemnify him from loss in respect of the suretyship. Instit., Lib. III., tit. XLVI., § 3.—ED.

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equity of redemption having passed to Sakháram Gopál by the purchase at the Government sale, and he not being in any respect, so far as the Court can at present perceive, represented by Gopál Ládko.

The Court, therefore, comes to the conclusion that the decree of the Judge in this case (No. 584) must be reversed; and the cause remitted to the Court below, in order that Sakháram Gopál, or, if he be dead, his heir or legal representative, be made a defendant in the suit, and that a new decree be passed upon the merits.

The Court observes that, in the other suit between the same parties (No. 585), the decree in which was affirmed, the Judge has credited Yashavant with the value of the mortgage transferred to him by Gopál Ládko.

Appeal allowed.

April 22.

Special Appeal No. 22 of 1864.

HIRA'CHAND BA'BAJI.....*Appellant.*
 BHA'SKAR A'BA'BIAT SHENDE*Respondent.*

Mortgage—Possession—Purchase—Registration.

Held that a mortgagee in possession, who also became purchaser of the property for the amount secured by the mortgage, under a deed of sale which was neither stamped nor registered, could fall back upon his mortgage, and recover the amount thereof, in preference to a subsequent purchaser of the same property, whose deed of sale was both stamped and registered.

THIS was a special appeal from the decision of C. Gonne, Acting Judge of the Konkan District, in Appeal Suit No. 523 of 1862, amending the decree of the Munsif of Alibág, in Original Suit No. 2343 of 1861.

Shende sued Keshav bin Bápúji and Raghá bin Múrji to recover Rs. 673-3-0, due on a mortgage bond passed by them, dated the 12th of November 1852, and sought to recover the amount by the sale of their share of the mortgaged property, or from them personally, should the proceeds of the sale turn out insufficient.