1864.
YASHAVANT S. KULKARNI' v. GOPA'L L. BHA'NDA'RKAR.

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 Láḍko.

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 Sakhárám 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 Láḍko.

Appeal allowed.

April 22.

Special Appeal No. 22 of 1864.

HIRA'CHAND BA'BA'JI..............................*Appellant.*
BHA'SKAR A'BA'BHAT 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 Konkaṇ District, in Appeal Suit No. 523 of 1862, amending the decree of the Munsif of Alíbág, 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.

1864.
HIRA'CHAND BA'BA'JI v. BHA'SKAR A. SHENDE.

Keshav and Raghá failed to appear and answer the suit. But Hiráchand Bábáji claimed to be joined as a co-defendant: stating that his father, Bábáji Tánáji, had bought from the defendants Keshav and Raghá the property in question; that a suit between the plaintiff and himself had terminated in a decree by the Ṣadr Diváṇí Adálat to the effect that Bábáji Tánáji was the rightful owner of the property, which was in his possession as purchaser; and that the mortgage bond now sued on was, therefore, superseded.

The Munsif found that the decree of the Ṣadr Diváṇí Adálat, in Special Appeal No. 4274 of the 17th of December 1860 (a), in deciding that Shenḍe had no right to the disputed property as owner by purchase, left it open to him to sue the first two defendants on his mortgage bond; but he considered that, as the same decree had decided the right to possession of the property to be with Bábáji Tánáji, his son's possession should not be disturbed; and he, therefore, decided that the plaintiff should recover from the defendants Keshav and Raghá personally, and not by sale of the mortgaged property.

Against this decision Shenḍe appealed to the Judge: urging that his mortgage deed was passed in a non-regulation district, and was, therefore, unaffected by the stamp and registration laws; that the former decision did not affect his mortgage; and that, as the mortgaged property had been transferred to his name in the Government accounts, and he had obtained a decree for rent on account of that property, his claim was good, and should be satisfied by sale of the same.

The judgment of the District Judge was as follows:—

"The issues for decision are: (1) Whether the plaintiff, by accepting a deed of sale from defendants 1 and 2, lost his former claim on them, secured by the mortgage bond; (2) if not, whether he still possesses a lien on the mortgaged property, of which Bábáji Tánáji has been declared to be the owner, by purchase from defendants 1 and 2. And the Court

(a) 7 S. D. A. Dec. 357.

1864.
HIRA'CHAND BA'BA'JI v. BHA'SKAR A'BA'BHAT SHENDE.

finds: That the plaintiff has not lost his claim on the mortgage bond; and (2) that he does still possess a lien on the mortgaged property, which entitles him to claim payment from its present owner, or to compel its sale.

"To explain these findings it is necessary to state the facts of the case. On the 12th of November 1852, the defendants Keshav and Raghá, together with others, being members of an undivided family, separated their interests and liabilities. They found they owed the present plaintiff, Bháskar, Rs. 1,268-5-9. This debt was divided into three portions, one a half portion, and the two others a quarter portion each. Defendants Keshav and Raghá, who appear to have remained united, passed the bond now in dispute, in security for the half portion, *i.e.*, Rs. 634-3-0. The other sharers passed two bonds for the quarter portions of the debt; and those bonds form the subject of two suits precisely similar to the present suit. In security for the three debts, the sharers all mortgaged their interest in certain fields &c., which had up to this time been their joint property.

"This mortgage was without possession. But nearly two years afterwards, on the 23rd of September 1854, the debt being unpaid, the sharers joined in selling the mortgaged property to the plaintiff, by one deed of sale, for the sum of their debts. Possession was so far delivered with the deed, that the vendors, remaining on the land, acknowledged themselves to be merely tenants under the plaintiff as the landlord; and they, by rázínámá, caused the land to be placed under the plaintiff's name in the Government books. They also paid rent, and when failing to pay rent, were sued and suffered a decree. Unfortunately for the plaintiff, he omitted to have his deed of sale stamped and registered.

"So matters rested till, on the 11th of April 1852, defendants Keshav and Raghá and the others sold the land again to one Bábáji Tánáji, the father of defendant Hiráchand. He took care that his deed of sale should be both stamped and registered. The land was made over to his possession; and when the plaintiff, Bháskar, as the prior vendee, sued to

ovst him, he lost his suit both before the Assistant Judge, and before the Ṣadr Diváṇí Adálat, on the ground that his deed of sale was neither stamped at the proper time, nor registered, while Bábáji Tánáji's was. Accordingly, Bábáji remained, and his son is still, in possession.

"The plaintiff, Bháskar, now falls back on his three mortgage bonds. He was not allowed to do this in his suit on the deed of sale; but it was left open to him to sue on the mortgage bonds, and this he has done in three separate suits.

"The first question which has arisen is, Did Bháskar, by converting his mortgage into a sale, annihilate his mortgage, whatever afterwards might have turned out to be the worth of the sale? The Munsif has held that he did. He has apparently considered that the satisfaction of the money debt, for which the mortgage bond was passed, was the consideration for the sale; and that as, therefore, the sale was never completed, he is entitled to get his consideration back; but that he has lost his claim on the mortgaged property, the mortgage transaction having merged into the sale.

"The Court cannot agree in this view. If the sale to Bháskar was incomplete, and could not be carried out, the rights of Bháskar and of the vendors must have remained, as they were before the sale. Bháskar, therefore, remained with a right to a lien on the mortgaged property, just as much as with a right to the money which was due to him.

"But the next question is, whether this lien on the mortgaged property, however valid it may have remained against the defendants Keshav and Raghá, the former owners of the property, is valid against Bábáji Tánáji, the new purchaser of the property.

"The Court thinks it is. Although the mortgage bond was not registered; yet the vitality of the mortgage was preserved in two ways. In the first place, the mortgagee, Bháskar, got possession. Being a trader and Bráhaman, he did not, of course, take possession by cultivating the land with his own hands, but he took possession of the only

1864.
HIRA'CHAND BA'BA'JI v. BHA'SKAR A'BA'BHAT SHENDE.

nature possible to him. He got the land transferred to his name in the accounts; and he demanded, and by suit compelled the mortgagors as tenants to pay him, rent. In the second place, due notice of his mortgage was given to the purchaser, Bábáji Tánáji. Not only was there the notice of Bháskar's name in the Government accounts; but in the deed of sale passed to Bábáji Tánáji, it was distinctly stated that there were sávakárs whose claims on the property had to be paid off, and that the vendors would pay off these claims, and hand over to Bábáji the recovered bonds; and from the Assistant Judge's decree in the former suit it further appears that Bábáji Tánáji was informed that the plaintiff, Bháskar, was one of these sávakárs.

"Bábáji, therefore, bought the land, fully warned of its incumbrances; and it is perfectly just that he should be now called on, either to pay off those incumbrances, or to see the land sold.

"The Munsif's decree is, accordingly, amended; it being ordered that the plaintiff shall recover from Hiráchand; or that the land shall be sold, and the plaintiff's claim be satisfied out of the proceeds, any balance due being made up by defendants Keshav and Raghá: costs on the respondents."

McCombie, for the appellant:—The respondent sues on his mortgage deed; but his rights under this instrument were extinguished by his deed of sale, on which he sued before; and were defeated by the appellant producing a deed of sale for the same property, stamped and registered prior to the respondent's deed of sale. The Judge was in error in holding that the appellant had any notice of the respondent's lien as mortgagee, which, moreover, was extinguished at the time the appellant purchased.

Vishvanáth Náráyan Mandlik, contra:—The respondent had possession of the property before its sale to the appellant. This fact has been found by the lower court, in this as well as in the former suit between the same parties. The sale as against the appellant being invalid, the respondent could fall back on his mortgage, which was not extinguished

by the subsequent sale. The respondent appears (from exhibit No. 11 in S. A. No. 4274, 7 S. D. A. Dec. 357) to have had notice of some incumbrances being on this property; and the sale, therefore, was a sale subject to the respondent's claim as mortgagee, which ought to be satisfied by the sale of the mortgaged property.

PER CURIAM (FORBES and COUCH, JJ.):—It appears in this case that Keshav and others first mortgaged the property to Bháskar Shende. Being unable to pay him the mortgage debt with interest, and he having sued them and obtained a decree, they entered into a deed by which they sold the mortgaged property to him. After this the land was transferred, on the application of the vendors, to Shende's name in the Government revenue books, and the vendors remained on the land as the tenants of Shende, and paid him rent; and when they failed in paying him rent, he sued them, and obtained a decree against them.

Matters remained in this state till the 11th of April 1856, when the defendants Keshav and others sold the same property to Bábáji Tánáji, the father of the special appellant. The District Judge is perhaps wrong in saying that Bábáji bought the land " fully warned of its incumbrances; " and that, in the deed of sale passed to Bábáji Tánáji, it was distinctly stated that there were sávakárs whose claims on the property had to be paid off, &c. But Shende having possession, other notice of his claim was not necessary; and it appears that there are words in the deed (exhibit No. 11, S. A. No. 4274) that should have set Bábájí Tánájí on inquiry.

Shende's deed of sale (exhibit No. 3, S. A. No. 4274) is invalid as against Bábáji's deed of sale, because it is neither stamped nor registered. Therefore, Shende's possession of the property at the time Bábáji's deed was executed, must be considered to be under the only legal title which he possessed, that is to say, the mortgage, upon which we think that he is entitled to fall back. The Judge's decree, therefore, is affirmed with costs.

Decree affirmed.