

Special Appeal No. 90 of 1867.

1867.
March 27.

SUNDAR JAGJI'VAN *Appellant.*
GOPA'L ESHVANT *Respondent.*

Mortgage—Registration—Purchase—Priority.

Held that a registered mortgagee, although without possession, is entitled to priority over a subsequent purchaser.

THIS was a special appeal from the decision of S. H. Phillips, Acting Assistant Judge of the Konkan District, in Appeal Suit No. 327 of 1866, confirming the decree of the Munsif of Pen.

Sundar Jagjivan brought the suit, to enforce a mortgage lien on the property of one Devji; the attachment on which was removed on the application of Gopal Eshvant, the defendant, who, in answer to the plaintiff's claim, alleged: that Devji and his son had mortgaged the property to him; that, on Devji's death, his son sold it to him; and that he was in possession.

The Munsif of Pen rejected the claim: finding that the plaintiff did not prove his case; and that the purchase of the property by the defendant was proved.

The Acting Assistant Judge found, on the authority of Special Appeals Nos. 23 and 75 of 1861 (a), that Gopal Eshvant, the defendant, being a purchaser with possession, was not liable for an equitable mortgage lien.

Dhirajlal Mathuradas, for the appellant, contended that, inasmuch as the mortgage bond passed to the plaintiff by Devji was dated the 22nd of March 1851, and registered on the 19th of October 1859, and not denied, the plaintiff had a lien on the property; and that the defendant purchased it on the 12th of March 1855, subject to that lien. The cases relied upon by the Court below, in support of its judgment, only went to show that an unregistered mortgage without possession was not valid against a subsequent purchaser

(a) 8 Bom. S. D. A., Dec., pp. 189 and 264.

with possession. Here the deed of mortgage was registered. The following cases were cited: *Rambuggut v. Sudanundrao* (b); *Purshotum Runchord v. Juggivan Mayaram* (c); S. A. No. 364 of 1865; and S. A. No. 129 of 1866.

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ESHVANT.

No one appeared for the respondent.

PER CURIAM (COUCH, C.J., and WARDEN, J.):—The Court remands the case to the lower appellate court, for the Judge to try and determine whether the alleged mortgage was made to the plaintiff; and, if he shall so find, to pass a decree in favour of the plaintiff, who, as a registered mortgagee, although without possession, is entitled to priority over a subsequent purchaser; and the Court directs the costs to follow the final decision.

Suit remanded.

Special Appeal No. 93 of 1867.

March 27.

GANPAT BAJA'SHET *Appellant.*
KHANDU CHA'UGSHET and others *Respondents.*

Mortgage—Registration—Purchase—Priority.

Held that an unregistered mortgage without possession is not valid against a purchaser with possession.

THIS was a special appeal from the decision of S. H. Phillips, Acting Assistant Judge of the Konkan District, in Appeal Suit No. 322 of 1866, reversing the decree of the Munsif at Alibág, in Original Suit No. 436 of 1866.

Ganpat sued to recover Rs. 148, the balance of a mortgage bond, from certain property in the possession of the defendant Tulsidás, which had been mortgaged to him (17th January 1863) before it was sold (20th January 1865) by the defendants Khandu and Lakshmi to the defendant Tulsidás. The deed of sale was registered. The mortgage was not registered.

Amrit Shripat, Munsif at Alibág, awarded the claim: holding that the defendant Tulsidás bought the property in question burdened with the plaintiff's lien as mortgagee over it.

(b) Bellasis, Rep. 9.

(c) 1 Bom. H. C. Rep. 60.