

assumés in some cases a mild and curable form, while in others it appears in a virulent and aggravated type. The Sadr Court find, on consulting the best authorities on the subject, that it is in the latter case only that the disease is regarded by Hindú Law as a disqualification entailing forfeiture of inheritance." This appears from the Mitákshará and Vyavahára Mayúkha to be the correct view of the law. We, therefore, reverse the decree of the Court below, and remand the case that it may be determined whether the plaintiff was suffering from leprosy of a virulent and aggravated type, so as to be disqualified by Hindú Law from inheriting.

1868.

JANA'RDHAN
PA'NDURANG
v.
GOPA'L
PANDURANG
et al.

Special Appeal No. 353 of 1868.

Sep. 23.

KA'NU KHANDU *Appellant.*
KRISHNA' BHULA'JI SHET *Respondent.*

Registration—Unregistered Mortgage—Decree—Priority.

An unregistered mortgage without possession upon which a decree has been obtained but not executed, has not, by virtue of such decree, priority over a subsequent deed of sale which is registered.

THIS was a Special Appeal from the decision of A. Lyon, Assistant Judge at Tháná, in Appeal Suit No. 269 of 1867, reversing the decree of the Munsif of Alibág.

One Bálu Hassiá, on the 9th of April 1858, mortgaged a house to the second defendant, Náthá. On the 21st of October 1859 a decree was obtained thereon by Náthá, but this decree was not executed till the 14th of January 1867, on which date the house was bought by Krishná at a Court's sale under the decree of the 21st of October 1859. Meanwhile, subsequently to that decree, but prior to the Court's sale in 1867, the house was sold to one Khemji at another Court's sale on the 24th of March 1862, and Khemji was put in possession on the 12th of May 1862. Khemji sold the house to the plaintiff, who continued in possession until he was dispossessed in execution of the decree against Bálu Hassiá.

1868.

KA'NU
KHANDU

v.

KRISHNA' B.
SHET.

The plaintiff applied for the removal of the attachment, but his application was rejected, not having been presented at the proper time. He, therefore, filed the present suit to establish his right to the property. The first issue raised was "whether the sale to Khemji was made *cum onere* of the decree passed on the mortgage deed in 1859." The Munsif held that the sale was not subject to the claim on the mortgage, on the authority of the decision in Special Appeal No. 23 of 1861 (a), in which it was held that a sale with possession rendered a prior mortgage without possession invalid.

The Assistant Judge was of opinion that this ruling would have applied to the case if the mortgage had been a simple mortgage and no more, but that it did not apply, as a decree had been obtained on the mortgage prior to the sale. He considered that the decree obtained on the mortgage cured the incompleteness of the mortgage caused by the absence of possession, and made the purchase subsequent to the decree a purchase subject to the decree on the mortgage.

The case was heard before COUCH, C.J., and NEWTON, J.

Dhirajlal Mathuradas, for the appellant:—The Munsif was right in holding that the ruling in Special Appeal No. 23 of 1861 (*supra*) applied to this case. The same ruling was followed in Special Appeal No. 971 of 1864.

Shantaram Narayan, for the respondent:—According to a recent ruling of this Court, registration cures the defect of want of possession, and makes the mortgage valid: *U'maji valad Manaji Patil v. Hari Ramchandra Kulkarni* (b); and by analogy a decree declaring a specific lien on the property will bind the property—the mortgage, in fact, merges in the decree.

COUCH C. J.:—The Assistant Judge finds that, a decree having been obtained upon an unregistered mortgage, the mortgage has, by virtue of the decree, priority over a subsequent deed of sale which was registered, and that the decisions of the High Court as to unregistered mortgages

(a) 8 Harrington 189. (b) 4 Bom. H. C. Rep., A.C.J. 143.

do not apply where a decree has been obtained on such mortgage; but he quotes no authority for his decision.

The decree was one of the ordinary decrees in suits upon mortgage bonds, and was for the recovery of the money from the mortgagor and his sureties personally (*vide* exhibit No. 26 in the case). It is contended for the respondent that the mortgage is merged in the decree, and the decree must be considered equivalent to possession under the mortgage. We have held in the case of *Hirúchand Bábjái v. Bháskar A'babhat Shende* (c) that a mortgagee in possession, who also became the purchaser of the property for the amount secured by the mortgage under a deed of sale which was neither stamped nor registered, can 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. Now that holding is quite inconsistent with what is urged here in regard to the merging of the mortgage in the decree. By the Hindú Law a mortgagee must have possession, and a declaration of right to get possession is not possession. We cannot, therefore, consider the decree as having the same effect as possession. The practice of this court, as far as I can remember it, is to look not at the date of the decree, but at the date of the mortgage which is the foundation of the decree. The mere obtaining a decree declaring that the mortgaged property is liable cannot have the effect of possession until the decree is executed, because no publicity or notoriety is caused by obtaining a decree if it is not executed. We, therefore, reverse the decree of the Assistant Judge, and the consequence will be that the decree of the Munsif will stand.

NEWTON, J., concurred.

Decree of District Court reversed.