

1870.

VINA'YAK  
JOSHI  
et al.  
v.  
JANA'RDAN  
JOSHI  
et al.

and it is argued that the provisions of Sec. 97 of the Code should be made applicable, and that the plaintiff, having withdrawn without permission, should be held to be precluded from bringing a fresh suit. But under the old Regulations no special permission was required, and the law permitted a plaintiff to withdraw in any case, with license to bring a new suit; and it is impossible to hold that the plaintiff, having availed himself of the liberty which the law allowed him, is now affected by the provisions of Sec. 97 of the Code.

It has been objected in special appeal that the court below erred in hearing the appeal, as the appellants had made an application reciting the substance of a compromise. But it appears that only one of the appellants made any such application, so that the court had no choice but to proceed with the appeal.

I would confirm the decree with costs.

WARDEN, J., concurred.

*Decree confirmed with costs.*

*Special Appeal No. 510 of 1869.*

Feb 7.

MATHURA'DA'S RANCHODDA'S ..... Appellant.

KA'LIA' KHUSHA'L ..... Respondent.

*Mortgage—Purchaser at Court's Sale—Priority.*

*Held that the rule laid down in Ganpat Bajáshet v. Khandú Chaúgshet (a), "that an unregistered mortgage without possession is not valid against a purchaser with possession," does not apply to a purchaser at a Court's sale whose instrument of purchase is not registered.*

THIS was a special appeal from the decision of George Ayerst, Acting Assistant Judge of Súrat, in Appeal Suit No. 119 of 1869, reversing the decree of the Šadr Amín of Broach.

The plaintiff, Mathurádás Ranchođdás, instituted this suit to recover possession of a house, in accordance with a decree which he had obtained against Bhúliá Harká and Jeṭhá

Harká, who had hypothecated the house to him in 1863. The plaintiff attached the house, but the attachment was removed on the application of the defendant, Káliá Khushál, who claimed to have purchased the house at an auction-sale in execution of a decree in 1866. The plaintiff, accordingly, brought this present suit to establish his right to the house against the defendant. The *san*, or deed of hypothecation, was dated the 20th of September 1863, and the auction-sale took place on the 24th of March 1866.

1870.  
 MATHURA'DAS  
 RANCHODDA'S  
 v.  
 KÁLIA'  
 KHUSHÁ'L.

The defendant, Kália Khushál, answered that the land had not been hypothecated to the plaintiff, and that he, and not the plaintiff or the persons through whom he claimed, was the owner of the property.

The Śadr Amín of Broach found that it was proved that the house had belonged to the mortgagors of the plaintiff, and that they had hypothecated it to the plaintiff. The mortgage being established, he held that it was not affected by the subsequent auction-sale, and awarded the claim of the plaintiff.

The defendant appealed to the District Court, and the Acting Assistant Judge found that the house in question was proved to have been hypothecated to the plaintiff by the sons of Harká. He held, however, that as the plaintiff was a mortgagee without possession, and as his mortgage-bond was not registered, his title could not prevail against the title of the defendant, who was a purchaser at an auction-sale and in possession, in accordance with the decision in *Ganpat Bajáshet v. Khandú Chaúgshet (b)*. He, accordingly, reversed the decree of the Śadr Amín.

The plaintiff appealed against this decision, and the appeal was heard before COUCH, C.J., and WARDEN, J.

*Girdharlál Dayáldás*, for the appellant:—The precedent followed in the lower appellate court does not apply. That was the case of a private sale by the mortgagor himself, in which case the vendor sells his entire property, and good title is implied. In an auction-sale, only the right,

(b) 4 Bom. II. C. Rep., A. C. J. 69.

1870.  
 MATHURADA'S  
 RANCHODDA'S  
 v.  
 KA'LIA'  
 KHUSHA'L.

title and interest of the debtor in the property, are sold burdened with any liens created by him before the date of the sale. The plaintiff's mortgage is thus valid against the purchaser.

*Dhirajlal Mathurádas* for the respondent.

PER CURIAM :—The Court reverses the decree of the lower appellate court. There is an essential difference between a sale by auction in execution of a decree against the judgment-debtor and a private sale by the judgment-debtor. The purchaser at an auction-sale in execution of a decree buys the right, title, and interest of the debtor, whatever that may be, burdened with all valid liens created by him. The precedent followed by the District Judge, therefore, does not apply, as it refers to private sales. This is a Gujarát mortgage, where it is usual for the mortgagor to remain in possession of property hypothecated; such mortgages are called *san*, and are allowed in Gujarát. The question of registration does not arise in this case, as neither the mortgage nor the instrument of sale is registered.

*Decree reversed with costs.*

*Special Appeal No. 529 of 1869.*

March 31.

RA'MCHANDRA VA'SUDEV ..... *Appellant.*  
 NA'NA'JI TIMA'JI ..... *Respondent.*

*Hindú Law—Adoption—Government Sanction—Watan.*

A formal adoption is not invalid because it has not received the sanction of the ruling power, and (where the ruling power does not interfere) an adoption without such sanction entitles the adopted son to succeed to property of the nature of a service *watan*.

THIS was a special appeal from the decision of J. R. Naylor, Acting Senior Assistant Judge, at Kaládgi, in Appeal Suit No. 92 of 1869, reversing the decree of Bábáji Lakshuman, Munsif of Mudebihál.

The plaintiff, Rámchandra, alleged that he was the adopted son of one Vásudev Devji, and, as such, sued to obtain a declaration of his title to a one-anna share in certain *kul-*