

1870. arrears from Samvat 1912 to 1918 inclusive, and simple
 UMEDSANGJI v. interest at nine per cent. per annum on each payment as it
 THE COLLECTOR OF accrued due until the date of the decree, and interest on the
 SU'BAT. whole sum at six per cent. till the day of payment. The
 respondent to bear all costs.

GIBBS, J. :—I concur. This cannot be strictly called a
todá garás case, and should not be cited as a precedent
 on that subject. No decision has been come to as to the
 nature of the *hak*—whether it is black-mail, or rent of *wanta*
 lands, or what; the decision is simply based on the admission
 of the respondent that he has collected the *haks* which are
 the subject of the suit from the villages, and is ready to pay
 them to whomsoever the Court orders.

Decree reversed with costs.

NOTE.—Special Appeal No. 21 of 1867 was decided on the same day
 on the same grounds.

Feb. 9.

Special Appeal No. 524 of 1869.

KISHORBHA'I GALLA'BHA'I and DESA'IBHA'I

GALLA'BHA'I *Appellants.*

JORA'BHA'I DA'JI and MULJI VENIDAS... *Respondents.*

Registration—Mortgage—Subsequent Purchase—Priority—Notice.

Where, when Act XIX. of 1843 was in force, a purchaser bought land
 with notice of a prior unregistered mortgage which was referred to in the
 purchase-deed, the purchaser agreeing to pay off the mortgage, *it was held*
 that the purchaser took subject to the mortgage, notwithstanding its not
 being registered.

THIS was a special appeal from the decision of M. H. Scott,
 Acting Extra Assistant Judge at Ahmedábád, in Appeal
 Suit No. 43 of 1869, affirming the decree of the Munsif of
 Umret.

Kishorbháí and Desáíbhái, the plaintiffs, sued to redeem a
 mortgaged field situated in the village of Od, in the Neriad
 taluká. They claimed as purchasers from the mortgagor of
 the defendants, under a registered deed of sale, dated the
 25th of March 1864, in the following terms:—

“To Kishorbháí Gallábhái and Desáíbhái Gallábhái this writing is passed by Rája Anopsoga Merubháí and three others.—We have sold to you the field as above named for Rupees 1,199. You are to enjoy the said field as long as the sun and moon last, with all that is above and below the said field. You are to pay the Government *salámi* and enjoy the field. If anybody obstructs your enjoyment, we, the vendors, will remove the obstruction. This field was mortgaged to Venidás Vallabhbhái for Rs. 751. You are to pay the mortgage-money and redeem the field. We have received the remaining Rs. 438 in cash from you, and have passed this document for the whole sum for which this field is sold to you.”

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The mortgage to the defendants was dated the 12th of April 1862, and was unregistered. The mortgage was conditioned for a term of twenty-one years.

The defendants answered that since the date of the mortgage they had become purchasers of the mortgaged land, and that the plaintiffs had no title to redeem.

The Munsif of Umret found that the plaintiffs' deed of purchase was proved. He also found that the deed of purchase set up by the defendants was unregistered, and could not prevail against the plaintiffs' registered deed.

The Munsif decreed that, as the defendants' mortgage was for a term of years, on the expiry of that term the plaintiff might, on payment of the mortgage-debt, redeem the land sued for.

The plaintiffs appealed to the District Judge, on the ground that the mortgage-deed of the defendants was not properly stamped and was not genuine.

Mr. M. H. Scott, the Extra Assistant Judge, held, on the preliminary point, that the deed was insufficiently stamped. He, however, allowed the defendants to make up the deficient stamp duty. On the merits he held that the mortgage-deed was genuine, as shown by the admissions in the deed of sale to the plaintiffs themselves.

On the remaining point, whether the defendants could claim adherence to the terms of the mortgage-deed, or could

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only claim the sum for which the land was mortgaged, the Assistant Judge observed—

“That the defendants alleged in their reply to the plaint that they had purchased the land from the mortgagor, they at the same time holding a mortgage on the land. The plaintiffs argue that (in this state of the pleadings) the defendants’ rights under the mortgage merged in the purchase; which, however, has been disallowed by the lower court, chiefly on the ground that the plaintiffs’ purchase-deed being registered and of a prior date, has priority over the defendants’ unregistered and subsequent purchase. The defendants, however, have a right to fall back upon their mortgage, which is not cancelled by reason of the sale being void. I am borne out in this view by the judgment in Special Appeal No. 156 of 1863 (a). The mortgage-bond being genuine and not cancelled, the defendants have a right to insist upon the fulfilment of its conditions. The mortgagor would be bound by it, and he could not convey to the plaintiffs a better or other title than he himself possessed.”

The Judge, accordingly, affirmed the decree of the Munsif.

The plaintiffs appealed against this decision, and the appeal was argued before WARDEN and GIBBS, JJ.

Nánabhái Haridás, for the appellants:—The plaintiffs are purchasers under a duly registered purchase-deed, while the defendants are mortgagees of an unregistered mortgage. As both the sale and mortgage are of a date previous to the commencement of Act XVI. of 1864, they are governed by Act XIX. of 1843 and Reg. IX. of 1827, Sec. 6.

A registered purchaser is entitled to priority over an unregistered mortgagee: *Purshotum Ranchord v. Jagjivan Mayaram* (b). The fact that the plaintiffs in this case had notice of the mortgage to the defendants does not, therefore, affect their claim to redeem the mortgage. As against them

(a) See *Hirachand Babaji v. Bhaskar Ababhat*, 2 Rom. H. C. Rep. 198 (2nd ed.).

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

the conditions of the mortgage-deed have no efficacy, the mortgage-deed not being registered. The lower courts were bound, under the precedent quoted, to decree immediate redemption.

Shántarám Nārāyan, for the respondents:—The case quoted from the first volume can be distinguished from the present case. The purchaser here bought only the equity of redemption from the mortgagor; the sale was not an out-and-out sale, and the plaintiffs can redeem only after the mortgage term is over.

WARDEN, J.:—We are of opinion that the plaintiffs in this case bought nothing more than the equity of redemption from the mortgagor. They were not only aware of the mortgage charge, which is recited in the deed of sale, but the mortgage debt formed a part of the consideration for the sale. The case quoted from 1 Bom. H. C. Reports is not, therefore, in point. The mortgage-bond cannot be adopted in part and ignored in part. It is found to be genuine, and must bind the purchaser who buys with notice, and undertakes to pay off the mortgage charge as part consideration for the sale, to the same extent as it would have bound the vendor of the plaintiffs. As the original mortgagor could not have sued to redeem before the term was over, neither can the plaintiffs sue for immediate redemption against the terms of the mortgage-bond. We, accordingly, confirm the decree of the lower courts with costs.

Decree confirmed with costs.

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