

1870.
July 28.

Special Appeal No. 122 of 1870.

KASANDA'S LA' LDA'S *et al.* *Appellants.*
PRA'NJIVAN A'SHA'RA'M..... *Respondent.*

*Code of Civil Procedure, Sec. 259—Prior and Puisne Mortgagees—
Nature of prior Mortgagee's Security.*

The security to which a mortgagee becomes entitled under the ordinary form of mortgage in the Mofussil is the right to sell the entire estate of the mortgagor as the same existed at the date of the mortgage, and he cannot be deprived of this security by any subsequent charges on the property or prior unregistered charges which the mortgagor may create or have created. When he brings the property to sale, the sale is an out-and-out sale of the estate of the debtor, and the purchaser takes the property subject only to those encumbrances which were in existence at that date, though such of the subsequent encumbrancers as may, at the time of the sale, have taken out execution, may have a right to satisfy their claims from the surplus proceeds of the sale.

In applying Sec. 259 of the Code of Civil Procedure to cases of the above description the words "the right, title, and interest of the defendant in the property sold" must be understood as meaning the right, title, and interest which the decree ordered to be sold, *i.e.*, the right, title, and interest which the judgment-debtor had in the property at the time of the mortgage.

THIS was a special appeal from the decision of E. T. Candy, Acting Assistant Judge of Ahmedábád, in Appeal No. 80 of 1869, reversing the decree of the Principal Şadr Amín of Ahmedábád.

The plaintiff represented the purchaser of the property in dispute, at a court's sale held on the 18th of November 1864, in satisfaction of a registered mortgage-deed, dated the 20th of November 1862, on which a decree had been obtained on the 24th of September 1864. The defendants, who were mortgagees of the same property under an unregistered deed of the 24th of July 1862, obtained a decree upon their mortgage-deed on the 19th of March 1866, and attached the property on the 13th of August 1866. The plaintiff thereupon sued to have this attachment removed, and to have his own right to the property declared.

Upon these facts the court of first instance threw out the claim of the plaintiff. The court of appeal reversed that finding, and awarded the claim of the plaintiff.

The special appeal was argued before GIBBS and MELVILL, JJ.

Nánabhái Haridás, for the appellants:—The defendants' mortgage was in existence at the date of the plaintiff's purchase at the auction-sale. What a purchaser buys at an auction-sale is only the right, title, and interest of the judgment-debtor on the day of the sale, which in this case was the equity of redemption. The plaintiff, therefore, bought the house burdened with the defendant's mortgage. Sec. 259 of the Civil Procedure Code supports this view: see also *Bhikáji v. Vallabhdás (a)*.

Nagindás Tulsidás appeared for the special respondent:—The right title, and interest bought by the plaintiff was the entire property which the mortgagor could mortgage at the time when the registered mortgage was executed—that is, the entire interest in the property: for the defendant's mortgage was of no avail to lessen that interest, it not being registered. If the first mortgagee be held to have bought only the equity of redemption, the puisne mortgagees would be in a better position than he. He cited *Prahlad Misser v. Udit Narayan Sing (b)*.

The judgment of the court was delivered by

MELVILL, J.:—The first point which we have to consider is the effect of registration. The deed which is the origin of the respondent's title is registered; the deed through which the appellants claim, though prior in point of time, is not registered. Act XIX. of 1843, which is the law applicable to the case, provides that a registered deed of mortgage shall be satisfied in preference to every prior unregistered deed of mortgage. The effect of this provision is to reverse the position of the two mortgagees. By virtue of registration the second mortgagee obtains the same rights as if his mortgage had been prior in point of time. We may deal with this case, therefore, as if the mortgage-deed on which the respondent's claim is founded had been

(a) 2 Bom. H. C. Rep. 209 (2nd ed.).

(b) 1 Ben. L. Rep., A. C. 197.

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executed before the mortgage-deed which is the origin of the appellants' title.

Next, what is it which a mortgagee brings to sale when he obtains a decree for sale in satisfaction of his mortgage? It has been argued for the appellants that in such a case all that is sold is the right, title, and interest of the mortgagor as the same existed at the time of sale; that such right, title, and interest cannot be dissociated from the liabilities to which the property is subject; and that, therefore, the purchaser is bound to satisfy all charges on the estate. Such argument is specious, and derives a certain amount of support from the words of Sec. 259 of the Code of Civil Procedure. But a very little consideration will show that it cannot be maintained. If such were the law, a prior mortgagee and the holder of the first decree against the property would, instead of being benefited, be prejudiced by the superiority of his claim against the property. A purchaser would give for the property no more than the difference between the market value of the property and the amount of the encumbrances to which it was subject. If the property were heavily mortgaged, this would amount to little or nothing. Thus the first decree-holder, who would probably be also prior mortgagee, would get little or nothing, while subsequent encumbrancers would be paid in full.

The security to which the mortgagee becomes entitled under the ordinary form of mortgage in the Mofussil is the right to sell the entire estate of the mortgagor as the same existed at the date of the mortgage. He cannot be deprived of this security by any subsequent charges on the property which the mortgagor may create without his consent. When he brings the property to sale, the sale is an out-and-out sale of the estate of the debtor as it existed at the date of the mortgage. The purchaser takes the property subject to encumbrances which were in existence at that date, but subsequent encumbrancers have no longer any claim upon the property, though, of course, any of them who at the time of sale may have taken out execution has a right to satisfy his claim from the surplus proceeds of the sale.

In applying Sec. 259 to cases of this description, the words "the right, title, and interest of the defendant in the property sold" must be understood as meaning the right, title, and interest which the decree ordered to be sold, *i.e.*, the right, title, and interest which the judgment-debtor had in the property at the time of the mortgage.

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The respondent in this case, representing the purchaser at a sale in execution of a decree obtained by the paramount mortgagee, is not liable for the appellant's claim, which is founded on a puisne mortgage.

The decree must be confirmed with costs.

Decree affirmed with costs.

Special Appeal No. 195 of 1870.

Aug. 8.

VITHAL VISHVANA'TH PRABHU.....*Appellant.*
RA'MCHANDRA SADA'SHIV KIRKIRE.....*Respondent.*

Procedure—Objections to Remand Order—Depositary—Trustee.

The court of first instance rejected a claim on the ground that it was barred by limitation. The court of appeal, however, entertaining a contrary opinion, remanded the case for trial on the merits. The case was, accordingly, in both courts, tried upon the merits.

Held that the omission to prefer a special appeal from the order of remand did not preclude the party aggrieved by that order from objecting to it in a special appeal preferred against the final decree of the appellate court.

Where immoveable property was given into the possession of the defendant under an order of a revenue officer which directed the defendant to sell the crops, and, after payment of Government dues, to account for the profits to the plaintiff on his claiming it, it was held that the defendant was not a depositary, but a trustee, of the property.

THIS was a special appeal from the decision of A. Lyon, Assistant Judge of Ratnágiri, in Appeal Suit No. 262 of 1868, confirming the decree of the Šadr Amín of Ratnágiri, Dáji Govind.

The plaintiff, Rámchandra, alleged that he was a half-sharer in the *khoti* of the hamlet Gavane, in the village of Harcheri, of which the defendant, Viṭhal Prabhu, is the *khot*. The plaintiff failing to pay all the defendant's dues, his half-share