Special Appeal No. 19 *of* 1870.

1871. Jan. 31.

KRISHNA'PPA' valad MAHA'DA'PPA' .....*Appellant.*
BAHIRU YA'DAVRA'V .....*Respondent.*

Hindú Law—Mortgage—Possession—Priority—Possession obtained by subsequent Mortgagee pending suit by prior Mortgagee—Lis pendens.

As a general rule, by Hindú law a mortgagee in possession is entitled to have his claim satisfied in preference to the claim of the holder of a mortgage of prior date unaccompanied by possession.

There are cases, however, which the Courts treat as exceptions to that general rule.

Thus where a prior mortgagee sued to recover possession of certain mortgaged premises from the mortgagor, and before judgment was given in that suit, a subsequent mortgagee filed another suit against the mortgagor and obtained judgment, under which possession was made over to him (the subsequent mortgagee); it was held that possession so obtained pending the earlier suit would not avail to give the subsequent mortgagee priority over the prior mortgagee.

The effect of a *lis pendens* in India considered.

THIS was a special appeal from the decision of S. H. Phillpotts, Acting Senior Assistant Judge of Solápur, in Appeal Suit No. 33 of 1868, amending the decree of the Munsif of Bársi.

The facts of this case were that one Hari Rájárám Joshi mortgaged a field (No. 9) to Krishṇáppá valad Mahádáppá, the appellant, on the 29th of April 1860, without transferring possession of the land to him. Hari Rájárám Joshi afterwards mortgaged the same field without delivering possession of it to Bahiru Yádavráv, the respondent, on the 10th of April 1864. More than two years after this mortgage, the mortgagor mortgaged the same field a second time to Krishṇáppá valad Mahádáppá on the 1st of August 1864. Part of the consideration for this second mortgage to Krishṇáppá was stated to be the amount due under the first mortgage of the 29th of April 1860. This second mortgage to Krishṇáppá was also without possession.

None of the mortgages appeared to have been registered.

Krishṇáppá valad Mahádáppá sued Hari Rájárám on the mortgage-bond dated 1st of August 1864, and obtained a

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decree on the 16th of April 1867. Hari Rájárám Joshi, the mortgagor, defended the suit. Meanwhile, before decree was pronounced in this suit, Bahiru Yádavráv obtained an *ex parte* decree against Hári Rájárám on the 9th of November 1866, though he filed his suit subsequently to the suit instituted by Krishṇáppá valad Mahádáppá. On the *ex parte* decree so obtained, Bahiru Yádavráv took out execution, and obtained possession of the field on the 1st of January 1867.

Afterwards Krishṇáppá valad Mahádáppá applied for execution of his decree, obtained on the 16th of April 1867, and dispossessed Bahiru Yádavráv from the field, whereupon Bahiru Yádavráv filed this petition praying for possession under Sec. 230 of Act VIII. of 1859.

The defendant, Krishṇáppá, answered that he had obtained possession of the field under a decree, and that, the land being mortgaged to him in the first instance before it was mortgaged to the plaintiff, he had a right to have his mortgage satisfied first. He also alleged that the plaintiff's mortgage and the *ex parte* decree and the execution thereon were collusive and fraudulent transactions.

By the terms of each of the decrees, the land was to remain in the respective mortgagee's possession till his mortgage-lien was satisfied.

The Munsif of Bársi rejected the petition of Bahiru, and held that the land having been mortgaged first to Krishṇáppá bin Mahádáppá, he had a right to have his lien satisfied before the petitioner.

The petitioner, Bahiru Yádavráv, appealed from this order to the District Judge of Sholápur, who, in amending the Munsif's decree, made the following observations:—

"Both the mortgage-deeds are held to be proved, and the question is whether Krishṇáppá, having obtained possession of the land under a decree founded on a mortgage-bond executed subsequently to that on which the petitioner Bahiru obtained his decree, can retain possession so acquired by virtue of a mortgage-bond antecedent in date to that of the

petitioner, which has never been sued on, nor has possession been obtained under it.

My finding on this issue is in the negative: for as the debt due to Krishṇáppá under the first mortgage has been extinguished by the amount due thereon being entered in another deed as part of the consideration thereof, nothing was still due on the first mortgage-deed. As the petitioner's unsettled mortgage-deed was executed previously to the only mortgage-deed of Krishṇáppá which remains unsettled, he is entitled to be first satisfied from the land mortgaged.

"I accordingly amend the Munsif's decree, and order that Krishṇáppá should satisfy the debt due to the petitioner secured on the land, and if the petitioner's claim is not so satisfied, he should receive possession of the land, and retain possession thereof till his debt is satisfied."

The defendant, Krishṇáppá, appealed from this decision, and the appeal was this day argued before GIBBS and MELVILL, JJ.

Nánábhái Haridás for the appellant.

Shántárám Náráyaṇ for the respondent.

Cur. adv. vult.

The judgment of the court was delivered this day by

MELVILL, J.:—This appeal was decided by us *ex parte* on the 22nd of June 1870, but, the respondent having shown that he was prevented by sufficient cause from appearing, we have set aside our judgment and readmitted the appeal.

The parties are rival mortgagees, the appellant having two mortgages, dated 29th April 1860 and 1st August 1864 respectively, while the respondent has an intermediate mortgage dated 10th April 1864. Neither party was put in possession by the mortgagor, and in 1866 they both sued the mortgagor for possession. The appellant's suit was instituted before that of the respondent, but his claim having been contested, while judgment in the respondent's suit was allowed to go by default, the respondent first obtained a

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decree, on which he sued out execution and was put in possession of the mortgaged property. Subsequently the appellant obtained a decree, and was put in possession by the court, and the respondent, having been dispossessed, made an application, which has been registered as a suit under Sec. 230 of Act VIII. of 1859.

The Senior Assistant Judge allowed the claim, on the ground that the appellant's first mortgage merged in and was extinguished by the second mortgage, and that, the latter mortgage being subsequent in date to the respondent's claim, the respondent's claim must be first satisfied. This decree we reversed, on the ground that the Senior Assistant Judge was in error in holding that any rights which the appellant might have under his first mortgage were extinguished by reason of his making a further advance on the security of the same property; and, now that the appeal is again before us, it is admitted by the respondent's Pleader that he is unable to support the Senior Assistant Judge's decree on the same ground on which it is founded.

But the respondent now takes up a new position; he contends that he had obtained possession of the mortgaged property under his decree, and that, in accordance with a long series of decisions in this court and the Ṣadr Diváni Adálat, he is, as mortgagee in possession, entitled to have his claim satisfied in preference to a mortgage of a prior date but unaccompanied by possession.

The first decision on this point which we have been able to find was passed in 1821 by the Ṣadr Diváni Adálat (2 Borr. 147). In that case, after consulting the Hindú and Muhammadan law officers, the Court found that, both by the Hindú and Muhammadan codes, the right claimed in virtue of joint possession and mortgage is of greater validity and effect than the mere circumstance of priority of mortgage without occupation. The rule laid down in that case has been, we believe, always followed, except when a departure from it has been rendered necessary by the provisions of the registration laws, or by some peculiarity supposed to be

inherent in *sán* mortgages in Gujarát. (The cases bearing on this subject will be found reviewed in the judgment of this Court in Special Appeal No. 202 of 1866 [*a*]). We are certainly not now disposed to question the correctness of a principle which has been adhered to by the court for half a century.

But there are circumstances which may well induce us, while accepting the rule, to regard the present case as an exception to that rule. The respondent was a mortgagee in possession, but his possession was acquired during the pendency of the appellant's suit, which was founded on a prior title, and the object of which was to obtain possession of the same property. To what extent our courts should apply the maxim "*pendente lite nihil innovetur*" is a question which we believe has yet to be decided. Mr. Justice Story, in his work on Equity Jurisprudence, § 405, says: "Every man is presumed to be attentive to what passes in the courts of justice of the state or sovereignty where he resides. And, therefore, a purchase made of property actually in litigation, *pendente lite*, for a valuable consideration, and without any express or implied notice in point of fact, affects the purchaser in the same manner as if he had such notice, and he will accordingly be bound by the judgment or decree in the suit." We might well hesitate to regard as conclusive such presumption as is here referred to, or to carry the doctrine of *lis pendens* to such an extreme. In England no *lis pendens* of which a purchaser has not express notice will now bind him unless the title of the cause, with other particulars, be registered; but in this country, notwithstanding our elaborate system of registration, there is no provision for the registration of a *lis pendens*. Sec. 223 of Act VIII. of 1859 clearly recognises the doctrine of *lis pendens* to a certain extent. That section is as follows:—"If the decree be for a house, land, or other immoveable property in the occupancy of a defendant or some person on his behalf, *or of some person claiming under a title created by the defendant subsequently to the institution of the suit*, the Court shall order delivery

(*a*) *Antè*, p. 50.

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thereof to be made by putting the party to whom the house, land, or other immoveable property may have been adjudged, or any person whom he may appoint to receive delivery on his behalf in possession thereof, and, if need be, by removing any person who may refuse to vacate the same."

Thus it appears that an alienee *pendente lite* is to be summarily removed, but on referring to Sec. 230, and comparing the wording of it with that of Sec. 223, it would seem reasonable to infer that the person so removed might, under certain circumstances, be reinstated in possession. The effect of the two sections taken together would seem to be that an alienation of property *pendente lite* is *primâ facie* fraudulent, but that if the alienee could show that he was a *bonâ fide* purchaser for valuable consideration without notice, or that in any other way he had an equity superior to that of the plaintiff in the suit, he might recover the property from which he had been in the first instance summarily removed. In the present case it is not necessary to express any decided opinion on this point, for the respondent has no equity in his favour, but the reverse. He gave no consideration for the completion of his title by possession. His mortgage was subsequent to that of the appellant, his suit was subsequent; and the circumstance that he was the first to obtain a decree against the mortgagor was due either to accident or to collusion.

It appears to us to make no difference in the present case that the respondent's title was created—or, to speak more correctly, perfected—not by the defendant in the pending suit voluntarily, but by a decree of court compelling him to do what he did. A court will not compel a person to do what he may not lawfully do, and if it be surprised or deceived into so doing, when it discovers it, it corrects its mistake. It seems clear from the subsequent conduct of the Subordinate Judge in the matter of the execution, that if he had known that the property was in litigation between the mortgagor and the appellant, he would not have put the respondent in possession at all. He would have made the appellant a party

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to the suit between the respondent and the mortgagor, so that the titles of all the parties might be simultaneously determined; or, if the decree had been already passed in favour of the respondent, he would have forborne to execute it until the suit between the appellant and the mortgagor had been decided. An alienation made by a defendant *pendente lite* is no more valid, because made under an order of court issued under a misapprehension of which he was the wilful cause, than it could have been if it had been made voluntarily.

On these grounds we shall adhere to our former decision, reversing the decree of the Senior Assistant Judge, and restoring that of the court of first instance.

Decree reversed.

April 13.

Special Appeal No. 455 *of* 1870.

GOKALBHA'I MULCHAND *et al.* .....*Appellants.*

JHAVER CHATURBHUJ *at al.* .....*Respondents.*

Mortgage—Limitation.

In 1848 a *sán* mortgage was executed to the plaintiffs; in 1850 the plaintiffs obtained a personal decree against the mortgagor; in 1857 this decree was modified in appeal, and the claim was allowed against the mortgaged property. In 1854 the mortgaged property was sold to the defendants at a sale held by a Civil Court in execution of a decree obtained against the mortgagor by a third party, and possession was made over to them. In 1866 the plaintiffs applied for execution of the decree obtained by them in 1857, and attached the mortgaged property in the hands of the defendants. The defendants then came in under Sec. 246 of the Code of Civil Procedure, and the attachment was raised on the 26th of July 1866; and the plaintiffs within one year from that day sued to have their debt satisfied out of the mortgaged property.

Held that the plaintiffs' claim (they not having sued the present defendants within twelve years from the date of the mortgage or of the sale to the defendants) was barred by the law of limitation, Act XIV. of 1859, Sec. I., cl. 12.

THIS was a special appeal from the decision of M. H. Scott, Extra Assistant Judge at Ahmedábád, in Appeal Suit No. 146 of 1867, confirming the decree of the Sadr Amín of Dhandhuká.