

*Special Appeal No. 53 of 1871.*1871.
June 15.

GIRDHAR RANCHODDA'S *Appellant.*
 HAKAMCHAND REVA'CHAND..... *Respondent.*

Purchaser of Land for Value—Prior Sankhat—Bona fides.

The plaintiff in 1866 obtained a decree against one Ramzán Mohidín for payment of a debt by him personally, or in default entitling the plaintiff to recover the amount from the sale of certain immoveable property situated in Gujarát on which the debt had been secured under a *sankhat*.* On the attachment of the immoveable property in execution of that decree, the defendant objected under Sec. 246 of the Civil Procedure Code, and alleged that he had purchased the property in 1865. The attachment having, accordingly, been raised, the plaintiff sued for a declaration of his right to sell the mortgaged property. Both the lower courts threw out the plaintiff's claim.

On special appeal, the decrees of the lower courts were reversed, and the case remanded for the trial of the issue whether the defendant was a *bonâ-fide* purchaser for valuable consideration without notice of the plaintiff's *sankhat* or lien on the property in dispute at or before the time of his purchase.

THIS was a special appeal from the decision of M. H. Scott, Extra Assistant Judge at Ahmedábád, in Regular Appeal No. 174 of 1870, confirming the decree of the Subordinate Judge.

In 1866, the appellant, Girdhar Ranchoddás, sued one Ramzán Mohidín and others on a *sankhat*, dated 24th August 1863, and obtained a decree (No. 1295 of 1866) against them for the payment of the amount claimed, or in default to recover the same from the sale of the immoveable property (three houses) mortgaged by the *sankhat*. The property, accordingly, was attached in execution of that decree. The attachment, however, was raised on the application of the respondent, Hakamchand Reváchand, under Sec. 246 of the Civil Procedure Code. Hakamchand based his claim to the attached property on a deed of purchase dated the 27th of July 1865. Girdhar, therefore, brought the present action against Hakamchand for the purpose of having his right to sell the property declared. The Subordinate Judge of Ahmedábád threw out his claim, and his

* The word *sankhat* means in Gujarát a mortgage unaccompanied with possession.

1871. decision was affirmed on appeal by the Assistant Judge, who
 GIRDHAR RANCHODDA'S delivered the following judgment :—

v.
 HAKAMCHAND REVA'CHAND. “The point for decision is whether or not the plaintiff has a right to sell the property in dispute in satisfaction of his decree.

“I am of opinion that the plaintiff cannot execute his decree upon this property.

“I do not consider that there is any ground for considering the defendant's deed of sale fraudulent, though there is not much proof on account of it; but it is registered, and there is no reason shown for believing it otherwise than good. Nor is it shown that the defendant knew of the plaintiff's *san*, and even if he did, that would not invalidate the sale.

* * * * * The decree which he seeks to execute was given, I find, not after a full trial, but upon an agreement between the parties. As the sale to the defendant was made in July 1865, and the decree was not passed till November 1866, it may very well be that the judgment-debtor—the vendor—would agree more readily to a decision knowing that he had parted with the property. I do not agree to the objection that this decree can be considered a *res inter alios acta*; but I do not think execution will lie against this property. The decree, in terms of the agreement, orders that, the claim being for Rs. 339, the defendant pay to the plaintiff Rs. 389, and that if he do not pay, the defendant is to be liable in person and property, and the *san* property is to be also liable. It has been held that when a person to whom property has been pledged for a debt, obtains a simple money-decree against the debtor, he cannot execute his decree against the property pledged to the prejudice of a subsequent *bona-fide* purchaser. Much more so, then, he cannot execute it to the prejudice of a purchaser prior to the decree; and I consider this decree must be held to be in fact a simple money-decree, since it is not distinctly against the *san* property, which is the last of the securities. Moreover, the *san* was to be held in abeyance till the judgment-debtor made default. The latter in fact made prospectively a new *san*, the old one being extin-

guished by the decree to all intents and purposes. * *
 * * I reject the plaintiff's claim, and affirm the
 decision of the lower court with costs."

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Against this decision, the plaintiff, Girdhar Ranchoddas, preferred a special appeal, which was heard before WESTROPP, C. J., and KEMBALL, J., on the 15th of June 1871.

Dhirajlal Mathuraddas, for the special appellant:—The plaintiff's *san* being prior to the defendant's purchase of the property, the defendant was bound to satisfy the plaintiff's prior lien thereon. The lower court has omitted to raise and determine one important issue in the case, namely, whether or not the defendant purchased the property in question with knowledge of the defendant's prior mortgage-lien.

Najindas Tulsidas for the special respondent.

WESTROPP, C. J.:—We are of opinion that the Assistant Judge should have framed an issue as to whether or not Ramzan Mohidin (the defendant in Suit No. 1295 of 1866) duly executed to the present plaintiff, Girdhar Ranchoddas, the *sankhat* (mentioned in the plaint in this suit) for valuable consideration; and the Assistant Judge should have caused that *sankhat* to be produced by the plaintiff in this suit, and if the same has been filed as an exhibit in the suit No. 1295 of 1866, should have had it removed from the record of that suit to the record in this suit. If that *sankhat* duly pledged the immoveable property (three houses) mentioned in the plaint to the plaintiff, the decree in the suit No. 1295 of 1866 could not extinguish it or merge it. On the other hand, that decree could not affect the present defendant, as he was not a party to that suit. The present suit, though somewhat informally framed, must in fact be regarded as a suit to establish the *sankhat* as against an alleged purchaser, namely, the present defendant; and if the *sankhat* were duly executed for valuable consideration, and the defendant were not a purchaser for valuable consideration, or, even if a purchaser for such consideration, had notice of the *sankhat* at or before the date of his purchase, the

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plaintiff is entitled to a decree in the nature of a decree for foreclosure and sale of the property, with costs. If, on the other hand, the defendant in this suit were a purchaser for valuable consideration without notice of the *sánkhat* at or before the time of such purchase, the decree should be for the defendant, on whom, it should be observed, lies the *onus* of proving that he so purchased without notice of the plaintiff's *sánkhat* or lien. Whether or not, under the circumstances of the case, such decree should be with costs of this suit other than the costs of this appeal (for which we shall now specially provide), the court below should duly consider according to the equity of the case. The Assistant Judge erred in holding that the decree in Suit No. 1295 extinguished the *sánkhat*, and also erred in not framing an issue and determining whether or not the defendant in this suit was a purchaser for valuable consideration without notice of the plaintiff's *sánkhat* or lien on the property at or before the time of his payment (if any) of the alleged purchase-money to Ramzán Mohidín. This court reverses the decrees of the courts below, and remands this cause for re-trial on the merits, subject to the foregoing observations. In such re-trial, the above-suggested issues, as well that concerning the plaintiff's *sánkhat*, as those concerning the defendant's deed of purchase, should be respectively framed and determined, and such other issues (if any) as may to the trying court seem necessary. The parties are to be at liberty to put in such further documentary and oral evidence as may, under the circumstances, be proper and necessary. In the event of the plaintiff's success on such re-trial, he will be entitled to recover from the defendant his costs of this appeal, and such other costs as the trying court may properly award to him. But in the event of the plaintiff's failing on such re-trial, he is to bear his own costs of this appeal, and is not to be charged with the defendant's costs of this appeal. Any other costs of this suit are, in the latter event, to be in the discretion of the trying court.

Decrees of the lower courts reversed, and case remanded.