

1872.
 ARDESAR
 JAHANGIR
 FRAMJI
 v.
 AVABAI.

cable as the appropriate means of enforcing a decree of the Court, we have a difficulty in seeing any ground for the enactment of the latter part of Sec. 36 of that Act. The measure provided by the Act is doubtless not a very stringent one for compelling a woman to return to her husband, but it may well be that the framers of the Act, recognizing the futility of attempting to force a woman to return to her husband, considered that a less severe penalty than is provided by the Code of Civil Procedure in other cases would best accord with the feelings of the Parsee community. On the whole we are of opinion that the Judge was right in refusing to put in force Sec. 200 of the Code of Civil Procedure, and that the rule *nisi* was rightly discharged with costs. The costs of this appeal must be borne by the appellant.

Appeal dismissed with costs.

[APPELLATE CIVIL JURISDICTION.]

Sept. 19.

Special Appeal No. 258 of 1872.

CHINTA'MAN BHA'SKAR.....*Appellant.*
 SHIVRA'M HARI and others.....*Respondents.*

Mortgage—Possession—Registration—Notice.

A mortgage without possession is not, in Hindu law, absolutely invalid but is binding as between the mortgagor and mortgagee.

A purchaser with possession at a Court's sale, whose certificate of sale is registered, buys the right, title and interest of the debtor, burdened with the lien of a prior mortgagee, without possession, whose deed of mortgage is registered.

THIS was a special appeal from the decision of H. F. Parsons, Assistant Judge of Ratnagiri, reversing the decree of the Subordinate Judge of that town.

The special appeal was heard by SARGENT, Acting C.J., and MELVILL, J.

Máneksháh Jehangirsháh for the special appellant.

Rávsáheb V. N. Mandlik for the special respondents.

The facts sufficiently appear from the following judgment:—

1872.

CHINTA'MAN
BHASKAR
v.
SHIVRA'M
HARI.

PER CURIAM:—This is a suit by the special appellant to recover possession from the respondents, the second and third defendants on the record, of half the village of Medeh which, the special appellant says, was mortgaged to him by the first defendant on the 2nd October 1867. The second defendant claims as purchaser at an auction sale of the right and title of the first defendant in the property in question, under a certificate of sale, which was given him by the court on the 27th May 1868, and registered on the 19th August 1868, and under which he obtained possession.

The mortgage deed of the special appellant was not registered before the 8th January 1868.

The Assistant Judge was of opinion that the question between the parties narrowed itself to the following:—Is a purchaser *bonâ fide* and for value liable for a mortgage of which he had no notice, and the holder of which is not in possession? and he answered this question in the negative.

In framing this issue as the crucial one to decide the rights of the parties, the Assistant Judge has omitted to draw the necessary distinction between a purchaser under an ordinary contract of sale from the owner of the property, and a purchaser at an auction sale in execution of a decree against such owner.

The latter purchases only the right, title, and interest of the judgment-debtor in the property in question, or, in other words, the property subject to all charges with which it may have been previously burdened by him. He acquires nothing by his purchase but what still remains in the judgment-debtor, and the question of notice can have no application to him. The decision of the Court in Special Appeal No. 510 of 1869, *Mathurâdâs v. Kâliâ (a)*, is a sufficient authority, if any were needed. It was contended, however, that the mortgage in the case cited was a *san* mortgage and

(a) 7 Bom. H. C. Rep. A. C. J. 24.

1872.
 CHINTA'MAN
 BHASKAR
 v.
 SHIVRA'M
 HARL.

created a valid charge without possession, but that in the Konkan, where the property in question is situated, a mortgage without possession created no valid incumbrance, and that the entire property was still vested in the judgment-debtor at the time of the attachment. It was said that such was the general Hindu law to which *san* mortgages were an exception. The Hindu Law undoubtedly gives the preference to a subsequent mortgagee, who has obtained possession, over a prior mortgagee, who has neglected to obtain it, but it is nowhere said that a mortgage without possession is not binding on the mortgagor, and we need scarcely say that it is a matter of constant occurrence for suits to be filed by mortgagees to compel delivery of possession by mortgagors; and so it was virtually ruled in Special Appeal No. 546 of 1869 *Gopal v. Krishnáppá (b)*. Lastly, it was contended that the decree might be supported on the fact, as found by the Judge, that the special appellant and the judgment-debtor's brother and son were present at the attachment and sale, and yet nothing was said as to the mortgage. Assuming that the special appellant could be deemed bound by the conduct of these persons owing to their being an undivided family, (a fact which is not found), there is no evidence to show that they were under any obligation to speak. They knew that the property was sold subject to the special appellant's interest and it is not alleged that they were questioned by the defendants, so as to have made it unconscientious in them to keep silence.

Moreover, this objection is now taken for the first time. The decree must, therefore, be reversed and the case remanded for the Judge to find as to the genuineness of the mortgage (Exhibit No. 3), and to pass a new decree having regard to the above observations.

Decree reversed and case remanded.

(b) Ibid 60.