

[APPELLATE CIVIL JURISDICTION.]

1874.

April 13.

Special Appeal No. 465 of 1873.

ITCHA'RA'M DAYA'RA'M *Plaintiff and Appellant.*
 RA'JI JAGA' and another... *Defendants and Respondents.*

Mortgage in Guzerat—Rights of a prior and puisne mortgagee—Possession—Purchaser of equity of redemption with notice of a subsequent incumbrance.

The rule of Hindu law that a mortgage with possession takes precedence of a mortgage of a prior date, but unaccompanied by possession does not apply to Guzerat.

Wherein Guzerat the defendant, a puisne mortgagee in possession, had notice of plaintiff's prior mortgage, the defendant was held not entitled to claim the benefit of the above rule of Hindu law.

Registration could not of itself alter this rule of Hindu law except so far as effect may be given to it by statute, and registration secures the same object which the Hindu law intended to secure by requiring possession, viz., notice to subsequent incumbrancers of the existence of a prior incumbrancer.

The purchaser of an equity of redemption, with notice of subsequent incumbrances, stands in the same situation, as regards such subsequent incumbrances, as if he had been himself the mortgagor: he cannot set up against such subsequent incumbrances either a prior mortgage of his own, or a mortgage which he or the mortgagor may have got in.

THIS was a special appeal from the decision of J. W. Walker, Assistant Judge at Ahmedábád, reversing the decree of the Subordinate Judge of Umraht.

Itchárá'm Dayárá'm sued to recover possession of a field from Rá'ji Jagá and another, and stated that he had purchased it on the 22nd September 1868 at a court's sale subject to a mortgage lien which was assigned to him by the mortgagee. The defence chiefly was, that the plaintiff never had possession of the property under his mortgage, while the defendants were mortgagees in possession. The Court of the first instance decreed the plaintiff's claim. In appeal, however, the Assistant Judge reversed that decree on the ground that the plaintiff, though a prior mortgagee, had not obtained possession

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under his mortgage, while the defendants were in possession, though their mortgage was of a subsequent date.

In special appeal it was contended that the defendants, though mortgagees with possession, having had notice of the plaintiff's prior mortgage, the lower Court was wrong in holding that the plaintiff's mortgage was not valid against them.

The appeal was argued before MELVILL and PINHEY, JJ.

Shivshankar Govindrám for the special appellant.

Dhirajlál Mathurádas for the special respondents.

MELVILL, J.:—The rule of Hindu law that a mortgage with possession takes precedence of a mortgage of prior date, but unaccompanied by possession, has not, I think, been held applicable to Guzerat: *Mathurádas v. Kálidá(a)*, *Hari Rámchandra v. Mahádáji (b)*, and *Krishnáppá v. Bahiru (c)*. But even if the rule were applicable in the present case, I should be inclined to hold that the defendants, having had notice of the plaintiff's prior mortgage, could not claim the benefit of it. I do not know any other ground, except that of notice, which will justify the decisions of this Court, which relax the rule of Hindu law in favour of registered mortgages. In *Hari Rámchandra v. Mahádáji* in which all the cases bearing on the subject are reviewed, the Court said: "We consider that we are only carry out the views of the late Sadr and the present High Courts by holding in the present case that in the Konkan the registration of a mortgage without possession cures any defect or imperfection which arose from the non-completion of the transaction by delivery of possession." It is clear that registration could not of itself alter a rule of Hindu law, except so far as such effect may be given to it by statute; and I understand the Court to have meant that registration secures the same object which the Hindu law wished to secure by requiring possession, viz., notice to subsequent incumbrancers of the existence of a prior incumbrance. That appears to me to be the principle on which the rule of Hindu law is founded, and on which this Court has acted in its decisions regarding re-

(a) 7 Bom. H. C. Rep. A. C. J 24. (b) 8 *Ibid.* 50. (c) *Ibid.* 55.

gistration. Then, if one kind of notice be sufficient to satisfy the rule of Hindu law, why should not another kind of notice? I conceive that the true principle is that laid down in *Gopál v. Krishnáppá* (a), and that the present case comes under the class of constructive frauds. The same principle is stated in Story's Eq. Jur., 9th Ed., Sec. 395, and illustrated by the case of a creditor who takes a mortgage of property with notice of a subsisting equitable mortgage.

But, although, in my opinion, the Assistant Judge's decision cannot be supported on the ground of the defendants' possession, it can, I think, be maintained on another ground. The plaintiff, subsequently to the mortgage to the defendants, purchased at a court sale the equity of redemption. Now generally speaking, a purchaser of an equity of redemption with notice of subsequent incumbrances, stands in the same situation, as regards such subsequent incumbrances, as if he had been himself the mortgagor: he can neither set up against such subsequent incumbrances a prior mortgage of his own, nor, consequently, a mortgage which he or the mortgagor may have got in: *Toulmin v. Steere* (b), *Greswolde v. Marsham* (c), and *Mocatta v. Murgatroyd* (d). The plaintiff, therefore, cannot set up his own mortgage, unless he can show that he is a purchaser for valuable consideration without notice of defendants' mortgage; and this he cannot be allowed to show, inasmuch as he is a purchaser at a court sale: *Chintáman Bháskar v. Shivrám Hari* (e).

On this ground alone, I would confirm the decree of the lower Court.

PINHEY, J. :—I am of the same opinion as to the ground on which my brother Melvill proposes to confirm the decree of the Court below.

But I refrain from expressing any opinion on the first point considered by my brother Judge, as it is not necessary that I should do so, in order to arrive at a decision of the case.

(a) 7 Bom. H. C. Rep. A. C. J. 60. (b) 3 Mer. 210. (c) 2 Ch. Ca. 170.

(d) 1 P. Wms. 933.

(e) 9 Bom. H. C. Rep 304.

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