

1873.

November 17.

[APPELLATE CIVIL JURISDICTION.]

*Special Appeal No. 215 of 1873.*GULA' BHAND MA' NIKCHAND *Appellant.*DHONDI VALAD BHA'U *Respondent.**Mortgage—Pendente lite.*

The rule *pendente lite nihil innovetur* is in force in British India.

Therefore, where the owner of a house, during the pendency of a suit by an unregistered mortgagee for foreclosure and sale, mortgaged the same house by a registered mortgage to another person, it was held that the last mentioned mortgagee had no title as against the purchaser under a decree for sale in the suit, although such purchaser was the plaintiff in the suit.

A grantee or vendee of the defendant, becoming such during the pendency of the suit, need not to be made a party to the suit, and, inasmuch as the first above-mentioned rule does not rest upon the equitable doctrine as to notice, it is a matter of indifference whether or not, at the time of his becoming grantee or vendee, he had actual notice of the existence of the suit.

THIS was a special appeal from the decision of E. F. Candy, Extra Assistant Judge at Tanna, affirming the decree of the Subordinate Judge of Sinnar.

The special appeal was argued before WESTROPP, C.J., and PINHEY, J., on the 17th November 1873.

Shántáram Náráyan for the appellant.

Máhádev Chinnáji Apte, contra.

The facts of the case fully appear from the following judgment delivered by

WESTROPP, C.J. :—In this case, Sakhu, the widow of Tukárám, and Dhondu, the son of Tukárám, by deed, dated the 10th November 1866, mortgaged a house, for Rs. 15, to Gulábchand Mánikchand, the defendant in this suit and present special appellant, who instituted, on the 8th July 1869, against those mortgagors and a third party, a suit for the enforcement of his mortgage, which instrument has never been registered. On the 26th of October 1869, he obtained

a decree for the amount due to him, viz., Rs. 30, principal and interest, and Rs. 11 costs, and that decree contained a direction that the house, the subject of the mortgage, should, in default of payment by the mortgagors of the amount decreed, be sold in satisfaction of the sum so found due on the mortgage for principal, interest, and costs. That amount not having been paid, the house was, on the 25th July 1870, sold by the Court, in pursuance of the decree, to Gulábchand Mánikchand, who himself became the purchaser, and it is admitted that, as such, he was then put into possession of the house. The present plaintiff and respondent, Dhondi valad Bháu Pátíl, claims under Exhibit No. 3, which is a mortgage of the same house to him for the sum of Rs. 251, executed by Sakhu and Dhondú Tukárám, on the 26th of July 1869, and registered on the same day. It is admitted that the consideration for that mortgage consisted of an unregistered mortgage bond, dated 3rd May 1868, of the same house for the sum of Rs. 99 (Exhibit 25), and of two ordinary money bonds of the same date, which, in the aggregate, together with the mortgage bond for Rs. 99, amounted to Rs. 216. That sum together with interest amounted to Rs. 251, then said to be due, and it is admitted that no fresh advance or new consideration was given for the registered mortgage bond of the 26th July 1869.

1873.

GULÁ'BCHAND
MA'NIKCHAND
v.
DHONDI
VALAD BHA'U.

Under these circumstances, the present plaintiff, Dhondi valad Bháu Pátíl, instituted this suit against Sakhu, Dhondú, and Gulábchand to recover the amount of the registered mortgage (Exhibit No. 3), or to be put into possession of the house.

The defendant, Gulábchand, relied on the priority of his unregistered mortgage of the 10th November 1866, on the decree made in the suit which was instituted by him on that mortgage before the execution of the registered mortgage to the plaintiff, and on his purchase under that decree.

The Subordinate Judge and the Assistant Judge have respectively decreed in favour of the plaintiff; the Assistant

1873. Judge saying that both defendant Gulábchand's unregistered mortgage of 1866 and plaintiff's registered mortgage of 1869 were without possession, and that, as regarded the plaintiff's mortgage, its registration cured that defect.

GULA'BCHAND
MA'NIKCHAND
v.
DHONDI
VALAD BHA'U.

The defendant, Gulábchand, has made a special appeal to this Court, and we do not think that the right view of this case has been taken in the Courts below. Those Courts do not seem to have had sufficient regard to the circumstance that the registered mortgage, on which the plaintiff relies, was executed subsequently to the institution of the suit of Gulábchand, or to have attended to the rule, which prevails as well at law as in equity, as to transactions entered into during the pendency of litigation, or to the kindred provisions of Sec. 223 of the Civil Procedure Code. The plaintiff could not, as against Gulábchand, rely on the unregistered mortgage of the 3rd May 1868 to him, inasmuch as it was puisne in date to the unregistered mortgage of the 10th November 1866 to Gulábchand, and, as to registration, stood in no better position.

The plaintiff's registered mortgage of the 26th July 1869, was executed during the pendency of Gulábchand's suit against the mortgagors, which commenced upon the 8th July 1869, and must, therefore, whether the plaintiff did or did not give valuable consideration for that mortgage, and whether he had or had not, at the time of the execution of that mortgage, any knowledge of the existence of Gulábchand's suit, be regarded as subject to the decree which might be pronounced in that suit. This is so as well in England as in India.

The rule is *pendente lite nihil innovetur* (a). It is a rule which does not rest on the equitable doctrine as to notice, although in some of the authorities it has been rested upon that doctrine. The better opinion is that it rests upon the inability of the defendant to give, as against the plaintiff, a title during the existence of a suit brought to enforce a specific lien against or purchase of the property. Sir Thomas

(a) Co. Lit. 344. ~~2 Inst. 376.~~

Plumer, M.R., in *Metcalf v. Pulvertoft* (b) said that "the true interpretation of this rule is, that the conveyance does not vary the rights of the parties in the suit; that it gives no better right, having no effect with reference to any beneficial result against the plaintiff in that suit; and it is very reasonable that the litigating parties should be exempted from the necessity of taking notice of a title, acquired under such circumstances. With regard to them it is as if it had never existed: otherwise suits would be interminable; if one party pending the suit could by conveying to others create a necessity for introducing new parties. The voluntary act, therefore, of the defendant conveying to another, cannot vary the situation or affect the right of the plaintiff." The same views were still more forcibly inculcated in *Bellamy v. Sabine* (c) by Lord Cranworth and Lord Justice Turner. In England the rule has, of late, been narrowed by the Stat. 2 Vic., C. 11, which enacts that a *lis pendens*, unless duly registered, shall not affect a purchaser without express notice. There is not any similar enactment in British India. The rule, as it existed in England before the Stat. 2 Vic., C. 11, prevails here: *Kasim Shaw v. Unnodapersaud Chatterji* (d) and 7 Calc. W. R. 225, Civ. Rul.; Calc. W. R. Special Number for 1864 F. B. 40; 7 Mad. H. C. Rep. 104. Sec. 223 of Act VIII. of 1859 is founded upon that rule.

1873.
 GULÁ'BCHAND
 MA'NIKCHAND
 v.
 DHONDI
 VALADBHÁ'Ú.

It follows hence that, even upon the assumption that the present plaintiff had given valuable consideration for his mortgage of the 26th July 1869, and that he had not any notice either of the defendant Gulábchand's earlier mortgage of the 10th November 1866, or of his suit of the 8th July 1869 to enforce that mortgage, the defendant Gulábchand's title, as purchaser in that suit, must prevail against, and is paramount to, the plaintiff's title as mortgagee. The registration of the plaintiff's mortgage cannot affect the rule that

(b) 2 Ves. & B. 200, 205 (c) 1 De G. & Jones, 566, S. C. 21
 L. J. Ch. 797, N. S. And see *Bishop of Winchester v. Paine*, 11 Ves. 194.

(d) 1 Hyde 160.

1873. he, who accepts a special lien or purchases from a defendant *pendente lite*, does so subject to the decree which may be made in the suit which is pending.

GULÁBCHAND
MA NIKCHAND
v.

DHONDI
VALÁDBHÁ'U.

But we cannot take so favourable a view of the facts of the plaintiff's case as above assumed. It is admitted that there was not any new consideration given by the plaintiff to Sakhu and Dhondu Tukárám for the registered mortgage of the 26th July 1869, the consideration for which was only the money remaining due, upon the plaintiff's unregistered mortgage of 1868 and the two money bonds, for principal and interest, all of which securities were of later date than that of the unregistered mortgage to Gulábchand. We regard the giving and taking of the registered mortgage as a collusive act on the part of Sakhu, Dhondu Tukárám, and the plaintiff for the purpose of conferring a technical priority upon the plaintiff's claims. We have no doubt that the plaintiff was then well aware of Gulábchand's mortgage and of his suit. The plaintiff will now, we trust, perceive how much a better course it would have been for him to have redeemed the property, as he might have done before the judicial sale to Gulábchand, the prior mortgagee, by payment of the moderate sum of Rs. 41 for principal, interest, and costs, than to have resorted to the illusory and abortive attempt to gain priority over him and so get rid of his claim altogether.

There is a further difficulty in the path of the plaintiff, who has no document on which he has any pretence for relying against Gulábchand except the registered mortgage of the 26th July 1869. It was contended for Gulábchand that the mortgage of 1869, being, on the face of it, for a consideration exceeding Rs. 100, does not fall within Sec. 50 of Act XX. of 1866, which, it is said, provides for the priority only, over unregistered instruments executed for a consideration less than Rs. 100, of registered instruments "of the kinds" mentioned in Cls. 1, 2, and 3 of Sec. 18 of the same Act, which are inapplicable to a registered mortgage executed for a consideration exceeding Rs. 100. It is unnecessary, however, for us to deal with that question, as we are satisfied with

the sufficiency of the first ground, which we have mentioned, viz., that the plaintiff, having taken his mortgage of 1869 during the pendency of Gulábchand's suit against Sahku and Dhondú Tukárám, did so subject to the decree which might be made in that suit, and therefore that the sale under that decree to Gulábchand is completely valid against the plaintiff. We, accordingly, reverse the decrees of the Subordinate Judge and of the Assistant Judge, and direct the plaintiff (special respondent) Dhondí valad Bháu Pátíl to pay the costs of the suit and of both appeals.

1873.

GULÁ'BCHAND
MA'NIKCHAND
v.
DHONDI
VALAD BHÁ'U.

[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 189 of 1874.

TRIMBAK DIXIT (*Defendant*) *Appellant.*
NÁ'RA'YAN DIXIT (*Plaintiff*) *Respondent.*

1874.
Aug. 26.

Undivided Hindu family—Suit by one co-parcener against the others for a declaration of his right to a Government cash allowance forming part of the undivided estate—Partition.

One member of an undivided family cannot sue his co-parceners for a declaration that he is entitled to recover the whole of a family *Varshásan*. The only mode in which, as between the members of the joint family, a declaration of right to the *Varshásan* can be properly obtained is by one of the co-parceners bringing a suit for partition of the whole of the family estate, including the *Varshásan*, and for a declaration of the shares of the respective co-parceners.

THIS was a special appeal from the decision of C. F. Shaw, District Judge of Belgaum, reversing the decree of Váman Parsharám, Subordinate Judge of Chikodi.

The facts of the case, so far as they are material to this report, are these:—

The plaintiff, Náráyan Dixit, and the defendant, Trimbak Dixit, were members of a joint Hindu family, to which a certain *Varshásan* (annual cash allowance) of Rs. 14 was payable every year from the Government treasury of the Gokák Taluka. The *Varshásan* was paid to the family up to 1847-48. In 1850 the Inam Commission commenced an inquiry into the claim of the family to the *Varshásan*, and, as a