

ference to the confession of the prisoner. We are thus compelled to find the accused guilty of the charges, viz., that he committed forgery of two documents, authorizing him to recover Municipal taxes, and we pass upon him a sentence of two years' rigorous imprisonment:

Order accordingly.

[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 36 of 1874.

July 9.

RA'VJI NA'RA'YAN.....Appellant.

KRISHNA'JI LAKSHMAN.....Respondent.

Rights of a previous mortgagee—Sale, pendente lite.

On the 31st August 1863, *A* mortgaged his house to *B*, who brought a foreclosure suit, and, on the 7th July 1866, obtained a decree against *A* for the sale of the house, if the mortgage debt was not paid on or before the 24th March 1868. The debt not having been paid, the house was sold at a Court's sale on the 15th July 1870, and purchased by *C*. In an action brought by the plaintiff to recover possession of the house on the ground that he had purchased it on the 2nd August 1868 at an execution sale under a common money decree against *A*:

Held that the plaintiff's sale was subject, not only to the mortgage of 1863, but also to the decree upon it under which the right, title, and interest of the mortgagor *A*, passed in 1870 to *C*, whose purchase was entitled to preference to the plaintiff's purchase in 1868.

Held, further, that if there had been no decree in the mortgage suit, the fact that that suit had been instituted in 1866, and was pending in 1868, would have been sufficient to defeat the plaintiff's suit; his purchase in 1868 having been made *pendente lite*, was completely subject to any decree which might be made in the mortgage suit.

THIS was a special appeal from the decision of E. T. Candy, Assistant Judge at Satara, reversing the decree of Rámchandra Apáji, Subordinate Judge at Walwa, in the District of Satara.

The special appeal was argued before WESTROPP, C.J., and WEST, J., on the 9th July 1874.

Ganpatráv Bháshkar for the appellant.

1874.

RA'VJI
N A' RA'YAN
v.
KRISHNA'JI
LAKSHMAN.

Vishnu Ghanashám, for the respondent, objected that the present special appeal, having been preferred by the mortgagee Rávji Náráyan, and not by the execution-purchaser, Rango Náráyan, could not be maintained, because Rávji had no interest whatever in the property, the same having absolutely passed to the execution-purchaser, Rango, who, however, did not choose to appear in the special appeal. Rango alone was entitled to maintain the present appeal : *Khevráj v. Lingayá* (a) and *Sheshgiri Shánbog v. Salvador Vas* (b).

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

WESTROPP, C.J. :—In this case, the plaintiff, as purchaser of a house at a judicial sale, made to him on the 2nd of August 1868 under a common money-decree in a suit, brought by one Rámchandra against Náná, the original owner of the house, sued the defendants Rávji Náráyan and Rango Náráyan to recover possession of the house, of which possession the plaintiff alleged that those defendants, colluding with Náná, had deprived the plaintiff.

It appears that Náná, on the 31st August 1863, mortgaged the house to Rávji Náráyan, who, in 1866, brought against Náná a suit for foreclosure and sale in satisfaction of the money due on the mortgage, and, on the 7th of July 1866, obtained a decree in that suit for sale of the house, if the whole of the money due was not paid on or before the last day of Phálgun, Shaka 1789 (24th March 1868). The money not having been paid, the house was, pursuant to that decree, sold, upon the 15th July 1870, to the defendant Rango Náráyan.

The Subordinate Judge in the present suit held that the plaintiff never had possession, and that the defendant Rango's title, being founded on that of the mortgagee Rávji, which was prior to that of the plaintiff (who could only have pur-

(a) S. A. No. 208 of 1873, decided by WESTROPP, C.J., and NA'NA'BHA'I HARIDA'S, J., 29th July 1873.

(b) S. A. No. 460 of 1872, decided by WESTROPP, C.J., and NA'NA'BHA'I HARIDA'S, J., 4th August 1873.

chased the equity of redemption which remained in Náná, the mortgagor), was preferable to that of the plaintiff, and the Subordinate Judge accordingly made a decree for the defendants with costs.

1874.

RA'VJI
NA RA'YAN
v.
KRISHNAJI
LAKSHMAN.

The plaintiff appealed on the ground that Rávji had no right to cause the house to be sold without a previous demand by him from the plaintiff of the moneys due on the mortgage. The Assistant Judge, Mr. Candy, having laid down as the issue to be determined the question "whether the plaintiff is entitled to possession of the house," held that he was, and reversed with costs the decree of the Subordinate Judge. The Assistant Judge, while admitting that the plaintiff, by his purchase in 1868, must be regarded as buying subject to Rávji's mortgage lien, which dated so far back as 1863, assigned as his reason for reversing the decree of the Court of first instance, that, after the sale to the plaintiff in 1868, Náná had no right, title, or interest in the house, and, therefore, that, in purchasing that right, title, and interest in 1870, the defendant Rango took nothing. The Assistant Judge said—"How can he have possession of that in which Náná had no title? Therefore the plaintiff, who holds a registered certificate of sale of 1868, whereby he purchased all Náná's rights, has a far better claim to possession than Rango, who purchased in 1870 that which was not in existence. Of course, the original mistake was in Rávji not demanding in 1870 the mortgage-money from the plaintiff, who stood in Náná's place." This Court cannot avoid observing that the reasoning of the Assistant Judge was unsound, and that his award of possession of the house to the plaintiff is, in every possible point of view, completely unsustainable. Assuming for a moment that the Assistant Judge was right in holding that the defendant Rango took nothing by his purchase in 1870, that circumstance would not have entitled the plaintiff to possession. If the estate and interest of the mortgagee Rávji had not passed by the sale in 1870 to Rango, it still remained vested in Rávji, who was a defendant in the suit, and would have had a better

1874.
 RA'VJI
 NA'RA'YAN
 v.
 KRISHNA'JI
 LAKSHMAN.

title, as mortgagee, to possession than the plaintiff, who, at the utmost, was only the purchaser of Náná's equity of redemption. Even if Rávji had not been a party to the suit, it would have been a sufficient answer to the plaintiff's suit for possession for Rango to show that the preferable title to possession was outstanding in Rávji or in any stranger. The plaintiff could only have obtained possession on the strength of his own title, and not on the weakness of that of Rango; and the utmost relief that, on the hypothesis of Rango not having taken anything by his purchase, the Assistant Judge could have properly awarded to the plaintiff, would have been that, by paying to Rávji the amount due on his mortgage the plaintiff should be at liberty to redeem the house. But in fact Rango's title, so far from being weak, was perfectly good as against the plaintiff. That Rávji's mortgage was a valid lien on the house is not disputed by the Assistant Judge. Rávji not only had instituted his suit for foreclosure and sale under that mortgage, but had also obtained a decree to that effect in July 1866, *i.e.*, two years before the sale to the plaintiff in August 1868. The sale, directed by that decree in the event of non-payment of the moneys due on the mortgage, could not, under the terms of the decree, take place before the 24th March 1868. It did not in fact take place until 1870, but, in the meantime, the plaintiff purchased under Rámchandra's common money-decree in 1868. That purchase was subject as well to the mortgage as to the decree founded upon it (such decree being an affirmance of Rávji's mortgage-lien), and, as was observed in this Court in *Khevráj v. Lingayá (ubi supra)*, although it is not the practice of the mofussil courts to require a mortgagee, who sues for and obtains a sale of the mortgaged premises, formally to convey to the purchaser, and the latter must be contented with a certificate of sale to him of the right, title, and interest of the mortgagor, yet in fact the interest of the mortgagee, who causes the sale to be made, is held to pass to the purchaser, and that mortgagee is completely estopped from disputing that such is the effect of the sale." See to the same effect (*viz.*, that the transfer takes place by way of estoppel,) *Kasan-*

dás v. Pránjivan (c) and *Sheshgiri Shánbog v. Salvador Vas (ubi supra)*. The estate and interest of Rávji, which was paramount to that of Náná, passed to Rango by the sale in 1870, and the plaintiff's purchase being subject not only to the mortgage, but also to the decree upon it, which decree directed a sale, the right, title, and interest of Náná passed to Rango by the sale in 1870; and that sale is entitled to preference to the sale in 1868 to the plaintiff.

1874.

RA'VJI
NA'RA'YAN.
v.
KRISHNA'JI
LAKSHMAN.

But further, if there had not been any decree in the mortgage suit, the mere fact that that suit, which had been instituted in 1866, was pending in 1868, would have in itself been sufficient to defeat the plaintiff's present suit. His purchase in 1868, having been made *pendente lite*, was completely subject to any decree which might be made in the mortgage suit: *Báláji Ganesh Apte v. Khusháji Bahiroji (d)*, *Gulábchánd Mánikchand v. Dhondi Bháu (e)*, *Bellamy v. Sabine (f)*, *Trye v. The Earl of Aldborough (g)*, *Manual Fruva v. Sanagapálli Latchmidevamma (h)*, *Kásim Shaw v. Unno-
dapersaud Chatterjee (i)*, and see *Umamoyi Burmoneea v. Tarini Prasad Ghose (j)*, *Hunoomon Doss v. Koomeroonnissa Begum (k)*. Rávji, therefore, made no mistake, and was not bound to take any notice of the plaintiff's purchase, or to ask him to redeem, that purchase having been made *pendente lite*. For these reasons, this Court reverses the decree of the Assistant Judge, restores that of the Subordinate Judge, and directs the plaintiff to pay the costs of the suit and of both appeals.

We ought, perhaps, to notice the objection made on behalf of the respondent, the plaintiff, by his pleader, that Rávji, who alone of the two defendants has appealed, not having any interest in the premises in dispute, cannot maintain this special appeal. But on our observing that, at the least, Rávji had been improperly charged with costs, and to that

(c) 7 Bom. H. C. R. 146 A. C. J. (d) *Supra* p. 24.

(e) *Supra* p. 64.

(f) 1 De Gex and Jones 566; S. C. 26 L. J. Ch. 797. N. S.

(g) 1 Ir. Ch. Rep. 666. (h) 7 Mad. H. C. R. 104.

(i) 1 Hyde 160. (j) 7 Calc. W. R. 225 Civ. Rul.

(k) Calc. W. R. F. B. Rul. 1862—1864-40.

1874.

RA'VJI
NA'RA'YAN
v.
KRISHNA'JI
LAKSHMAN.

extent had an interest in appealing, and had been treated by the plaintiff, who had made him a party-defendant to the suit, as having an interest, and further that, if it were necessary, this Court was prepared to adjourn the hearing in order to permit Rango (who most probably had purchased as a trustee for Rávji) to be made a party to the appeal as co-appellant, the respondent's pleader declined to persist in his objection.

[APPELLATE CRIMINAL JURISDICTION.]

July 30.

REG. V. CHOUTHMAL LACHHIRA'M.

Cotton Frauds (Bombay) Act IX. of 1863, Sec. 2.

Ginning together two varieties of cotton which had been mixed before constitutes "mixing" within the meaning of Section 2 of Bombay Act IX. of 1863.

THIS was an application for the exercise of this Court's extraordinary jurisdiction. The accused was convicted by the Second Class Magistrate of Khandesh of dishonestly mixing cotton of two different varieties in one bale, and sentenced to suffer one months' rigorous imprisonment and pay a fine of Rs. 150. In appeal this sentence was enhanced to two months and a fine of Rs. 300.

The application was heard by WEST and NA'NA'BHA'I, JJ.

Shántárám Náráyan for the applicant.

Dhírajál Mathurádás, Government Pleader, for the Crown.

The facts appear sufficiently from the following judgment delivered by

WEST, J. :—The accused has been convicted of the offence of mixing dishonestly two different varieties of cotton in one bale; and the only question for decision, which requires any serious remarks, is whether the accused is found to have done any act which constitutes a "mixing" within the meaning of Bombay Act IX. of 1863, Section 2. Mixing, like adulteration, admits of almost infinite degrees, and if, after a partial mixing operation by one person, there