

1876.
September 5.

[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 211 of 1876.

TUK'ARA'M BIN ATMA'RA'M (DEFENDANT AND APPELLANT) v. RA'M-CHANDRA BIN BUDHARA'M (PLAINTIFF AND RESPONDENT).

Mortgage—Possession—Priority—Notice—Estoppel.

Plaintiff claimed under a mortgage, dated the 27th November 1871, for Rs. 50, which was neither registered nor accompanied with possession. Defendant claimed under a mortgage, dated the 17th March 1873, for Rs. 150, which was both registered and accompanied with possession. Defendant had no notice, express or constructive, of the plaintiff's previous mortgage. In 1873 plaintiff sued the mortgagor for a money claim, unconnected with the mortgage, and on the 20th February 1874 obtained a decree for Rs. 100. In execution of this money decree the mortgaged property was attached and sold by the Court, at the plaintiff's instance, the defendant becoming the purchaser for Rs. 86 on the 17th September 1874. An unregistered certificate of the Court's sale, bearing date the 29th October 1874, was issued to defendant. In 1874 plaintiff brought a suit on his mortgage (to which suit defendant was not a party), and obtained a decree (the date of which did not appear in evidence) for possession of the mortgaged property against the mortgagor. In endeavouring to enforce that decree, plaintiff was obstructed by defendant on the 15th January 1875.

Held that, if it was passed subsequent to the Court's sale of the mortgaged property to defendant on the 17th September 1874, the decree for possession was valueless, as neither the title to, nor the possession of, the mortgaged property was then vested in the mortgagor.

Held, further, that as defendant had no notice of the plaintiff's mortgage when plaintiff caused the Court's sale to be made under his money decree, or that the sale was made subject to the plaintiff's mortgage, it was incumbent on plaintiff, as such money judgment-creditor, to inform defendant, when bidding for the right, title, and interest of the judgment-debtor in the mortgaged property, that the judgment-creditor (plaintiff) held a mortgage on the same property, and intended to enforce it, especially as the mortgage was neither registered nor accompanied with possession, and that the plaintiff having omitted so to inform the defendant was estopped from enforcing his own mortgage against the defendant.

Itchárám Dayárám v. Ráiji Jagá (11 Bom. H. C. Rep. 41) distinguished.

THIS was a special appeal from the decision of H. J. Parsons, Assistant Judge at Satara, reversing the decree of Achyut Jagannath Ghata, Second Class Subordinate Judge at Rahimatpur.

The plaintiff claimed under a mortgage of 27th November 1871 for Rs. 50, which was neither registered nor accompanied by possession. The defendant claimed under a mortgage of 17th March 1873 for Rs. 150, which was both registered and accompanied by possession. The plaintiff did not allege, nor was

there anything to show, that the defendant, when he took his mortgage with possession, had notice of the plaintiff's unregistered mortgage. On the 20th February 1874 the plaintiff, having obtained a money decree for Rs. 100 against the mortgagors in a suit instituted in 1873, but not in respect of the mortgage, caused the mortgaged property to be attached and sold by the Court, and the defendant became the purchaser for Rs. 86 on 17th September 1874, and obtained a certificate of sale, which he did not register, dated 29th October 1874. The plaintiff alleged that he had, in 1874, obtained a decree for possession in a suit (to which the defendant was not a party) brought on the mortgage, and that in endeavouring to enforce this decree he had been obstructed by the defendant on 15th January 1875. The date of the decree itself did not appear in evidence. The Subordinate Judge threw out the plaintiff's claim, and awarded the possession of the property in dispute to the defendant, on the ground that the defendant had been in possession under his mortgage, and that he subsequently became a purchaser thereof at the Court's sale, caused by the plaintiff in execution of his money decree against the mortgagor. In appeal the Assistant Judge set aside that decision for reasons which are contained in the following extract from his judgment :—

“ It is a rule of law that a mortgage accompanied with possession is entitled to priority over a prior mortgage unaccompanied with possession ; that is to say, a prior mortgagee cannot eject a later mortgagee [with possession]. The latter's lien is superior. Simply, therefore, as a question between the parties as mortgagees, the title of the respondent (the defendant Tukárám) would be preferable. But, then, there comes in the fact that the latter (Tukárám) has purchased the right, title, and interest of the mortgagors—*i.e.*, their equity of redemption—and the point arises as to whether he can now set up his mortgage against the appellant's (the plaintiff Rámchandra's) mortgage. I do not think that he can : he cannot divide his title, so to say ; he cannot be mortgagee and vendee, with different rights and liabilities attaching severally to each, at one and the same time. There is a decision which I have just found expressly deciding the point (*Itchárám v. Ráji Jagá*)⁽¹⁾.

(1) 11 Bom. H. C. Rep. 41.

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There, under similar circumstances, it was held that the purchaser at the Court's sale could not set up his own mortgage, that he stands in the same position as regards subsequent incumbrances as if he had been the mortgagor, and that he cannot set up against them a prior mortgage of his own. That, therefore, is the decision which governs this case. The appellant (the plaintiff Rámchandra), being a mortgagee and having a decree for possession of the land in suit obtained under his mortgage, is entitled to possession from the respondent (defendant Tukárám), who is to be regarded, by virtue of his purchase, as standing in precisely the same place as the mortgagor. I must, therefore, reverse the lower Court's decree, and order that the appellant's (plaintiff Rámchandra's) suit be awarded with costs.

The special appeal was argued before WESTROPP, C.J., and NA'NA'BHAI HARIDA'S, J.

Bhaironath Mangesh for the special appellant :—The defendant Tukárám is found to have been in possession under his mortgage which has also been registered. Plaintiff was not in possession, nor is his mortgage registered. It has been repeatedly held that a mortgage accompanied with possession prevails against a prior mortgage without possession. Moreover, Tukárám became a purchaser of the mortgaged property at a Court's sale, which took place in execution of plaintiff's money decree against the mortgagor, and plaintiff kept back from defendant's knowledge the existence of his (plaintiff's) own prior mortgage on the same property. Plaintiff does not even allege that defendant had any knowledge of his mortgage. The ruling in 11 Bom. H. C. Rep. 41, relied upon by the Assistant Judge in deciding this case, does not apply, because in that case the defendant, who was a puisne mortgagee in possession, had notice of plaintiff's prior mortgage. Besides, the correctness of the rule laid down in the last clause of the head-note of that case has been very much doubted in the subsequent decisions of this High Court.

Ghanashám Nilkantha Nádkarni, contra, relied upon the case in 11 Bom. H. C. Rep. 41.

WESTROPP, C. J. :—The plaintiff claims under a mortgage of the 27th November 1871 for Rs. 50, which was unregistered and unaccompanied by possession. The defendant claims under a mort-

gage of the 17th March 1873 for Rs. 150, which was registered, and which was accompanied by possession. The plaintiff has not alleged that the defendant, when he took his mortgage with possession, had notice of the plaintiff's unregistered mortgage; and the plaintiff not being in possession, and his mortgage being unregistered, there cannot be any presumption that the defendant had any such notice. Further, the plaintiff obtained, on the 20th February 1874, in a suit instituted in 1873, a money decree against the mortgagors (but not in respect of the mortgage) for Rs. 100, and caused the mortgaged property to be attached and sold by the Court. The defendant (being in possession as a mortgagee of 1873) purchased the mortgaged premises for Rs. 86 at that sale on the 17th September 1874, and holds an unregistered certificate of sale of the 29th October 1874. The plaintiff alleges that in 1874 he commenced a suit (to which the defendant was not a party) on the mortgage, and obtained against the mortgagors a decree for possession, and, in endeavouring to enforce it, he was obstructed by the defendant on the 15th January 1875. The date of that decree for possession does not appear in evidence. If it were subsequent to the sale to the defendant, that decree was valueless, as neither the title to, nor the possession of, the land was then vested in the mortgagors. Independently, however, of that circumstance, and whatever may have been the date of the decree, the plaintiff does not allege that the defendant had any notice of the plaintiff's mortgage when the plaintiff caused the Court sale to be made on the 17th September 1874 under his money decree, or that the sale was made subject to the plaintiff's mortgage. It was incumbent on the part of a money judgment-creditor, like the plaintiff, who was causing lands to be sold under his money decree, to let it be known to persons bidding for the right, title, and interest of the judgment-debtor in the land that he, the judgment-creditor, held a mortgage on the same land, and intended to enforce it, and not to keep the mortgage, like a stone in his sleeve, in the dark until after the land had been sold to persons ignorant of the existence of such mortgage. This duty was especially incumbent on a mortgagee whose mortgage was neither registered nor even accompanied by possession. It was for the plaintiff who seeks to eject *bonâ fide* mortgagees in possession under a registered mortgage, to show that he is not estopped from assert-

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ing his mortgage without possession by the sale which he caused to be made under a money decree altogether independent of his mortgage, and he certainly would, in our opinion, be so estopped if he did not give warning, at or previously to the sale of the land, to the purchaser of his (the plaintiff's) mortgage on the same land, and that the sale was intended to be subject to such mortgage. This the plaintiff has not even alleged that he did, and still less has he proved it. The plaintiff, in order to obtain as much money as he could under his money decree, was interested in keeping his mortgage secret from intending purchasers. The case, therefore, materially differs from that of *Itchárám Dayárám v. Ráji Jagá*⁽¹⁾, and is not governed by it. We refrain from now expressing any opinion whether we could concur in the ruling mentioned in the last clause of the head-note to that case. For the reason already mentioned, we think that equity forbids that the plaintiff, without making such a special case as we have above indicated, can enforce his mortgage against the defendant to whom the plaintiff himself in execution of a judgment in another suit against the mortgagor, founded upon another cause of action, previously caused the land to be sold.

We reverse the decree of the Assistant Judge, and restore that of the Subordinate Judge, with costs of suit and both appeals to be paid by the plaintiff to the defendant.

[APPELLATE CIVIL JURISDICTION.]

Miscellaneous Regular Appeal No. 3 of 1876.

September 18. NARSINGRAV RAMCHANDRA (PLAINTIFF AND APPELLANT) v. LUXUMANRAV (A MINOR SON AND HEIR OF MADHAVRAV, DECEASED, REPRESENTED BY HIS ADMINISTRATOR MR. E. P. ROBERTSON, COLLECTOR OF DEARWAR, DEFENDANT AND RESPONDENT).

Act XX. of 1864, Sections 11 and 15—Collector—Act XIV. of 1869, Section 32—Officer of Government—Jurisdiction.

Sections 11 and 15 of Act XX. of 1864, taken together, show that a Collector, when appointed to take charge of the estate of a minor, is so appointed in his capacity as Collector, and, therefore, as an officer of Government within the meaning of Act XIV. of 1869, Section 32.

(1) 11 Bom. H. C. Rep. 41.