

[APPELLATE CIVIL JURISDICTION.]

*Special Appeal No. 263 of 1876.*1876.
November 23.GOVIND RAGUNA TH (PLAINTIFF, APPELLANT) v. GOVINDA' JA'GOJI
(DEFENDANT, RESPONDENT).*Possession—Sale in execution—Assignment.*

Upon a sale in execution of a decree the property in the thing sold passes to the purchaser ; and there is nothing in either the Hindu or the English law which debars a third person from taking an assignment of such property from the auction-purchaser, albeit it has not been reduced into possession by him.

THIS was a special appeal from the decision of Edward Cordeaux, Senior Assistant Judge, F. P., at Sholápur, reversing the decree of the Subordinate Judge of Sholápur.

The following are the facts of the case :—

The plaintiff set forth that Nágu obtained a decree against Dattu, and attached Dattu's premises in execution. Subsequently Shidram attached the same premises in execution of a decree against Dattu's brothers ; eventually the premises were sold to the defendant on the 27th September 1872, in execution of Shidram's decree, the Court having decided that Nágu's attachment was fraudulent ; but this decision was afterwards set aside, and the premises were again put up to sale in execution of Nágu's decree, and purchased by Nágu himself on the 21st August 1873 for Rs. 500. Nágu sold them to the plaintiff for Rs. 200. The plaintiff endeavouring to take possession of the same premises was obstructed by the defendant, who was in possession as purchaser at the sale under Shidram's decree. The plaintiff accordingly filed this suit for possession.

The defendant replied he purchased the premises on the 27th September 1872, and was put in possession by the Court under Shidram's decree, and could not now be turned out ; that the sale could not be set aside, and that Nágu's decree was fraudulent.

The Subordinate Judge awarded to the plaintiff one-third of the premises in dispute, and directed that each party should pay his own costs.

On appeal, the Assistant Judge raised the following issue for determination :

“Whether the transfer of the premises by sale to the plaintiff by Nágu is invalid by reason of Nágu not being in possession of the said premises at the time of such sale.”

He found it in the affirmative for reasons given below :—

“Nágu purchased the right, title, and interest of his judgment-debtor, and obtained the Court’s certificate. That certificate is deemed to be a valid transfer of such right, title, and interest. By Hindu law it is not absolutely necessary that the purchaser should be put in possession, and the provision of Section 259 of the Code of Civil Procedure is consistent with this principle. But if the purchaser before he is put in possession sells merely the document which certifies his purchase of the right, title, and interest in certain property, can he be said, by any force of argument, to be in possession of the property sold? It is evident how important possession of the property sold is before the holder of the Court’s certificate can transfer all his rights in that property by sale. The judgment-debtor’s right, title, and interest in the property sold may be worthless, and the purchaser may know it to his cost; but he may find some one enterprising enough to undertake what he despairs of accomplishing, and transfer by sale all his risk to him. This is plainly against policy and justice, and tending to promote unnecessary litigation.” * * *

Mr. Cordeaux, therefore, rejected the plaintiff’s claim with costs.

The special appeal was heard by KEMBALL and PINHEY, JJ.

Máncksháh Jehángirsháh, for the plaintiff, the special appellant :—Nágu having purchased the right, title, and interest of Dattu and obtained a certificate of sale, held under Section 259 of the Civil Procedure Code a legal right to possession; and there was nothing to prevent his transferring that right to the plaintiff. The cases which rule that the vendor of immoveable property should be in possession of it at the time of the sale, apply to the sale of lands and houses as such, and not to the transfer of rights over immoveable property:—*Nánábhái v. Tukárám*⁽¹⁾. Possession cannot be indispensably necessary in all cases; for were it so, a person who has mortgaged his property with possession could not

Decided by Melvill and West, JJ., on the 22nd December 1873.—See page 186 of printed Judgments for 1873; not reported.

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sell the equity of redemption. Want of possession in the vendor does not render the sale *ipso facto* void.—*Lokenath Ghose v. Jugobundhoo Roy*⁽¹⁾. It is only a circumstance which weakens the presumption of the *bona fides* of a transaction. In the present case the transaction was undoubtedly *bonâ fide*.

Honourable V. N. Mandlik, Acting Government Pleader, for the special respondent:—The sale in this case was a speculative one, the vendor not being in possession, and; therefore, opposed to justice and policy as held by the Court below. In *Kachu v. Kachobâ*⁽²⁾ it was held that a change of possession was necessary to complete a sale of corporeal property to prevent successive purchasers from being cheated by successive sales and to obviate disputes as to what was really sold. A purchaser without possession from a Hindu vendor did not obtain an enforceable title.

PER CURIAM:—We are of opinion that the Assistant Judge was wrong in throwing out this claim on the ground that the assignment to the plaintiff was invalid. Upon a sale in execution of a decree the property in the thing sold passes to the purchaser, and we know of nothing in either the Hindu or the English law which debars a third person from taking an assignment of such property from the auction-purchaser, albeit it had not been reduced into possession. This is not the case of a speculative claim such as this Court has refused to recognize, and we are unable to concur in the view taken by the Assistant Judge that the sale of such a title is “against policy and justice and tending to promote unnecessary litigation.” We reverse the decree of the lower Court, and return the case in order that the claim may be disposed of on the merits. Costs to follow final decision.

(1) I. L. R. 1 Calc. 297.

(2) 10 Bom. H. C. Rep. 491.