

1878.

SARUBAIKUM
JITMAL
v.
BA'PU NA'IR-
HAR SOHONI.

The judgment of the Court was delivered by
WEST, J. :—The District Judge says that “the easement.....
in the matter of air and light existed before the portions of the
wall were erected,” *i. e.*, the portions between which is the window
which the defendant’s new structure has closed up. The light and
air were there, no doubt, before the wall was built, but there was
no appropriation of them, nothing done in reliance on their con-
tinued access, in accordance with the provisions of the law, which
in such cases allows a right to be created by user and enjoyment
as conducive to the general convenience and improvement. The
appropriation began no earlier than the wall was built, which was
eight years ago at most; and, until the lapse of time should convert
the plaintiff’s actual enjoyment into a right to its continuance, the
defendant had an actual right to build on a space that belonged to
her. This she has done. The plaintiff in consequence sustains an
inconvenience, but one of which he took the risk when he made his
window without an agreement as to the defendant’s use of her
contiguous property. The defendant had so far the same right as
the plaintiff, and could not be prevented from exercising that
right to build, by the mere circumstance that the plaintiff had
built first.

We must, therefore, reverse the decree of the District Judge
and reject the plaintiff’s claim, with costs throughout on the res-
pondent.

Decree reversed.

[APPELLATE CIVIL.]

Before Mr. Justice West and Mr. Justice Pinkey,

July 15.

S. B. SHRINGARPURE (ORIGINAL PLAINTIFF), APPELLANT, v. S. B. PETHE
(ORIGINAL DEFENDANT), RESPONDENT.*

Mortgage—Registration—Sale—Possession—Priority.

A registered mortgage without possession has priority over a subsequent regis-
tered sale and conveyance with possession.

By a duly registered deed, D mortgaged land to the plaintiff with power of
sale. On default made by D the plaintiff brought a suit for a sale of the mort-
gaged land; but pending the suit D sold the land to the defendant, who regis-
tered his conveyance and entered into possession. The plaintiff subsequently
obtained a decree, and at the execution sale became himself the purchaser. In the
present suit he sought to recover possession from the defendant.

* Second Appeal No. 132 of 1878.

Held that the plaintiff was entitled to recover. His rights as mortgagee included the right of bringing to sale the property as it subsisted at the date of the mortgage. The property having been so brought to sale, the purchaser acquired a right free from any created subsequently to the mortgage and subject to it.

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GAPURE
v.
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This was an appeal from the decision of Gopalráv Hari Deshmukh, Joint Judge of Tháná, reversing the decree of the Subordinate Judge of Dáhánu.

The facts of the case are as follows :—

Dharmá, Budhá, and Káná owned certain lands in the Máhim Taluka of the Tháná District. Some time in the year 1864 they mortgaged these lands to Rávjí Apáji, to whom the plaintiff is heir. The mortgage deed was registered on the 24th of December of that year. It did not contain any stipulation to put the lands in the possession of the mortgagee; it merely provided for the sale of the lands in the event of failure in the repayment of the sum advanced. The plaintiff in 1869 sued to enforce this provision.

On the 7th of October 1869, and while the suit just mentioned was pending, the owners sold the lands to the defendant, who got his deed of sale registered on the 10th of February 1870, and immediately entered into possession. In 1871 the plaintiff (the original mortgagee's heir) obtained a decree in the suit which had been instituted in 1869 on the mortgage, in execution of which the lands in dispute were sold by public auction on the 18th of September 1873, and the plaintiff himself became the purchaser. The certificate of sale in his favour was registered on the 12th of December 1873.

The plaintiff in this suit sought to establish his right to the lands, and to recover possession.

The defendant, without controverting any of the facts stated above, pleaded that his title, being accompanied by possession, was superior to that of the plaintiff.

The Subordinate Judge awarded a part of the claims, and rejected the rest; the Joint Judge held that the defendant's title was preferable to that of the plaintiff, whose claim was accordingly wholly rejected. The plaintiff appealed.

Yashvant Váśudev Athale for the appellant:—The plaintiff's mortgage was prior to the defendant's sale; and the defect in

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his title, in consequence of his never having had possession of the mortgaged property, was effectively supplied by the registration of his mortgage. In consequence of the mortgage the lands were always charged with the liability to be sold, and its registration was a notice to all persons who subsequently wished to deal with it. A mortgage without possession is not absolutely void, even in the Deccan—*Gopál v. Krishnáppá*; ⁽¹⁾ and registration cures the defect of possession which the Hindu law requires: *Hari Ramchandra v. Máhádoji* ⁽²⁾ and *Itchárám v. Ráiji and another.* ⁽³⁾ The case of *Rávi v. Krishna* ⁽⁴⁾ was also cited.

Nagindás Tulsidás for the respondent:—The sale to the plaintiff was subsequent to the defendant's purchase, and was subject to it. It conveyed no right, title, or interest to the plaintiff. Registration of this sale, private though it was, was a notice to the buyer at the Court's sale: *Pándubhat v. Báláji.* ⁽⁵⁾ [WEST, J.:—That case is different from this. The judgment, decree, and sale there deprived the original owner of the property of every interest he had in it.] At all events, the defendant should not be deprived of the lands if he is willing to pay off the plaintiff's mortgage money.

The judgment of the Court was delivered by

WEST, J.:—The plaintiff in this case is a purchaser, at an execution sale, of the interest of Dharmá and others, sold to satisfy a mortgage effected and registered in 1864. The mortgage does not stipulate for possession, but does stipulate for a sale of the property in the event, which has happened, of non-payment of the debt secured.

Before the decree on the mortgage, but apparently during the pendency of the suit, the defendant purchased the property from Dharmá and other owners by a registered conveyance, and obtained possession. This he maintained against the purchaser (the judgment-creditor) under the sale to satisfy the prior mortgage, and the present suit is brought to establish the title of the execution purchaser.

(1) 7 Bom. H. C. Rep. 60 A. C. J.

(2) 8 Bom. H. C. Rep. 50.

(3) 11 Bom. H. C. Rep. 41.

(4) *Ibid.* 139.

(5) See printed Judgments for 1878, page 54.

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By the mortgage in 1864 an interest in the property was conferred on the mortgagee by way of security for his advance of money, which interest became available against all subsequent purchasers or encumbrancers by the registration of the mortgage. This result was quite in accordance with the principles of the Hindu law as lately laid down in the case of *Lalubhai v. Bai Amrit*⁽¹⁾ and in the case at 2 Macn. H. L. 308. When, therefore, the defendant purchased the property, he bought it subject to the rights derogating from the full ownership of his vendor already transferred to the mortgagee. These rights were made as effectual by registration as by possession, so as to prevent their being impaired by subsequent transactions.

The rights of the mortgagee included that of bringing the whole property, as it subsisted at the time of the mortgage, to sale. It was brought to sale, and the purchaser in execution thus acquired a right free from any created subsequently to the mortgage and subject to it. The possession of the intermediate purchaser, though it might make his right, as it existed, effective, and as against strangers might be essential to its efficacy, could not make his right itself different from what it was—a secondary and subordinate one, available only after the right of earlier creation had been satisfied. The purchaser at the execution sale, therefore, had a claim to possession superior to that of the vendee of the equity of redemption who represented the original mortgagor.

As vendee, however, it is said, and under a registered conveyance, the defendant here ought to have been made a party in the mortgagor's suit to enforce his security. It seems unlikely that he was, in fact, a purchaser, certainly not a registered purchaser, when the suit on the mortgage was instituted. Becoming a purchaser during the pendency of the suit, he ought himself to have asked to be made a party if he desired to guard his newly-acquired interest. But, apart from that, it was not incumbent on the registered mortgagee, desiring to enforce his lien, to search for subsequent incumbrancers or purchasers. It lay on them to inform him of the assignment of the equity of redemption or of the interest they had acquired. Registration of a subsequent sale did

(1) *Supra*, page 299.

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not supply the place of such notice ; as the mortgagee, though he would properly look for prior incumbrances, could not be expected to keep up a constant search for those subsequent to his own, and in the absence of notice would properly proceed against the person *primâ facie* liable to him. And if his proceeding was right, the title acquired under it was complete so as to displace the defendant's title.

We must, therefore, reverse the decree of the Joint Judge, and amend that of the Subordinate Judge by awarding to the plaintiff possession of the whole lands sought, with costs in all the Courts.

[APPELLATE CIVIL.]

Before Mr. Justice West and Mr. Justice Pinhey.

July 16.

BA'BA'JI MA'HA'DA'JI (ORIGINAL DEFENDANT No. 2), APPELLANT, v. KRISHNA'JI' DEVJI, A MINOR, BY HIS GUARDIAN SAKUBA'I (ORIGINAL PLAINTIFF), RESPONDENT.*

Hindu law—Family necessity—Manager's discretion—Sale by father of ancestral estate.

The expression "family necessity," when used to justify the sale of ancestral property, must be construed reasonably, and the head of the family and those dealing with him must be supported in transactions which, though in themselves diminishing the estate, yet prevent or tend to prevent still greater losses. A reasonable latitude must be allowed for the exercise of a manager's judgment, especially in the case of a father, though this must not be extended so far as to free the persons dealing with him from the need of all precautions where a minor son has an interest in the property.

The fact that a mortgage or a bond, to pay off which ancestral property is sold, had some time to run, is not a sufficient reason to disprove an otherwise apparent family necessity.

The Hindu law recognizes a debt contracted by the father of a family to enable him to earn a maintenance as one contracted under pressure of a family necessity.

This was a second appeal from the decision of S. H. Philpotts, Judge of Puna, reversing the decree of Râv Bâhâdur Mâhâdev Govind Rânâdè, Subordinate Judge, First Class, of Puna.

Krishnâji, a Hindu minor, by his guardian and mother, brought this suit to set aside the sale of a house made by his father Devji, the first defendant, to Mâhâdâji, the second defendant, and to ob-

* Second Appeal No. 147 of 1878.