

4 B. 34=4 Ind. Jur. 519.

[34] APPELLATE CIVIL.

Before Mr. Justice Melvill and Mr. Justice Kembal.

PRANJIVAN GOVARDHAN DAS (*Original Plaintiff*), Appellant,
v. BAJU (*Original Defendant*), Respondent.* [17th June, 1879.]*Mortgage without title—Priority of mortgagee's right—Lis pendens—Award.*

P and his partners mortgaged certain immoveable property to plaintiff on the 11th October 1869. They had then no title to the property, but they subsequently acquired one by purchase on the 29th June 1871. On plaintiff demanding that B and his partners should make good the contract of mortgage out of the interest they had acquired, the matter was referred to arbitrators who, on the 26th December 1873, made an award empowering plaintiff to sell the mortgaged property in satisfaction of his debt. The award was presented in Court by plaintiff on the 23rd January 1874, and was filed by the Court on the 23rd February 1874. Meanwhile, on the 14th February 1874 the property was attached in execution of a money decree obtained by a creditor of P and his partners against them. On the 15th April 1874 it was sold by auction and purchased by defendant. In a suit brought by plaintiff to recover possession of the property, both the lower Courts rejected his claim, on the ground that P and his partners had no right to the property when they mortgaged it to plaintiff.

Held, by the High Court on second appeal, reversing the decrees of the lower Court, that the defendant as purchaser under a money decree could not defeat the plaintiff's right as mortgagee to sell the property in satisfaction of his debt.

Held, also, that the presentation in Court of the award obtained by plaintiff was equivalent to the presentation of a plaint for the specific performance of the contract of mortgage, and the proceedings consequent thereon constituted a *lis pendens*, during which a mere money-decree-holder could not, by any proceedings which he might take, defeat the object of plaintiff's application to the Court to file his award.

[R., 9 M. 130 (132); 35 M. 63 (74)=8 Ind. Cas. 520=21 M.L.J. 44 (55)=9 M.L.T. 142; 7 Ind. Cas. 218 (224); 1 O. C. 260.]

THIS was a second appeal from the decision of J. Monteath, Acting Assistant Judge at Thana, in appeal No. 92 of 1877, affirming the decree of Sakharam Krishnashet, Subordinate Judge (Second Class) at Bassein, in original suit No. 437 of 1875.

This was a suit for the recovery of certain immoveable property under the following circumstances. On the 11th October 1869 Pascoal, Pedro and Manuel D'Mello executed a document (No. 24) which purported to mortgage the property in dispute with some other property to the plaintiff Pranjivan. Afterwards, on the 29th June 1871, they purchased the property from one Murar Narayan, and paid the money through one Lakhmiram, who advanced the [35] money to them for the purchase. A dispute arising between the plaintiff and his mortgagors about the transaction, they referred the matter to arbitrators, who on the 26th December 1873 made an award to the effect that a certain amount was due to the plaintiff, who was to realize it by the sale of the mortgaged property. Pranjivan presented the award in Court on the 23rd January 1874 for its enforcement under s. 327 of Act VIII of 1859, and the Court ordered it to be filed on the 23rd February 1874. But on the 14th February 1874 the property in dispute was attached in execution of a decree obtained by Lakhmiram for the money advanced by him to Pascoal and his partners, and it was put up to auction and purchased by the defendant Baju on the 15th April 1874. Pranjivan resisted the delivery of the property to the defendant, but the Court rejected his application on the 7th November

* Second Appeal, No. 130 of 1879.

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1874. He, therefore, brought the present suit to establish his right to, and recover possession of, the property in dispute.

The defendant Bajú denied the plaintiff's right, and claimed the property in dispute by virtue of his right as purchaser at a Court sale.

Both the lower Courts dismissed the plaintiff's suit. The Court of first instance held the mortgage to have been proved. (The Assistant Judge, in appeal, held it invalid for want of title in the mortgagors at the date of its execution.)

On the 15th February 1879 the plaintiff Pranjivan presented a second appeal to the High Court.

Dinkar Gangadhar, for the appellant.—Even admitting that the mortgagors had no title to the property at the date of the mortgage, they acquired one by their subsequent purchase, and they were bound in equity to give such newly-acquired title to the plaintiff and to perfect his originally defective title: *Dart on Vendors and Purchasers*, p. 528 (3rd ed.) and the cases cited in note.

Shantaram Narayan, for the respondent.—The title which the mortgagors subsequently acquired by purchase would not go to cure the original defect in the plaintiff's mortgage. At the [36] date of the Court sale, under which the defendant claims, the title was in the D'Mellos, the judgment-debtors of Lakhmiram and passed to the defendant by sale. The Assistant Judge, has found as a fact that the award obtained by the plaintiff against his mortgagors is collusive. That finding cannot now be opened in this second appeal.

JUDGMENT.

The following is the judgment of the Court delivered by

MELVILL, J.—There is no doubt that at the time when Pascoal and his partners executed the mortgage of the 11th October 1869 they had no title to the property, but they subsequently acquired a title by purchase on the 29th June 1871, and the plaintiff thereupon had a right to demand that Pascoal and his partners should make good the contract of mortgage out of the interest which they had acquired. This he accordingly demanded; and the matter being referred to arbitration, an award was made on the 26th December 1873, empowering the plaintiff to sell the mortgaged property in satisfaction of his debt. The Acting Assistant Judge says that this award was made by collusion between the plaintiff and Pascoal and his partners, but we do not understand what collusion (in the usual sense of the term) there could have been in the matter. The Courts below seem to have held that the original mortgage was of a *bona fide* character, and, if so, Pascoal and his partners were bound specifically to perform their contract, and were not guilty of collusion or fraud if they consented to an award being made in the plaintiff's favour. The award in question was presented in Court by the plaintiff on the 23rd January 1874, and was filed on the 23rd February 1874. Meanwhile, on the 14th February 1874, Lakhmiram, who had obtained a decree against Pascoal and his partners for the money which he had advanced to them to enable them to purchase the property, attached the property under his decree, and it was subsequently sold by auction, and purchased by the defendant. The question is whether the defendant, as purchaser under Lakhmiram's decree, can defeat the plaintiff's right, as mortgagee, to sell the property in satisfaction of his debt. We are of opinion that he cannot do so. The presentation, in Court, of the award obtained by the plaintiff was, at the very least, equivalent to the

presentation of a [37] plaint for the specific performance of the contract of mortgage; and the proceedings consequent thereon constituted a *lis pendens*, during which a mere money-decree-holder, like Lakhmiram, could not, by any proceedings which he might take, defeat the object of the plaintiff's application to the Court. For these reasons we reverse the decrees of the Courts below, and direct that the plaintiff be put in possession of the Pokhran Vadi, and the house thereon situated. The defendant must bear all costs throughout.

Decrees reversed.

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FULL BENCH—APPELLATE CIVIL.

*Before Sir Michael Roberts Westropp, Kt., Chief Justice, Mr. Justice
Kemball and Mr. Justice Pinhey.*

SADU (Plaintiff), Appellant v. BAIZA AND GENU (Defendants),
Respondents.* [25th June, 1878.]

Hindu law—Inheritance of an illegitimate son among Shudras—Dasiputra—Res-judicata.

A Hindu of the Shudra caste died in 1850 leaving him surviving his two widows, B and S; a son Mahadu, and daughter Darya, the children, respectively, of B and S; and an illegitimate son Sadu, the plaintiff. Sadu and Mahadu continued to live together for some time after their father's death. But subsequently, owing to domestic quarrels, they lived separately and Sadu was allowed by Mahadu a portion of the family property under an agreement in writing. They were, however, joint and undivided in estate and continued to be so until the death of Mahadu in 1865. In 1866 Sadu brought a suit on the agreement, and obtained a decree against B, S, Darya and R (a lessee of B) for the property mentioned in the agreement. In 1870 Sadu brought a second suit as heir of his father and brother, and claimed the whole of the ancestral property. Both the lower Courts rejected his claim as barred by the previous suit.

Held in special appeal by MELVILL and NANABHAI HARIDAS, JJ., that the claim was not barred, inasmuch as the former suit was brought on the agreement, while the latter was instituted to establish plaintiff's general rights as heir of his father and brother. They accordingly reversed the decree of the Courts below, and remanded the case for its trial on the merits. On remand, the Subordinate Judge held that the plaintiff was entitled, as heir of his father and Mahadu, to all the ancestral immoveable property. Two of the defendants appealed.

[38] *Held*, by a Full Bench (WESTROPP, C. J., KEMBALL and PINHEY, JJ.) that, after the death of their father, Mahadu and Sadu succeeded as co-parceners to the whole property, subject to the maintenance of B, S and Darya, if she were then unmarried, and in that event also to her reasonable marriage expenses, —Sadu, however, as an illegitimate son taking only half a share.

Held, also, that inequality of shares did not prevent co-parcenary and succession by survivorship, and that as Mahadu and Sadu were co-parceners from the death of their father until the death of Mahadu, the usual result of co-parcenary followed on the occurrence of the latter event, *viz.*, the surviving co-parcener (*i.e.*, the plaintiff Sadu) took the whole property.

Rahi v. Govinda Teja (I.L.R. 1 Bom. 97) referred to and followed.

[N.F., 28 C. 194 (202); F., 6 C.P.L.R. 144 (152); Appr., 11 C. 702; 18 C. 151 (P.C.) = 17 I.A. 128 = 5 Sar. P.C.J. 596; R., 21 A. 99 = 18 A.W.N. 170; 14 B. 282; 23 B. 257; 25 M. 519 = 11 M.L.J. 399; 34 M. 68 = 5 Ind. Cas. 919 = 20 M.L.J. 350 = 7 M.L.T. 161 = (1910) M.W.N. 138; 16 C.L.J. 335 = 17 C.W.N. 442 = 17 Ind. Cas. 276; Expl., 19 C. 91; D., 25 B. 189 (194); 10 M. 334 (346).]

THIS was an appeal under s. 15 of the Letters Patent, 1865, against the decision of a Division Bench (M. Melvill and Nanabhai Haridas, JJ.) dated the 25th January 1877.

* Appeal No. 1 of 1877 under s. 15 of the Letters Patent, 1865.