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[57] APPELLATE CIVIL.

Before Mr. Justice Kemball and Mr. Justice F. D. Melvill.

NARSIDAS JITRAM (*Original Plaintiff*), *Appellant v.* G. JOGLEKAR (*Original Defendant*), *Respondent.**

[9th July, 1879.]

Mortgage—Effect of sale by mortgagee of mortgaged property under a money decree—Assignment—Sale—Decree—Execution.

A mortgaged property to *B*, who assigned his mortgage to *U*. *U* under an unregistered instrument assigned his interest to the plaintiff. The plaintiff then obtained a money decree against *A* personally, and put up the property for sale, and it was purchased on the plaintiff's behalf. On going to take possession the plaintiff was successfully obstructed by *N*, a person who had already purchased it at an auction sale in execution of a money decree obtained against *A* by another creditor.

The plaintiff having, before the date of his decree, obtained a second assignment duly registered from *C*, sued upon it, and obtaining a decree against the mortgaged property, put it up for sale, and now became the purchaser in his own name. On going to take possession he was obstructed by the defendant, who had bought it in execution of a money decree against *D*, the former successful purchaser and obstructor.

Held that, although the mere taking of a money decree for a mortgage debt does not extinguish the lien, still, when the mortgagee proceeds to satisfy such decree by the sale of his security, the interests of both himself and his judgment-debtor in the said security pass to the auction-purchaser. The particular nature of the right acquired by the purchaser at the sale does not depend on the form of the decree on which the mortgagee has proceeded to satisfy his judgment-debt. What the mortgagee really seeks when he proceeds to sell, whether under a decree for sale or a simple money decree, is to obtain satisfaction out of his security,—in fact, to enforce his lien; and although the proceeding may be in execution of a money decree only, he cannot retain his lien for enforcement *qua* mortgagee, if the debt be not discharged by a second sale of the same property.

Syud Eman Mamtazoodin Mahomed v. *Rajcoomar Dass and another* (1), *Bhuggobutty Dossee* v. *Shamchurn Bose and others* (2), and *Ramu Naikan* v. *Subbaraya Mudali* (3) followed.

Khubchund v. *Kaliandas* (4) dissented from.

[N.F., 29 C. 537 (543); F., 10 C. 567 (570); R., 5 B. 614 (618); 9 C.L.R. 369 (376); 7 O.C. 314 (317); D., 8 C. 517; L.B.R. (1893-1900) 14.]

THIS was a second appeal from the decision of S. H. Phillpotts, Judge of Poona, confirming the decree of R. B. Chintaman, S.C., Subordinate Judge (First Class), Poona.

The facts of the case are as follows :—

[58] On the 29th November 1866 the Ainapuris, by a registered instrument in the English form, mortgaged a house situated in the City of Poona, along with other immoveable property, to the Bank of Bombay for a sum of Rs. 2,26,579. The Ainapuris paid back Rs. 80,000, and on the 8th November 1870 the Bank assigned its interest in the remainder of their loan to one Umedram Pitamber for Rs. 3,500, who again assigned away his interest to the plaintiff Narsidas Jitram on the 19th September 1871. Upon this assignment, which the plaintiff neglected to register, he instituted a suit in the High Court, on the 9th November 1871, to recover from the Ainapuris the balance of the loan advanced to them

* Second Appeal No. 408 of 1878.

(1) 14 B.L.R. 408. (2) 1 C. 337. (3) 7 M.H.C.R. 229. (4) 1 A. 240.

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by the Bank of Bombay. During the pendency of this suit the plaintiff obtained from Umedram a second assignment, dated 13th June 1872, and registered it; but without taking any steps upon it, pressed on the pending suit which resulted in a money decree in his favour against the Ainapuris personally on the 11th January 1873. This decree was, at the plaintiff's request, sent to the Subordinate Judge of Poona for execution. An application was made for the attachment and sale of the house in the City of Poona, which being granted the house was attached and subsequently, on the 17th October 1873, sold for Rs. 361, nominally to one Vithoba, but really to the plaintiff himself. When, however, Vithoba went to take possession of the house he was successfully resisted by one Narayan Walekar, who had previously purchased it as the property of the Ainapuris at a Court sale held on the 28th February 1871, in execution of a money decree obtained against them by another of their creditors.

The plaintiff, failing to obtain possession, instituted a second suit against the Ainapuris in the High Court on the 13th February 1875, resting his claim on the second assignment and his former decree, and praying for a decree against the mortgaged property specifically. He obtained a decree in this suit on the 29th of June 1875, and it was transferred to the Poona Court for execution. The disputed house was in consequence again attached and sold on the 28th of July 1876, the plaintiff now becoming the purchaser in his own name. On the 20th February 1877 the plaintiff sought for the second time to obtain possession, and was now obstructed by the defendant, who [59] had purchased it at a sale held on the 30th September 1875, in execution of a money decree against the former obstructor, Narayan Walekar.

The plaintiff, therefore, filed this suit in the Court of the Subordinate Judge of Poona to recover possession of the house. The defendant, amongst other things, contended that the plaintiff was acting in collusion with the original mortgagors, and had no right to possession superior to his own.

Both the lower Courts held that, by the first sale in execution of the money decree obtained in October 1873, the whole interest in the premises, both of the Ainapuris as mortgagors and of the plaintiff as assignee of the mortgagee, passed to the purchaser, and that, whatever the effect of the second decree obtained by the plaintiff might be, the plaintiff having caused the house to be attached and sold in execution of his first decree, he could not again attach it as the property of the Ainapuris. The lower Courts, therefore, made a decree in favour of the defendant.

The plaintiff appealed.

Latham (with him *Manekshah Jehangirshah*), for the appellant.—The High Courts in India have passed conflicting decisions on the question whether, by a sale under a money decree on a mortgage bond, the mortgage lien passes to the purchaser. In the case of *Syud Emam Momtazoodin Mahomed* v. *Rajcumar Dass* (1) the High Court at Calcutta ruled that, independently of the direction in the decree as to the sale of the mortgaged property, the mortgagee, when he puts that property up for sale, sells the joint interest of himself and the mortgagor. In *Bhugyobutty Dossee* v. *Shamachurn Bose and others* (2) a similar principle is enunciated by the same Court. The lower Courts have relied upon the case of *Kasimannissa Bibi* v. *Hurannissa Bibi* (3). The plaintiff in that case had

(1) 14 B.L.R. 408. (2) 1 C. 337. (3) 2 B.L.R. Appx. 6.

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the option, either to take a decree binding the property, or to take a simple decree for money, and choosing the latter alternative got possession in execution; but being subsequently ejected by a party claiming to hold the mortgaged property on a prior conveyance by the judgment-debtor, it was held that he could not sue to have the mortgaged [60] property declared liable, or to saddle it with the money due on his decree. This was hardly an expression of the mature opinion of the Court, and is in conflict with the other rulings. The Madras High Court in *Ramu Naikan* v. *Subaraya Mudali* (1) ruled that a prior mortgagee, having purchased, might still use his mortgage as a shield against the claim of subsequent mortgagees. The case of *Khubchand* v. *Kaliandas* (2) is in our favour, and was arrived at by a Full Bench of the Allahabad High Court after a review of the Calcutta and Madras decisions above cited and a number of unreported decisions. It was held that the holder of a money decree on a mortgage bond could not resist a claim to foreclose a second mortgage of the property created prior to its attachment and sale in execution of his decree. The Bombay High Court does not seem to have dealt with this question; but from the remarks of Westropp, C.J., in *Tukaram Atmaram* v. *Ramachandra Budharam* (3) it may be inferred that his Lordship was of opinion that if a mortgage, at the time of selling the mortgage property under his money decree, gave notice of his mortgage lien, he would be allowed to hold the lien after the purchase. We contend that the effect of all these decisions is to keep the mortgage lien in his mortgagee after the plaintiff's first purchase, and that he enforced that lien by his second purchase; and we are entitled to eject the defendant, who is a subsequent purchaser at a Court sale, under a simple money decree, and whose purchase is subject to our lien.

Ganssh Ramachandra Kirloskar, for the respondent.—The second assignment by Umedram in place of the former unregistered assignment was without any consideration, and was null and void. It was not competent to him to give it, and, therefore, all the proceedings held upon it are futile and of none effect. The first assignment was never cancelled, but was on the contrary, enforced to the end the plaintiff not having left one single step which he could take untried. But assuming that Umedram was competent to pass it, I submit the purchaser got nothing by his second purchase. The cases cited are in my favour, except the Allahabad case, which does not touch the question. [61] They do not hold that the mortgagee after the sale for his mortgage debt can still hold a mortgage lien on the property which he can again sell. According to the Allahabad decision the plaintiff got nothing by his first sale; according to the Calcutta decisions he got nothing by his second sale. The present suit is on the second sale alone, the plaintiff ignoring the first sale altogether. He cannot be allowed to fall back on his first sale in consequence. Under any circumstances, therefore, the defendant is entitled to the decree which he has obtained from both the lower Courts.

JUDGMENT.

The judgment of the Court was delivered by

KEMBALL, J.—This suit was instituted in the Court of the First Class Subordinate Judge of Poona to obtain possession of a house, situated in the Poona City, which plaintiff alleged he had purchased at a Court's

(1) 1 A. 240. (2) 7 M.H.C.R. 229. (3) 1 B. 314.

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sale on the 28th July 1866 as the property of certain persons surnamed Ainapuri.

Upon the facts, which are either undisputed or found conclusively proved, it appears that the house in dispute, in addition to other properties, was mortgaged by the Ainapuris, in 1866, to the Old Bank of Bombay to secure a loan of some two lakhs odd. A certain portion of this sum was repaid, leaving a balance of over a lakh and forty-six thousand, and the Bank's interest in the mortgaged property was then assigned for a sum of Rs. 3,500 to one Umedram Pitambar under date the 8th November 1870. Plaintiff purchased the said lien from Umedram taking a deed of assignment, dated the 19th September 1871, which, however, he neglected to register, and on this deed he instituted a suit in the High Court on its original side on the 9th November 1871, to recover the amount of the loan then due. Some discussion, it is stated, arose in the early part of the suit as to plaintiff's right to sue at all on an unregistered bond, and on the 13th June 1872 plaintiff obtained a second deed of assignment from Umedram which he registered; he, however, prosecuted his suit, which was still pending on the first deed, and obtained a decree for the amount of this claim against the mortgagors personally. This decree was, on his application, transferred for execution to the Court at Poona, and plaintiff then applied to **[62]** have it satisfied by attachment and sale of the house in dispute. The property was accordingly put up to auction, and sold for Rs. 361 on the 7th October 1873, and was purchased in the name of a third person, but on behalf of the plaintiff. The purchase-money was paid into Court, and plaintiff entered up satisfaction of the decree to that extent. On his endeavouring, however, to get possession he was opposed by one Narayan Walekar, who had purchased the house on the 28th February 1871 at an auction sale held in execution of a money decree passed against the Ainapuris in favour of another of their creditors. Whereupon plaintiff filed a second suit in the High Court against the mortgagors on the 13th February 1875, on the registered deed of assignment, and asked for a decree for the amount of the debt as against the mortgaged property. This decree was passed on the 29th June 1875, and was also, at plaintiff's request, transferred for execution to Poona. The house in dispute was then, on plaintiff's application, attached and sold a second time on the 28th July 1876, plaintiff himself being again the purchaser. Plaintiff after this, *i.e.*, on the 20th February 1877, again sought to obtain possession, when he was obstructed by the defendant, who had purchased the house at an auction sale held on the 30th September 1875 in execution of a money decree of one of the Poona Courts against the aforesaid Narayan Walekar. Whence this suit.

The only question raised here by the plaintiff in second appeal is whether the fact of the plaintiff, having attached and sold the house in dispute in satisfaction of his first decree precluded him from again attaching and selling it in execution of his second decree; though the defendant has objected that the District Court ought to have held that it was not competent to the plaintiff's assignor, Umedram, to execute the second deed of the 13th June 1872, and that, therefore, the decree founded upon it was bad. With regard to the cross objection, it is sufficient, we think, to say that we concur in the decision of the District Judge on the point. It is true the first deed of assignment became inoperative against the security through the plaintiff's own fault in neglecting to register; but as the assignor was willing to perfect the **[63]** defective title by

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executing to the plaintiff a fresh deed for the same consideration and the same property, which he was able to register, we know of no reason for holding that it was not competent to such assignor to do this. Turning, then, to the first question, it has been conceded in argument that the mere taking of a money decree for a mortgage-debt does not extinguish the lien, so that what we have to consider is the effect upon such lien when the mortgagee proceeds to execute his money decree upon the mortgaged property, and, if it be correct to hold that a sale under these circumstances conveys the rights of both debtor and creditor, it is clear that plaintiff's present action must fail. It has been held by a Full Bench of the High Court at Calcutta in *Syud Emam Momtazoodin Mahomed* v. *Rajcumar Dass* (1) that "whether the decree do or do not direct the sale of the mortgaged property, the mortgagee, when he puts that property up for sale, sells the entire interest that he and the mortgagor could jointly sell"—a principle adopted in a subsequent case by a Division Bench of the same Court (Garth, C.J., and Pontifex, J.) in appeal from the judgment of Phear, J., in *Bhuggobutty Dossee* v. *Shamachurn Bose and others* (2). And this rule seems to be in accordance with the doctrine laid down by the High Court of Madras under a similar condition of things: *Ramu Naikan* v. *Subaraya Mudali* (3). A Full Bench of the High Court at Allahabad, however, has held, under like circumstances, that nothing passes to the auction-purchaser but the right, title and interest "of the judgment-debtor at the time of the sale," one of the Judges (Turner, J.) expressing dissent from the view taken by the Calcutta Full Bench.

We think that the principle now recognized by the High Court at Calcutta is the correct one, and that it is impossible to hold that the particular nature of the right acquired under the sale depends on the form of the decree on which the mortgagee has proceeded to satisfy his judgment-debt. The idea that the mortgagee only sells under a money-decree the right, title and interest which the mortgagor has at the time of the sale, appears to be a creature of the old Civil Procedure Code. What the mortgagee really seeks, when he proceeds to sell, whether under a decree for [64] sale, or a simple money-decree, is to obtain satisfaction out of his security,—in fact, to enforce his lien; and we do not see on what principle it can be said that when the proceeding is in execution of a money-decree only he still retains his lien for enforcement *qua* mortgagee, if the debt be not discharged, by a second sale of the same property.

We must, therefore, hold that all the plaintiff's own rights as well as those of the Ainapuris were disposed of at the first sale, and that the plaintiff took nothing under his second purchase. Beyond this it is unnecessary to go. Plaintiff asked in the course of the argument to be allowed to fall back on his first purchase, but that was not the case made in either of the lower Courts, nor was it the case presented to this Court in the petition of appeal; and, having regard to the course of conduct pursued by the plaintiff throughout, we do not think that he is entitled to the smallest indulgence at our hands. Putting out of consideration the speculative character of the assignment which he took from Umedram, we find him first electing to take a personal decree, though it was in his power to rectify his mistake, if mistake it was, and to proceed for foreclosure and sale; then having obtained leave to bid at the sale, he put up a third person to bid, not in his name but on his behalf; and lastly, he went through the

(1) 14 B.L.R. 408. (2) 1 C. 337. (3) 7 M.H.C.R. 229.

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solemn farce of paying the purchase-money into Court to receive it back again through his pleader. We think it fair to assume that such proceedings could only have been pursued for purposes of deception. It may be that the plaintiff's object was partly to deprive the mortgagors of the privilege, always accorded, of an allowance of time within which to redeem, and on this point we think it worthy of remark that it would be well if the Courts in the mofussil would follow the practice adopted by the High Court, on its original side, in the case of applications to enforce personal decrees, by sale of the collateral security, which is to order the sale, but to direct that it shall not take place till after the expiration of six months.

We confirm the decree of the District Court, with costs on appellant.

Decree confirmed.

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[65] APPELLATE CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice and Mr. Justice Melvill.

KASTURCHAND (*Original Plaintiff*), *Appellant v.* RAVJI SADASHIV, NAZIR, DISTRICT COURT, SATARA, AND ANOTHER (*Original Defendants*).* [10th July, 1879.]

Nazir's liability for escape of judgment-debtor—Batta, payment of—Civil Procedure Code, Act (VIII of 1859), s. 282.

The plaintiff sued out a warrant for the arrest of his judgment-debtor on the 4th December 1876. The warrant was lodged with the nazir on the 16th December, and was to be in force till the 4th January 1877. On the 22nd December 1876, the nazir was informed that the judgment-debtor was already in the civil jail under a writ of execution issued by another creditor. The nazir then returned the warrant to the Subordinate Judge who had issued it. On the 29th December, the Subordinate Judge again sent it to the nazir's office, where it was duly received by the nazir's karkun (defendant No. 2.). This fact was not reported by the karkun to the nazir (defendant No. 1) until the 4th January 1877. On the 1st January 1877 the judgment-debtor's debt was paid by Government, and he was released in honour of Her Majesty's assumption of the title of Empress of India. The judgment-debtor thereupon left the district, and could not be found, and the plaintiff's warrant remained unexecuted. The plaintiff sued the nazir and his karkun for allowing his judgment-debtor to escape.

Held, that the nazir ought not to have sent the warrant back to the Subordinate Judge, and that there was no necessity for a fresh order on it until the time which it had to run had expired.

Held, further, that if the nazir forgot the existence of this unexecuted warrant on the 1st January 1877, and thus allowed the debtor to be released from the former process, when he ought to have been re-arrested under the plaintiff's warrant, there was actual negligence on his part, making him liable in damages to the plaintiff.

Held, also, that according to Act VIII of 1859, as it stood at the end of 1876 and until October 1877, the *batta* for the maintenance of a debtor could not become payable until he was arrested and brought before the Court and the latter made the order for his committal to the civil jail.

Quære, whether or not the nazir could have been made responsible for the negligence of the karkun, who was not his servant, but the servant of, and paid by, Government and appointed by the District Judge, if the warrant had been lodged with the karkun in the first instance and that fact had never been communicated to the nazir and if he had never known of the existence of the warrant.

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* Appeal No. 6 of 1879.