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all the lands in the village (s. 6, cl. 3); but they were not, in fact, the holders of land, which was not in their own possession, nor in that of their tenants, sub-tenants, or agents (s. 32), in none of which relations the defendants can be held to have stood. When, therefore, the plaintiffs received the notice, they ought to have communicated it to the defendants, and obtained their consent to their (the plaintiffs') acting on their behalf; and if such consent was refused, they might have left the defendants to fight their own battle with the Government. But [83] it is not alleged that the plaintiffs did anything of the kind; and we must, therefore, assume that they took upon themselves to negotiate with the Government for lands of which they were not the owners. If they voluntarily undertook to pay, and have since paid, the quit-rent on such lands, we cannot say that they are entitled to recover the amount so paid from the owners of the lands. It is true that the defendants have apparently for some years paid to the plaintiffs the amount, or part of the amount, levied from them as quit-rent by the Government; but we cannot hold that such payments estop the defendants, when better informed of their rights, from contesting the title of the plaintiffs to any further payments, or from asking the Government to modify the plaintiffs' *sanad*, and to grant a *sanad* to themselves in respect of the land in their possession. It appears that such a demand has been made by the defendants; and we think that the plaintiffs would, if well advised, acquiesce in that demand, and so escape any further payments on account of the land held by the defendants. We confirm the decree of the Court below with costs.

Decree confirmed.

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4 B. 83.

APPELLATE CIVIL.

Before Mr. Justice M. Melvill and Mr. Justice Kemball.

NARU AND ANOTHER (*Original Defendants*), *Appellants v.* GULABSING (*Original Plaintiff*), *Respondent.* *

[1st September, 1879.]

Mortgage—Possession—Registration—Sale in execution of decree—Rights of purchaser—Priority—Right to redeem—Parties to suit.

By two deeds, dated respectively the 22nd February 1868, and 7th September 1872, and duly registered, A mortgaged the lands in dispute to B for a term of years which expired in 1880. On 10th October 1873, A executed a *razinama* in favour of B relinquishing all his right in the said lands, and B next day executed a *kabulayat* to Government for the lands, which thenceforward were entered in B's name. Previously to the second mortgage and *razinama* to B, *viz.*, on 21st March 1870, A had by a duly registered deed mortgaged the same lands to the plaintiff, who in 1874 brought a suit against A upon his mortgage and obtained a decree, under which he sold the mortgaged property, and became himself the purchaser [84] thereof. Before, and at the time of the institution of this suit, B was in possession of the mortgaged land, but was not made a party to the suit. In 1877 B sold the land to C by a duly registered deed. In a suit brought by the plaintiff against B and C to recover possession of the land so purchased by him, as above mentioned, at the sale in execution of his own decree.

Held, that B's possession at the date of the plaintiff's suit upon his mortgage was sufficient to put the plaintiff on inquiry, and to constitute legal notice to him that the equity of redemption was at that time vested in B, and it was

* Second Appeal, No. 240 of 1879.

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therefore the plaintiff's duty to have made B a party to the suit brought by him against A, who had then alienated the equity of redemption to B; and not having done so, the plaintiff could not rely in support of his own title, upon a purchase under his own irregularly obtained decree, and could not, therefore, stand in a better position as against B than if his original suit had been properly constituted, *i.e.*, he was bound to give B an opportunity of redeeming his mortgage.

[R., 5 M. 164; 17 M. 17 (20); 9 Ind. Cas. 513 (522)=21 M L.J. 213=9 M.L.T. 431=(1911) 1 M.W.N. 165.]

THIS was a second appeal from the decision of E. Cordeaux, Judge of Khandesh, reversing the decree of the Subordinate Judge of Erandol.

The facts of the case appear from the following extract of Mr. Cordeaux's judgment:—

"On 22nd February 1868, one Dila mortgaged the land in dispute to the defendant Naru under an agreement for a period of six years, that is, up to the year 1874. Again, on 7th September 1872, Dila executed another agreement by which the land was mortgaged for an additional period of six years, that is, up to the year 1880. Both the instruments, (Exs. 11 and 12) were registered. On the 10th October 1873, Dila passed a *razinama*, in favour of Naru, of the land in dispute, relinquishing all his right therein, and Naru passed a *kabulayat* to the Government on the following day, the land henceforth standing in his name. But Dila had also mortgaged the same land to the plaintiff on the 21st March 1870, under a registered deed. Subsequently, the plaintiff obtained a decree against the mortgaged property, which was put up to sale and bought in by the plaintiff for Rs. 5-4-0 on the 27th April 1875. On the 2nd May 1877, the defendant Naru sold the land to Hira (defendant No. 2) under a registered deed of sale (Ex. 15). The defendant Naru was in possession of the land from the year 1868, and the mortgage to the plaintiff was unaccompanied by possession."

Under these circumstances the plaintiff sued to recover possession [85] of the land, making Naru and Hira defendants. The defendants, *inter alia* contended that their title was superior to the plaintiff's.

The Subordinate Judge rejected and the District Judge allowed the plaintiff's claim. The latter found—(1) that the plaintiff was entitled to possession of the land as auction-purchaser thereof in satisfaction of his mortgage lien; (2) that Dila conveyed the land to Naru subsequently to his mortgage of it to the plaintiff, and that Naru had notice of the said mortgage; and (3) that the land was subject to the plaintiff's lien upon it.

The defendants appealed.

Shantaram Narain, for the appellants.—The District Judge held that the transfer of the land by Dila to Naru was for valuable consideration, and complete. The defendant's mortgage (No. 11) being prior to that executed to the plaintiff, and the defendants being in law entitled to tack their mortgage No. 11 to mortgage No. 12, the Judge should have held that these mortgages were entitled to preference over the plaintiff's mortgage. The defendants' mortgage was with possession, while the plaintiff's was not. The plaintiff should have made the defendant Naru a party to this suit against Dila. He having failed to do so, the decree against Dila does not bind either Naru or Hira. These defendants having by the purchase acquired the whole right, title and interest of Dila therein, the plaintiff got nothing. At any rate we are entitled to redeem the plaintiff.

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Manekshah Jehangirshah, for the respondent.—The doctrine of tacking of mortgages does not obtain in India. The plaintiff was not bound to make Naru a party to his suit against Dila, he not having had any notice of Naru's mortgage, nor of the subsequent sale of the equity of redemption. This case is similar to that of *S. B. Shringarpure* v. *S. B. Pethe* (1), on which we rely.

JUDGMENT.

The judgment of the Court was delivered by

M. MELVILL, J.—The plaintiff in this suit, claiming under a mortgage, brought an action against his mortgagor in 1874, and obtained a decree, under which he attached and sold the mortgaged [86] property, and himself became the purchaser. He is now resisted by the defendant, who, at the date of the plaintiff's suit, was in possession by virtue, first, of a registered mortgage, and secondly, of a subsequent assignment of the equity of redemption for valuable consideration. The question which we are asked to decide is, whether the defendant can be ousted without the option of redeeming the plaintiff's mortgage. On the one side it is contended that the defendant is not bound by the decree obtained by the plaintiff against the mortgagor, because he was not a party to the suit; on the other side, that the plaintiff was not bound to make the defendant a party to the suit, because he had no notice of the defendant's mortgage, nor of the subsequent sale to the defendant of the equity of redemption. It is not necessary for us now to consider whether, if the plaintiff had no notice of the defendant's encumbrance and assignment, the defendant would be bound by the decree obtained by the plaintiff against the mortgagor. There is some apparent conflict between certain observations made in the case of *Shringarpure* v. *Pethe* (1) and the decision of this Bench in *Ganesh* v. *Balkrishna* (2) and other cases, a decision to which, as at present advised, we still adhere. But in the present case we think that the defendant's possession, at the date of the plaintiff's suit, was sufficient to put the plaintiff on inquiry, and to constitute legal notice to the plaintiff that the equity of redemption was at the time vested in the defendant. If the plaintiff had inquired into the cause of the defendant's possession, he would have ascertained that he was the purchaser of the equity of redemption, or, at all events, that he was a registered encumbrancer. It was, therefore, the plaintiff's duty to make the defendant a party to the suit brought by him against the person who had alienated the equity of redemption to the defendant; and such being the case, the plaintiff cannot rely, in support of his title, upon a purchase under his own irregularly obtained decree, even if a third party, who was an innocent purchaser, could have done so—a point on which it is not now necessary for us to express any [87] opinion. The plaintiff cannot now stand in a better position, as against the present defendant, than if his original suit had been properly constituted; that is to say, he is bound to give to the defendant an opportunity of redeeming his mortgage, the genuineness of which is not seriously contested by the defendant. We think that the proper decree to make in this case is that the defendant do pay to the plaintiff, within six months from the date of ascertaining the amount due, the sum to which the plaintiff is entitled under his mortgage, and that, in default of such payment, the

(1) 2 B. 662.
(2) Second Appeal, 350 of 1878; Printed Judgments of 1879, p. 28.

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plaintiff be put in possession of the mortgaged property, and the defendant be for ever foreclosed. When either party applies to the Subordinate Judge for execution of this decree, the Subordinate Judge should (after notice to the other party), take an account of the amount due on the plaintiff's mortgage; and the six months within which the payment is ordered, should date from the day on which the amount due may be determined by the Subordinate Judge.

The decree of the District Court is amended accordingly.

The parties to bear their own costs throughout.

Order accordingly.

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4 B. 87=4 Ind. Jur. 576.

APPELLATE CIVIL.

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

ICHHASHANKAR (*Plaintiff*) *v.* KILLA AND ANOTHER (*Defendants*).*

[4th September, 1879.]

Limitation—Bond—Act IX of 1871*—Act XV of* 1877, *s.* 2.

The defendant executed on the 20th April 1875 a bond to the plaintiff, who, without making a demand for his money, filed a suit upon it on the 21st of June 1878.

Held, that under s. 2 of the Limitation Act XV of 1877 the suit was not barred, although more than three years had elapsed since the date of the bond.

[R., 9 B. 475.]

THIS was an application for the exercise of the Court's extraordinary jurisdiction.

The plaintiff brought a suit in the Court of Small Causes at Surat to recover Rs. 490 due on a bond passed to him by the [88] defendant on the 20th of April 1875. The bond stipulated for payment on demand. The plaint was filed on 21st of June 1878, that is, more than three years after the date of the bond.

The defendant contended that the suit was barred by art. 73 of s. 2 of the Limitation Act XV of 1877, which provides that the limitation of three years upon a bond runs from the date of its execution.

The Judge of the Court of Small Causes, Khan Bahadur Kaikhoshru Hormasji, allowed the contention and rejected the plaintiff's claim.

Thereupon the present application was made to the High Court by the plaintiff.

Nagindas Tulsidas, for the plaintiff.—Under Act IX of 1871 the limitation on a bond payable on demand was three years from the date of making the demand: art. 72, s. 2. Under Act XV of 1877 the period of limitation is the same, but the Legislature by art. 73, s. 2, provides that it is to begin from the date of the bond. The latter period is shorter than the former, and in such a case s. 2 of the present Act gives a period of two years from the date when it came into force, *viz.*, 1st October 1877, within which the suit could be brought. The present suit was filed on the 21st of June 1878, and was within time: *Omirotlall Dey* v. *A. Howel* (1).

Gokuldas Kahandas, for the defendant.

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* Civil Application No. 69 of 1879.

(1) 2 C.L.R. 426.