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is mentioned. The insolvent, therefore, can only protect his after-acquired property by satisfying the conditions of s. 59 of the Indian Insolvent Act, viz., by paying in cash one-third of his debts or obtaining the consent of a majority in number and value of his creditors.

### JUDGMENT.

5 B. 1.

MARRIOTT, J.—It appears from the insolvent's own account of himself that the occupation which he followed did not come within the terms of any of the Acts which define and enumerate the classes of persons who are to be deemed traders. He cannot, therefore, obtain a certificate under s. 60 of the Indian Insolvent Act. Neither can he obtain one under s. 59 of that Act, as he has not complied with the provisions of that section by paying the required proportion of his debts or obtaining the assent of his creditors. I must discharge the order.

*Order discharged.*

Attorneys for the opposing creditors.—Messrs. *Tobin and Boughton.*

5 B. 2.

### APPELLATE CIVIL.

*Before Sir Michael Roberts Westropp, Kt., Chief Justice, and  
Mr. Justice Nanabhai Haridas.*

KHEVRAJ JUSRUP, DECEASED, BY HIS WIDOW AND HEIRESS  
NANABHAI (*Original Defendant*); *Appellant v.* LINGAYA  
(*Original Plaintiff*), *Respondent.*\* [29th July, 1873.]

*Mortgage—Execution—Sale—Right of purchaser—Effect of sale—Estoppel—Minor—Act  
XX of 1864.*

On 10th September 1863, A. mortgaged a house to B., who registered the deed, but did not obtain possession of the premises. On 2nd July, 1868, A. mortgaged the same house to C., who registered the mortgage deed and took possession of the premises. On 10th October, 1868, B. sued on his mortgage and obtained a decree against A's son who was a minor and who was represented by his mother as his [3] guardian. She, however, had obtained no certificate of administration under the Minors' Act XX of 1864. On 17th December 1869, the mortgaged property was sold by the Court in execution of B's decree. The plaintiff bought it, and obtained a certificate of sale. On the plaintiff's attempting to take possession of the property, the defendant, who was C's widow and heiress, resisted him, and he, thereupon, sued to recover it.

*Held*, that the plaintiff was entitled to possession. He stood at least in the same position as had been occupied by B., before the sale, and B, as prior mortgagee had a superior title to that of defendant, who claimed under a subsequent deed.

Where mortgaged property is sold in execution of a decree in a suit brought upon the mortgage, the interest of the mortgagee, at whose instance the sale is made, is held to pass to the purchaser, and the mortgagee is estopped from disputing that such is the effect of the sale.

[R., 5 B. 5; 5 B. 8; 22 B. 686 (692); 22 B. 945 (948); 35 B. 395 (400) = 13 Bom. L.R. 678 = 11 Ind. Cas. 989; 11 Bom. H.C. 139 (142); D., 20 B. 290 (293).]

SUIT for possession of a house purchased by the plaintiff at a Court sale on the 17th December 1869.

On the 10th September, 1863, the house in dispute with two others was mortgaged by Krishnarav Narayan for Rs. 525 to Lachmandas.

\* Special Appeal No. 208 of 1873. See Printed Judgments for 1873, p. 19.

by a deed which was registered on the 28th November, 1863. The latter did not enter into possession under the mortgage. On the 2nd July, 1868, Krishnarav mortgaged the same three houses for Rs. 1,000 to Khevrāj Jusrup, husband of the defendant Nandabai. That mortgage was registered on the 17th July, 1868, and accompanied with possession. On the 10th October, 1868, the earlier mortgagee, Lachmandas, obtained a decree on his mortgage for Rs. 909-12-0 against Balkrishna, the mortgagee's son, who was a minor and represented by his mother, Radabai, as guardian. She, however, had obtained no certificate of administration of his estate under the Minors' Act XX of 1864. On the 17th December, 1869, the mortgaged property was sold by the Court in execution of Lachmandas' decree. At that sale the plaintiff Lingaya purchased the house in dispute for Rs. 201-8-0 and obtained a certificate of sale, dated the 26th February, 1870. As the plaintiff failed to obtain possession of the house, in consequence of the defendants' resistance, he brought the present suit to establish his right to, and to recover possession of it from her. The defendant, Nandabai, contended that she was entitled to the possession of the house under the mortgage deed of 1868 till the whole of the mortgage debt was paid off. The First Class Subordinate Judge of Ahmednagar (Rao Bahadur P. S. Biniwale), in whose Court the suit was filed, awarded the [4] plaintiff's claim. That decree was affirmed, in appeal, by the District Judge (Mr. A. Bosanquet) on the ground that the mortgage to Lachmandas was prior in date to the mortgage to Khevrāj. The defendant thereupon brought a special appeal. It was contended in the High Court that the execution sale, under which the plaintiff claimed, was not valid, as the minor defendant was represented by his mother who was without a certificate under Act XX of 1864.

*Ghanasham Nilkant*, for the appellant, cited *Vasudev Vishnu v. Narayan Jagannath* (1), *Bai Kesar v. Bai Ganga* (2) and *Hari v. Mahadaji* (3).

*Shivshankar Govindram*, for the respondent.

#### JUDGMENT.

WESTROPP, C. J.—We do not think it necessary to give any opinion as to the effect of the judicial sale upon the equity of redemption, the validity of which sale is impeached by the appellant on the authority of *Vasudev Vishnu v. Narayan Jagannath* (1) and of *Bai Kesar v. Bai Ganga* (2), or upon the question whether that sale was only voidable and not void, i.e., only an irregularity and not a nullity. The Court is not now called upon to say whether the infant Balkrishna Krishnaram could wholly or to any extent impeach the sale of the equity of redemption to the plaintiff, Lingaya, on the ground that Radabai, his mother and guardian in the suit, brought by the earlier mortgagee, Lachmandas Jōharimal, against them, did not properly represent her son's interest, inasmuch as she had not a certificate of administration under Act XX of 1864. The mortgage to Lachmandas, dated 10th September, 1863, and registered on the 28th November in the same year, is in evidence in this suit, and neither the execution of it by Krishnaram Narayan, nor its consideration is impeached by the defendant, Nandabai, the representative of the second mortgagee, Khevrāj Jusrup, whose mortgage was executed on the 2nd July, 1868, and registered on the seventeenth day of the same month in that year. That being so, it is clear that the defendant, Nandabai, cannot deny the right of the plaintiff to stand in the same position

(1) 9 B. H. C. R. 289. (2) 8 B. H. C. R. A. C. G. 31. (3) *Ibid.*, 50.

1873  
JULY 29.  
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APPEL-  
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CIVIL.  
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5 B. 2.

with respect to the house, the subject of the sale, as previously to that sale had been held by Luchmandas. And Luchmandas could not deny that proposition, inasmuch [5] as he was the plaintiff in the suit in which the sale took place and moved the Court to make that sale; and although it is not the practice of the Mofussil Courts to require a mortgagee who sues for, and obtains a sale of the mortgaged premises, formally to convey to the purchaser, and the latter must be contented with a certificate of sale to him of the right, title and interest of the mortgagor, yet, in fact, the interest of the mortgagee, who causes the sale to be made, is held to pass to the purchaser, and that mortgagee is completely estopped from disputing that such is the effect of the sale (see *Kasandas v. Pranjivan* (1)).

For these reasons we think that the plaintiff is, as at least standing in the position of Lachmandas, who held under a mortgage prior both in execution and registration to that of Khevraj, entitled to recover possession of the house from the widow and representative of the latter: *Hari v. Mahadaji* (2). Whether, under the circumstances of the case, either she or the infant Balkrishna would be entitled to sue the plaintiff to redeem the mortgage of 10th September, 1863 (Exhibit No. 49), by paying it off, we do not express any opinion. In so far as the decrees of the Courts below award possession of the house and premises in dispute to the plaintiff, we affirm the same with costs.

*Decree affirmed.*

[NOTE.—See the next case.]

5 B. 5.

APPELLATE CIVIL.

*Before Sir Michael Roberts Westropp, Kt., Chief Justice, and  
Mr. Justice Nanabhai Haridas.*

SHESHGIRI SHANBHOG AND ANOTHER (*Original Defendants Nos. 3 and 4*), *Appellants v. SALVADOR VAS (Original Plaintiff), Respondent.\**  
[4th August, 1873.]

*Mortgage—Sale—Decree—Execution—Effect of sale in execution of decree.*

A. mortgaged his land to B. in 1861, which mortgage was then registered, but the mortgagee did not enter into possession. Subsequently in 1866, A. leased the same land to C. That lease was registered and C. entered into possession. In 1867 B. obtained a decree upon his mortgage, and in execution attached and sold the mortgaged property. C. who had applied to have this attachment of the land removed and failed in his application, sued to establish his right under the lease and recover possession.

*Held* that, under the lease of 1866, he could only take what the mortgagor had to give him, *viz.*, a lease subject to the registered mortgage.

[6] Where a decree is obtained upon his mortgage by a mortgagee and the mortgaged property is sold under the decree for the purpose of paying off the mortgages, the interest of both mortgagor and mortgagee passes to the purchaser. The mortgagee is estopped from disputing that such is the effect of the sale, so far as his interest is concerned, although the officer of the Court may only have described the sale as one of the right, title and interest of the mortgagor. It is not the practice, in the Mofussil, to require the mortgagee to convey to the purchaser. The transfer takes place by estoppel.

[R., 5 B. 8; 22 B. 686; 22 B. 945 (948); 35 B. 395 (400)=13 Bom.L.R. 678=11 Ind. Cas. 989; 40 C. 173 (184)=16 C.L.J. 202=17 C.W.N. 137=16 Ind. Cas. 365; 11 Bom.H.C. 139 (142); D., 20 B. 290 (293).]

\* Special Appeal No. 460 of 1872. Printed Judgments for 1873, p. 25.

(1) 7 B. H. C. R. A. C. J. 146.

(2) 8 B. H. C. R. A. C. J. 50.