

1873
 JULY 29.
 APPEL-
 LATE
 CIVIL.
 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.

SUIT by a lessee to recover possession of land.

On the 4th May, 1861, the land was mortgaged by its owner Waman Pai, to one Mudulgiri, who duly registered the mortgage but did not obtain possession. On the 5th July, 1866, Waman's son Sheshgiri Pai (husband of defendant No. 1), let the same land to the plaintiff on lease for a period of ten years. This lease was also duly registered, and the plaintiff was put into possession. He occupied the land and paid rent to Sheshgiri Pai till his death, and after that event to his widow (defendant No. 1). On the 2nd July 1867, the mortgagee obtained a decree on his mortgage against Sheshgiri Pai's widow (defendant No. 1), in execution of which the land was attached. The plaintiff applied for the removal of the attachment, but his application was rejected, and at the execution sale, the land was purchased by Sheshgiri Shanbhog and his brother (defendants 3 and 4). The plaintiff thereupon sued to establish his right to and recover possession of the land, alleging that the auction-purchasers had notice of his right. Defendants Nos. 3 and 4 contended that they were entitled to the land in preference to the plaintiff, whose right was based upon a lease subsequent in date to the mortgage. The name of defendant No. 2 (Mudulgiri, the mortgagee and decree-holder) was struck out from the suit on the application of the plaintiff. The Subordinate Judge of Honavar, in whose Court the suit was filed, rejected the plaintiff's claim on the ground that it was not valid as against the auction-purchasers. That decree was reversed, in appeal, by the District Judge of Kanara (Mr. A. L. Spens) on the ground that what the defendants 3 and 4 purchased at the Court sale was the right, title and interest of the widow; that the land was subject to the plaintiff's lease when it was sold by the Court; that the mortgage was one without possession; that the auction purchasers (defendants 3 and 4) were only entitled to rent according to the terms of the lease. The Judge accordingly made [7] a decree in favour of the plaintiff. Defendants 3 and 4 brought a special appeal.

Shantaram Narayan, for the appellants.

Shamrav Vatal, for the respondents.

JUDGMENT.

WESTROPP, C.J.—The mortgage, dated the 4th May, 1861, though not accompanied by actual possession, was duly registered on the same day. Conformably to a decree made on the 2nd July, 1867, in a suit brought upon it by the mortgagee, the property (land) in dispute was sold to Sheshgiri Shanbhog and Mangesh Shanbhog (the defendants Nos. 3 and 4), who are the present appellants. The plaintiff, Salvador Vas, claims under a lease executed by the mortgagor on the 5th July, 1866, and subsequently duly registered.

Notwithstanding the form of the sale to the third and fourth defendants by the Court, the suit in which it took place being founded on the mortgage, and the sale being made for the purpose of paying off the mortgagee, the interest of the latter as well as that of the defendant in that suit (the mortgagor) passed to the purchasers (defendants 3 and 4): *Kasandas v. Pranjivun Asharam* (1), *Kheeraj Jurup v. Lingayya Rajaram* (2). The mortgagee is completely 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

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

(2) 5 B. 2.

1873 practice in the Mofussil to require the mortgagee to convey to the purchaser. The transfer takes place by way of estoppel.
 AUG. 4. The lessee, under the lease of 1866, could only take what the mortgagor had to give him, viz., a lease subject to the prior right of the mortgagee, whose mortgage was duly registered, and, therefore, did not need possession to render it valid against subsequent alienations by the mortgagor: *Hari v. Mahadaji* (1). We must, therefore, reverse the decree of the District Judge, and make a decree for the defendants, with costs of the suit and of the appeal to the District Judge, but we direct that the parties respectively bear their own costs of the special appeal.

APPELLATE
 CIVIL.
 3 B. 3.

Decree reversed.

[NOTE.—See the next case.]

5 B. 8.

[8] APPELLATE CIVIL.

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

SHAIK ABDULLA SAIBA (*Original Plaintiff*), *Appellant v. HAJI ABDULLA AND OTHERS (Original Defendants), Respondents.**
 [2nd August, 1880.]

Mortgage—Decree—Non-joinder—Sale of the right, title and interest of a mortgagor or his heir—Rights of an auction-purchaser—Equity of redemption.

The usual mode, in the Mofussil Civil Courts, of selling in mortgage suits “the right, title and interest” of the mortgagor or his heir, is not correct, if deemed to be his right, title and interest at the time of the sale. The intention of the Court is to pass to the purchaser the right, title and interest both of the mortgagor and mortgagee. What passes to the auction-purchaser under the certificate of sale, is the right, title and interest of the mortgagor as it stood when he made the mortgage, and not merely as it stood at the time of the Court sale.

One Umar Saiba mortgaged certain immoveable property to A.R. (defendant No. 1) for Rs. 400 on the 7th May, 1865. On the death of Umar the mortgagee A.R. brought a suit (No. 311 of 1871) against his widow K. (defendant No. 2), but did not make his (Umar's) children (who were minors) parties to it. On the 28th July, 1871, A.R. obtained a decree for Rs. 460, being the amount of principal and interest due on his mortgage, with further interest from the date of suit to date of payment. That decree directed satisfaction of the amount due under it out of the mortgaged property if it were not paid by the widow K. (defendant No. 2). K. having failed to satisfy the decree, the Court on the application of A.R. (the decree-holder), sold the mortgaged property, on the 19th September, 1872, for Rs. 400, to the brother of A.R. On the 7th August, 1873, the auction-purchaser obtained a certificate of sale to the effect that he had purchased at the Court sale “the right, title and interest of K.” (the widow) in the mortgaged property. On the 17th August, 1874, the auction-purchaser sold the property for Rs. 700 to the father of the plaintiff. In 1877 the plaintiff sued A.R. (the mortgagee and decree-holder) to recover possession of the property with mesne profits. Umar's widow K. and children (two sons and a daughter) were defendants in the suit, the plaintiff alleging, in addition to the facts just stated, that these defendants had colluded with the tenants of the property in dispute, and collected the produce thereof. Defendant No. 1 (A.R.) denied his liability. The answer of defendants 2, 3, 4 and 5 (respectively the widow, two sons and a daughter of Umar) substantially was that the Court sale did not affect the rights of defendants 3, 4 and 5, as they had not been parties to the mortgage suit No. 311 of 1871, and that they were entitled to hold the property. The

* Second Appeal No. 202 of 1880.

(1) 8 B.H.C.R.A.C.J. 50.