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practice in the Mofussil to require the mortgagee to convey to the purchaser. The transfer takes place by way of estoppel. 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.

*Decree reversed.*

[NOTE.—See the next case.]

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[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.

subordinate Judge awarded the plaintiff's claim, holding that both the sales, *viz.*, the Court sale under the mortgage decree in suit No. 311 of 1871, and the subsequent private sale by the auction-purchaser, were *bona fide* and binding on defendants 2, 3, 4 and 5, inasmuch as the debt for which the property was sold, had been contracted by Umar. This decree was reversed in appeal, on the ground that the Court sale extended only to the right, title and interest of K. (defendant No. 2) in the mortgaged property, and [9] did not affect the rights of defendants 3, 4 and 5, who were not parties to it. On appeal to the High Court.

*Held* that the defect in the title of the purchaser (plaintiff) arose from the circumstances that the suit of A. R. (No. 311 of 1871) for foreclosure and sale was insufficiently constituted as to parties, both the sales having been found to be unimpeachable in all other respects and that the defendants Nos. 3, 4 and 5 were only entitled to the same relief which they would have obtained if they had been made parties to that suit, *viz.*, the right of redeeming the property by paying off the mortgage.

The High Court accordingly reversed the decree of the District Judge, and directed the defendants 3, 4 and 5 to pay to the plaintiffs, within six calendar months from date, the sum of Rs. 460, with interest on the principal (Rs. 400) from date of the institution of suit No. 311 of 1871, until payment. The Court further directed that, in default of payment, the mortgage should be foreclosed, and defendants 3, 4 and 5 precluded from redeeming the property which should be delivered up to the plaintiff.

*Karsandas v. Pranjinan* (1), *Shringarpure v. S.B. Pelhe* (2), *Rarji v. Krishnaji* (3), *Khevraj v. Lingaya* (4), *Sheshgiri Shanbhog v. Salvador Vas* (5) referred to.

[R., 10 A. 520 (523)—8 A.W.N. (1888) 210; 5 B. 614 (618); 6 B. 515 (519); 16 B. 486 (491); 28 B. 153 (162, 163); 17 M. 247 (249); D., 19 B. 680 (693).]

THIS was a second appeal from the decision of A. L. Spens, District Judge of Kanara in appeal, reversing the decree of the Subordinate Judge of Honavar.

The suit was brought for possession of certain immoveable property under the following circumstances:—One Umar Saiba mortgaged the property in dispute for Rs. 400 to Abdul Rahiman (defendant No. 1) on the 7th May, 1865. On the death of Umar Saiba, the mortgagee (Abdul Rahiman) brought a suit (No. 311 of 1871), against Umar's widow, Kulsambi, but did not make his (Umar's) children, who were minors, parties to it. On the 28th July, 1871, Abdul Rahiman (the mortgagee) obtained a decree for Rs. 460, being principal and interest due on his mortgage, with further interest from date of suit to date of payment. The decree directed that Abdul Rahiman should recover the amount due under it from the mortgaged property, unless it was paid by Kulsambi (Umar's widow). Kulsambi having failed to satisfy the decree, the Court, on the application of Abdul Rahiman (the decree-holder), sold the mortgaged property on the 19th September, 1872, for Rs. 400 to Abdulla, brother of Abdul Rahiman. On the 7th August 1873, the [10] auction-purchaser (Abdulla) obtained a certificate of sale from the Court to the effect that he had purchased at the Court sale "the right, title and interest of Kulsambi" in the mortgaged property. On the 17th August, 1874, the auction-purchaser sold the property for Rs. 700 to Ibrahim Sabeb, father of the plaintiff. In 1877 the plaintiff brought the present suit against Abdul Rahiman (the decree-holder), Kulsambi (Umar's widow) and his two sons and a daughter by her. The plaintiff alleged, in addition to the facts just stated, that defendants 2, 3, 4, and 6 colluded with the tenants of the property in dispute, and collected the produce thereof; that plaintiff, therefore, sued to recover possession of the property, with mesne profits for previous years.

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

(2) 2 B. 662.

(3) 11 B. H. C. R. 139 (142).

(4) 5 B. 2.

(5) 5 B. 5.

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Defendant No. 1 (Abdul Rahiman) denied his liability. Defendant No. 2 (Kulsambi, widow of Umar and mother of defendants 3, 4, and 5) denied all knowledge of the mortgage suit No. 311 of 1871, and the sale of the mortgaged property by the Court to Abdulla on the 19th September, 1872. She, however, admitted the mortgage of the property in dispute by her husband to defendant No. 1 (Abdul Rahiman), but contended that, under the Mahomedan Law, defendants 3, 4 and 5 (her two sons and a daughter by Umar Saiba) were entitled to the property; that defendant No. 1 (Abdul Rahiman) ought to have made them parties to his suit No. 311 of 1871; that the decree and sale, therefore, could not be upheld; that the property was worth Rs. 2,000, and its sale by the Court was very much under its value; that only Rs. 400 were due to defendant No. 1 on account of his mortgage. The answer of defendants 3, 4 and 5 substantially was that they were entitled to, and were rightfully in possession of, the property; that the mortgage suit No. 311 of 1871, and all the subsequent proceedings therein did not affect their rights, as they were not parties to it; that the sales alleged in the plaint were fraudulent and were not binding on them. (Defendant No. 4 was a minor, and represented by his brother, defendant No. 3.)

The Subordinate Judge held that both the sales were *bona fide* and not fraudulent, and that the Court sale was binding on defendants 2, 3, 4 and 5, and affected their rights, inasmuch as the debt, for which the property was sold, had been contracted by [11] Umar Saiba, as whose heirs the said defendants claimed. He, therefore, made a decree in favour of the plaintiffs.

In appeal, which was preferred by defendants 3, 4 and 5, the District Judge reversed the decree of the first Court on the ground that the Court sale, under the decree in the mortgage suit No. 311 of 1871, extended only to the right, title and interest of Kulsambi in the property sold, and did not affect defendants 3, 4 and 5, because they were not parties to the suit. He accordingly dismissed the plaintiff's claim on the 27th January 1880.

On the 16th April 1880, the plaintiff appealed to the High Court.

*Shantaram Narayan*, for the appellants.—What was really sold at the Court sale, was the interest of the mortgagee and the mortgagor's equity of redemption, and not merely the right, title and interest of Kulsambi, as held by the Judge. He ought to have held that the mortgage suit No. 311 of 1871, was against all the parties then competent to represent the estate of the mortgagor and that Kulsambi represented not only her own interest but that of her minor children by Umar Saiba, inasmuch as she was their natural and lawful guardian. The mortgage debt was a *bona fide* charge on the property and admitted by the defendants even in this suit. The plaintiff, therefore, as representing the interest of the mortgagee, was entitled to retain possession of the mortgaged property till the satisfaction of the mortgage debt. Even assuming that the defendants ought to have been *pro forma* parties to the suit No. 311 of 1871, and that they were not bound by the decree and Court sale, they were entitled to nothing more than the equity of redemption, and the plaintiff has a right to hold possession of the mortgaged property till it is completely redeemed.

*Shamrav Vithal*, for the respondents.—The Court expressly sold at the auction sale the right, title and interest of Kulsambi in the mortgaged property, as appears from the certificate of sale. The Court sale and the subsequent private sale, therefore, in no way affected the rights of defendants 3, 4 and 5, as held by the District Judge.

## JUDGMENT.

[12] The following is the judgment of the Court :—

WESTROPP, C.J.—The immoveable property, the subject of this suit, was mortgaged on the 7th of May, 1865, for Rs. 400 by Umar Saiba to Abdul Rahiman, the interest payable thereon being 10 khandis of rice per annum. The validity of that mortgage is not disputed. Umar Saiba (the mortgagor) having died, Abdul Rahiman (the mortgagee) instituted a suit (No. 311 of 1871) against Kulsambi, the widow of Umar Saiba, but omitted to make the children of Umar Saiba parties to that suit. Those children were then and some of them were at the institution of the present suit still minors. On the 28th July, 1871, Abdul Rahiman, in his suit (No. 311 of 1871), obtained a decree on his mortgage that unless Kulsambi paid the amount then due, *viz.*, Rs. 400 principal and Rs. 60 interest, and further interest from the date of the plaint up to the time of payment, he should recover the amount from the mortgaged property, which decree was substantially a decree for sale of that property, in default of payment by Kulsambi, of the amount decreed. Kulsambi not having paid that amount, the property was sold for Rs. 400 by the Court on the 19th September, 1872, to Abdulla, the brother of Abdul Rahiman, the mortgagee; and a certificate of that sale, dated the 7th August, 1873, was given to the purchaser, who, on the 17th August, 1874, sold the same property for Rs. 700 to Ibrahim Saheb, the father of the plaintiff. By the certificate of sale given by the Court to Abdulla, the first purchaser, it appears that what the Court put up for sale was "the right, title and interest of Kulsambi" in the mortgaged property. She, as widow of the deceased mortgagor, was only entitled to a small share in or maintenance out of his property, his sons being entitled to the rest of it. Therefore, she represented only her own limited interest in the equity of redemption of the mortgaged premises. If she had been sole heir, she would have represented to the whole of the equity of redemption. The mode, usual in the Mofussil Civil Courts, of selling in suits on mortgages "the right, title and interest" of the mortgagor or his heirs, is not correct, if the right, title, or interest so sold are deemed to be only his right, title and interest at the time of the sale. In fact, the intention of the Court is to pass to the [13] purchaser the right, title and interest both of the mortgagor and mortgagee. And in order to surmount the difficulty caused by the form of sale adopted in the Mofussil in mortgage suits, this Court has ruled that "the right, title and interest" of the mortgagor, as it stood *when he was making the mortgage* (and not merely as it stood at the time of the Court sale), is what passes under the certificate of sale to the purchaser: *Kasandas v. Pranjivan* (1), *Shringarpure v. Pethe* (2); and [the mortgagee who puts the Court in motion to sell, is held to be estopped from denying that his interest as mortgagee has passed under the sale of the right, title and interest of the mortgagor or his heirs to the purchaser, although the mortgagee has not executed a conveyance to the purchaser:] *Ravji v. Krishnaji* (3), *Khevraj v. Lingaya* (4) and *Sheshgiri Shanbhog v. Salvador Vas* (5). The defect in the title of the purchasers in the present case is due to the suit of Abdul Rahiman for foreclosure and sale having been insufficiently constituted as to parties: *Assamathem Nessa Bibi v. Roy Lutchmiput Singh* (6), the sale to Abdulla, and the sale by him to Ibrahim

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(6) 4 C. 142.

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Sahab having been found to be in all other respects unimpeachable. We quite discredit Kulsambi's affectation, in her written statement in the present suit, of ignorance of the foreclosure suit. She did not attempt, in the Courts below, to raise any issue as to her not having been duly served with process in it.

If the sons of Umar Saiba had been made parties to that foreclosure suit, it is clear that they could not have averted a decree for sale and foreclosure, except by redeeming the property by paying off the mortgage. To that decree of relief only we think them now entitled—the payment, however, must be to the defendants, the heirs of Ibrahim Saheb, who now stand in the place of Abdul Rahiman, inasmuch as his rights, at least, as mortgagee passed by the Court sale to his brother Abdulla, and have by him been conveyed to Ibrahim Saheb; and should the heirs of Umar Saiba, under the decree which we are now about to make, fail to redeem, the heirs of Ibrahim Saheb will be entitled to have the mortgage foreclosed in his favour and for his benefit, and to recover possession of the mortgaged premises.

[14] Accordingly, we reverse the decree of the District Judge and order the defendants in the present suit, other than Abdul Rahiman and Kulsambi, to pay to the plaintiff (who now stands in the former position of Abdul Rahiman as mortgagee; for she as well as Kulsambi are bound by the decree and sale in the foreclosure suit), the sum of Rs. 460 and further interest on Rs. 400 from the date of the plaint filed in suit No 311 of 1871 at the rate of 10 khandis of rice *per annum* down to the day of payment. And in the event of the said defendants, other than Abdul Rahiman and Kulsambi, not paying the said sum of Rs. 460, and the said further interest within six calendar months from this second day of August 1880, it is decreed that the mortgage on the 7th of May, 1865, be foreclosed, and that the defendants be for ever barred from redeeming the property, the subject thereof, and that they do deliver up possession thereof to the plaintiff. The plaintiff and defendants respectively must bear their own costs of this suit and of both appeals.

*Decree reversed.*

[NOTE.—See the next case.]

5 B. 14=5 Ind. Jur. 368.

APPELLATE CIVIL.

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

JATHA NAIK (*Original Defendant*), *Appellant v. VENKTAPA*  
(*Original Plaintiff*), *Respondent*.\* [3rd August, 1880.]

*Mortgage—Suit for foreclosure and sale—Parties—Minor—Guardian—Certificate—Madras Reg. V of 1804—Act XX of 1864—Form of decree.*

J. (defendant No. 1) brought a suit (No. 374 of 1861) against the plaintiff's father G. on a mortgage-bond, dated the 2nd April 1856. G. having died before any decree was passed, his widow (plaintiff's mother) was substituted as defendant, and a decree was made against her *ex parte*. It was, however, set aside after her death on the application of M. (defendant No. 2) the sister of G., on the ground of want of due service of process upon G. and his widow. M. was substituted as defendant in the suit, and a new decree was made in her favour. That decree was reversed, in appeal, by the District Court, which allowed J.'s

\* Second Appeal No. 188 of 1880.