

Garth, C.J., in *Moonshi Golam Arab v. Curreem Bux Shaikji* (1) have been surmounted by rigorously confining the execution of the High Court decrees in such suits to immoveable estate. If in any instance (and at present we are not aware that there has been one) execution of the High Court decree in such cases has issued against the person or freshly discovered moveable property of the judgment-debtor, it must have been inadvertently so issued, and, if brought to the notice of the Court, would have been quashed. The ground of the interference of the High Court is that, practically, the judgment-creditor could not recover his debt except by process against the immoveable estate of the debtor.

(1) I. L. R. 5 Calc. 294, 298.

## APPELLATE CIVIL.

*Before Sir M. R. Westropp, Kt., Chief Justice, and Mr. Justice Pinhey.*

DA'MODAR DEVCHAND (ORIGINAL PLAINTIFF), APPELLANT, *v.* NA'RO MAHA'DEV KELKAR AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.\*

September 13.

*Mortgage—Rights and liabilities of prior and subsequent mortgagees—Redemption—  
Suit by second mortgagee—Form of decree.*

S mortgaged a house and site to R on the 4th January, 1870; and on the 21st February, 1870, he (S) mortgaged the same property to D. On the 3rd January, 1874, R brought a suit against S on the mortgage, and obtained a decree which directed the satisfaction of the mortgage debt by the sale of the mortgaged property. R did not make D a party to that suit. The property was sold by the Court and purchased by N in his own name, but as trustee for R. At the Court sale, D, the puisne mortgagee, gave notice of his claim to R and N. D sued N, R, and S for the amount due on his mortgage. In his evidence R admitted that he, subsequently to the sale to N, pulled down the house and sold portion of the materials. The lower Courts dismissed the suit, holding that N (defendant No. 1), the purchaser at the auction sale, was not liable for the plaintiff's claim. On appeal to the High Court,

*Held* that D being puisne mortgagee, and, as such, representing the equity of redemption to the extent of his mortgage, should have had an opportunity of redeeming the mortgaged premises from R's mortgage, and should have been made a party to R's suit. He could not be deprived of his right by proceedings to which he was not a party, and was, therefore, entitled to a decree framed on the basis of such right of redemption.

\*Second Appeal, No. 508 of 1880.

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DAMODAR  
DEVCHAND  
v.  
NARO  
MAHADEV  
KELKAR.

THIS was a second appeal from the decision of J. W. Walker, Assistant Judge at Ratnagiri, affirming the decree of Mukundrao Bhaskar, Second Class Subordinate Judge of Dapoli.

The plaintiff Damodar sued Naro, Ragho, and a third person for the amount due on his mortgage dated the 21st February, 1870. The suit was filed in the Subordinate Court of Dapoli.

The facts of the case are fully stated in the judgment of the High Court.

Both the lower Courts dismissed the suit, holding that Naro, the purchaser at the auction sale (defendant No.1), was not liable for the plaintiff's claim. The following are the Assistant Judge's reasons:—

“It is not contended for the plaintiff that his mortgage had priority over that of Ragho (defendant No. 3). But it is urged that at the time of the sale in execution of the decree obtained by defendant No. 3, plaintiff gave notice of his claim, and that, therefore, Naro (defendant No. 1) purchased the house subject to that claim. But it is now well settled that the first mortgagee is entitled to sell the property mortgaged to him as it existed at the time of the mortgage, and free from any subsequent incumbrances. To hold otherwise would make it impossible for the first mortgagee to realize anything when he brought the property to sale. The decree is confirmed with costs.” (3rd September, 1880.)

The plaintiff appealed to the High Court.

The Hon. Ráo Saheb *V. N. Mandlik* for the appellant.—Naro's purchase was subject to the plaintiff's mortgage, of which he had ample notice.

There was no appearance for the respondents.

WESTROPP, C.J.—Sonu mortgaged a house and site to Ragho on the 4th January, 1870, for Rs. 50. Sonu further mortgaged the same house and site and a cattle-shed and a cart and harness to Damodar for Rs. 80 on the 21st of February, 1870. Both of those mortgages were unregistered. On the 3rd January, 1874, Ragho instituted a suit on his mortgage against Sonu, and on the 17th November, 1874, obtained *ex parte* a decree for sale of the house and site in default of payment of Rs. 60 (the amount due

on Ragho's mortgage) and costs. He did not make Damodar, the puisne mortgagee, a party to that suit. Damodar had, on the 2nd of January, 1874, instituted a suit on his mortgage against Sonu and another person, but omitted to make Ragho a party to that suit. Damodar obtained a decree in his suit on the 5th February, 1875. The house and site were sold, as appears by the certificates dated the 10th of May, 1875, under Ragho's decree to the defendant Naro, who, however, admits in his deposition (exhibit 50) that he purchased as a trustee for Ragho. Naro further says that he resold the house to Gan Nak, whom Ragho, however, in his deposition (exhibit 51) admits to have purchased as a trustee for Ragho himself. This complication was probably resorted to for the purpose of throwing difficulties in the way of Dámodar. It should be mentioned that Damodar at the auction sale to Naro gave notice to Naro and Ragho of his (Damodar's) mortgage. The omission of Ragho to make Damodar a party to Ragho's suit prevents the decree and sale in that suit and the subsequent sale from binding Dámodar, who, though a mortgagee puisne to Rágho, did, as such mortgagee, represent the equity of redemption to the extent of his (Dámodar's) mortgage. As such puisne mortgagee Dámodar was entitled to be made a party to Rágho's suit, and to have an opportunity of redeeming the mortgaged premises from Rágho's mortgage, and could not be deprived of that right by proceedings to which he was not a party.

Ragho in his deposition admits that he, subsequently to the sale to Naro, pulled down the house and sold the greater part of the materials. Under these circumstances the decrees of the Courts below cannot be supported, and must be reversed; and there must be a decree as follows, viz., that an account be taken of the amount realized by the sale of the materials of the house sold by Ragho, or on his behalf; and, if the amount so realized exceed Rs. 60 and the costs of Ragho's suit against Sonu, let the amount of such excess be paid by Ragho into the Subordinate Judge's Court to the credit of this suit. If the amount realized by sale of the said materials be less than the said sum of Rs. 60 and costs awarded to Ragho by his decree against Sonu, it is hereby declared that the plaintiff Damodar is entitled to redeem the unsold materials of the said house and the site thereof by

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paying to Ragho the amount of such deficit within three calendar months from the date on which the Subordinate Judge shall notify to Damodar or his pleader the amount of such deficit ; and if Damodar make default in payment of such deficit (if any) within the time aforesaid, let him be for ever barred and foreclosed from redeeming the said unsold materials of the said house and the said site. In the event of it appearing, on taking the said account of the sold materials, that the amount realized by the sale thereof exceeds the said sum of Rs. 60 and costs awarded to Ragho by his decree, let the excess (ordered hereinbefore in that event to be paid into Court by Ragho), or so much thereof as may be necessary, be paid over to the plaintiff Damodar in or towards satisfaction of the sum of Rs. 133-8-3 and costs found due to him under his mortgage ; and in the event of such last-mentioned payment being insufficient to meet the said sum of Rs. 133-8-3 and costs, or in the event of the amount realized by the sale of the said materials equalling the amount found due to Ragho under his decree for Rs. 60 and costs, let the said unsold materials of the said house and (if necessary) the said site be sold, and let the proceeds, or so much thereof as may be sufficient, be paid to the said Damodar in discharge of so much of the said sum of Rs. 133-8-3 and costs as may remain due to him, and let the balance, if any, be made over to the said defendant Ragho. The parties respectively should bear their own costs of the suit and both appeals.

*Decree reversed.*

## APPELLATE CRIMINAL.

*Before Mr. Justice M. Melvill and Mr. Justice Pinhey.*

IMPERATRIX v. SHIVRAM GUNDO.\*

September 20.

*Mukhtyar—Criminal Procedure Code, Act X of 1872, Section 278—Appeal.*

An Appellant in a criminal case has a right to appear and be heard by a mukhtyar.

THIS was an application for a revision of an order passed by M. B. Baker, Joint Session Judge of Poona, at Sholapur.

The accused was originally tried by Khan Bahadur Darasha Dosabhai, Magistrate (First Class) at Sholapur, of the offence of

\* Criminal Application for Revision, No. 203 of 1881.