

## APPELLATE CIVIL.

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

1882  
March 13.

BAPUJI BALAL (ORIGINAL PLAINTIFF), APPELLANT, v. SATYABHAMBABAI, WIDOW AND HEIR OF BALKRISHNA RAMCHANDRA, DECEASED (SECOND DEFENDANT), RESPONDENT.\*

*Mortgage without possession—Decree—Execution—Judicial sale—Right of mortgagee as against the purchaser—Effect of Court sale—Difference between a mortgage valid as against a private purchaser for valuable consideration and one valid as against a purchaser at a Court sale—Priority—Optional registration—Penalty.*

On the 19th September, 1871, the land in dispute was mortgaged by L. (defendant No. 1) to the plaintiff for Rs. 25. The deed of mortgage was not registered. By it defendant No. 1 agreed to pay interest at the rate of one pice per rupee per mensem, and it was provided that the mortgagee was to remain in possession for a period of twenty-five years in lieu of principal and interest, and that the mortgagor was not to claim the property back, unless he paid the principal and interest that might accrue due in twenty-five years from the date of the bond. On the 8th July, 1872, the land was sold in execution of a decree against the father of L. and purchased by B. (defendant No. 2), who obtained possession under the certificate of sale. In 1874 the plaintiff (the mortgagee) sued L. and B. for possession of the property. It was contended for B. (defendant No. 2) that the mortgage did not bind him, because he was a purchaser for value without notice of the mortgage, and because it was not accompanied with possession.

*Held* that, although the mortgage to the plaintiff might have been without possession, it would bind the mortgagor himself, and was, therefore, binding as against defendant No. 2, who purchased at a Court sale under a decree obtained against the mortgagor. A purchaser at such a sale takes only that which the judgment-debtor could himself honestly dispose of.

Possession or registration is necessary to validate a mortgage in the Deccan or elsewhere in the Presidency of Bombay (except Gujarat) against a private purchaser for valuable consideration, but not against a purchaser at a Court sale.

*Held*, also, that the clause in the mortgage deed as to payment of twenty-five years' interest was not a penalty.

THIS was a special appeal from the decision of Baron D. H. Larpent, District Judge of Poona, amending the decree of the Joint Subordinate Judge at the same place.

The plaintiff sued to obtain possession of one-eighth share of a field at Banere, in the district of Poona. The first defendant, Lakshman, mortgaged that share for Rs. 25 to the plaintiff by

\* Special Appeal, No. 134 of 1876.

deed dated the 19th September, 1871, which provided that interest should be paid at the rate of one pice *per mensem*, and it contained the following clause:—"You are to manage the same (i.e., the land) yourself, or cause any other person to manage it, and enjoy the same from the month of Chaitra in Shake 1794 (April, 1872). And in lieu of interest and principal amount you are to manage the same for the period of twenty-five years, and after the expiration of the (said) period you are to deliver the said land in my charge. Should an objection be made by me to your management, I shall not claim the land, unless I pay the principal and interest that may accrue due in twenty-five years from the date (of this bond)."

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A decree had been obtained against Lakshman's father, Ramji bin Vithoji, and on the 26th February, 1872, the decree-holder attached the land which had been mortgaged to the plaintiff, and on 8th July, 1872, sold it by auction to Balkrishna, the second defendant, who obtained possession. He died in the course of the present suit, and was then represented by his widow, Satyabhamabai. For the second defendant it was contended that as he had not notice of the first defendant's mortgage to the plaintiff, and as that mortgage was without possession, it was not binding upon him (the second defendant), he being a purchaser for valuable consideration. The Subordinate Judge awarded the sum of Rs. 33-14-0 to the plaintiff against the mortgaged property and defendant No. 1 personally. In appeal, the District Judge held that the clause in the mortgage deed relating to the payment of twenty-five years' interest was a penalty, and amended the decree of the first Court.

The plaintiff appealed to the High Court.

*Shamrav Vithal* for the appellant.

*Pandurang Balibhadra* for the respondent.

The following is the judgment of the High Court:—

WESTROPP, C.J.—The suit in which this special appeal has arisen, was brought by the plaintiff, Bapuji Balal, against Lakshman Ramji Tambre and Balkrishna Ramchandra to obtain possession of a share of one-eighth of a field at Banere, in the district of Poona. The first defendant, Lakshman, mortgaged

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that share to Bapuji Balal by deed dated 19th September, 1871, the translation of which runs as follows:—"Mortgage bond on the 5th of the month of Bhadrapad, Tuesday, in the cyclical year named Prajapati, Shake 1793 (19th September, 1871). On that day this mortgage bond is given in writing to Rajashri Bapuji Balal Khare, inhabitant of Poona, Peth Shanvar, by Lakshman bin Ramji Tambre, Mali (gardener), inhabitant of mauze Banere, tarf Haveli, for reasons as follows:—I have borrowed from you Rs. 25 in cash of the Company's coin, in letters twenty-five. As to interest thereon, I have agreed to pay you one pice per rupee *per mensem*. In security for the [payment of the] same there is my eighth share in Thal Payer bearing classification [Survey] No. 98 in the village of Banere, situate withing the local limits of the Sub-Registrar of taluka Haveli. The land, together with trees, shrubs, and the peru (guava) plantation therein, measuring 13 gunthas, assessed at rupee 1, has been mortgaged to you by me; you are to manage the same yourself, or cause any other person to manage it, and enjoy the same from the month of Chaitra in Shake 1794 (April, 1872). And in lieu of interest and principal amount you are to manage the same for the period of twenty-five years, and after the expiration of the [said] period you are to deliver the said land in my charge. Should an objection be made by me to your management, I shall not claim the land, unless I pay the principal and interest that may accrue due in twenty-five years from the date [of this bond]. I have this day taken and received these twenty-five rupees, and, consequently, there is no need of a [separate] payment receipt. I have duly given in writing this mortgage bond of my free will and pleasure and in sound mind and consciousness. The 19th of September, 1871."

Naro Govind had obtained a decree against Ramji bin Vithoji, the father of the defendant, Lakshman, in respect of a debt apparently due to Naro Govind from Vithoji, the grandfather of the defendant, Lakshman; and on the 26th February, 1872, caused the land now in dispute to be attached under that decree under which it was sold on the 8th July, 1872, by auction, to Balkrishna Ramchandra, the second defendant, who obtained possession. He died in the course of the present suit, and is represented by his widow and heir, Satyabhamabai. The certifi-

cate of sale has not been put in evidence : so it does not appear whether or not that certificate was registered. The sale has, however, been admitted.

In the Courts below it was contended that Lakshman, the mortgagor, was a minor when he executed the mortgage of the 19th September, 1871, and that the mortgage was fraudulent and antedated. The District Judge, however, (whose findings of fact bind this Court on special appeal,) has found against the alleged minority of Lakshman, and also that the alleged fraud has not been proved. Hence we must assume the mortgage to the plaintiff to be a genuine and valid instrument. Being for a sum under Rs. 100 it was optionally registrable only.

For the defendant, Balkrishna, it was contended that as he had not notice of Lakshman's mortgage to the plaintiff, and as it was without possession, it did not bind him (Balkrishna), he being a purchaser for valuable consideration. Whether the plaintiff ever had possession under Lakshman's mortgage, was a fact in dispute between the parties. The Subordinate Judge held that the plaintiff never had such possession. It is not quite clear on the judgment of the District Judge whether he intended so to hold. But, in the view which we are compelled to take of this case, it is not material whether or not the plaintiff ever had possession. No doubt, possession or registration is necessary to validate a mortgage in the Deccan (where the property in dispute lies), or elsewhere in this Presidency, except Gujarat, against a private purchaser for valuable consideration without notice ; but this is not the case of a private purchaser, but of a purchaser at a judicial sale, and, according to the main principle on which the recent Full Bench decision in *Sobhagchand v. Bhaichand*(1) was based, such a purchaser takes only that which the judgment-debtor could honestly dispose of, and although the mortgage to the plaintiff may have been without possession, it would bind the mortgagor himself : *Chintaman v. Shivram*(2) ; *Shark Adam v. Baba*(3) ; and see the remarks on the second exception to the rule as to possession in *Lakshmandas v. Dasrat*(4), another recent Full

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(1) *Supra*, p. 193.

(3) Sp. Ap. 286 of 1872. Printed Judg-

(2) 9 Bom. H. C. Rep., 304.

ments of 1872, December 9.

(4) *Supra*, p. 163.

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Bench decision. For these reasons we agree with the District Judge that the mortgage of 1871 must prevail against the judicial sale in 1872.

We regret that we are compelled to differ from the learned District Judge on the question of interest. It does not appear to us that the payment of twenty-five years' interest is a penalty. The main scheme of the mortgage is that the mortgagee should by twenty-five years' possession be deemed to have received in full both principal and interest, but that, if the mortgagor wished to regain possession of the land within that time, he might do so by repayment of so much of the principal and twenty-five years' interest as might then be due. This is an option given to him, and not a penalty inflicted on him. Of course, it must be understood that, if the mortgagee had been in possession, he would not be entitled to receive any principal or interest in proportion to such time as he may have been in possession, but the balance only of such principal and interest as so much of the twenty-five years as remained to run from the time of the redemption of the land by the mortgagor would represent. It was a part of the case of the plaintiff (the mortgagee) that he was in possession. For so much time as he has alleged that he was in possession he will not be entitled to the principal or interest as would be covered by that time. For example, if the plaintiff were in possession for two years, two twenty-fifth parts of the principal and two years' interest at the rate of one pice per rupee *per mensem* must be deemed to have been received by him, and he would be entitled on that hypothesis to the balance only of the principal, viz., Rs. 23 and interest at one pice per rupee *per mensem* on that amount from that time. It should be ascertained precisely for what time the plaintiff by himself or through his witnesses alleged that he was in possession; and the principal and interest due to him should be calculated according to the method above indicated. The decree of the District Judge stands varied accordingly by directing that the amount due to the plaintiff must be ascertained by that method. The parties respectively must bear their own costs of this appeal, and the respondent must also bear the costs (if any) of the cross-objections.

*Decree varied.*