

## APPELLATE CIVIL.

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

RUPCHAND DAGDUSA (ORIGINAL DEFENDANT), APPELLANT, v.  
DAVLATRAV VITHALRAY (ORIGINAL PLAINTIFF), RESPONDENT.\*

1882  
March 15.

Registration, optional, compulsory—Acts XX of 1866, VIII of 1871, and III of 1877, Section 50—Priority.

On the 14th February, 1869, S. and M. mortgaged a house and site to the plaintiff for Rs. 50. The mortgage was not registered. On the 15th June, 1870, S. (M. being then dead) mortgaged the same property to the father of the defendant for Rs. 200. That mortgage was registered. On the 24th June, 1871, S. further mortgaged the property to the plaintiff for Rs. 96, including the amount due on the previous mortgage. This second mortgage was not registered. Possession was not given under any of the mortgages. In 1873, the defendant obtained a decree on his mortgage against S., and in execution of it purchased the property for Rs. 20 at a Court sale. The certificate of sale, dated the 9th July, 1874, was registered, and the defendant was put in possession of the property under it. The plaintiff sued S. on his second mortgage, and obtained a decree upon it in 1875. The defendant was no party to that suit. The plaintiff attached the property in execution of his decree, but the attachment was removed on the application of the defendant. In 1879, the plaintiff sued the defendant on his two mortgages, seeking to enforce them and his decree on the second mortgage against the property. The defendant contended that section 50 of the Registration Act III of 1877 operated retrospectively and conferred priority on his mortgage of 1870, in virtue of its registration, even over the plaintiff's earlier mortgage of 1869.

*Held* that the plaintiff's unregistered mortgages, being each for a sum under Rs. 100, were, under the Registration Acts of 1866 and 1871, optionally, and not compulsorily, registrable, and that the Registration Act of 1866, under which the defendant's intermediate mortgage of 1870 had been registered, did not bestow any priority on it.

*Held*, further, that section 50 of the Registration Act III of 1877 was not retrospective in its application, and that, as registered purchaser at a Court sale, the defendant took subject to existing liens.

*Held*, also, that the plaintiff's decree did not operate against the defendant, as he was not made a party to the suit in which that decree was obtained, although the plaintiff had constructive notice of the defendant's mortgage through registration.

Kanithkar Joshi (1) followed.

THIS was a second appeal from the decision of E. Cordeaux, Judge of the District Court of Khandesh, reversing the decree

Second Appeal, No. 506 of 1880.

(1) I. L. R., 5 Bom. 442.

1882

RUPCHAND  
DAGDUSA  
v.  
DAVLATRAM  
VITHALRAV.

of Jeyasatya Bodhrav, Second Class Subordinate Judge at Amalner.

This suit was instituted by the plaintiff for possession of a house and site. The claim was dismissed by the Subordinate Judge, but allowed by the District Judge in appeal. The facts of the case are fully stated in the judgment of the High Court.

*Pandurang Balibhadra* for the appellant.

*Shivshankar Govindram* for the respondent.

The following is the judgment of the Court delivered by

WESTROPP, C. J.—The plaintiff has brought this suit to obtain possession of a house and site, mortgaged to him for Rs. 50 on the 14th February, 1869, by Shekji and Mukun (Mahomedans). That mortgage (exhibit 26) was not registered. The same property was mortgaged on the 15th June, 1870, by Shekji (Mukun being then dead) to Dagdusa, the father of the present defendant, Rupchand, for Rs. 200. That mortgage (exhibit 21) was registered. On the 24th June, 1871, Shekji further mortgaged the same property to the plaintiff for Rs. 96, including the sum due on the mortgage of the 14th February, 1869. This second mortgage to the plaintiff (exhibit 17), was not registered. Under none of these mortgages was possession given to either of the mortgagees. But in the year 1873 the defendant obtained against the mortgagor a decree under his mortgage (exhibit 21) for Rs. 167-9-6, and at a sale made in execution of that decree purchased the property for Rs. 20. The certificate of that sale (dated 9th July, 1874,) was registered. The defendant was put into possession of the property under that certificate of sale as purchaser. The plaintiff sued the mortgagor on the second mortgage to the plaintiff (exhibit No. 17), and in 1875 obtained a decree upon it, but in attempting to execute that decree was resisted by the defendant, and the plaintiff's attachment was removed. By the present suit, founded on his mortgage of 1869 and his mortgage of 1871, the plaintiff seeks to set aside the order removing his attachment, and to enforce those mortgages and his decree upon the second of them against the property. Those unregistered mortgages, having each been for a sum under Rs. 100, were, under the Registration Acts of 1866 and 1871, optionally, not compulsorily, registrable. The

Act of 1866, under which the defendant's intermediate mortgage of 1870 had been registered, did not bestow any priority, but it was contended that section 50 of Act III of 1877 operates retrospectively, so as to confer priority on the mortgage of 1870, in virtue of its registration, over even the plaintiff's earlier mortgage of 1869. This we, following *Kanithkar v. Joshi*(1), hold not to be so. And as registered purchaser at a Court sale we hold that the defendant took subject to existing liens (see Full Bench decision in *Sobhagchand v. Bhaichand*(2) ; *Bapuji Balal v. Satyabhamabai*(3), and *Rama Kuber v. Bai Lakhmi*(4).

The plaintiff has, it is true, by his plaint sought to enforce his decree on the second mortgage, which decree is inoperative against defendant, who was not made a party to the suit in which that decree was obtained, although plaintiff had through registration constructive notice of defendant's mortgage. But we do not think that we should put the plaintiff to the expense of another suit, because his pleader in the Court below mistook his remedy. We, therefore, vary the decree of the District Judge by ordering an account to be taken by the Subordinate Judge of the amount due to plaintiff on his mortgage of the 14th February 1869 (exhibit 26), and the defendant to pay the balance found due thereon within two months after amount of such balance is notified to him, or, in default, to deliver possession of the premises in the plaint mentioned to the plaintiff.

(1) I. L. R., 5 Bom. 442.

(2) *Supra*, p. 193.(3) *Supra*, p. 490.

(4) Second Appeal, No. 243 of 1981. Printed Judgments of 1882, p. 82.

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