

APPELLATE CIVIL.

FULL BENCH.

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

1882
February.

NARAN PURSHOTAM (ORIGINAL DEFENDANT), APPELLANT, v.
DOLATRAM VIRCHAND (ORIGINAL PLAINTIFF), RESPONDENT.*

*Mortgage—Priority—Purchaser for value without notice of a prior san-mortgage—
Suit by mortgagee against purchaser to establish right to attach property—Right
of purchaser to redeem—Parties—Form of decree.*

On the 23rd March, 1869, a house was mortgaged by its owner, P, to J by a *san-mortgage*. After the death of P, his heirs, D and T, on the 9th July, 1869, executed to the plaintiff a *san-mortgage* of the same house for Rs. 62. That mortgage was neither registered nor accompanied with possession. On the 27th July, 1869, D and T sold the house to the defendant. The deed of sale was not registered. A part of the purchase-money was applied to the payment of the first *san-mortgage*, which was then delivered up to the defendant, with a receipt on it by J, who acknowledged to have received from the defendant the amount due on his mortgage. The defendant, however, omitted to take an assignment of that mortgage to himself. The plaintiff sued D and T on his *san-mortgage* of the 9th July, 1869, and, in 1872, obtained a decree for the recovery of the mortgage-debt out of the mortgaged property. The defendant was not made a party to that suit. The plaintiff attached the house in execution of his decree; but the attachment was raised on the application of the defendant under section 246 of the Civil Procedure Code, Act VIII of 1853. The plaintiff then sued the defendant to establish his (plaintiff's) right to attach and sell the house under his *san-mortgage*. The defendant answered that he was a purchaser for value, without notice of the plaintiff's mortgage. The plaintiff's claim was dismissed by the first Court, but allowed by the Appellate Court. On special appeal

Held, that the defendant's plea that he was a purchaser for valuable consideration, and without notice of the plaintiff's *san-mortgage*, would not avail to defeat that mortgage under the established usage of Gujarat in favour of *san-mortgages*.

Held, further, that the defendant, having become entitled by his purchase at least to the equity of redemption in the house, ought to have been made a party to the plaintiff's original suit on his mortgage, and was not bound by the decree in that suit, and was entitled to a reasonable time to redeem the house from the plaintiff's mortgage.

Sobhagchand v. Bhaichand(1) referred to and followed.

THIS was a special appeal from the decision of W. H. Newnham, Judge of the District Court of Ahmedabad, reversing the

* Special Appeal, No. 240 of 1875.

(1) See *supra*, p. 193.

decree of Chunilal, Manaklal, Second Class Subordinate Judge at the same place.

The special appeal first came before Westropp, C. J., and Nanabhai Haridas, J., who, on the 16th December, 1876, referred it to a Full Bench in connection with *Sobhagchand v. Bhaichand* (1), reported *supra*, p. 193.

The facts of the case are briefly mentioned in the head-note above, and will be found more fully stated in the judgment of the Full Bench.

Nagindas Tulsidas for the appellant.

Dhirajlal Mathuradas for the respondent.

The following is the judgment of the Full Bench, delivered by

MELVILL, J.—This special appeal was argued before the same Full Bench which heard the reference in Special Appeal, No. 540 of 1873(1), on which reference judgment has been given to-day.

The house in dispute originally belonged to Pitha Bhana, who, in 1869, mortgaged it by way of *san* to Jeysang Bhavani. Pitha having died, the equity of redemption of the house devolved upon his heirs, Dala Dungar and Tulsu Dungar. They mortgaged it by way of *san* to the plaintiff, Dolatram, on the 9th July, 1869, for Rs. 62. That mortgage was unregistered. On the 27th July, 1869, Dala Dungar and Tulsu Dungar sold the house to the defendant, Naran; the deed of sale was unregistered. A part of the money was applied in paying off the first *san*-mortgage, viz., that to Jeysang Bhavani, which was then delivered up to the defendant, and upon it there was written a receipt dated 27th July, 1869, whereby Jeysang Bhavani acknowledged to have received from the defendant, Naran, the amount due on that mortgage. Naran unfortunately, however, did not take an assignment of that mortgage either to himself or to a trustee for him. The plaintiff Dolatram instituted, against Dala Dungar and Tulsu Dungar, a suit on the *san*-mortgage of the 9th July, 1869, to recover the amount due thereon, and obtained a decree to that effect in 1872. An attachment was thereupon issued against the house, but, on the application, under section 246 of Act VIII of 1859, of the

(1) See *supra*, p. 193.

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present defendant, Naran, (who had not been made a party to that suit,) was raised on the 21st October, 1872. The plaintiff thereupon brought the present suit against Naran to establish the plaintiff's right under his *san*-mortgage of the 9th July, 1869, to attach and sell the house. Naran had not any notice of the plaintiff's *san*-mortgage when he (Naran) purchased the house on the 27th July, 1869, from Dala Dangar and Tulsī Dangar, though he had made some inquiry as to their title. The Subordinate Judge dismissed the plaintiff's suit. The District Judge reversed that decision and made a decree for the plaintiff, against which the defendant has instituted the present special appeal to the High Court.

The reply, which we have to-day given to the first question on the reference in *Sobhagchand v. Bhaichand*(1), shows why we must hold that Naran's plea—that he has purchased for valuable consideration and without notice of the plaintiff's *san*-mortgage—will not avail Naran to defeat that mortgage in the presence of the established usage of Gujarat in favour of *san*-mortgages. But Naran, having by his purchase become entitled at least to the equity of redemption in the house, ought to have been made a party to the plaintiff's original suit on that mortgage, and, not having been so, is not bound by the decree in that suit, and is entitled now to a reasonable time to redeem the house from the plaintiff's mortgage. There is nothing to show that Naran was aware of the plaintiff's original suit, whereas Naran being then in possession of the house, the plaintiff must have wilfully omitted to make Naran a party to that suit in which the equity of redemption was then wholly unrepresented, inasmuch as the defendants in that suit had divested themselves by their sale to Naran of all interest in the house. Under these circumstances the accounts taken by the Court in the plaintiff's original suit do not bind Naran, and, if such be his desire, but not otherwise, let there be a fresh account taken of what was due to the plaintiff on his *san*-mortgage. Naran must, within one month after the decree of this Court in this suit is notified to him by the Subordinate Judge, elect whether he (Naran) will have such fresh account taken or not. If within six calendar months from his

(1) See *supra*, p. 193.

election to abide by the former accounts or within six calendar months after the Subordinate Judge shall have notified to the defendant, Naran, or his pleader the amount found due on such fresh account, as the case may be, the defendant, Naran, do not pay the amount due to the plaintiff on his *san*-mortgage, let the defendant, Naran, be for ever barred and foreclosed from redeeming the said house, and let the same be sold, and let the amount due to the plaintiff be paid to him out of the proceeds of sale, and the balance (if any) made over to the defendant, Naran. The decree of the District Judge must be varied in conformity with the above directions. The defendant, Naran, should pay to the plaintiff his costs of the suit. The parties respectively should bear their own costs of the appeals.

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Decree varied.

APPELLATE CIVIL.

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

**KHODABHAI MAHIJI, PLAINTIFF, v. BAHDHAR DALA
AND OTHERS, DEFENDANTS. ***

March 13.

Hindu law—Inheritance in Gujarat—In Gujarat the father succeeds to the estate of a son, dying without issue or widow, in preference to the mother.

In Gujarat the right of succession to the estate of a Hindu who is separate in interest and who, at his death, leaves a father and mother, but no issue or widow, devolves upon the father, in preference to the mother.

This was a reference under section 617 of Act X of 1877 by Rao Saheb Madhuvachram Balvachram, Subordinate Judge of Borsad, in the District of Ahmedabad.

The following are the facts of the case as stated by the Subordinate Judge:—The plaintiff, Khodabhai, sued to recover Rs. 40, due on a bond, dated the 14th December, 1875, and payable on the 17th March, 1877. The bond was executed by Gabad Bahdhar (deceased) as principal and Kala Vahala as surety. Gabad died before the institution of the suit without issue or widow, but

* Civil Reference, No. 19 of 1880.