

Hence we think that the Indian Legislature did not intend to exclude such property from section 1, clause 12 of the Act. The opposite opinion expressed by some of the other tribunals which have dealt with this case renders us diffident in taking this view ; but of this we are certain that no Hindu would have supposed the grant to be other than immoveable property. We affirm the order of Sir Charles Sargent with costs.

1882

THE
COLLECTOR
OF THANA
v.
HARI
SITARAM.

Order affirmed.

APPELLATE CIVIL.

Before Mr. Justice Melvill and Mr. Justice Pinhey.

SHANTAPA (ORIGINAL DEFENDANT), APPELLANT, v. BALAPA (ORIGINAL PLAINTIFF), RESPONDENT.*

1880
April 24.

Mortgage—Prior and puisne mortgagee —Purchase by prior mortgagee of equity of redemption at a court sale—Evidence of intention to keep mortgage alive.

Where a prior mortgagee purchased the equity of redemption at a court sale, held, following the Full Bench ruling in *Mulchand Khuber v. Lallu Trikam* (1), that in a contest between himself and a puisne mortgagee he was entitled to fall back upon his original mortgage, and to retain possession until his mortgage was paid off.

Generally, slight evidence will suffice to show that the prior mortgagee intended to retain the benefit of his mortgage. The fact that the mortgage deed remains with the mortgagee who purchases is evidence that he intends to retain the benefit of his mortgage.

THIS was a second appeal from the decision of C. F. H. Shaw, Judge of Belgaum, confirming the decree of A. M. Cantem, Subordinate Judge (First Class) at Belgaum.

One Yeshvant owned a piece of land in the village of Karalgi, taluka Bidi, of the Belgaum District. He mortgaged it to the defendant, Shantapa, when, it did not appear, the deed of mortgage not having been produced in the case ; but Shantapa obtained a decree upon it, which directed that Yeshvant should pay him annually Rs. 100 until the debt, amounting to Rs. 706-10-9, was liquidated, and, in default of the punctual payment of this sum of Rs. 100, the said Shantapa was to be immediately placed in possession of the land. The stipulated sum was not paid,

*Second Appeal, No. 387 of 1878.

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and Shantapa was placed in possession in March, 1863, for a term of years.

The owner, Yeshvant, next mortgaged the same piece of land to one Vithalrav in 1866, who obtained a decree against him for possession, and was placed in possession in 1867. The evidence as to the possession of this land was conflicting. Each mortgagee alleged that he had obtained possession. Vithalrav, it was alleged, continued in possession for three years, at the end of which his mortgage was paid off, and possession reverted to Yeshvant.

Defendant, Shantapa, in 1867 brought a second suit against Yeshvant, and in execution of his decree put up the land to sale, and purchased it himself.

On the 27th of January, 1870, Yeshvant mortgaged the land to the plaintiff, Balapa, who sued him in 1873, and obtained a decree in January, 1874.

In August following the defendant, Shantapa, was again placed in possession. The plaintiff having, on the 10th of October, 1874, applied for execution, was obstructed by the defendant; hence this suit.

The defendant contended that his mortgage was earlier than that of the plaintiff, and denied that his subsequent purchase of the mortgaged property affected in any way his right to the settlement of his original prior mortgage.

The Courts below held that the defendant's mortgage had merged in his purchase. They, therefore, decreed that the defendant should deliver possession of the land to the plaintiff until the plaintiff's debt was satisfied, that is to say, for a period of nine years, or that the defendant should pay to the plaintiff the sum due upon his mortgage and retain possession of the land.

The defendant appealed to the High Court.

Gokaldas Kahandas Parekh for the appellant.

Vinayak Mahadev Pandit for the respondent.

The judgment of the Court was delivered by

MELVILL, J.—It has been decided by the Full Bench in *Mulchand Khuber v. Lallu Trikam* (1)(a) that the purchase by a

(1) *Supra*, p. 404.

mortgagee of the equity of redemption does not necessarily prevent the mortgagee from falling back upon his mortgage in a contest between himself and a puisne mortgagee. The question in such cases is whether the prior mortgagee and purchaser intended to retain the benefit of his charge, and this question may be decided in the affirmative, if he have declared his intention by express words, or necessary implication, that the mortgage shall continue to subsist, or if such continuance would be for his benefit. Generally, slight evidence will suffice to establish such an intention. Now, in the present case, the defendant was a purchaser, not from the mortgagor himself, but at a court sale, and, therefore, there could have been no agreement between the mortgagor and the defendant that the mortgage should merge, nor any restoration of the mortgage-deed to the mortgagor. The circumstance, of which we can entertain no doubt, that the mortgage-deed remained with the purchaser, would be evidence that he intended to retain the benefit of his mortgage. Moreover, the plaintiff's mortgage was registered; and defendant must be supposed to have had notice of it; and with such knowledge it would be very improbable that he should give up his own mortgage, and render himself liable to redeem a subsequent incumbrancer. It was so clearly to the benefit of the defendant that he should retain his own mortgage, and the circumstances, so far as they appear, are so clearly indicative of the probability of such an intention, that we do not think it necessary to send down an issue on the subject, which could only be decided in one way. We, therefore, determine that the defendant is entitled to remain in possession until his mortgage is paid off, and we, accordingly, reverse the decrees of the Courts below, and reject the claim with costs on the plaintiff throughout.

Decrees reversed.

1852

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