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was erroneous. The Subordinate Judge had jurisdiction to decide whether the matter before him was *res judicata* or not; and if he decided this question wrongly, or, if the question not having been raised, he did not decide it at all, his decision is not the less binding, and cannot now be set aside.

We have come to this conclusion reluctantly, for the plaintiff seems to have been diligent in his endeavours to obtain the fruit of his decree. He appealed against the fatal order of the 28th November, 1876, and the ground on which his appeal was rejected was a very technical one. He might, (unless there was some strong reason to the contrary), have been allowed time to produce the copy of the order appealed against.

The order of the District Judge is reversed, and that of the Subordinate Judge restored. The respondent must bear the costs in the two lower Courts. The parties will bear their own costs of this second appeal.

Decree reversed.

APPELLATE CIVIL.

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

September 6. APA'JIBHIVRA'V RAYRIKUR (ORIGINAL PLAINTIFF NO. 3), APPELLANT, v. KA'VJLANDANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

Mortgage of property already sold in execution—Subsequent mortgagee with notice of previous sale—Assignment—Rejection of application under section 269 of Act VIII of 1859—Suit within one year.

On the 17th October, 1866, K (defendant No. 1), one of the three sons of Bahirji, mortgaged certain immoveable property to one Narhar with possession. On the 19th December, 1866, Atmaram (plaintiff No. 1) obtained a money decree against K and the estate of his deceased father. In execution of that decree the property was sold by the Court and purchased by Atmaram himself, who obtained a certificate of sale dated the 30th January, 1868. He subsequently sold and conveyed the property to Damodar and Apaji (plaintiffs Nos. 2 and 3). On applying to the Court for possession, the plaintiffs were resisted by Narhar. The Court rejected the plaintiffs' application on the 11th July, 1868. On the 31st May, 1871, K and his two brothers mortgaged the property to M (defendant No. 2), who took the mortgage with full notice of the Court sale to the plaintiff Atmaram. K and his

*Second Appeal, No. 26 of 1881.

brothers paid off the mortgage of Narhar out of the money borrowed by them from M (defendant No. 2) on the mortgage of the property. Narhar returned his mortgage-deed to K and his brothers, who made it over to M. In 1878 the plaintiffs brought a suit against K and M for possession of the property. The Subordinate Judge held the plaintiffs entitled to recover it, on payment of the amount due to M on his mortgage, being of opinion that M was in the same position as Narhar. In appeal, the District Judge dismissed the plaintiffs' suit, on the ground that it was not brought within one year from the date when the application for possession was rejected. On appeal to the High Court,

Held that the mortgage by K and his brothers to M, dated the 31st May, 1871, was a mortgage of property which did not then belong to them,—their estate and interest in it having passed to the plaintiff Atmárám at the Court sale.

Held, also, that the order of the 11th July, 1868, rejecting the plaintiffs' application for possession under section 269 of the Civil Procedure Code (Act VIII of 1859) did not affect the right to bring a redemption suit against Narhar.

Held, further, that there was nothing to show any assignment, by Narhar, of his mortgage, or any intention on his part to assign it to M, or to keep it on foot for M's benefit.

The High Court, accordingly, reversed the decrees of the Courts below, and made a decree in favour of the plaintiffs.

THIS was a second appeal from the decision of W. H. Newnham, District Judge of Poona, reversing the decree of D. J. Karmarkar, Joint Subordinate Judge at the same place.

On the 17th October, 1866, Kavji, one of the three sons of one Bahirji, mortgaged certain immoveable property to Narhar with possession. On the 19th December, 1866, Atmaram (plaintiff No. 1) obtained a decree against Kavji and the estate of his deceased father Bahirji, and in execution of that decree the property was sold by the Court and purchased by Atmaram himself, who obtained a certificate of sale dated 30th January, 1868. He subsequently sold and conveyed the property to Damodar and Apaji (plaintiffs Nos. 2 and 3). On applying to the Court for possession, the plaintiffs were resisted by Narhar, and the application was rejected. On the 31st May, 1871, Kavji and his brothers, Jabaji and Genu, mortgaged the property to one Manikji with notice of the previous execution sale to the plaintiff Atmaram. Out of the money advanced by Manikji, Kavji and his brothers paid off the mortgage of Narhar, who returned his mortgage-deed to them, by whom it was thereupon handed over to Manikji. In 1878, Atmaram and his vendees (Damodar and Apaji) sued Kavji and Manikji for possession of the property.

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Shamrav Vithal appeared for the appellant (plaintiff No. 3).

G. R. Kirloskar appeared for the respondents.

The following is the judgment of the Court delivered by—

WESTROPP, C. J.—The mortgage (exhibit 19) of the 31st May 1871, by Kavji, Jabaji, and Genu, the three sons of Bahirji, to Manikji was a mortgage of property which did not then belong to those mortgagors. Their estate and interest in that property had, under the judicial sale (evidenced by the certificate of sale (exhibit 13), dated the 30th January, 1868), passed to the plaintiff Atmaram, who subsequently sold and conveyed it to the plaintiffs, Damodar and Apaji. Manikji, as appears from the evidence of witness Bhikaji Gopal, (the writer of exhibit 19,) had full notice of the sale to Atmaram; nevertheless with that knowledge he ignored Atmaram's claim, and dealt with the ex-owners of the property, who could not convey to him any title.

It is said that Narhar, the alleged mortgagee of the 17th October, 1866, having defeated, under section 269 of Act VIII of 1859, an attempt of Atmaram to obtain possession of the property, and Atmaram not having brought an action of ejectment within a year after his failure to obtain such possession, Manikji may have assumed that Atmaram had lost all title to the property. But there was nothing to prevent Atmaram from bringing a suit against Narhar for redemption. The order under section 246 could not and did not affect that right; and if Manikji supposed otherwise, he must take the consequence of his mistake in law: *ignorantia legis neminem excusat*.

Again, on behalf of Manikji it has been contended that he must be regarded as occupying the same position, at least as Narhar, and that the plaintiffs cannot recover the property without paying, as redemption to Manikji, the amount which is said to have been paid to Narhar. This might be so if Manikji could in anywise be regarded as assignee of Narhar's mortgage. Manikji's own deed of mortgage, however, negatives any such assignment to Manikji. The mortgage to Manikji, which was executed by the three sons of the deceased Bahirji, shows that they borrowed Rs. 325 from Manikji, and that they (not Manikji) paid off Narhar by giving to him Rs. 300 out of the money which they so borrowed,

and that Narhar then returned his mortgage to the three sons of Bahirji, who then made the same over to Manikji. Narhar did not execute or in anywise assign his mortgage to Manikji, but he (Narhar) attested the mortgage to Manikji. Although that mortgage to Manikji, as already said, recites the making over, by the sons of Bahirji, of Narhar's mortgage-deed to Manikji, the latter has not produced it, nor has it been given in evidence either here or in the lower Courts. The writer of Manikji's mortgage states that he indorsed upon Narhar's mortgage-bond a release thereof which was signed by Narhar—a circumstance which may perhaps account for the non-production of that mortgage. No excuse for its non-production has been given by or on behalf of Manikji, and secondary evidence of it, therefore, is inadmissible. Hence there was not before the lower Courts and is not here any lawful evidence that Narhar's mortgage ever existed. But, even if there were, there is naught (as we have said) to show any assignment of it by Narhar, or of any intention, on his part, to assign it to or to keep it on foot for the benefit of Manikji.

Under these circumstances we must reverse the decree of the District Judge (except so far as it reverses the decree of the Subordinate Judge), and make a decree that the plaintiffs, Damodar and Apaji, do recover the premises in the plaint mentioned. We give no mesne profits in consequence of the laches of the plaintiffs in enforcing their claim, and we direct that the parties, respectively, bear their own costs throughout. This decree is made without prejudice to any equities which may exist between the plaintiffs, Damodar and Apaji.

Decree reversed.

APPELLATE CIVIL.

Before Sir M. R. Westropp, Kt., Chief Justice, and Mr. Justice Kemball.
 NA'RA'YAN BHIVRA'V (ORIGINAL DEFENDANT), APPELLANT, v. KASHI
 AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS.*

July 27.

Landlord and tenant—Inamdar—Notice to quit—Ejectment—Partition.

An *inamdar* cannot eject a yearly tenant without six months' notice to quit, ending with the cultivating year. Nor can he eject other tenants, except on the expiration of their term of years or other interest in the land.

* Second Appeal, No. 29 of 1880, from order.

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