

## APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Birdwood.

1883.  
August 13.

MOHAN MA'NOR, (ORIGINAL PLAINTIFF), APPELLANT, v. TOGU UKA',  
(ORIGINAL DEFENDANT), RESPONDENT.\*

*Mortgage—San mortgage—Mortgage with possession—Sale in execution of decree obtained by first mortgagee—Purchase by first mortgagee at such sale—Suit by purchaser against second mortgagee for possession—Rights of second mortgagee—Redemption.*

In 1866, R. executed a *san* mortgage of certain land to the plaintiff, and four years afterwards mortgaged the same land with possession to the defendant. In 1875 the plaintiff brought a suit against R. alone upon the mortgage, obtained a decree, and he himself purchased the property at the Court sale held in execution of that decree. In attempting to take possession he was obstructed by the defendant, who was in possession of the property as mortgagee. The plaintiff now sued the defendant for possession. Both the lower Courts held that the plaintiff should satisfy the defendant's subsequent mortgage before he could recover possession. On appeal by the plaintiff to the High Court,

*Held*, reversing the lower Courts' decree, that the plaintiff's claim should be allowed. The plaintiff having brought to sale, in execution of his decree, the estate as it stood at the date of his mortgage free from all subsequent incumbrances, the fact that he himself was the purchaser could not affect the estate which passed by that sale. As the defendant had not been a party to the plaintiff's suit against R., he was entitled to redeem the property if he wished.

THIS was a second appeal from the decision of F. Beaman, Assistant Judge of Ahmedábád.

In 1866 one Rajebháí executed a *san* mortgage, by a registered deed, of the land in dispute to the plaintiff. Four years afterwards he mortgaged the same land to the defendant, with possession, by another registered deed.

In 1875 the plaintiff sued Rajebháí alone upon his mortgage, obtained a decree, and at a sale in execution of that decree he himself purchased the land. In attempting to take possession of the land the plaintiff was obstructed by the defendant, who was then in possession.

The plaintiff now brought the present suit to recover possession of the land and for mesne profits.

The defendant (*inter alia*) contended that Rajebháí had mortgaged the land to him with possession by a duly registered deed

\* Second Appeal, No. 717 of 1883.

that he had not been made a party to the suit brought by the plaintiff against Rajebháí; that the plaintiff was fully aware of the defendant's mortgage at the date of the auction sale at which he purchased the land, and that the title of the plaintiff should not prevail over his title, he having been in possession of the land.

The Subordinate Judge of Dhanduka, who tried the suit, dismissed the plaintiff's claim for possession with the following remarks:—" \* \* \* As the plaintiff is the purchaser at an auction sale, he cannot be presumed to have intended to retain his mortgage claim. No such thing is mentioned in the sale certificate No. 3. But, even if the plaintiff be considered to have intended to retain his mortgage claim, he cannot now get possession of the field without paying the defendant's charge \* \* \* \*. I hold that the plaintiff's decree and sale certificate are not binding on the defendant, and that his right to enforce his mortgage against the defendant is time-barred. The plaintiff must suffer the consequences of his own neglect in not making the defendant a party in his former suit. He cannot, therefore, now recover possession of the disputed field from the defendant without paying his charge of Rs. 500. As the plaintiff does not express willingness, in his deposition, to redeem the defendant's mortgage, the Court does not think it proper to order redemption by him in this suit \* \* \*. The plaintiff's claim for possession of the disputed field is rejected."

The plaintiff appealed, and the lower Appellate Court upheld the Subordinate Judge's decree.

The plaintiff preferred a second appeal to the High Court.

Ráv Sáheb Vāsudev Jagannáth Kirtikar for the appellant:—The lower Courts were wrong in ordering the appellant to redeem the subsequent mortgage of the defendant. The Court sale was held in execution of a decree upon a mortgage, and what the appellant bought at it was the right and interest of the mortgagor and mortgagee free from any subsequent incumbrance by the mortgagor—*Wāsudev Báláji v. Náráyan Krishna*<sup>(1)</sup>. It is immaterial whether the purchaser was the mortgagee himself: see *Kasandás Láldás v. Pránjivan Ashárám*<sup>(2)</sup>.

(1) Printed Judgments for 1882, p. 21. (2) 7 Bom. H. C. Rep., A. C. J., 146.

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*Goculdás Kahándás* for the respondent:—The appellant's mortgage was a *san* mortgage, which amounts to a mere hypothecation. As *san* mortgagee he is not entitled to possession, and a period of sixty years would not apply to it. Twelve years having elapsed since the appellant's mortgage, the appellant is entitled to recover no money under it. The respondent's mortgage was accompanied with possession, and though subsequent in time is entitled to preference. At best, the appellant is entitled to a right of redemption.

SARGENT, C. J.:—The lower Courts were wrong in holding that the plaintiff, as the purchaser at auction sale under the decree obtained in his suit of 1875 against Rajebháí, was bound to satisfy the defendant's mortgage which was subsequent in date. The plaintiff at the auction brought to sale the estate as it stood at the date of his mortgage free from all subsequent incumbrances—*Kasandás Láldás v. Pránjivan Ashárám*<sup>(1)</sup>; *Wásudev Báláji v. Náráyan Krishna*<sup>(2)</sup>; and the fact that the plaintiff was himself the purchaser cannot affect the estate which passed by the sale—*Dámodar Devchand v. Náro Mahádev*<sup>(3)</sup>. However, as the defendant was not made a party to the suit in ~~the~~ the decree of 1876 was made, he is still entitled to redeem the property if he so wishes—*Wásudev Báláji v. Náráyan Krishna*<sup>(4)</sup>; *Mansukh Pitámbar v. Tarbhovan Parshotam*<sup>(5)</sup>.

The decree of the Court below must, therefore, be reversed, and a decree passed, that defendant do deliver possession to the plaintiff of the land in question, but should be at liberty to redeem the same by payment, within six months after taking the account, of what is due on the mortgage of 30th June, 1866. The account of the mortgage-debt to be taken on the basis of what was found due on or by the decree of 26th January, 1876. Defendant to pay costs throughout.

*Decree reversed.*

<sup>1)</sup> 7 Bom. H. C. Rep., A. C. J., 146.      <sup>(3)</sup> I. L. R., 6 Bom., 11.

<sup>(2)</sup> Printed Judgments for 1882, p. 21.      <sup>(4)</sup> Printed Judgments for 1882, p. 21.

<sup>(5)</sup> Printed Judgments for 1882, p. 213.