

APPELLATE CIVIL.

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

1885.
August 13.

DULLABHDÁS DEVCHAND, (ORIGINAL PLAINTIFF), APPELLANT, v. LAKSHMANDÁS SARUPCHAND, (ORIGINAL DEFENDANT), RESPONDENT.*

Mortgage—Two mortgages to same mortgagee—Merger of first mortgage—Intention—Decree on second mortgage—Other mortgagees not made parties to suit—Purchaser at auction sale—Priority—Suit by purchaser for possession—Right of other mortgagees to redeem—Form of decree.

On the 15th of July, 1870, certain lands were mortgaged by their owners (Sham-bhu and his sons) to one Harlál with possession under a registered mortgage. On the 11th of June, 1871, the same lands were mortgaged without possession to the defendant; on the 10th of June, 1873, a second mortgage, purporting to give possession, was executed to Harlál; on the 12th of June, 1873, a second mortgage, also purporting to give possession, was passed to the defendant; on the 15th of November, 1877, Harlál obtained a decree against the mortgagors upon his mortgage of 10th June, 1873, and sold the lands, which were purchased by the plaintiff. The plaintiff sought to obtain possession, but was obstructed by the defendant. He thereupon brought this suit. The defendant contended that he had not been a party to the suit by Harlál, and was entitled to possession, and offered to pay to the plaintiff the amount of his purchase money, or to vacate the lands on satisfaction of his own mortgage lien.

Held, that the question whether Harlál's mortgage of the 15th July, 1870, was to be regarded as merged in his second mortgage of 10th June, 1873, so as to deprive him of priority of title over the defendant, depended on the intention of the parties to the said mortgage, and there was nothing in the second mortgage deed to show an intention to forego the benefit of the security created by the prior mortgage deed of 15th July, 1870, which was neither given up to the mortgagor nor cancelled at the time, but remained with Harlál until handed over to the plaintiff with the other title deeds. Under these circumstances the decree passed on the 15th November, 1877, conferred an absolute title on the plaintiff, who purchased at the auction sale free from all incumbrances created by the mortgagor subsequent to the mortgage of 15th July, 1870. The defendant, however, not having been made a party to Harlál's suit to enforce his security, did not lose his right of redemption, which still remained to him. The plaintiff, therefore, purchased the property subject to the defendant's right of redemption.

The High Court passed a decree ordering the defendant to deliver up possession to the plaintiff, but that he (the defendant) should be at liberty to redeem by payment to the plaintiff within six months of the amount which would be due on the mortgage of the 15th July, 1870, if the same had remained unaffected by the mortgage of 10th June, 1873, or, in default, should remain for ever foreclosed.

* Second Appeal, No. 537 of 1883.

THIS was a second appeal from the decision of M. B. Baker, Judge of the district of Khándesh, confirming the decree of the Subordinate Judge of Yával.

1885.

DULLABHDÁS
DEVCHAND

v.

LAKSH-
MANDÁS
SARUFCHAND.

On the 15th of July, 1870, certain lands belonging to one Shambhu and his two sons were mortgaged by them to one Harlál without possession under a registered instrument. On the 11th of June, 1871, the same lands were mortgaged without possession to the defendant. On the 10th of June, 1873, a second mortgage was passed to Harlál. It purported to give him possession. On the 12th of June, 1873, a second mortgage was passed to the defendant. That also purported to give possession to the defendant. On the 15th of November, 1877, Harlál obtained a decree against his mortgagors upon his mortgage of 10th June, 1873, and sold the lands, which were purchased by the plaintiff. In this suit of Harlál the defendant was not made a party.

The plaintiff sought thereupon to obtain possession of the property, but was obstructed by the defendant. The plaintiff accordingly brought the present suit against the defendant to recover possession.

The defendant contended that he was entitled to possession, as he was not bound by Harlál's decree, to which he was not a party, and offered to pay the plaintiff the amount of his purchase money, or to vacate the lands on satisfaction of his own mortgage lien.

The Court of first instance as well as the Court of appeal rejected the plaintiff's claim.

The plaintiff appealed to the High Court.

Shivrám Vithal Bhándárkar for the appellant.—The second mortgage of Harlál was a renewal of the first. The former was not merged in the latter. The question of merger is one of intention—*Goluknáth Misser v. Lalla Premlál*⁽¹⁾. The plaintiff purchased an absolute title free from incumbrances, and is, therefore, entitled to possession as prior mortgagee.

Mahádev Chimnáji Apte for the respondent.—The defendant was not made a party to the suit of Harlál against his mortgagors, and the decree in that suit does not bind him. He does not, therefore, lose his right of redemption. The plaintiff's suit is one of ejection, and not of foreclosure.

(1) I. L. R., 3 Calc., 307.

1885.

LULLABHDÁS
DEVGHAND
v.
LAKSHMAN-
DÁS
SARUPCHAND

SARGENT, C.J.—The plaintiff in this case is the purchaser at auction-sale in execution of a decree passed on 15th November, 1877, ordering the sale of certain property which had been mortgaged by one Sambhu and his sons to Harlál Sarbhárám on 10th June, 1873.

It appears that the same property had been previously mortgaged with possession on a registered deed on 15th July, 1870, to Harlál; and it is not disputed that, in 1873, an account having been taken of the principal and arrears of interest due on that mortgage, the second mortgage was passed as a security for the aggregate amount of the said principal and interest, and a further sum as principal—the arrears of interest. The defendant was also a mortgagee of the same property by a mortgage-bond of 11th June, 1871, in substitution for which a mortgage of 12th June, 1873, was subsequently passed, by which the principal and interest due on the former mortgage were converted into principal.

The first question which arises in the case is, whether Harlál's mortgage of 15th July, 1870, is to be regarded as merged in the second mortgage of 10th June, 1873, so as to have deprived Harlál of the priority of title over the defendant. We agree with the remark of White, J., in *Goluknáth Misser v. Lalla Premal* (1), that in such a case "it depends upon the intention of the parties whether or not the earlier security has become merged or extinguished in the later one." In the present case, as in the one cited, there is nothing in the second security to show an intention to forego the benefit of the security created by the prior mortgage-bond of 1870, which was neither given up to the mortgagor, nor cancelled at the time, but remained with Harlál until handed over to the plaintiff with the other title-deeds. Under these circumstances, it is plain that the decree, which was passed in 1877, conferred an absolute title on the purchaser at auction free from all incumbrances created by the mortgagor subsequent to the mortgage of 1870—*Wásudev Báláji v. Náráyan Krishna*(2).

(1) I. L. R., 3 Calc., at p. 309.

(2) Printed Judgments for 1882, p. 21.

The defendant, however, was not made a party to Harál's suit to enforce his security, and, therefore, does not lose his right of redemption, which, according to the well-established rule of Courts of Equity in England, followed in the Courts of this country, still remains open—*Ganesh Saddshiv v. Bálkrishna Gopál* ⁽¹⁾; *Venkata Somayazulu v. Kannam Dhora* ⁽²⁾; *Bir Chunder Manikya v. Mahomed Afsarodeen* ⁽³⁾. The plaintiff, therefore, purchased the property subject to the defendant's right of redemption. Now, it is true that the plaintiff's suit is not one to foreclose the defendant, but we think we shall be only following the practice of this Court in analogous cases if we reverse the decree of the Court below and pass a decree in the same form as was adopted in *Wásudev Báláji v. Náráyan Krishna* ⁽⁴⁾, viz., that the defendant do deliver possession to the plaintiff, but that he be at liberty to redeem by payment to the plaintiff, within six months, of the amount which would be due on the mortgage of 15th July, 1870, if the same had remained unaffected by the mortgage of 1873, or, in default, should remain for ever foreclosed. The defendant to pay plaintiff his costs throughout.

(1) Printed Judgments for 1879, p. 28. (3) I. L. R., 10 Calc., 299.

(2) I. L. R., 5 Mad., 184.

(4) Printed Judgments for 1882, p. 21.

APPELLATE CIVIL.

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

CHATUR KUSHA'LCHAND, DECREE-HOLDER, v. MAHA'DU BHAGA'JI,
JUDGMENT-DEBTOR.*

1885.
August 13.

Dekkhan Agriculturists' Relief Act XVII of 1879, Sec. 22—Conciliation-agreement—Civil Procedure Code (Act XIV of 1882), Sec. 261—Limitation Act XV of 1877, Sch. II, Art. 179—Application for attachment of an agriculturist's property.

A conciliation-agreement dated the 2nd October, 1880, between the decree-holder and the judgment-debtor, stipulating that the former should allow a remission of 10 rupees and the latter should execute a document for the remaining sum of Rs. 90, to be paid in 1882, was filed in Court on 20th November, 1880. In 1883 the decree-holder presented two applications for satisfaction of the agreed debt of Rs. 90 by attachment of the debtor's property, which applications were

* Civil Reference, No. 25 of 1885.

1885.
DULLABHDÁS
DEVCHAND
v.
LAKSHMAN-
DÁS
SARUPCHAND.