

the plaintiff, who impugns that order by the present suit, to prove her case. For this purpose it would be necessary for the plaintiff to prove the payment of the purchase-money, and that she had since been in possession.

As the Judge has considered the evidence from a wrong point of view, we cannot accept his conclusion on the question whether the sale to the plaintiff was a real transaction, and must reverse the decree, and send back the case to the lower Court of appeal for a fresh decision. Costs of this appeal to be costs in the cause.

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12 B. 270.

Decree reversed.

12 B. 272.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Nanabai Haridas.

SHRIDHAR NARAYAN (*Original Plaintiff*), *Appellant v.* KRISHNAJI VITHOJI (*Original Defendant*), *Respondent*.*

[19th September, 1887.]

Insolvency—Civil Procedure Code (Act XIV of 1882), ss. 354, 355 and 356—Receiver selling a mortgaged property of insolvent—Purchaser at such sale—Right of mortgagee unaffected by such sale.

By an order dated the 9th July, 1879, A. was declared an insolvent under s. 351 of the Civil Procedure Code (XIV of 1882), and his property vested in the receiver, who was ordered to convert it into money. Nine fields, which were part of A.'s property, had been mortgaged to the plaintiff, who was duly cited to appear and prove his debt. The plaintiff, however, failed to appear, and he was consequently omitted from the schedule of A.'s creditors. The receiver sold one of the fields, which was purchased by A.'s undivided son G. At the sale the plaintiff gave notice of his claim as mortgagee. After paying off the debts of the scheduled creditors the receiver made over to A. the residue of the purchase-money and the eight unsold fields. In 1881 the plaintiff sued A. for possession of the mortgaged property, and on appeal obtained a decree. While that suit was pending, G. sold to [273] the defendant the field which he had purchased. In execution of his decree the plaintiff recovered possession of the eight fields, but on attempting to get possession of the ninth field he was obstructed by the defendant, who was in possession, and he consequently brought this suit to recover it.

Held, that the plaintiff was entitled to recover it from the defendant. The only interest the insolvent had in the mortgaged premises was the equity of redemption, and this having vested in the receiver under s. 354 he under s. 356 was directed to convert it into money. G., therefore, at the sale only purchased the equity of redemption in the one field; and the defendant, who now stood in G.'s shoes with notice of the plaintiff's claim, although he might possibly be entitled to redeem the whole nine fields comprised in the mortgage, was bound to deliver possession to the plaintiff (the mortgagee) until that was done.

The mortgaged property could not be sold by the receiver without the consent of the plaintiff (the mortgagee), or paying him off. Section 356 of the Civil Procedure Code (Act XIV of 1882) no doubt contemplates the payment of debts secured by mortgage out of the proceeds of the conversion of the insolvent's property in priority to the general creditors; but this must be taken in connection with s. 354, and must be understood as referring to those cases in which the mortgaged premises have been sold after coming to an understanding with the mortgagee.

THIS was a second appeal from a decision of G. McCorkell, Assistant Judge of Ratnagiri.

* Second Appeal, No. 457 of 1885.

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On the 12th July, 1873, one Atmaram mortgaged certain land, comprising nine fields, to the plaintiff, who forthwith granted the same in lease to his mortgagor.

In 1878 Atmaram having been arrested on a money decree, and brought before the Court, applied to be declared insolvent. He was accordingly declared an insolvent on the 9th July, 1879, and his property was made over to the nazir as receiver, with an order to convert the same into money. In his petition Atmaram entered the land in question as subject to the plaintiff's mortgage. The plaintiff, although he received notice to appear and prove his debt, failed to do so, and was consequently omitted from the schedule.

The receiver subsequently sold one of the nine fields, which was purchased by Atmaram's undivided son Govind, and after satisfying the claims of the scheduled creditors made over to Atmaram the remaining eight fields and the residue of the purchase money of the field that was sold. At the aforesaid sale the plaintiff was present, and gave notice of his claim as mortgagee. [274] In 1881, the plaintiff brought a suit against Atmaram to obtain possession of the mortgaged property, and on appeal obtained a decree. On the 30th September, 1882, and prior to the determination of the plaintiff's suit, Govind sold the field to the defendant.

In execution of the appellate Court's decree the plaintiff recovered possession of the eight fields, but on attempting to take possession of the ninth was obstructed by the defendant, who had been in possession of it since his purchase.

The plaintiff, therefore, brought the present suit.

The Court of first instance awarded the plaintiff joint possession of Atmaram's undivided share, which was to be ascertained by a separate suit.

The defendant appealed to the Assistant Judge, who reversed the lower Court's decree, with the following remarks :—

"The receiver or official assignee received not merely the equity of redemption, but the entire right, title, and interest of Atmaram in the *thikan* (field) * * * *. Section 354 of the Civil Procedure Code (Act XIV of 1882) vests in the receiver all the insolvent's property. Section 356 provides how the receiver is to dispose of the property, and under this section a mortgagee is treated merely as a secured creditor who comes in after certain privileged creditors, *viz.*, Government, and the costs of the decree-holder. It appears to me that, under these circumstances, it was the duty of the mortgagee to have come forward and put in his claim against the estate as well as the other creditors did. A notice was duly issued to, and served on, the mortgagee, but he did not come forward and prove his claim * * * *. By his insolvency Atmaram became, for the moment, incapable of possessing any property; and as the purchase was made by Govind with money borrowed for the purpose on his own responsibility, I consider that the *thikan* must be regarded as his self-acquired property, in which Atmaram has no interest whatever * * * *"

From this decision the plaintiff preferred a second appeal to the High Court.

[275] *Daji Abaji Khare*, for the appellant.—The failure of the appellant to comply with the notice to appear and prove his claim does

not disentitle him to his right as a mortgagee—*Shridhar Narayan v. Atmaram Govind* (1). Govind bought only the right title, and interest of Atmaram, which consisted of equity of redemption only. The receiver could sell nothing more. The defendant purchased only what Govind had.

Manekshah Jehangirshah, for the respondent.—The whole property became vested in the receiver, and s. 356 of the Civil Procedure Code (Act XIV of 1882) gives full power to deal with the property as the Court directs. The respondent, therefore, bought the field free of the plaintiff's mortgage. The non-appearance of the plaintiff when cited was a waiver of his rights.

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JUDGMENT.

SARGENT, C. J.—The language of ss. 354, 355 and 356 is far from being as clear as might be wished; but we think that the Assistant Judge was wrong in holding that the mortgaged property could be sold by the receiver without either the consent of the plaintiff, (the mortgagee) or paying him off. By s. 354 the equity of redemption, which was the only interest the insolvent had in the mortgaged premises, vested in the receiver, and s. 356, which directs the receiver to convert the property into money, must be read with s. 354 and as referring to the property vested in the receiver by that section. It is true that s. 356 contemplates the payment of the debts secured by mortgage out of the proceeds of the conversion of the insolvent's property in priority to the general creditors; but this must be taken in connection with the preceding section, and must be understood as referring to those cases in which the mortgaged premises have actually been sold after coming to an understanding with the mortgagee. The language of s. 31 of the Indian Insolvent Act (St. 11 and 12 Vic., cap. XXI) directing the official assignee to sell the property and effects of the insolvent, was so treated by the Supreme Court of Calcutta: see the remarks of Sir L. Peel in *Llewellyn v. O'Dowda* (2). Govind, therefore, only purchased the equity of redemption in the one field; and the defendant, who now stands in Govind's [276] shoes with notice of plaintiff's claim, although he may possibly be entitled to redeem the entire nine fields comprised in the mortgage, must deliver possession to the plaintiff, (the mortgagee), until that is done. We must, therefore, reverse the decree, and order that plaintiff be put into possession. Appellant to have his costs here and in the Courts below.

12 B. 276.

APPELLATE CIVIL.

*Before Mr. Justice Nanabhai Haridas, Mr. Justice Birdwood,
and Mr. Justice Jardine.*

In re THE APPLICATION OF SHESHAMMA.* [20th December, 1887.]

Stamp Act I of 1879, sch. II, 1 (b)—Construction.

S. being desirous of obtaining copies of certain records in a suit in the Court of the Subordinate Judge of Sirsi appeared before the nazir and clerk of that Court, and made an affidavit to the effect that she was the heir and legal representative

* Civil Reference, No. 39 of 1887.

(1) 7 B. 455.

(2) Taylor's Reports, 169.