

1888

13 B. 348.

OCT. 11.

APPELLATE CIVIL.

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CIVIL.*Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Scott.*RAMKRISHNA SADASHIV (*Original Plaintiff*), *Appellant v.*
CHOTHMAL (*Original Defendant*), *Respondent.**

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[11th October, 1888.]

Mortgage—Subsequent sale by mortgagor of a part of the property mortgaged—Suit on the mortgage—Satisfaction of the decree in such suit partly by a second mortgage—Suit on second mortgage and decree for sale—Title of the purchaser at sale in execution of such decree as against the private prior purchaser of the part—Merger.

On the 4th October 1864, N. mortgaged without possession a house to K. On the 25th June, 1868, N. sold the eastern half of that house to the defendant, who forthwith entered into possession. K. sued N. upon the mortgage, and obtained a decree on the 28th November, 1868, N. made certain payments to K. under the decree until 1875. On the 27th July, 1875, N. passed to K. an instalment bond for the balance due on the decree, together with Rs. 25 on account of *savai* profits, and as security executed a new mortgage of the house. Satisfaction of the decree was entered up and certified, and the new mortgage bond was registered. In 1882 K. sued N. upon this mortgage bond, and obtained a decree directing the debt to be realized by the sale of the mortgaged house, and on the 20th July, 1883, the plaintiff purchased the house at the execution sale. In 1885 the plaintiff sued to recover the eastern half of the house which was in the possession of the defendant. The lower Courts rejected the plaintiff's claim. On appeal by the plaintiff to the High Court,

Held, confirming the decree of the lower Courts, that the plaintiff by his purchase in July 1883, did not acquire a title paramount to that of the defendant. All rights under the mortgage of 1864 had merged in the decree obtained in November, 1868, but satisfaction of that decree had been entered up and certified when the second mortgage of 1882 was passed. The mere circumstance that the debt secured by the second mortgage was the balance of the old debt, was not sufficient to justify the inference that it was intended to keep the decree alive. There were, [349] therefore, no rights under the old mortgage which the plaintiff could assert as against the defendant in possession.

[D., 35 M. 642=11 Ind. Cas. 865=21 M.L.J. 811=10 M.L.T. 169=(1912) M.W.N. 24.]

THIS was a second appeal from a decision of W. H. Horsley, Acting District Judge of Khandesh.

On the 4th October, 1864, one Narayan Kumbhar mortgaged without possession a house to one Khando. On the 25th June, 1868, Narayansold the eastern half of the same house to the defendant Chothmal, and immediately put him into possession. On the 28th November, 1868, Khando obtained a decree upon his mortgage against Narayan, who paid him certain sums under the decree until 1875.

On the 27th July, 1875, Narayan executed an instalment bond to Khando for the balance still due under the decree, together with a further sum of Rs. 25 on account of *savai* profits, and as security the same house was again mortgaged. Satisfaction of the decree was duly entered up and certified, and the new mortgage was registered.

Narayan having failed to pay under the bond, Khando sued him in 1882, and obtained a decree directing the mortgage-debt to be realized by the sale of the house. The house was accordingly put up for sale on the 20th July, 1883, and was purchased by the plaintiff. The plaintiff brought the present suit in 1885 to recover the eastern portion of the house, of which the defendant was in possession.

* Second Appeal, No. 154 of 1897.

The plaintiff contended (*inter alia*) that the sale to the defendant was fraudulent and collusive, but that even if it was *bona fide*, the plaintiff's purchase had priority, as the first mortgage-debt to which he traced his title was prior to the sale to the defendant.

The defendant contended that as purchaser in 1868 he had priority to the plaintiff, who had purchased at a sale held in execution of a decree obtained on the mortgage of 1875, long subsequently to his purchase, and that the plaintiff could not avail himself of the earlier mortgage of 1864, inasmuch as the mortgagee Khando got the second mortgage with full knowledge of the defendant's prior purchase, and in substitution of the first mortgage.

[350] The Subordinate Judge rejected the plaintiff's claim.

The plaintiff appealed to the District Judge, who confirmed the lower Court's decree.

The plaintiff preferred a second appeal to the High Court.

Ganesh Ramchandra Kirloskar, for the appellant.—When the second mortgage of 1875 was taken by Khando, the first was still in existence.

The second mortgage was only in substitution of the first, and took its place. The debt due upon the first mortgage was included in the second. Clearly, Khando intended to keep alive his right—*Shantapa v. Balapa* (1); *Mulchand Kuber v. Lala* (2); *Dullabhdas v. Lakshmandas* (3). There was no merger. There was no fresh advance at the time of the second mortgage. There was nothing but the old-debt due under the previous mortgage. The later mortgage must, therefore, have priority to the defendant's purchase.

Mahadev C. Apte, for the respondent.—The question of merger is a matter of intention and a question of fact. Both the lower Courts have held that the first mortgage was no longer in existence after the second mortgage was effected. This Court cannot interfere with the lower Courts' decision on a matter of fact. These two mortgages differ as to rates of interest, and are quite distinct transactions. The mere circumstance that a part of the old debt was the consideration for the second mortgage does not prevent a merger. The first mortgage merged in the decree passed upon it in November, 1868, but satisfaction of that decree was entered up and certified, and there remained nothing of it. The second mortgage was a new mortgage. The purchase of the respondent was long prior to it. The respondent has been in possession, and as against him the plaintiff cannot succeed.

JUDGMENT.

SARGENT, C.J.—The facts in this case as found by the Acting Judge are that on 4th October, 1864, Narayan Kumbhar executed a mortgage of his house to one Khando. That on 25th June, 1868, he sold the eastern half of his house to defendant, and that [351] defendant then obtained possession of that half of the house. On 24th September, 1868, Khando sued Narayan on his mortgage of 1864, and obtained a decree, on 28th November, 1868. On 27th July, 1875, Narayan passed an instalment bond to Khando for the balance due on the decree, and Rs. 25 on account of *savai* profits, giving the house as a security. Satisfaction of the decree was duly entered up and certified, and the mortgage was registered. On this mortgage bond Khando sued Narayan in 1882, and obtained a decree directing the mortgage money to be realized by sale of the mortgaged

(1) 6 B. 561.

(2) 6 B. 404.

(3) 10 B. 88.

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property, in execution of which the house was sold to plaintiff on the 20th July, 1883, for Rs. 27.

It has been contended before us that the plaintiff can rely on the first mortgage to Khando passed on 4th October, 1864, on the ground that it must be deemed to have been kept alive by Khando when Narayan passed the second mortgage of 1882, and that the plaintiff thus acquired a title paramount to that of defendant in the eastern half purchased by him in 1868. The question in such cases doubtless depends on the intention of the parties to be gathered from all the circumstances—*Goluknath v. Lalla* (1), which was followed by this Court in *Dullabhdas v. Lakshmandas* (2). Here, however, a decree had been obtained on the mortgage of 1864, and all rights under that mortgage had become merged in the decree. Satisfaction of the decree was certified to the Court, and entered up, when the second mortgage of 1882 was passed; and the fact that the debt secured by the second mortgage is the balance of the old debt, is the only circumstance from which an intention to keep alive the decree could be inferred.

We agree with the Subordinate Judge that this circumstance alone is not sufficient, and that there are no rights under the old mortgage which the plaintiff can now assert as against defendant in possession. We must, therefore, confirm the decree with costs.

Decree confirmed.

13 B. 352=13 Ind. Jur. 423.

[352] ORIGINAL CIVIL.

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

EMNABAI AND OTHERS (*Original Plaintiffs*), *Appellants v. HAJIRABAI* (*Original Defendant*), *Respondent*.^{*}
[30th November and 7th December, 1888.]

Mahomedan law—Hiba, or deed of gift—Gift by husband to wife—Possession—Continued receipt of rents by husband—Husband, manager for wife—Gift of "mooshaa" or undivided part—Subsequent partition.

In 1871 H. G., a Mahomedan, executed a formal *hiba*, or deed of gift, to his wife, the defendant, of a house belonging to himself, but let out to tenants, and duly registered the deed. In 1876-77 he caused the house to be transferred into the name of his wife in the municipal and *fazandari* books. After the execution of the deed of gift, and down to the time of his death in 1884, H. G. continued to collect the rents as before, and they were entered in his books and drawn upon for family purposes in the same manner as they had always been. In 1881-82 H. G. had an account of the rents of the house prepared in his wife's name from 1871-72 up to date.

Held, that the above circumstances afforded sufficient evidence of possession having been given to the defendant, either in 1871 or 1876, to satisfy the requirements of Mahomedan law. H. G. being the husband of the defendant, would naturally continue to collect the rents as her manager, even when he regarded himself as having parted with the ownership to his wife, which the above-mentioned circumstances sufficiently showed that he did.

In 1883 H. G. executed a second *hiba*, duly registered, to the defendant, of an undivided moiety of the house in which he and the defendant resided, and to which H. G. and his brother were entitled in equal shares. No partition had been made between H. G. and his brother when H. G. died.

* Suit No. 525 of 1886; Appeal No. 607.

(1) 3 C. 307.

(2) 10 B. 88.