17 B. 741.

1892
OCT. 12.

APPELLATE CIVIL.

APPELLATE CIVIL.

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

17 B. 741.

NARAYAN LAKSHMAN (*Original Plaintiff*), *Appellant v.* BAPU VALAD HAIBATRAV AND OTHERS (*Original Defendants*), *Respondents.**

[12th October, 1892.]

Registration—Vendor and purchaser—Priority—Notice—Possession—Subsequent purchaser with notice obtaining possession and paying off mortgage—Right to recover sum applied in paying off mortgage.

The plaintiff sued to recover land purchased by him in 1886 from the first defendant, and which was in possession of defendants Nos. 2, 3 and 4. The conveyance to [742] the plaintiff was duly registered. The third defendant claimed part of the land under a previous sale to him in 1885 by the first defendant, the conveyance to him being also duly registered. The fourth defendant claimed the rest of the land under a sale to him by the first defendant subsequent to the sale to the plaintiff of which he had no notice. He relied upon the fact of his having got possession, and he alleged that the purchase-money which he had paid for the land had been applied by the first defendant in paying off a mortgagee who at the date of his purchase was in possession. He claimed, at all events, the repayment of this sum.

Held—(1) that the plaintiff was not entitled to the lands in the hands of the third defendant, the latter being a prior purchaser with a deed of conveyance duly registered;

(2) that the plaintiff was entitled to the land in the possession of the fourth defendant, who must be taken to have purchased with notice of the plaintiff's prior purchase, inasmuch as the deed of conveyance to the latter was registered;

(3) that, if the fourth defendant's purchase-money was applied to pay off a mortgage which plaintiff would otherwise have had to pay, the plaintiff could not equitably recover the land without paying the fourth defendant so much of the purchase-money as was so applied.

[R., 26 B. 538 (541); 134 P.L.R. 1904; **Disappr.**, 7 C.W.N. 11.]

SECOND appeal from the decision of G. C. Whitworth, District Judge of Khandesh.

The plaintiff sued to recover certain land in the possession of defendants Nos. 2, 3 and 4. He alleged that he had purchased it from the first defendant under a registered deed dated 16th July 1886.

The first and second defendants did not appear.

The third defendant alleged that he had purchased part of the said land on 2nd September 1885 under a registered deed of that date, from one Bhauprasad Khankaria, to whom the land had been formerly sold by the son of the first defendant.

The fourth defendant alleged that he had purchased the rest of the land in December 1887 from the first defendant and his son for Rs. 550 and had got possession; that he had no notice of the plaintiff's purchase, and that the purchase-money which he had paid had been applied by the first defendant in paying Bhauprasad Kankaria, who had been a mortgagee in possession.

The Subordinate Judge held that the sale to the plaintiff in 1886 was proved, but that the plaintiff could not recover possession as against the third defendant, inasmuch as the latter was in possession under a prior sale to him, and that he could not recover [743] as against the fourth defendant, because the latter, although a subsequent purchaser, had obtained possession.

* Second Appeal No. 470 of 1891.

1892
OCT. 12.
APPELLATE CIVIL.
17 B. 741.

The plaintiff's claim was, therefore, rejected.

On appeal by the plaintiff the District Judge confirmed the decree.

The plaintiff preferred a second appeal.

Manekshah J. Taleyarkhan, for the appellant (plaintiff).—Both the lower Courts erred, in law, in holding that so far as defendant No. 4 was concerned we are not entitled to priority, because our purchase, though registered, was not accompanied with possession. Our sale-deed is dated 16th July, 1886, and was registered the next day. The sale-deed being registered, the defendant had, when he purchased the property in December, 1887, notice of the sale to us, and consequently we are entitled to priority —*Lakshmandas* v. *Dasrat* (1); *Radhabai* v. *Shamrav* (2); *Agarchand* v. *Rakhma* (3).

Respondents Nos. 1 and 2 (defendants Nos. 1 and 2) did not appear.

Mahadeo Chimnaji Apte, for respondent No. 3 (defendant No. 3).—Both the lower Courts have found that our purchase was proved and was prior to that of the plaintiff. Therefore, he cannot recover the land in our possession.

Dhondu Shamrav Garud (with *Daji Abaji Khare*), for respondent No. 4 (defendant No. 4).—According to Hindu law a title which is accompanied with possession cannot be over-ridden by a prior title not accompanied with possession. With repect to possession, gift and sale stand on the same footing—*Lallubhai* v. *Bai Amrit* (4); *Kali Das Mullick* v. *Kanhaya Lal Pandit* (5). Registration is not equivalent to possession—*Vasudev Bhat* v. *Narayan Daji Damle* (6).

We have paid off the mortgage of Bhauprasad with our money and, therefore, the appellant should not be allowed to recover possession without repaying us what we have paid. If we had not [744] paid off the mortgage, the appellant would have had to pay it—*Mahomed Shumsool* v. *Shewukram* (7).

Manekshah J. Taleyarkhan, in reply.—In *Lakshmandas* v. *Dasrat* (1) the question of possession and registration was fully considered, and it was held that registration was equivalent to possession.

Respondent No. 4 is merely a stranger, and it was not incumbent upon him to pay the mortgage. Further, he has not taken an assignment from the mortgagee. Therefore he cannot insist that he should be paid the mortgage amount.

JUDGMENT.

SARGENT, C. J.—The Full Bench decision in *Lakshmandas Sarupchand* v. *Dasrat* (1) followed in *Agarchand Gumanchand* v. *Rakhma Hanmant* (3), shows that, as the plaintiff's purchase-deed was registered when the fourth defendant purchased, the latter must be taken to have had notice of it, and cannot claim priority by reason of the plaintiff's purchase not having been accompanied with possession. We may remark that in *Lalubhai Surchand* v. *Bai Amrit* (4), the earlier purchase without possession was not registered until after the later purchase, so that the effect of registration as giving notice did not arise. However, if the fourth defendant's purchase-money was applied in part in paying off Bhauprasad's mortgage of 1881, which the plaintiff would otherwise have had to meet, the plaintiff cannot equitably recover the property without paying the fourth defendant so much of the purchase-money as was so applied. See *Mahomed Shumsul* v. *Shewukram* (7).

(1) 6 B. 168. (2) 8 B. 168. (3) 12 B. 678. (4) 2 B. 299.
(5) 11 I.A. 218. (6) 7 B. 131. (7) 2 I. A. 7.

1892
OCT. 12.
APPELLATE CIVIL.

We must, therefore, reverse the decree, except as regards the third defendant, as to whom it must be confirmed, and send back the case for a fresh decision as regards the other defendants. Appellant to pay the third defendant his costs. The other costs of the appeal to abide the result.

Decree partially reversed.

17 B. 745.

17 B. 741.

[745] APPELLATE CIVIL.

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

NAIK PARSOTAM GHELA (*Original Plaintiff*), *Appellant v.* GANDRAP FATELAL GOKULDAS (*Original Defendant*), *Respondent.**
[17th October, 1892.]

Easement—Right of way—Prescription—Prescriptive right of the defendant to have branches of his trees overhanging the plaintiff's land—Right of the defendant to go on to the plaintiff's land to collect the fruit of the trees distinct from and not accessory to the right to have the branches overhanging.

The defendant having acquired a prescriptive right to have the branches of his trees overhanging the plaintiff's land, the lower Courts held that he had a right to go on to the plaintiff's land for the purpose of gathering the fruit of trees, on the ground that the prescriptive right to have the branches of his trees overhanging the plaintiff's land carried with it an "accessory" right to enjoy the profits of the branches in the best way possible.

Held, (reversing the lower Courts' decree) that the right to go on the plaintiff's land to pick the fruit off the branches was perfectly distinct from the prescriptive right to have the branches overhanging the land, and could not be said to be accessory to the latter right in the sense of being within the limits of that right.

SECOND APPEAL from the decision of Venkatrao R. Inamdar, Acting Joint Judge of Ahmedabad.

The plaintiff sued for (1) a declaration that the defendant was not entitled to enter upon the plaintiff's land for the purpose of inspecting his own wall recently erected by him and of taking the fruit of his trees, the branches of which were hanging over the plaintiff's land, and for (2) an injunction restraining the defendant from going upon the land for the aforesaid purposes.

The defendant contended that he had acquired by long user a right of way over the land in question, and that there was no other passage by which he could go and inspect his wall and take the fruit of the trees.

The Subordinate Judge (Rao Saheb N. N. Nanavati) made a decree in the following terms:—

"The defendant has no right to enter the plaintiff's land at all times and on all occasions except during the fruit season and when the necessity arises of removing the branches or wood or repairing the wall, &c., and that the defendant do enter the plaintiff's land [746] at such times with plaintiff's permission which the plaintiff should not refuse."

Against the above decree the plaintiff appealed to the District Court, and the defendant preferred cross-objections under s. 561 of the Civil Procedure Code (Act XIV of 1882).

The Acting Joint-Judge found on the issues that (1) the defendant had a right to pass over the plaintiff's ground, and that (2) with respect to the

* Second Appeal, No. 473 of 1891.