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with Ch. II, s. I, para. 39, of the Mitakshara. The Mayukha cannot, therefore, be said to afford any assistance in construing the Mitakshara in a different sense from what has been given to it by the Privy Council, and, indeed, the judgment of West, J., in *Vijiarangam* v. *Lakshman* (1), where that learned Judge is disputing the correctness of the Privy Council construction of the Mitakshara, shows that no fresh argument was to be derived from the Mayukha in aid of the view he was contending for, *viz.*, that property inherited by [711] a widow from her husband was woman's property based on Mitakshara, Ch. XI, s. 11, paras. 3 and 4. As to the conclusion arrived at by Sir Matthew Sausse that the widow has the power of alienation over the moveables, the judgment shows that it was the result of the statement in Steele's Law and Customs of Hindu Castes.

In this state of the authorities, we think that the ruling of the Privy Council, that the property inherited by a widow from her husband devolves on his heirs at her death, must have effect given to it throughout the Presidency with regard to the devolution of the moveables so inherited and to that extent, if the decision in *Damodar* v. *Purmanandas* (2) is to be regarded as necessarily giving the moveables that remain to the widow's heirs, it must be treated as of no authority. Assuming then, as we think we must, that the moveables existing at the time of the widow's death devolve, by inheritance, on her husband's heirs, we think the widow's power of alienation over the moveables cannot be regarded as including the power of willing them away at her death so as to displace the right of inheritance by her husband's heirs. We must, therefore, answer the question referred to us in the negative.

The reference being answered in the negative, the Division Bench reversed the decree.

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17 B. 711.

ORIGINAL CIVIL.

Before Mr. Justice Starling.

MUNCHERJI FURDOONJI MEHTA AND PEROZBAI (*Plaintiffs*) *v.* NOOR MAHOMEDBHOY JAIRAJBHOY PIRBHOY AND OTHERS (*Defendants*)* [12th June, 1893.]

Mortgage—Sale by mortgagee—Notice of sale—Subsequent mortgage of same property—Notice of sale to mortgagors—Notice of sale to subsequent mortgagees—Delay in selling—Rescission of notice of sale—Suit by second mortgagee to prevent sale—Offer to redeem joint mortgage—Right of mortgagee to sell mortgaged property.

Certain property was mortgaged to the defendants in 1885 for Rs. 60,000, and the mortgage-deed contained the usual power of sale on notice to the mortgagors or their [712] assigns. The debt was not paid, and the defendants on the 31st August 1891, gave notice of sale to the mortgagors, but did not then proceed further in the matter. Three days after this notice, *viz.*, on the 3rd September, 1891, the mortgagors mortgaged the property to the plaintiffs for Rs. 10,000. On the 18th November, 1892, the plaintiffs by letter offered to transfer their mortgage to the defendants or to join with them in selling the property. In the event of their being unwilling to accept either of these proposals, the plaintiffs requested the defendants to render an account of the sum due to them in order that they (the plaintiffs) might, if so advised, redeem the defendant's mortgage. On the 3rd December, 1892, the plaintiffs by letter enquired whether the defendants

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* Suit No. 236 of 1893.

(1) 8 B.H.C.R. 244 (257). (2) 7 B. 155.

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were willing to reconvey the mortgaged property on payment of a certain sum, which was less than the amount the defendants claimed, but they did not positively offer to pay the defendants either that amount or the amount which might be found to be due. In April, 1893, the defendants advertised the property for sale on the 27th of that month without giving notice of sale to the plaintiffs, and on that day the plaintiffs filed a suit and obtained a rule, restraining the defendants from proceeding with the sale. In the argument of the rule it was contended for the plaintiffs, first, that the defendants had no power to sell, because their mortgage-deed required previous notice of sale to be given to the mortgagors or their assigns, and no such notice had been given to the plaintiffs, who, as subsequent mortgagees were assigns of the equity of redemption; secondly, that the notice of sale given to the mortgagors on the 31st August, 1891, had been rescinded and a fresh notice was, therefore, required, and, thirdly, that inasmuch as the plaintiffs were willing to redeem the defendants' mortgage, the sale should be restrained.

Held—(1) that notice to the plaintiffs was not necessary. Proper notice had been given to the mortgagors on the 31st August, 1891, three days before the plaintiffs had acquired any interest in the equity of redemption. No further notice was required to be given to any person who at that time was not an assign, in order to enable the defendants to sell under that notice. An assign must take things in the state in which he finds them, and cannot claim to alter rights which have accrued before he has any authority to interfere;

(2) that the notice of sale of the 31st August, 1891, had not been rescinded by the defendants, who were not bound to give a fresh notice before the sale advertised to be held on the 27th April, 1893. The mere fact of a long delay taking place between the maturing of the notice of sale and the actual sale does not make a fresh notice necessary;

(3) that on the evidence it did not appear that the plaintiffs were able and willing to redeem the defendants' mortgage. The plaintiffs admittedly had not the money inhand, and the Court would not interfere with a mortgagee's right to sell on the mere chance of the plaintiffs being able to make arrangements to pay the amount due at some uncertain time.

Where a mortgage-deed which gave the mortgagee a power of sale contained also a proviso that the remedies of the mortgagors, their heirs, administrators, and assigns in respect of any breach of the clauses or provisions (relating to such sale) or of any impropriety or irregularity whatever in any such sale should be in damages.

[713] *Held*, on the authority of *Prichard* v. *Wilson* (1), that the Court would not grant an injunction to restrain the mortgagee from selling the mortgaged property.

RULE for an injunction restraining a sale by mortgagees of mortgaged property.

The plaintiffs were second mortgagees of the property in question. The first three defendants were prior mortgagees. The remaining defendants (Nos. 4 to 8) were the owners and mortgagors.

The plaint stated that the first three defendants, were the mortgagees of the property in question under a mortgage dated 7th September, 1885, for Rs. 60,000. They also held a deed of further charge on the said property dated 12th October, 1880, for Rs. 9,000.

The said property was mortgaged to the plaintiffs on the 3rd September, 1891, for a sum of Rs. 10,000. At the date of suit the amount due to the plaintiffs upon their mortgage was Rs. 11,900. There was also a large sum due to the first three defendants in respect of their prior mortgage of the 7th September, 1885, and the deed of further charge.

The plaintiffs alleged in the plaint that the first three defendants were desirous to obtain the property for themselves, and in collusion with the mortgagors were endeavouring to depreciate its value and were thereby lessening the security of the plaintiffs. They stated that the first three defendants had in the previous year advertised the property for sale on

(1) 10 Jur. (N.S.) 330.

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four different occasions, and then, without any reason, postponed the sale, thereby disappointing intending purchasers.

They further stated that on the 18th November, 1892, they had by letter offered to transfer their mortgage to the first three defendants, or to join with them in selling the property. In the event of the defendants being unwilling to accept either of these proposals, the plaintiffs requested that first three defendants to render an account of the sum due to them, in order that their mortgage might be redeemed. The said defendants, however, had not complied with any of these proposals.

The plaintiffs further alleged that the first three defendants, ostensibly in exercise of their power of sale under their mortgage [714] of 7th September, 1885, and in collusion with the mortgagors, for the purpose of defrauding the plaintiffs, had again recently advertised the property for sale on Thursday, the 27th April, 1893. The plaintiffs received no notice of the intended sale.

The plaintiffs alleged that the time of year chosen by the said first three defendants was exceedingly unfavourable for the sale of the property, and that the notice of sale was far too short and was otherwise wholly insufficient, and that, if the sale were allowed to take place on the 27th April, the property would certainly be sold far below its value and at a price wholly inadequate to pay off the mortgages, and that they would thereby suffer a heavy loss.

The plaint prayed for redemption, for accounts, and for a sale if necessary, &c.

The plaint was presented on the 27th April, and on the same day a rule *nisi* was obtained by the plaintiffs calling on the first three defendants to show cause why they should not be restrained from selling the said property. An *interim* injunction against the intended sale was granted at the same time.

The rule now came on for argument.

Macpherson, for the first three defendants, showed cause. He cited Kerr on Injunctions (3rd Ed.), pp. 524, 525; *Hill* v. *Kirkwood* (1); *Hickson* v. *Darlow* (2); *Prichard* v. *Wilson* (3).

Inverarity, for plaintiffs, in support of the rule. He cited *Naran Purshotam* v. *Dolatram Virchand* (4); *Mohan Manor* v. *Togu Uka* (5); *Rhodes* v. *Buckland* (6); *Hoole* v. *Smith* (7); Coote on Mortgage, p. 274; *Tommey* v. *White* (8).

JUDGMENT.

STARLING, J.—The plaintiffs in this suit are mortgagees of a property in Bombay, known as the Imambara, and their mortgage, which was made on the 3rd September, 1891, is subject to certain mortgages in favour of the first three defendants. The property had been advertised for sale by these defendants several times before the plaintiffs took any step in the matter. At [715] the end of 1892 certain correspondence took place between the solicitors of the plaintiffs and the defendants, which seems to have come to an end in December of that year. In April, 1893, the defendants advertised the mortgaged properties for sale on the 27th idem, and on that day the plaintiffs filed a suit and obtained a rule *nisi* with an *interim* injunction restraining the defendants from proceeding

(1) 28 W. R. 358. (2) 23 Ch. D. 690. (3) 10 Jur. (N. S.) 330.
(4) 6 B. 538 (540). (5) 10 B. 224. (6) 16 Beav. 212.
(7) 17 Ch. D. 434. (8) L. R. 3 H. L. 49.

with the sale, and the question I have to determine is whether that rule and injunction should be discharged or not.

Mr. Inverarity, for the plaintiffs argued that the defendants at the present time had no power to sell at all, because, the mortgage deed providing that notice should be given to the mortgagors or their *assigns*, they had not given notice to the plaintiffs, who as subsequent mortgagees were assigns of the equity of redemption, citing on that point *Hoole* v. *Smith* (1), in which Fry, J., held that in such a case it was impossible to hold that it was sufficient to go on serving the mortgagor after he had assigned his equity of redemption. It appears, however, that the defendants gave a notice of sale to the mortgagors on the 31st August, 1891. *i.e.*, three days before the plaintiffs had any interest in the equity of redemption; and as that appears to me to be a proper notice, I do not think that any further notice would be required to be given to any person who at that time was not an assign, in order to enable the defendants to sell under that notice; because I am of opinion that an assign must take things in the state in which he finds them, and cannot claim to alter rights which have accrued before he has any authority to interfere.

It has been, however, argued for the plaintiffs that the notice of the 31st August, 1891, has been rescinded, and consequently a fresh notice was required. In support of that the case of *Tommey* v. *White* (2) was cited. In that case, a debtor had assigned his house and business for the payment of his debts, the debtor being left in possession, and a power given to the trustee to sell the property on giving notice to the debtor. The trustee gave a proper notice, which was subsequently withdrawn by the consent of the creditors and the trustee, and the Court held that under such circumstances the trustee could not subsequently sell [716] without giving a fresh notice. The mere fact of a long delay having taken place between the maturing of the notice for sale and the actual sale does not make a fresh notice necessary—see *Metters* v. *Brown* (3), where the delay was nearly four years; consequently to make *Tommey* v. *White*(2) applicable, it must, in my opinion, be shown that there was an actual withdrawal of the notice of the 31st August, 1891; but I can find no evidence of this having been done. All that the defendants did was at the request of the mortgagors and in consideration of their promising to do certain acts to postpone the sale in some instances, and in one instance to stop a particular sale. I can find no case which lays down the principle that postponing or even stopping a sale effects a withdrawal of the notice under which the sale is about to take place; and I should be surprised if such a case were to be cited, seeing that mortgagees ordinarily are given full power to buy in, or rescind, or vary, any contract for sale and to resell, without being responsible for any loss occasioned thereby; and if the mortgagee can stop a sale by buying in or by rescinding a contract, I fail to see why he should not be authorized to stop one by giving notice to the auctioneer not to proceed with it. Consequently, I am of opinion that the defendants did not rescind their notice of sale, and were not bound to give a fresh notice before the sale intended to have been held on the 27th April last, at which time a notice to the mortgagors and the plaintiffs, or at any rate to the plaintiffs, would have been necessary if a fresh notice had to be given.

It was then argued, on the authority of *Rhodes* v. *Buckland* (4), that as the plaintiffs are willing to redeem, and the defendants had refused to

(1) 17 Ch. D. 434. (2) L.R. 3 H.L. 49. (3) 33 L. J. (Ch.) 97. (4) 16 Beav. 212.

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accept their offer and threatened to sell, the Court would restrain the sale. Now I am not at all sure that the plaintiffs were willing (which must also include able) to redeem. It was admitted by Mr. Inverarity in the course of his argument that the plaintiffs had not the money in hand, and would have to make arrangements in order to obtain it, and I should be very sorry to interfere with a mortgagee's right to sell on the mere chance of the plaintiffs being able to make arrangements to pay the amount due at some uncertain time. In *Rhodes* v. [717] *Buckland* (1), the plaintiff gave notice (notice of intended payment being necessary) that at a particular time she would be ready to pay the amount which might be due; but what the plaintiffs here did on the 18th November, 1892, (and that only in the alternative) was to ask for accounts to enable them, "if so advised, to redeem," which is a very different thing; and on the 3rd December, 1892, the plaintiffs only inquired whether the defendants were willing to reconvey the mortgaged property on the payment of a certain sum named therein, which is less than the amount claimed by the defendants, and do not positively offer to pay the defendants either that amount or the amount which might appear to be due. In my opinion, however, the plaintiffs were never willing and ready to redeem, but, fearing that they would not realize the full amount due on their mortgage, they wanted to induce the defendants to pay them off and take an assignment of their security. This appears to be the main object of the letter of the 18th November, 1892. There is, however, another objection to this rule being made absolute. The mortgage-deed provides that "the remedies of the mortgagors, their heirs, administrators, *and assigns* in respect of any breach of the clauses or provisions lastly hereinbefore contained (*i.e.*, with regard to notices and sales) or of any impropriety and irregularity whatever in any such sale shall be in damages," and the case of *Prichard* v. *Wilson* (2) lays down the rule that in such a case a Court of Equity will not grant an injunction to stop a sale.

The result is that the rule and the *interim* injunction of 27th April last ought to be discharged, but as the defendants are willing to accept an offer now made by the plaintiffs to pay them Rs. 1,20,000 within a fortnight, the rule and the *interim* injunction will stand over for that time, and in the event of the said sum being paid within that time the rule will be made absolute. Plaintiffs paying their own costs, first three defendants' costs to be costs in the cause. If the said sum be not paid within the time limited, the rule will be discharged with costs.

Attorneys for the plaintiffs :—Messrs. *Framji and Moos.*

Attorneys for the defendants :—Messrs. *Thakurdas, Dharamsi and Cama.*

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(1) 16 Beav. 212. (2) 10 Jur. (N.S.) 330.