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APPELLATE CIVIL.

*Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Telang.*VISHNU (*Original Plaintiff*), Appellant v. RANGO GANESH
PURANDARE (*Original Defendant*), Respondent.* [4th July, 1893.]1893
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Easement—Right of way—Right of drainage—Mortgage—Mortgage of part of a house—Easement over the other part granted to the mortgagee by the mortgage-deed—Subsequent sale of parts of the house to different owners—Sale of mortgaged part subject to the mortgage—Mortgage paid off by purchaser—Purchaser's right to easement—License—Grant of right of way in a mortgage of part of property of mortgagor—Reservation by mortgagor of similar right in respect of other property not mortgaged by him—Vendor and purchaser—Sale of land subject to a mortgage giving a right of way—Mortgage paid off by purchaser—Mortgagee not a party to conveyance—Receipt for mortgage money endorsed on conveyance.

V, the owner of a house, mortgaged the east portion of it to M, in 1878. The mortgage-deed gave to the mortgagee the use of a certain privy situated in another part of the house and the right of way to it through a certain *door* or passage. V, subsequently sold the whole house to C., and C., in 1880, mortgaged the western part of it to R., who got a decree, and in execution the part mortgaged to him (*i.e.*, the west) was sold in 1885, and the defendant became the purchaser. In 1887 C. sold the east part to the plaintiff, who paid off the mortgage to M., and obtained M.'s endorsement of payment on his deed of conveyance. The plaintiff subsequently sued to restrain the defendant from interfering with his use of the passage and of the privy. The defendant alleged that both were comprised in the property purchased by him at the Court sale in 1885, and that the right given by the mortgage of 1878 was merely a license to the mortgagee and not an easement.

Held, that the use of the passage and of the privy was a privilege granted by the very instrument which created the mortgage, and should be regarded as a privilege [383] ancillary to the use of the part of the house mortgaged to M. in 1879. The defendant's purchase in 1885 was subject to the easement acquired by M. (the mortgagee), and the plaintiff had purchased the mortgagee's interest in the house, which included her right by way of easement. The plaintiff was, therefore, entitled to the use of the privy and the passage.

In the mortgage-deed of 1880, by which the west part of the house was mortgaged by C. to R., the following clause was contained :—"You are to have the use of the drain for passing water as it has continued from old times."

Held, that these words should be understood as intended to reserve to C. (the mortgagor), in respect of the part of the house not included in the mortgage, a right to use the drain similar to the right given to the mortgagee. The right so reserved by C. was afterwards sold by C. to the plaintiff along with the east part of the house in 1887, and the plaintiff was, therefore, entitled to the use of the drain.

The plaintiff purchased a part of the house which the vendor had previously mortgaged to M. The mortgage deed gave to the mortgagee the use of a certain privy and the right of going to it through a passage situated at the rear of the mortgaged part of the house. M. was not a party to the conveyance to the plaintiff, but at the time of the purchase the plaintiff paid off M.'s mortgage, and M. signed a receipt for the mortgage money endorsed on the conveyance.

Held, that the plaintiff must be taken to have purchased the mortgagee's interest in the house including the right by way of easement over the passage.

SECOND appeal from the decision of L. G. Fernandez, First Class Subordinate Judge of Poona, with appellate powers.

The plaintiff was the owner of a house adjoining the defendant's house and situated to the east of it.

These houses were originally one house, facing eastwards. It belonged to one Vithu bin Sayaji, who on the 4th December, 1878, mortgaged the

* Second Appeal, No. 335 of 1890.

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front (*i. e.*, east) portion of it to one Mathura. The mortgage-deed gave to the mortgagee the use of a certain privy, with the right of going to it through a certain *bol* or passage at the rear of the mortgaged part of the house. The clause in the deed was as follows:—

“And there is to the west of my (mortgagor’s) rear *sopa* (veranda), a passage (*bol*) as far as the privy. This has been left joint for your user and enjoyment, because you have the *vahivat* (management) of the northern privy in the rear.”

In the following year (*viz.*, 12th June, 1879) Vithu sold the whole house to one Chimnaji, and Chimnaji on the 5th June, 1880, mortgaged with possession the rear *i. e.*, the western part of the [384] house to one Ravji Lakshman, the mortgage-deed in this case providing that the mortgagee was “to have the use of the drain for passing water as it has continued from old times.” This drain passed under the above-named *bol* or passage.

In 1882, Ravji sued Chimnaji on the mortgage and got a decree, in execution of which the west or rear part of the house mortgaged in 1880 was sold in 1885, and the defendant purchased it and took possession.

On the 14th July, 1887, Chimnaji sold to the plaintiff the front or east part of the house, which had been mortgaged in 1878 to Mathura. The plaintiff redeemed the mortgage, and Mathura made an endorsement on the deed of conveyance to the effect that the mortgage was paid off.

On the 16th December, 1887, the plaintiff filed this suit, praying for an injunction restraining the defendant from obstructing his (plaintiff’s) right of using the passage and the privy and the drain under the passage. The plaintiff alleged that the passage, the privy and the drain under the passage belonged to him.

The defendant contended that he had purchased the passage (*bol*), the privy and the drain when he purchased the house at the Court sale in 1885.

The Subordinate Judge found that the privy belonged to the plaintiff; that the passage (*bol*) with the drain underneath belonged to the defendant, but that the plaintiff had a right to use the passage (*bol*) and to discharge the water from his premises through the drain. He, therefore, partially allowed the plaintiff’s claim.

The defendant appealed and the plaintiff presented cross objections under s. 561 of the Civil Procedure Code (Act XIV of 1882). The appellate Court reversed the decree and dismissed the suit, holding that the plaintiff had not proved his right to the passage (*bol*) leading to the privy, that the privy did not belong to the plaintiff, and that he had no right to discharge his water through the drain.

The plaintiff preferred a second appeal.

[385] *Shivram v. Bhandarkar*, for the appellant (plaintiff).—When the plaintiff purchased the front portion of the house it was under mortgage to Mathura, to whom it had been mortgaged in 1878. After his purchase the plaintiff paid off the mortgage, and the mortgagee (Mathura) endorsed the payment on the plaintiff’s deed of conveyance. The plaintiff, therefore, is entitled to Mathura’s rights under the mortgage-deed. That deed gave Mathura the use of the privy and of the passage to it. The defendant’s purchase was subsequent to Mathura’s mortgage, and was, therefore, subject to any rights which Mathura had acquired under her mortgage. The right of passage over the *bol* is an easement of necessity for the use of the privy—*Watts v. Kelson* (1); *Morris v. Edgington* (2); *Purushottam Sakharam v. Dargoji Tukaram* (3). As to the drain, the defendant only

(1) L. R. 6 Ch. 166.

(2) Taunton’s Rep. 81.

(3) 14 B. 452.

takes the right given to Ravji by Chimnaji under the mortgage of 1880. By that mortgage Chimnaji merely gave the use of the drain to Ravji, while also reserving a right of user to himself. This reserved right now belongs to the plaintiff, who purchased from Chimnaji.

Mahadev Chimnaji Apte, for the respondent (defendant).—The plaintiff can only lay claim to that portion of the house which he purchased from Chimnaji and nothing more. He cannot lay claim to the privy and the right of passage over the *bol* simply on the ground that the mortgagee Mathura was entitled to them. In order that an easement should be apparent and continuous, the person claiming a right to the easement should have a right to compel his opponent to submit to the easement. There is no reservation made in the plaintiff's sale-deed with respect to use of the privy and the *bol*. If the owner of a property conveys a portion of it to another, the vendee cannot by implication get any right of easement over the other portion of the property—*Suffield v. Brown* (1). An apparent and continuous easement may pass to the grantee, only under certain circumstances—*Wheeldon v. Burrows* (2); *Russell v. Watts* (3). In both these cases *Suffield v. Brown* (1) was followed.

[386] Next we contend that the appellant plaintiff cannot claim those rights which Mathura had under her mortgage, because there was no assignment of the mortgage to him. The use of the privy and the *bol* was not an easement, but a mere license conferred on Mathura by the mortgage. Under the mortgage-deed the mortgagor allowed Mathura to use the privy and for this purpose the *bol* was kept in the joint use of the mortgagor and Mathura. This was merely a personal privilege—*Prosonna Coomar Singha v. Ram Coomar Ghose*, (4) ; *Wood v. Leadbitter* (5).

JUDGMENT.

SARGENT, C. J.—Both the Courts below have found that the *bol* in question belonged to the defendant, but the lower Court of appeal, differing from the Subordinate Judge, has held that plaintiff has failed in establishing a right to the use of the northern privy and a passage along the *bol* for that purpose, and also to have the water from his house allowed to pass by the drain running down the *bol*.

It has been contended for the plaintiff that, as regards the use of the privy, it was granted by the mortgage of 1878 to Mathura, which was paid off by plaintiff on the occasion of his purchase in 1887,—that it, therefore, passed to the plaintiff by his purchase, and the defendant holds the *bol* subject to that easement. For the defendant it was contended that it was only a license and not an easement which was conferred by the mortgage to Mathura, and *Prosonna Coomar Singha v. Ram Coomar Ghose* (4) was referred to. Here, however, the privilege was granted by the very instrument which created the mortgage, and must be regarded by the very terms of the provision as a privilege ancillary to the use of the house—to use the language of Martin, B., in *Hill v. Tupper* (6). It is plain, therefore, that the defendant acquired the *bol* subject to the easement which the mortgagee Mathura had over it.

It was contended, however, that it did not pass to the plaintiff, because there is no express assignment of Mathura's mortgage. It is true that Mathura was not made a party to the conveyance to the plaintiff as would be done in England; but she signed a [387] receipt for the mortgage

(1) 10 Jurist, 111.

(2) 12 Ch. Div. 31.

(3) 25 Ch. Div. 559.

(4) 16 C. 640.

(5) 13 M. and W. 838.

(6) 32 L. J. Exch. 217.

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money endorsed on the conveyance, and the plaintiff must, therefore, be taken to have purchased the mortgagee's interest in the house, which would include the right by way of easement over the defendant's *bol*. We think, therefore, that the plaintiff has established his right to the use of the northern privy and a way to it along the *bol*.

As to the rights of draining the water of his house by the drain running down the *bol*, we think that the words of the mortgage by Chimnaji to Ravji Lakshman, through whom defendant derives his title,—“you are to have the use of the drain for passing water as it has continued from old times”—must be understood as intended to reserve to Chimnaji the right in respect of the house still retained by him of using the drain whilst conferring an equal right on Ravji Lakshman of using it for the enjoyment of the mortgaged house.

We must, therefore, vary the decree of the Court below by granting plaintiff an injunction to restrain defendant from interfering with or obstructing the right of way of himself and other inmates of the house through the *bol* to the northern privy and the use of the same and also his right to have the water from his house conveyed by the drain in the *bol*. The plaintiff to have his costs of this appeal. Parties to pay their own costs in the lower Court of appeal.

Decree varied.

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APPELLATE CIVIL.

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

SAVLARAM AND OTHERS (*Original Defendants Nos. 2, 3 and 7*),
*Appellants v. GENU AND OTHERS (Original Plaintiffs), Respondents.**
[6th July, 1893.]

Limitation Act (XV of 1877), art. 134, sch. II—Mortgage—Sub-mortgage—Redemption.

In 1864 Ramji mortgaged the property in dispute with possession to Raghu. Raghu and his widow after his death sub-mortgaged various portions of it to Savlaram (defendant No. 3) in 1864, 1866 and 1870. After the death of the mortgagor, Ramji, his grandsons (plaintiffs Nos. 1, 2 and 3) sold their equity of redemption to plaintiffs Nos. 4 and 5 and in 1891 the five plaintiffs sued defendants Nos. 1 and [388] 2, the heirs of Raghu (original mortgagee) and the sub-mortgagee (defendant No. 3) for redemption and possession. The defendants contended that the suit was barred by the Limitation Act (XV of 1877), sch. II, art. 134.

Held, that art. 134 did not apply, as the language of the sub-mortgage-deed showed that the transaction was merely a mortgage of the mortgage-interest of Raghu and not of the entire property in the land.

Eivakhan Daudkhan v. Bhiku Sazba (1) and Yesu Ramji v. Balkrishna (2), referred to.

APPEAL from an order of remand passed by Rao Bahadur Chunilal M., First Class Subordinate Judge of Poona, with appellate powers.

The plaintiffs in 1891 sued to redeem and recover possession of certain lands from the defendants. The lands originally belonged to Ramji, the grandfather of plaintiffs Nos. 1, 2 and 3. In 1864 he mortgaged

* Appeal No. 1 of 1893 from order.