

Before Mr. Justice Jardine and Mr. Justice Ránada.

1895.

February 4.

DHONDO BA'KRISHNA KA'NITKAR (ORIGINAL PLAINTIFF), APPELLANT, v. RA'OJI VALAD DA'DU (ORIGINAL DEFENDANT), RESPONDENT.*

Mortgage—Registration—Notice—Sale of mortgaged property in execution of a money decree without express notice of mortgage—Right of mortgagee to enforce mortgage against the property in hands of purchaser—Civil Procedure Code (Act XIV of 1882), See. 287.

A mortgagee under a registered mortgage-deed obtained a money decree against the mortgagors in some matter other than the mortgage, and sold the mortgaged property in execution of the decree. The mortgage lien was not announced in the proclamation of sale as required by section 287 of the Civil Procedure Code (Act XIV of 1882), and the auction-purchaser had no actual knowledge of the mortgage. In a suit brought by the mortgagee against the mortgagors and the auction-purchaser to recover the mortgage-debt by sale of the mortgaged property,

Held that, except in a case of fraudulent concealment, the registration of the mortgage was notice to subsequent purchasers. The property was, therefore, liable under the mortgage, and the auction-purchaser was bound by it.

Held, further, that the omission to declare the mortgage at the time of the sale could not be treated as an estoppel.

SECOND appeal from the decision of G. C. Whitworth, District Judge of Násik, confirming the decree of Ráo Sáheb L. K. Nulkar, Subordinate Judge of Sinnar.

Suit by a mortgagee for sale of the mortgaged property, &c. By a registered mortgage-deed dated 23rd June, 1886, the first and second defendants mortgaged the property in question to the plaintiff with possession. Subsequently the plaintiff obtained a money decree against them, not for the mortgage-debt, but in some other matter, and in execution of this decree the house was sold and purchased by the third defendant.

The plaintiff's *darkhást* for execution had stated that the house was to be sold subject to his mortgage lien, but in the proclamation of sale the lien was not mentioned, nor was anything said about it at the auction-sale.

The third defendant having purchased the property was put into possession by the Court. Thereupon the plaintiff applied to be restored to possession, and his application being rejected he filed

* Second Appeal, No. 272 of 1893.

the present suit to establish his right as mortgagee and to recover the amount due on the mortgage by sale of mortgaged property and from the first and second defendants.

Defendants Nos. 1 and 2 did not appear.

Defendant No. 3. replied (*inter alia*) that he did not admit the plaintiff's mortgage lien; that the plaintiff did not reserve his lien upon the property when it was sold in execution; and he contended that he being a *bona-fide* purchaser for value without notice of the lien, the claim as against him should be rejected.

The Subordinate Judge found that the third defendant purchased the house without notice of the plaintiff's mortgage lien; that he was entitled to retain possession; and that the plaintiff should recover the mortgage-debt from the first and second defendants.

On appeal by the plaintiff the decree was confirmed.

The plaintiff preferred a second appeal.

Daji Abaji Khare, for the appellant (plaintiff):—The plaintiff is entitled to enforce his lien upon the property in the hands of the third defendant who bought it with notice of the mortgage. For the mortgage was registered, and registration is notice—*Motiram v. Hari*⁽¹⁾. The lower Courts have held that because the mortgage was not mentioned in the proclamation of sale or at the auction sale, it is not binding on the purchaser. But the only question is whether the purchaser had notice, and he had notice by the fact of registration. In our *darbhast* for execution we prayed that our lien should be declared.

Gangaram B. Rebe, for the respondent (defendant No. 3):—The mere fact that the mortgage was mentioned in the *darbhast* cannot be considered to be equivalent to notice. Unless the mortgage was mentioned in the proclamation of sale, or proclaimed at the auction sale, it cannot affect the purchaser. It was incumbent on the plaintiff to announce the lien, because it was his own lien and not that of a stranger—*Dullab Sirkar v. Krishna Kumar Bakshi*⁽²⁾; *Agarchand v. Rakhma*⁽³⁾.

(1) P. J., 1877, p. 4.

(2) 3 Beng. L. R., 407, A. C. J.

(3) I. L. R., 12 Bom., 678.

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[JARDINE, J.:—In the last case the lien was fraudulently concealed, and, therefore, it was held not binding.]

In the present case, though there is no finding that the lien was fraudulently concealed, still the very fact that it was not proclaimed, and that we purchased the property *bond fide* in the belief that we purchased an absolute estate, estops the plaintiff setting up the lien. We should not be made to suffer for the plaintiff's omission.

JARDINE, J.:—The plaintiff, being mortgagee of the property under a registered deed of 1886 executed by the defendants Nos. 1 and 2, obtained a decree against them in some other matter, and in execution thereof had the property put up for sale at a court sale, where it was bought by the defendant No. 3. In the present suit the Courts below have refused to make the property liable on the mortgage. It is found as a fact that the defendant No. 3 had no actual knowledge of the mortgage. This incumbrance had not been stated in the proclamation as section 287 of the Code of Civil Procedure requires. Laying stress on this fact, the District Judge held that the defendant No. 3 had no notice at all.

But although *Dullab v. Krishna*⁽¹⁾ is cited to support the decision, it has long been settled in this Presidency that registration is notice to subsequent purchasers—*Hasha v. Ragh*⁽²⁾; *Lakshmandas v. Dasrat*⁽³⁾; *Radhábái v. Shamráv*⁽⁴⁾; *Dundaya v. Chenbasápa*⁽⁵⁾. In *Agarchand v. Rakhma*⁽⁶⁾, a fraudulent concealment was held to create an exception; but in the case before us there is no fraud, but only omission. The case is thus on all fours with *Motirám v. Hari*⁽⁷⁾ and resembles also *Nanabhat v. Lakshman*⁽⁸⁾ discussed without disapproval by the Full Bench in *Lakshmandas v. Dasrat*. Mr. Rele has urged the Court to treat the omission of the plaintiff to declare his incumbrance at the time of sale as creating an estoppel. But this would be contrary to the decisions, *e. g.*, *Baswuntapa v. Ranu*⁽⁹⁾ and see also *Sobhagchand v. Bháichand*⁽¹⁰⁾. It would have been otherwise if the

(1) 3 Beng. L. R., 407, A. C. J.

(2) I. L. R., 6 Bom., 165.

(3) *Ibid.*, 168.

(4) *Ibid.*, 8 Bom., 168.

(5) P. J., 1883, 83.

(6) I. L. R., 12 Bom., 678.

(7) P. J., 1877, 4.

(8) *Ibid.* 83.

(9) I. L. R., 9 Bom., 86, p. 92.

(10) I. L. R., 6 Bom., 193, at p. 206.

decree in execution of which the Court sale occurred had been obtained on the mortgage—*Kheeraj v. Lingaya*⁽¹⁾; *Sheshgiri v. Salvador Vas*⁽²⁾.

We, therefore, amend the decree by adding to the relief thereby given a declaration that the plaintiff has a right to recover the amount due on the mortgage by sale of the property in suit, and a direction that the amount be recovered therefrom if he fails to recover it from the defendants Nos. 1 and 2; the defendant No. 3 to pay his own costs throughout and the costs of both appeals.

Decree amended.

(1) I. L. R., 5 Bom., 2.

(2) *Ibid.* 5.

APPELLATE CIVIL.

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

SHIVDAYA'L RA'MCHARAN (ORIGINAL DEFENDANT No. 2), APPLICANT;
KHETU GANGU AND ANOTHER (ORIGINAL PLAINTIFFS), OPPONENTS.*

1895.

February 5.

Practice—Procedure—Civil Procedure Code (Act XIV of 1882), Sec. 39—Pleader—Pleader duly appointed by a party to a suit cannot delegate his authority to another pleader—Ex-parte decree.

The applicant (defendant No. 2) was one of two defendants in a suit in the Court of Small Causes in Bombay. He and his co-defendant (defendant No. 1) appointed separate pleaders (K. and W.) to conduct their case. On the day of hearing the applicant was unavoidably unable to be present, and his pleader (K.) being also engaged elsewhere requested W., the pleader of the other defendant in the suit, to hold his brief and to conduct the case for both defendants. W. did so. A decree was passed against both defendants. The applicant subsequently applied to the Full Court under section 37 of the Presidency Small Causes Court Act (XV of 1882) for a new trial on the ground that he had not been represented at the hearing and that the decree had been passed against him *ex parte*. The Full Court refused the application, holding that the applicant had been represented by a pleader, and that the decree against him was not *ex parte*. The appellant then applied to the High Court in its extraordinary jurisdiction.

Held, discharging the order of the Full Court, that the decree against the applicant was an *ex-parte* decree. K., who was the applicant's duly appointed pleader, could not delegate his authority to W., and as the applicant was not himself present, the decree was *ex-parte*. W. was not the duly appointed pleader of the applicant and could not, therefore, represent him at the hearing: see section 39 of the Civil Procedure

* Application No. 119 of 1894 under the extraordinary jurisdiction.