

1895.

UMED
HATHISING
v.
GOMAN
BHA'JI.

and dispose of it in conformity with the above remarks. The applicant to have his costs of this application if he should succeed in the execution proceedings.

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ránade.

1895.
March 12.

DESAI LALLUBHAI JETHA'BHAI (ORIGINAL DEFENDANT NO. 7), APPELLANT, v. MUNDA'S KUBERDA'S (ORIGINAL PLAINTIFF), RESPONDENT.*

Mortgage—Priorities—Registration Act III of 1877, Sec. 50—Sale in execution of decree on prior unregistered mortgage—Rights of purchaser—Claim of subsequent mortgagee in possession under registered mortgage—Rights of such subsequent mortgagee where he was not a party to the suit on prior mortgage—Transfer of Property Act (IV of 1882), Sec. 75.

In October, 1887, the plaintiff purchased certain lands at a sale held in execution of a decree passed on an unregistered mortgage effected in 1862. The defendant was in possession as mortgagee under a subsequent registered mortgage of 1867. He was not a party to the suit and decree of 1887. The plaintiff sued for possession. The defendant claimed that the plaintiff could not recover possession without paying off his (the defendant's) claim.

Held that at the execution sale the plaintiff bought the property in dispute free from all subsequent incumbrances, subject only to the right of the defendant, if he so desired, to retain possession.

Held also that the plaintiff as purchaser stood in the place of the prior mortgagee and had a right to possession; that the defendant as subsequent mortgagee could not compel the plaintiff to pay off his (the defendant's) mortgage, but that the defendant not having been a party to the suit on the prior mortgage had a right, if he wished to retain possession, to pay off the plaintiff's claim.

Mohan Manor v. Togu Uka⁽¹⁾ referred to and followed.

Registration under Act III of 1877 does not operate so as to exclude instruments executed before Act XX of 1864 came into operation on the ground of their non-registration.

Tirumala v. Lakshmi⁽²⁾ referred to and followed.

SECOND appeal from J. FitzMaurice, Assistant Judge of Ahmedabad.

Suit for possession of a godown and certain lands.

In February, 1862, one Nathubhai and his sons mortgaged the property in question by an unregistered *san*-mortgage-deed to Bhogilál and Kálidás.

* Second Appeal, No. 880 of 1893.

(1) I. L. R., 10 Bom., 224.

(2) I. L. R., 2 Mad., 147.

In 1887 the mortgagees obtained a decree on the mortgage, and on the 30th October, 1887, sold the property in execution to plaintiff. In attempting to obtain possession the plaintiff was resisted by Desái Lallubhai Jethábhái. (defendant No. 7) and two others (defendants Nos. 8 and 9).

The plaintiff, therefore, brought this suit against the original mortgagors (defendants Nos. 1—6) and Desái Lallubhai (defendant No. 7) and defendants Nos. 8 and 9.

Lallubhai (defendant No. 7) claimed possession of some of the land under a registered mortgage from Nathubhai and his sons, dated 1st January, 1867, which was renewed in May, 1883, and of the godown under registered mortgages dated 1873 and 1883. He contended that he being in possession under a registered mortgage the plaintiff had bought subject to his claim, and that the plaintiff must satisfy his mortgage-debt before he could recover possession.

Defendants Nos. 8 and 9 claimed other parts of the property sold at the execution sale in 1887, but the plaintiff compromised the suit as against them, and sold them the land they claimed.

The Subordinate Judge held that as Lallubhai had not been a party to the mortgagee's suit in 1887 he should be permitted to redeem the mortgage under which the plaintiff claimed, and directed that he should pay within six months the full amount (Rs. 1,448) of the decree of 1887 into Court to the credit of the plaintiff, and in default that the plaintiff should recover possession.

On appeal the Assistant Judge varied the decree by permitting the defendant Lallubhai to redeem on payment Rs. 751-8-0 instead of the whole amount of the decree in 1887 on the ground that Lallubhai had possession of only part of the lands comprised in the original mortgage, the rest being in the possession of the defendants Nos. 8 and 9 with whom the plaintiff had compromised his claim by selling these lands to them. He said :—

“ I think, however, that the Subordinate Judge erred in requiring defendant No. 7 to redeem by payment of the full amount of the decree obtained against the mortgagors. For under the

1895.

DESÁI
LALLUBHAI
JETHÁBHAI
v.
MUNDÁS
KUBERDÁS.

1895.

DESÁI
LALLUBHAI
JETHABHAI
v.
MUNDÁS
KUBERDÁS.

decree other property besides that with defendant No. 7 was sold; that other property was also the subject of the prior mortgage. It was in the possession of defendants Nos. 8 and 9 in this suit, and plaintiff has compromised the suit as against them by selling that property to them for Rs. 600 (*vide* purshis in appeal). I think, therefore, it would be inequitable to throw the whole burden of the amount decreed on the prior mortgage on the portion of the property which is with defendant No. 7."

Defendant No. 7 was, therefore, permitted to redeem on payment of Rs. 751-8-0 only within six months from the date after the decree in appeal.

Against this decision Lallubhai (defendant No. 7) preferred a second appeal to the High Court.

Govardhanrám M. Tripáthi for the appellant.

Chimanlál H. Setálwad for the respondent (plaintiff).

RA'NADE, J. :—There are only two points which demand consideration in this case, the first being concerned with the relative rights of prior and subsequent incumbrancers *inter se*, and the second has reference to the operation of section 50 of the Registration Act III of 1877.

The respondent (original plaintiff) purchased the property in dispute at a Court sale held on 30th October, 1887, in execution of a decree on an unregistered *san*-mortgage-bond of 1862. When he proceeded to take possession of the land, the appellant (original defendant No. 7) obstructed him on the ground that he was in possession under a registered mortgage-bond of 1867, renewed in 1883, and that respondent was bound to satisfy his mortgage before he could recover possession of the lands under his certificate of sale. The contest is thus between the purchaser in execution of a decree on a prior unregistered *san*-mortgage of 1862, and the defendant in possession under a subsequent registered mortgage of 1883, a renewal of one effected in 1867.

The authorities—*Námdár Chaudhri v. Karamrájí*⁽¹⁾, *Muhammad v. Man Singh*⁽²⁾, *Gajadhar v. Mul Chand*⁽³⁾, *Mohan Manor v. Togu Uka*⁽⁴⁾—are quite clear on the points (1) that the pur-

(1) I. L. R., 13 All., 315.

(3) I. L. R., 10 All., 520.

(2) I. L. R., 9 All., 125.

(4) I. L. R., 10 Bom., 224.

chaser stands in the place of the prior mortgagee, and (2) that he has a right to recover possession, (3) that the subsequent mortgagee cannot compel him to redeem his own mortgage, but (4) has a right himself, in case he has not been made a party to the suit on the prior mortgage, to pay off the prior incumbrance if he desires to retain possession. The case of *Gaya Prasád v. Salih Prasád*⁽¹⁾ had special features, but even in that case Oldfield, J., admitted that he had seen reason to change the view once held by him, and stated, following the ruling in *Gopee v. Kálee*⁽²⁾, that the subsequent incumbrancers have only a right to pay off the debt on account of which the estate was sold, and to treat the purchaser as the owner of the estate subject to their claim.

The facts of the present case are on all fours with those in *Mohan Manor v. Togu Uka*⁽³⁾, and on the authority of that decision and the cases referred to therein—*Kasandás v. Prájivan*⁽⁴⁾ *Dámodar v. Naro*⁽⁵⁾—we must hold that the respondent bought at the execution sale the property in dispute free from all subsequent incumbrances, subject only to the right of the appellant to redeem him if he so desired—*Wásudev v. Náráyan*⁽⁶⁾; *Mansukh v. Turbhovan*⁽⁷⁾. The law under section 75 of the Transfer of Property Act (IV of 1882) is the same—*Venkata v. Kannam*⁽⁸⁾; *Shivrám v. Genu*⁽⁹⁾; *Náran v. Dolatrám*⁽¹⁰⁾; *Sankána v. Virupakshápa*⁽¹¹⁾; *Rádhábái v. Shámráv*⁽¹²⁾.

The question of registration appears to present no difficulty. Registration under Act III of 1877 does not operate so as to exclude instruments executed before Act XX of 1864 came into operation, on the ground of their non-registration—*Tirumala v. Lakshmi*⁽¹³⁾. The Bombay decision in *Khandu v. Taráchand*⁽¹⁴⁾, is to the same effect. As the execution-sale took place in respect of a *san*-mortgage in Gujarát, the question of want of possession can have no significance. We accordingly confirm the decree. Appellant to pay all costs.

Decree confirmed.

(1) I. L. R., 3 All., 682.

(2) 23 W. R., 338.

(3) I. L. R., 10 Bom., 224.

(4) 7 Bom. H. C. Rep., A. C. J., 146.

(5) I. L. R., 6 Bom., 11.

(6) F. J., 1882, 21.

(7) *Ibid.*, 213.

(8) I. L. R., 5 Mad., 184.

(9) I. L. R., 6 Bom., 515.

(10) *Ibid.*, 538.

(11) I. L. R., 7 Bom., 146.

(12) I. L. R., 8 Bom., 168.

(13) I. L. R., 2 Mad., 147.

(14) I. L. R., 1 Bom., 574.

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