APPELLATE CIVIL.

FULL BENCH.

Before Mr. Justice Chandavarkar, Mr. Justice Batty, and Mr. Justice Aston.

HARI BIN BHIWA (ORIGINAL PLAINTIFF NO. 1), APPELLANT, *v.* VISHNU DINKAR AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

1904. *February 4.*

Mortgage—Mortgage-debt—Another debt on a previous khâta made payable under the deed—Clog on Equity of Redemption—Charge.

The property in suit was mortgaged for Rs. 1,500. The mortgage-deed further recited an earlier debt of Rs. 5,000 due on a previous kháta and provided that if the mortgagor did not repay this Rs. 5,000 within two years from the date of the deed, he was not at liberty to redeem the property, unless both the debts of Rs. 1,500 and Rs. 5,000 were paid. The deed was stamped as a mortgage for Rs. 6,500.

On a construction of the deed:

Held, that the property mentioned in the deed was mortgaged for the sum of Rs. 5,000 and interest payable thereunder and also for Rs. 1,500, with this difference that the mortgage as to the former sum took effect on the expiry of two years after the date of the deed.

SECOND appeal from the decision of G. C. Whitworth, District Judge of Sátára, confirming the decree passed by N. V. Samant, Subordinate Judge of Rahimatpur.

The property in suit originally belonged to one Vishnudas Gujar. He mortgaged it in 1863 to Dinkar Apaji Damle (father of defendants 1 and 2) for Rs. 1,500. The deed recited an earlier debt of Rs. 5,000 due on a previous kháta, and provided that if the debt of Rs. 5,000 were not paid by the mortgagor within two years from its date, he was not at liberty to redeem the property unless both the debts, *viz.*, Rs. 1,500 and Rs. 5,000, were paid. The mortgage-deed (Exhibit 23) was stamped as one for Rs. 6,500; and was in the terms set out in the judgment of Batty, J.

Vishnudas had three sons: Krishnadas, Narayandas and Damodardas. Of them Narayandas and Damodardas died without any issue. Krishnadas had a wife, Subhadra, by whom he had one son, Bhikhudas. This Bhikhudas sold the equity of

* Second Appeal No. 97 of 1903.

1904.

HARI v. VISHNU.

redemption in the property to the plaintiff 1 on the 30th July, 1895, for Rs. 500. In 1898, the plaintiff 1 brought a suit against the defendants to redeem the property on a payment of Rs. 1,500. While these proceedings were pending in Court, the plaintiff 1 sold on the 16th January, 1900, for Rs. 500, the *inámi* rights in the property to Gokaldas Ramdas, who was subsequently added as plaintiff 2.

The defendants contended (*inter alia*) that the deed of sale dated the 30th July, 1895, on which the plaintiff relied was colourable, that the mortgage was for Rs. 6,500 and not for Rs. 1,500, and that they had been in possession of the property in consideration of the loan of Rs. 6,500.

The Subordinate Judge held that the deed of sale on which the plaintiffs relied was colourable, and that if the plaintiffs were to be allowed to redeem they would have to pay Rs. 1,680 besides the damdupat of the loan of Rs. 5,000.

On appeal this decree was confirmed by the District Judge.

Plaintiff 1 appealed to the High Court contending among other things that the Lower Courts erred in holding that the sum of Rs. 5,000 was a charge on the land in question and should be paid before it could be redeemed.

The appeal came on for hearing before *Batty and Aston, JJ.*, when their Lordships recorded the following judgments in making a reference to the Full Bench.

BATTY, J.:—In this case the plaintiff sues as assignee of the equity of redemption to redeem certain property mortgaged in 1863 to the father of the defendant. The assignment was held colourable by the Courts below. The suit was dismissed partly on this ground (which we hold to be immaterial), and partly on the ground that the mortgage purported to make the payment of a debt prior to the mortgage transaction a condition precedent to the right to redeem and that the plaintiff not having proved discharge of that prior debt was not entitled to redeem. The Court of first instance held on a construction of the mortgage-deed that the prior debt was not made a charge upon the property mortgaged, but that its payment was a condition precedent and the Lower Appellate Court held that there was

1904.

HARI v. VISHNU.

nothing in the ruling in *Hari* v. *Balambhat*(1) which would allow this provision to be disregarded and redemption without payment of that prior debt. Before us it has been argued that the condition requiring payment of another debt not itself charged upon the property was a clog on the equity of redemption and as such must be disregarded. The mortgage in question runs as follows :—

"Debt bond. The 2nd of Shravan Shudh in Shake 1785, in the cyclical year named Rudhirodgari, the day of the week Sunday (16th August, 1863). Given in writing to the creditor by name Rajeshri Dinkarpant Apa Damle residing at Kasba Rahimatpur, táluka aforesaid. The Fasli year 1273. For a reason I give this debt bond in writing as follows :—I have borrowed from you for my own purposes money as follows :—

The particulars in respect thereof are—

5000. Money was due to you in respect of a previous (?) Mirajkhata. The document in respect thereof bore the Lunar date the 1st of Kartik Shudh of Shake 1776. In respect of the same the sum of rupees five thousand of Surat currency is this day fixed to be payable.

1500. There is due to Rajeshri Vishnu Bapuji Bhide of Sátára money borrowed by me on the security of a *kotha* (? granary) situate at Sátára and a house and Inám Mala (plantation), &c., situate at Kasba Rahimatpur. For the purpose, among other things, of making payment to Bhide by redeeming out of the said property, the Inám Mala and the house situate at Kasba aforesaid from Bhide and (thus) for mortgaging (the same) to you I have this day taken in cash rupees fifteen hundred of Surat currency.

6500

Thus the principal sum of rupees six thousand and five hundred is this day due to you. The terms in respect of making payment of the same together with interest are as follows :—

I. As to the sum of rupees 5,000 of Surat currency which is now fixed to be payable in respect of the previous debt, I will pay off the same within two years from this day. The security for the said money (is) : There is due to me from Shrimat Rajeshri Raghunathrao Jaivant Mantri Islampurkar money (? lent) in the presence of the deceased Govind Mahadeo Sane Limbkar, a denizen of paradise, by his son and heir Nilkant Govind Sane Limbkar, and through the deceased Rajeshri Narayanrao Vithal Mahajani, a denizen of paradise, by his brother and heir Vamanrao Vithal Mahajani of Sátára. The matter is now pending before the British Government. When the said money is received, out of that money I will pay off the aforesaid money together with interest at the rate of Re. ½ (namely eight annas) per centum per mensem, that is to say, the whole amount,

(1) (1884) 9 Bom. 233.

1904.

HARI v. VISHNU.

whatever the same may come to under the account. Should no money be received from Mantri, I will pay up the principal sum by trying my best at any time you may demand payment in respect thereof without pleading any excuse on his (Mantri's) account.

I. As to rupees (1,500) fifteen hundred taken this day in cash for making payment to Bhide and for other purposes, as mortgage security for the same I give my private inám lands and house situate at Kasba Rahimatpur, táluka Koregaon. The particulars thereof (are) as follows :—

I. Inám lands, plots two Bagait and Jirait. (Here follows description of property which is not translated.)

For the above sum of rupees fifteen hundred borrowed (from you) I mortgage (to you) the Inám lands and house as described above and this day I give the same into your possession for vahivat. You may therefore yourself carry on vahivat of the said lands and house as owner thereof or you may cause vahivat to be carried on by any other person and in any manner you like. You yourself are to take the income which may be realised from the lands every year and the fruits, &c., which the trees may yield and the rent of the house as the fixed interest on the said fifteen hundred rupees. The sum of fifteen hundred rupees borrowed from you is to bear no interest. I am to repay the said rupees fifteen hundred without interest in five years from this day. As to the Chauthai (dues) and Nazarána (presents) amounting in all to (Rs. 14-11-0) fourteen rupees and eleven annas which are every year payable to Government for the Inám lands, you are to pay the same and take a receipt in respect thereof. Should any embankments have to be erected in the said lands and should there be any breakage and falling off of the wells and should there be any breakages and dilapidations in respect of the house, I will cause repairs to be made to the same at the proper time. Should I fail to cause the said repairs to be made in time and should you happen to make the same, you are to make the outlays that may be required to be made and debit the same in my name. At the time of paying off the mortgage money I will make payment of the whole amount together with interest at Re. ½ (namely eight annas) per centum per mensem on the total sum of expenses, &c. Should you happen to plant new trees and preserve them hereafter in the said lands, half of the new trees which may be in existence at the time of the redemption of the mortgage are to belong to you and the (other) half are to belong to me. As the said Inám lands are mortgaged to you and given to you for vahivat, I give to you as muniment of title the sanad given to me by the Sarkár for enjoyment thereof. My kinsmen and others have no claim to the lands and house given in mortgage.

I will pay off both the sums in pursuance of the stipulations contained in the above two paras. Stipulations have been made above in respect of the payment of the previous sum. Unless and until the said sum is paid off in pursuance of the said stipulations I will not (try to) redeem the property mortgaged, by the mere payment of rupees fifteen hundred borrowed on the security of the property mortgaged. Should I have to redeem the mortgage, I will not lay any claim to the property mortgaged, unless I pay off both the sums wholly.

I have duly given this deed in writing at Rahimatpur of my own accord. Dated the 16th of August in the Christian year 1863. The handwriting of Damodardas Vishnudas Gujaráti of Sátára, residing at Rahimatpur."

The pleader for the appellants refers us to the case of *Noakes & Co. Limited* v. *Rice*(1) and to the remarks thereon in the recent judgment in *Rajamal Motiram* v. *Shivaji Anandrao*(2) in which the ruling in *Hari* v. *Balambhat*(3) is not accepted as sufficient authority for the view taken in this case by the Courts below.

For the respondent it is sought to support the decisions of the Courts below on the authority of the following cases: *Hari* v. *Balambhat*(3); *Yeshvant Shenvi* v. *Vithoba Sheti*(4); *Sunder Malhar Patel* v. *Bapuji Shridhar*(5); *Krishnaji* v. *Maheshwar*(6).

In the cases cited for respondent the Court upheld agreements purporting to make the right to redeem dependent on prior payment of a debt that was not itself made a charge, notwithstanding the decisions in *Rama* v. *Martand*(7) and *Narayan* v. *Raoji*.(8)

In the present case the terms of the document appear to bring the case within the principles accepted in *Rama* v. *Martand*(7), *Narayan* v. *Raoji*(8) and *Rajamal Motiram* v. *Shivaji Anandrao*(2). But in view of the decisions abovementioned as cited for the respondent, we think desirable a reference to a Full Bench of the question whether a condition in a mortgage deed is not invalid as a clog on the equity of redemption, if it purports to make the payment of a sum not specifically made a charge upon the property mortgaged, a condition precedent to the right to redeem.

ASTON, J.:—In *Hari* v. *Balambhat*(3) and *Yashvant* v. *Vithoba*(4) a stipulation to postpone redemption till payment of another debt set out, was interpreted as constituting not a charge on the property but a condition precedent to redemption.

In *Krishnaji* v. *Maheshvar*(6) Sargent, C. J., said: "having regard to the decision in *Yashvant Shenvi* v. *Vithoba Sheti*(4)

(1) (1902) A. C. 24.
(2) (1902) 4 Bom. L. R. 963.
(3) (1884) 9 Bom. 233.
(4) (1887) 12 Bom. 231.
(5) (1893) 18 Bom. 755.
(6) (1895) 20 Bom. 346.
(7) (1884) 9 Bom. 236 *f.*
(8) (1884) P. J. p. 254.

1904.

HARI v. VISHNU.

affirming the validity of an agreement embodied in a mortgage-deed to postpone redemption of the mortgage until payment of another debt which had not been made a charge upon the land, we are unable to hold that a similar agreement contained in a subsequent deed executed for a fresh consideration is invalid."

In *Sunder* v. *Bapuji*[1] a mortgage bond contained a clause stipulating that the mortgagors were not to redeem the mortgaged property without paying not merely the amount of the mortgage debt and interest but also the amount due on a certain instalment bond executed at the same time as the mortgage in respect of money due under a decree and that "unless the whole was paid off neither the mortgagor nor any one else should have a claim."

It was contended that upon the proper construction of this instrument it must be taken that it was the intention of the parties to make the amount due upon the instalment bond a charge on the lands mortgaged. Dealing with this construction Sargent, C. J., said :—"We do not think it necessary to express a decided opinion on this contention of the defendant, as we think that in any case the right of redemption was made conditional on whatever was due at the time on the instalment bond being paid."

Mr. Coyaji for the appellant, original plaintiff No. 1, contends that where a debtor owing an unsecured debt obtains from his creditor a further loan under an instrument which mortgages property as security for the fresh loan and also provides in the terms used in Exhibit 23 that the previously unsecured loan is to be paid before redemption as to the fresh loan, the latter provision is not a part of the mortgage transaction and does not make the property security for both the prior and the subsequent debt. On this assumption he bases the further contention that such a condition precedent to redemption is a clog or fetter on the equity of redemption of what is only a mortgage for the subsequent loan and as such cannot be enforced. He relied upon the judgment pronounced by Melvill, J., in *Rama* v. *Martand*[2] and upon *Rajamal* v. *Shivaji*[3].

Mr. Bakhle for the mortgagees contends that the instrument Exhibit 23 properly construed shows that the parties intended

(1) (1893) 18 Bom. 755 at p. 757. (2) (1884) 9 Bom. 236 *f. n.*
(3) (1902) 4 Bom. L. R. 966.

to make the (mortgaged) property security for both the prior and the subsequent debts, and the stipulation referred to was therefore part of the mortgage transaction which entitles the mortgagees to possession of the property as security for the prior debt, so there is no need to treat the whole of the transaction of mortgage as confined to the agreement about the subsequent debt (Rs. 1,500) by which method alone the stipulation can be treated as a clog or fetter on redemption. Mr. Bakhle in effect contends that the decision in *Rama* v. *Martand*[1] and *Rajmal* v. *Shivaji*[2] do not avail the appellant unless the decision in *Hari* v. *Balambhat*[3] and *Yashvant* v. *Vithoba*[4] are treated as binding this Court to the view that such a stipulation does not create a charge; and he argues that the stipulation in question in Exhibit 23 is in itself a transfer of an interest to secure payment of money and does create a charge and being part of the mortgage transaction, is enforceable as such.

He relies upon the definitions of "mortgage" and "charge not amounting to a mortgage" in sections 58 and 100 of the Transfer of Property Act (IV of 1882).

The following remark of Lord Davey in *Noakes & Co., Limited*, v. *Rice*[5] was cited: "The principle is this—that a mortgage must not be converted into something else, and when once you come to the conclusion that a stipulation for the benefit of the mortgagee is part of the mortgage transaction, it is but part of his security, and necessarily comes to an end on the payment off of the loan." See also the observation of Jessel, M. R., in *Ex parte Sheil*[6] .... "Another instance familiar to real property lawyers was where the debt had been extinguished at law by the taking of the debtor's body in execution. Still the mortgagor could not get back the estate without payment of the money secured by the mortgage deed. The right of the mortgagee to keep the estate did not depend upon his right to recover the debt in the action, but the two rights were wholly independent the one of the other. His right was, not to recover the money, but to keep the estate till the money was paid, which is a totally different thing." I

(1) (1884) 9. Bom. 236 *f. n.*
(2) (1902) 4 Bom. L. R. 966.
(3) (1884) 9 Bom. 233.
(4) (1887) 12 Bom. 231.
(5) (1902) A. C. 24, at p. 34.
(6) (1877) 4 Ch. D. 739 at p. 793.

1904.

HARI v. VISHNU.

concur with Mr. Justice Batty that a reference should be made to a Full Bench, but looking to the similarity between the stipulations about the (previously) unsecured earlier debt in Exhibit 23 and in the mortgage document in *Sunder* v. *Bapuji*[1] and the remark of Sargent, C. J., therein I think it unnecessary to express at this stage an opinion whether upon a proper construction of the document Exhibit 23 (which is stamped for Rs. 6,500) it must be taken that the parties intended to include in the mortgage transaction the previously unsecured debt (Rs. 5,000) and I would prefer to widen the terms of the reference so as to cover this point as follows :—Whether upon a proper construction of the instrument (Exhibit 23) the property comprised therein has been made security for the prior and the subsequent debts or a charge created in respect of the prior debt or whether the agreement so far as it relates to the earlier debt amounts merely to a clog on an equity of redemption not enforceable.

The reference was argued before a Full Bench consisting of Chandavarkar, Batty and Aston, JJ.

H. C. Coyaji and *W. R. Kerkar*, for the appellant.

Branson (with him *S. R. Bakhle*), for the respondent.

CHANDAVARKAR, J.:— The first question arising on this reference, whether the debt of Rs. 5,000 is secured on the property as a charge by way of mortgage, depends upon a proper construction of the deed, Exhibit 23, by the light of its terms and surrounding circumstances. In the deed itself we have the fact recited that this debt of Rs. 5,000 due on a previous khata had become payable under a bond and for the liability thereunder was substituted a fresh liability under this deed, whereby the debtor obtained a period of two years from its date for the repayment of Rs. 5,000 with interest at the rate of Rs. 1-2-0 per cent. per mensem. The result of the transaction so far was that the old liability of the debtor was extinguished and the creditor could sue him only on and according to the terms of Exhibit 23. This fresh liability with the extinction of the old has some bearing on the question whether the amount of Rs. 5,000 was intend-

(1) (1893) 18 Bom. 755.

ed to be a mortgage debt like the other debt of Rs. 1,500 in this deed. By one of the terms in Exhibit 23 the debtor undertook to repay the amount of Rs. 5,000 with interest within two years out of moneys which he expected to receive from Mantri. The fund which the debtor was entitled to receive from Mantri was made the primary source of repayment—" the security," in the words of the deed, for the sum of Rs. 5,000 and interest. But it could be security only when it came actually into the hands of the debtor. Mantri might or might not pay. The parties therefore appear to have contemplated the contingency of Mantri not paying at all, and they studiously provided for it in the deed by the stipulation that should the debtor have to redeem the property, in express terms mortgaged for the other debt of Rs. 1,000 by the same deed, he should " not lay claim to the property mortgaged " unless he paid off " both the sums wholly ". That is, if the debt of Rs. 5,000 should remain unpaid within two years, it should be treated just like the other debt expressly charged on the property as a mortgage ; that, in fact, the two debts should be dealt with in that event not as separate but as one, and the property should be redeemed on that footing. This language of the stipulation must be construed by the light of the facts apparent from the deed itself, *viz.*, that the debt of Rs. 5,000 due under the old bond was gone and became merged in the transaction evidenced by this deed, Exhibit 23, and that the debtor had to provide for the contingency of Mantri's failure to supply him with the funds out of which he primarily promised to discharge this debt of Rs. 5,000. So construed, the language of the deed leaves little doubt that the intention of the parties was to burden the property with the debt of Rs. 5,000 at the end of two years from its date. Indeed, that such was their intention is conclusively shown by the fact that they have stamped the deed as a mortgage for both the sums. The contract as to Rs. 5,000 forms part, to borrow the language of West, J., in *Appa v. Bahirji*[1], of the same agreement embraced in the same memorial as that relating to the contract as to Rs. 1,500 and must be construed and given effect to as a whole.

(1) (1875) P. J., p. 362.

1904.

HARI v. VISHNU.

But then it was urged by Mr. Coyaji, who argued the case for the appellant with his usual ability and conciseness, that this construction of the deed was opposed to the difference between the language employed as to the debt of Rs. 5,000 and that as to the other debt of Rs. 1,500. No doubt, after agreeing to pay Rs. 5,000 within two years from the moneys which he expected to get from Mantri, and after speaking of those moneys as "security" for that sum, the debtor goes on to say that he mortgages the property mentioned in the deed for the sum of Rs. 1,500. Mr. Coyaji's argument, as I have understood it, was that the express mention of a mortgage with reference to Rs. 1,500 must be taken as an implied exclusion of Rs. 5,000 from that category. The answer to that argument, however, is that it might have prevailed if the language of the deed had been no more than that on which Mr. Coyaji relies. From the beginning the property stood mortgaged for Rs. 1,500 only and the debt of Rs. 5,000 was personal for two years from the date of the deed. It was only on the expiry of two years from the date of the deed that the right of the creditor to look to the property as security for Rs. 5,000 also arose. The writer of the deed appears to have fastened his mind upon this difference in point of liability between the two debts, and with a view to give effect to it, he appears to me to have used the language on which Mr. Coyaji lays stress. He might have no doubt said in express terms that on the expiry of the two years the property should stand mortgaged for Rs. 5,000 also; but we must not construe too narrowly the language of the document drafted apparently by one not versed in the technical terminology of law. The writer of the deed seems to me to have used as to Rs. 5,000 a more elliptical form of expression at the end of the deed than that used in the previous part of it as to Rs. 1,500, to convey the intention of the parties, apparent from the whole of the deed and surrounding circumstances, that the property should stand mortgaged for both the sums, if the sum of Rs. 5,000 were not repaid within two years from moneys that might be received from Mantri.

I need not discuss at length the decided cases mentioned in the referring judgments, because the question in each of them was, whether, upon the deed there concerned, there was a charge

by way of mortgage in respect of the amount, on the payment of which, together with the other amount expressly made a charge, the right of redemption was made conditional. A decision on the construction of one document cannot be taken to govern the construction of another, and these decided cases can be of little use in the construction of the deed with which we are here concerned. Moreover, it is clear from the terms of the documents in all those decided cases that they are distinguishable from the terms here. For instance, in *Rama* v. *Martand*[1] the Court held that, as the terms were obscure, there was no reason for differing from the view of the Lower Courts that a charge by way of mortgage was not intended. In *Hari Mahadaji Savarkar* v. *Balambhat Khare*[2] the mortgage was only for Rs. 152, but the mortgagor subsequently contracted fresh debts, for which he passed two bonds in which he stipulated that he would pay those debts before redeeming the mortgage. The two transactions—that of the mortgage and that of the bonds—were different and there is nothing in the report of the case to show that the bonds were stamped as mortgage-deeds. In *Yashvant Shenvi* v. *Vithoba Sheti*[3] the mortgage was for Rs. 64 only, but the deed contained a stipulation on the part of the mortgagor to redeem on payment of the mortgage-debt and another debt due on a separate bond. This bond was not cancelled but kept alive as creating a separate liability in spite of the stipulation in the mortgage-deed. That is clear from the stipulation in the mortgage-deed that the mortgagor should pay the mortgage-debt and the bond-debt and take back the mortgage-deed and the bond and then redeem the property. The Court held, under those circumstances, that the bond-debt was not made a charge on the mortgaged property. In the report of this case also there is nothing to show that the mortgage-deed was stamped as a mortgage for both the debt expressly charged by way of mortgage and the bond-debt. In *Sundar Malhar Patel* v. *Bapuji Shridhar*,[4] the mortgage was for Rs. 700 and at the same time the mortgagor executed a bond for Rs. 500; in the mortgage-deed he stipulated that he should redeem the property on payment of

(1) (1884) 9 Bom. 236 *f. n.*
(2) (1884) 9 Bom. 233.
(3) (1887) 12 Bom. 231.
(4) (1893) 18 Bom. 755.

1904.

HARI v. VISHNU.

both the sums; and the mortgage-bond was stamped as for a mortgage-debt of Rs. 1,200. But the Court did not think it necessary to express a decided opinion on the contention raised in the case that Rs. 500 were charged on the property by way of mortgage. The decision in *Krishnaji* v. *Maheshvar Lakshman Gondhalekar*[1] followed that in *Yashvamt Shenvi* v. *Vithoba Sheti*.[2] The mortgage was expressly for a certain amount and certain money debts were secured by bonds, one term of which was that the money debts should be paid off before the mortgage was redeemed. These money debts formed a separate liability arising out of bonds not stamped as mortgage-deeds, and the mortgage-deed was not stamped as for a mortgage-debt comprising the amount expressly charged and the money debts also.

None of these cases has, in my opinion, any close resemblance to the present, except the decision in *Sundar Malhar Patel* v. *Bapuji Shridhar*,[3] where, however, the question now before us was left open.

For these reasons my answer to the reference is that the property mentioned in Exhibit 23 is mortgaged for the sum of Rs. 5,000 and interest payable thereunder as also for Rs. 1,500—with this difference that the mortgage as to the former took effect on the expiry of two years after the date of Exhibit 23; and that no question as to a clog on the equity of redemption arises in the case.

BATTY, J.:—I concur and think the provisions in the document relating to the sum of Rs. 5,000 amount to a mortgage. They would certainly fall within the first paragraph of clause (*a*) of section 58 of the Transfer of Property Act, and would not operate to create a condition precedent clogging the equity of redemption.

ASTON, J.:—I also concur.

In my opinion, the stipulations in the instrument (Exhibit 23) regarding the prior debt of Rs. 5,000 do not upon a proper construction of the terms of that document (which is stamped as for a mortgage up to Rs. 6,500) constitute merely a collateral agreement outside the transaction of mortgage giving to the

(1) (1895) 20 Bom. 346. (2) (1887) 12 Bom. 231.
(3) (1893) 18 Bom. 755

mortgagor " under the colour of a mortgage a distinct collateral advantage " (see *Broad* v. *Selfe*,(1) and *Noakes* v. *Rice*(2)), but they, I think, constitute a part of the transaction of mortgage entered into between the parties to that deed (Exhibit 23) and create a " mortgage " as defined in section 58 of the Transfer of Property Act IV of 1882 and make the property comprised in the deed security for the prior debt on the conditions and terms set out in the document.

I therefore concur in the judgments of my learned colleagues that the answer to the reference should be in the terms set out in the judgment of Mr. Justice Chandavarkar.

(1) (1863) 9 Jur. (N. S.) 885. (2) (1902) A. C. 24.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Batty.

SAMAL AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS, *v.* BABAJI BALU JADHAV AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS.*

1904. *February 8.*

Lis pendens—Mortgage-decree—Execution proceedings—Purchase at a Court-sale under another decree—Pendency of the execution proceedings.

On the 16th February, 1883, R. obtained a decree on a mortgage against B. While execution proceedings under this decree were pending, a money-decree was obtained against B. by another person; and at a Court-sale held in execution thereof, the property was purchased by S. on the 18th December, 1886. S. obtained his certificate of sale on the 20th December, 1887, and obtained possession of the property on the same day. S. subsequently sold the property to the defendants, who came into possession of the property. The execution proceedings under the mortgage-decree terminated in the sale of the property, which was purchased by R. R. obtained his certificate of sale on the 5th September, 1887, and sold the property to the plaintiffs. The plaintiffs sued to recover possession from the defendants:

Held, that, under the law as it stood before the Transfer of Property Act came into force, as the purchase on which the defendants relied took place during the pendency of the proceedings in execution of the mortgage-decree, it

* Second Appeal No. 685 of 1902.