

mortgagor " under the colour of a mortgage a distinct collateral advantage" (see *Broad v. Selfe*,<sup>(1)</sup> and *Noakes v. Rice*<sup>(2)</sup>), 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.

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## APPELLATE CIVIL.

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*Before Mr. Justice Chandavarkar and Mr. Justice Batty.*

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

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*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.

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was affected by *lis pendens* and was therefore void as against the plaintiffs who were purchasers under the mortgage decree.

*Shinjiram v. Waman*<sup>(1)</sup> followed.

SECOND appeal from the decision of J. E. Modi, First Class Subordinate Judge, A. P., at Thána, reversing the decree passed by C. R. Karkare, Subordinate Judge of Mahád.

Suit to recover possession of land.

The lands in suit belonged originally to Balu *alias* Bhagoji Govind Jadhav. He mortgaged them to Raghunath Ganesh Joshi. Raghunath obtained a decree on his mortgage (in suit No. 6 of 1883) on the 16th February, 1883. The property was sold at a Court-sale on the 25th February, 1887, and was purchased by the decree-holder Raghunath himself. The sale certificate was issued to Raghunath on the 5th September, 1887. In 1888, Raghunath sold the lands to the plaintiffs.

While the execution proceedings under the mortgage-decree were pending, the same lands were sold under a money-decree obtained by a third person against Balu. At this sale Sadashiv became the purchaser on the 18th December, 1886. He obtained his certificate of sale on the 20th December, 1887, and obtained possession of the lands on the same day. Sadashiv then sold the lands to the defendants, who were in possession thereof since the date of the sale.

The plaintiffs who were purchasers from Raghunath filed this suit to recover possession of the lands from the defendants.

The Subordinate Judge dismissed their claim; but on appeal, their claim was awarded by the First Class Subordinate Judge, A. P., who held that the purchase relied on by the defendants was affected by *lis pendens* and was therefore void.

The defendants appealed to the High Court.

G. K. Parekh, for the appellants.

H. C. Coyaji, for the respondents.

CHANDAVARKAR, J. :—The facts on which the determination of this second appeal turns are undisputed and are as follows. On the 16th February, 1883, one Raghunath Ganesh Joshi obtained a

(1) (1897) 22 Bom. 939.

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decree on a mortgage against one Balu *alias* Bhagoji Jadhav. The decree directed that in default of payment of the mortgage-debt by Balu, the property, which is in dispute now, should be sold and the debt realized. In the meantime, while execution proceedings under the mortgage-decree were pending, a money-decree was obtained against Balu by another person and at a Court-sale held in execution thereof the said property was purchased by one Sadashiv Prabhakar on the 18th of December, 1886. Sadashiv obtained his certificate of sale on the 20th of December, 1887, and apparently he obtained possession on that date. The defendants claim the property under a sale by Sadashiv and are in possession. In execution of the mortgage-decree the property was brought to sale and purchased with the Court's permission by the decree-holder Raghunath himself. He obtained his certificate of sale on the 5th of September, 1887, and sold the property to the plaintiffs who have sued to recover possession from the defendants.

The rights of the parties, under these undisputed facts of the case, have to be determined by the law as it stood before the 1st of January, 1893, when the Transfer of Property Act came into force in this Presidency. It is clear from those facts that the purchase on which the defendants rely took place during the pendency of the proceedings in execution of the mortgage-decree of Raghunath. That purchase, therefore, was affected by *lis pendens* according to the principle of the decision of this Court in *Shivjiram v. Waman*<sup>(1)</sup> where Farran, C. J., and Candy, J., held that execution proceedings under a mortgage-decree revive *lis pendens* and a purchase made during their pendency is void and cannot affect a purchase under the decree. The same Bench followed the decision in *Shivjiram v. Waman*<sup>(1)</sup> in *Lope v. Barve*<sup>(2)</sup> where they said:—"The District Judge in this case has overlooked the fact that the defendant purchased after the plaintiff had obtained a decree for sale of the mortgaged premises and pending execution proceedings to enforce that decree. The plaintiff's *lis* was still *pendens* when the defendant purchased: (*Shivjiram v. Waman*).<sup>(1)</sup> The defendant by purchasing the property after the plaintiff's suit had been instituted could not lessen

(1) (1897) 22 Bom, 932.

(2) (1896) P. J. p. 39.

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or in any way derogate from the plaintiff's right to bring the property to sale and confer an absolute right to the property upon the purchaser in execution."

These remarks apply on all fours to the present case, where, as in the case of *Lope v. Barve*<sup>(1)</sup>, the defendant claims under a purchase at a Court-sale in execution of a money-decree. Further *Shivjiram v. Waman*<sup>(2)</sup> was followed by another Bench of this Court (Parsons and Ranade, JJ.) in *Rachappa Nilkanthappa v. Mangesh Mahadaji Sharaff*.<sup>(3)</sup> We are bound by these decisions which apply to the facts of this appeal. We therefore confirm the decree with costs.

*Decree confirmed.*

<sup>(1)</sup> (1898) P. J. p. 36.

<sup>(2)</sup> (1897) 22 Bom. 939.

<sup>(3)</sup> (1898) P. J. p. 386.

## APPELLATE CIVIL.

*Before Mr. Justice Chandavarkar and Mr. Justice Batty.*

MALUKCHAND AMARCHAND (ORIGINAL PLAINTIFF), APPELLANT, v.  
MANILAL NANSHA (ORIGINAL DEFENDANT), RESPONDENT \*

*Registration Act (III of 1877), sec. 17 (e)—Composition deed—Conveyance—Trustees under the deed.*

The expression "composition deed" as used in section 17 (e) of the Registration Act (III of 1877) denotes a transaction entered into by a debtor, insolvent or in embarrassed circumstances, with his creditors with the object of paying the latter a composition upon their claims. The deed must in substance be of the nature of a composition, not a conveyance. Hence, where a debtor transfers his property to a creditor or creditors in consideration of his debts, i.e., where he parts with his rights absolutely, the transaction may partake of the nature of a composition, but it is in reality a conveyance. It is otherwise where with the consent of his creditors he parts with his property in favour of a trustee for the purpose of paying the composition upon the claims, and the trustee is authorized to deal with the property for that purpose.

A composition deed for the benefit of all the creditors, not comprising the whole of the property of the judgment-debtor, is not void, if the transaction is

\* Second Appeal No. 418 of 1903.

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