APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice and Mr. Justice Heaton.

1916. September 28.

GANESH NARAYAN KHARE AND OTHERS ORIGINAL DEFENDANTS NOS. 2, 3 AND 4) APPELLANTS *v.* GOPAL VISHNU APTE AND ANOTHER (ORIGINAL PLAINTIFFS NOS. 2 AND 3) RESPONDENTS.*

Mortgagor and mortgagee—Suit to redeem—Decree obtained by mortgagee for a claim independent of the mortgage—Mortgagee purchasing the equity of redemption in execution of the decree—Leave to bid not obtained—Irregularity of practice—Sale not a nullity.

In 1888, plaintiffs mortgaged the property in suit with possession to defendant No. 1. In 1897, the defendant brought a suit against the mortgagor for a claim independent of the mortgage and in execution of the decree obtained therein the equity of redemption was sold and purchased *benami* by the defendant. In 1913, the plaintiffs sued to redeem and recover the property. The trial Court held that the purchase by the defendant mortgagee was valid until it was set aside and not having been set aside in execution proceedings was binding upon the plaintiffs. The lower appellate Court reversed the decree holding that the mortgagee purchased the property without leave to bid and therefore the mortgagor could disregard the sale and redeem. On appeal to the High Court,

Held, reversing the decree, that the disregard of the statutory provision that leave to bid should be obtained by a judgment-creditor was a mere irregularity of practice, and was not a fundamental breach of trust which nullified the apparent effect of the Court-sale.

SECOND appeal against the decision of K. B. Wasoodew, Assistant Judge of Thana, reversing the decree passed by M. H. Waghle, Subordinate Judge at Panvel.

Suit for redemption.

This was a suit instituted by plaintiff No. 1 the mortgagor and his son plaintiff No. 2 for the redemption of a possessory mortgage dated the 7th September 1888, against defendant No. 1 the mortgagee and his sons.

In 1897, defendant No. 1 the mortgagee obtained a decree for money against the mortgagor plaintiff No. 1. Plaintiff No. 2 was not a party to this decree.

* Second Appeal No. 1017 of 1915.

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In 1900, defendant No. 1 assigned his decree to one Lagu. The said Lagu applied to execute the decree and in 1900, the equity of redemption in the mortgaged property of the mortgagor, plaintiff No. 1, was attached; and subsequently on the 21st October 1902 the equity of redemption was sold and purchased by one Raghunath Krishna Tilak from whom it was purchased by defendant No. 1 on the 20th December 1902.

The plaintiffs alleged that the sale of the equity of redemption was *benami* and void under section 99 of the Transfer of Property Act, 1882, to which the defendants replied that it was not a nullity and the mortgagor having failed to get it set aside under section 244, (old) Civil Procedure Code, 1882, it was binding on him; that the parties being Hindus the decree for money was binding on both the plaintiffs and therefore plaintiff No. 2 was not entitled to redeem his share.

The Subordinate Judge found that the assignment of the decree to Lagu and the purchase by Tilak were *benami* for defendant No 1. He, however, held that the purchase by the 1st defendant was valid until it was set aside and not having been set aside in execution proceedings was binding on the plaintiffs. He decreed the claim for redemption only in respect of the share of plaintiff No. 2 as he was not a party to the decree. As to the effect of the sale he observed as follows:—

"In *Martand* v. *Dhondo* (I. L. R. 22 Bom. 624) such a sale was held to be void and the mortgagor was held entitled to redeem. In that case Dhondu who brought the suit for redemption was not a party to the suit in execution of the decree in which the property was sold, but it was held that the decree was binding upon him and that his uncle who was a defendant in the suit sufficiently represented him. After the above decision came the decision of the Privy Council in *Khiarajmal* v. *Daim* (32 Cal. 296) in which their Lordships held that such a sale was not void but irregular. The reason of this was explained in the Full Bench case of the Calcutta High Court (35 Cal. 61). The sale is not vitiated by want of jurisdiction on the part of the Court. The

Court has power to hold it; only it was to be held in execution of a decree for sale and not in execution of a decree for money. The defect is in procedure and not in competency. Then the prohibition in section 99 is for the benefit of an individual viz., the mortgagor and not against public policy or right. When the rule is made for the benefit of an individual and is not obeyed the infringement becomes only an irregularity and not a nullity. On these grounds it is held that the sale held in contravention of the provisions of section 99 is only an irregularity and therefore viodable and not void. Their Lordships in the above Privy Council case say that they 'agree that the sales cannot be treated as void or now be avoided on the grounds of any mere irregularities of procedure in obtaining the decrees or in execution of them.' The fact that section 99 is repealed from the Transfer of Property Act and is introduced into the (new) Civil Procedure Code shows that the rule embodied in it was procedural and not of substance. The non-observance thereof amounted therefore to irregularity only.

The sale thus being voidable it must be regarded as valid till it is set aside. The above Calcutta case decides that the application to set aside such a sale must be made in execution proceedings under section 47 of the Civil Procedure Code and must be made before the confirmation of the sale unless the applicant proves that owing to fraud or other reasons he was kept in ignorance of the sale proceedings preliminary to sale. In the present case no such application was made, though admittedly the plaintiffs had notice of the intended sale (Exhibit 31). They knew that the right of redemption was being sold and yet did nothing to prevent it. The sale took place in January 1902 and was confirmed in March following.

What then is the result of the sale. Do the defendants get an irredeemable title thereby. The question was put before the Full Bench in the above Calcutta case but was not answered as it was not necessary to do so under the circumstances. The Privy Council in the above case, varying the decree of the Sadar Court in Sindh, allowed redemption of the shares of those persons who were not parties to the proceedings or properly represented on the record of the case in which equity of redemption was sold. The shares of those who were parties or were sufficiently represented were held to be irredeemable. As regards those who were not parties or were not properly represented the sale was void, and their shares remain unaffected. The Court was not competent to sell them in the absence of the owners. In the present case the decree in execution of which the right of redemption was sold was against plaintiff No. 1 only. It is not known what the debt was and whether it bound the family. If it was not a family debt, plaintiff No. 2 would not be bound thereby. Plaintiff No. 1 could not be said to have represented him, so the share of plaintiff No. 2 must remain unaffected. The share of plaintiff No. 1 only would be irredeemable....

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The Assistant Judge, on appeal, reversed the decree holding that mortgagee defendant No. 1 must have purchased the equity of redemption without leave to bid and therefore the mortgagor could disregard the sale and could redeem.

The defendants preferred a second appeal.

Coyajee with *J. R. Gharpure*, for the appellants :— The purchase by the mortgagee of the equity of redemption in 1902 at the Court-sale has made the mortgagee full owner of the property so as to bar the right of redemption. Mortgagor's remedy was by an application in execution proceedings or by way of a suit to set aside the sale. But the mortgagor has not availed himself of either of these remedies and so the execution sale is binding upon him. He cannot question it in a redemption suit. The sale is not void but merely voidable and it was the duty of the mortgagor to set it aside within the time allowed by law, otherwise the mortgagee acquires an irredeemable title to the mortgaged property : see *Khiarajmal* v. *Daim* ;[1] *Ashutosh Sikdar* v. *Behari Lal Kirtania* ;[2] *Sahadu Manaji* v. *Devlya Jaba* ;[3] *Chintamanrav Natu* v. *Vithabai* ;[4] *Lal Bahadur Singh* v. *Abharan Singh* ;[5] *Poraka Subbarami Reddy* v. *Vadlamudi Seshachalam Chetty*.[6]

Pendse with *H. B. Gumaste*, for the respondents :— We submit, first, that a mortgagee purchasing the equity of redemption at a Court-sale without obtaining leave to bid from the Court is a trustee of the equity of redemption for the mortgagor and so cannot acquire an irredeemable title to such property by his purchase.

(1) (1904) 32 Cal. 296.
(2) (1907) 35 Cal. 61.
(3) (1911) 14 Bom. L. R. 254.
(4) (1887) 11 Bom. 588.
(5) (1915) 37 All. 165.
(6) (1909) 33 Mad. 359 at p. 362.

We rely on *Martand* v. *Dhondo*;[1] *Husein* v. *Shankargiri*;[2] *Mahabir Pershad Singh* v. *Macnaghten*;[3] *Datto* v. *Ganesh*.[4]

Section 90 of the Trusts Act, 1882, enacts the same principle of equity which recognises a confidential relation between qualified owners.

Secondly, when once the mortgagee becomes a trustee for the mortgagor, the mortgagor can redeem the property without first setting aside the Court-sale under the Civil Procedure Code, 1908: see *Pancham Lal Chowdhury* v. *Kishun Pershad Misser*.[5]

The case of *Ashutosh Sikdar* v. *Behari Lal Kirtania*[6] if rightly construed is not against us. There the mortgagee purchased the equity of redemption openly and with the sanction of the Court. It was further held that the sale was binding upon the mortgagor but the question whether the sale would be a bar to the right of redemption in a redemption suit was left open and the Full Bench refused to give any opinion on the point.

SCOTT, C. J.:—The claim of the plaintiffs in this suit is to redeem and recover the plaint property. They allege that the plaintiff No. 1 (since deceased) mortgaged the property with possession to defendant No. 1 by a deed dated the 7th September 1888, and that the cause of action arose in September 1893. The defendants admit the mortgage, but say that in 1902 the right of redemption was sold in execution of a decree of one Mahadeo Vithal Lagu, and was purchased by one Raghunath Krishna Tilak from whom it was purchased by the defendant No. 1 on the 20th December 1902.

The learned trial Judge finds that in 1897 the 1st defendant brought a suit against the mortgagor for a

(1) (1897) 22 Bom. 624.
(2) (1898) 23 Bom. 119.
(3) (1889) 16 Cal. 682.
(4) (1903) 5 Bom. L. R. 952.
(5) (1910) 14 Cal. W. N. 579.
(6) (1907) 35 Cal. 61

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claim independent of the mortgage, and obtaining a decree assigned it to Mahadeo Vithal Lagu. Lagu in execution attached the equity of redemption in the mortgaged property. The purchaser at the auction sale was Raghunath Krishna Tilak, and Raghunath in the same year transferred his right to the 1st defendant. The lower Court finds it proved that the assignment of the decree to Lagu and the purchase by Raghunath Tilak were *benami* for the 1st defendant. The lower Court, however, held that the purchase by the 1st defendant was valid until it was set aside, and not having been set aside in execution proceedings was binding upon the plaintiffs, and he allowed the claim for redemption only in respect of the share of the 2nd plaintiff, the son of the original mortgagor.

From that decree an appeal was preferred to the lower appellate Court, and in the memorandum of appeal the finding that the decree was in respect of a claim independent of mortgage was not challenged. The lower appellate Court reversed the decree of the trial Court, and remanded the case for taking accounts on the footing that both mortgagors should be allowed to redeem. The ground of the decision appears to be this, that it being established that the defendant No. 1 who was a mortgagee had purchased the mortgaged property *benami*, he must have purchased it without leave to bid, and therefore, the mortgagor could disregard the sale and could redeem. Apparently at the base of this conclusion is the idea that there must have been some fraud, and that fraud would make the sale void and not voidable. In my opinion the conclusion of the lower appellate Court is wrong.

It has been argued on behalf of the respondents that the case upon these facts is practically identical with that of *Martand* v. *Dhondo*.[1] As appears, however,

[1] (1897) 22 Bom. 624.

from the judgment in that case, and the subsequent case of *Husein* v. *Shankargiri*,[1] it was established that the mortgagee by an improper use of his position had obtained the equity of redemption at an under-value at a Court-sale. That is by no means proved here. The auction proceedings are on the record which show that the equity of redemption of the property which had been mortgaged for Rs. 475 fetched Rs. 234 gross and 214 net and that there were 13 bidders of whom the *benamidar* for the defendant No. 1 was the highest. The bid amounted to half the amount for which the property had been mortgaged, and even if we assume that the property was not mortgaged for more than ⅔rds of its value, not a very likely assumption in the Deccan, the equity of redemption must be held to have fetched a very good price. There is, therefore, no reason for treating the case on its facts as on all fours with *Martand* v. *Dhondo*.[2] Even, however, if it could be so treated, that would be no justification for holding that a mortgagor was entitled to treat the sale as a nullity. The decision of the Privy Council in *Khiarajmal* v. *Daim*[3] shows that where the debt sued for in the suit in which the decree resulting in the judicial sale is passed is not for the mortgage debt, the fact that the mortgagee purchased would not be a reason for holding that the sale was a nullity for want of jurisdiction, but a case of irregularity in procedure only. In this connection the observations of the Judicial Committee in *Malkarjun* v. *Narhari*[4] are also very pertinent. It was observed there by Lord Hobhouse in delivering the decision of the Court that "if the sale is a reality at all, it is a reality defeasible only in the way pointed out by law."

(1) (1898) 23 Bom. 119.

(2) (1897) 22 Bom. 624.

(3) (1904) L. R. 32 I. A. 23 at p. 37.

(4) (1900) 25 Bom. 337 at p. 352.

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If the mortgagor's case is rested upon the provisions of section 99 of the Transfer of Property Act, before it was amended and transferred into the Civil Procedure Code, the answer is the same. For it has been held in more cases than one that the violation of the provisions of section 99 in bringing the mortgaged property to sale upon a money decree unconnected with the mortgage is an irregularity and does not justify the Court in holding that the sale is a nullity: see *Lal Bahadur Singh* v. *Abharan Singh*.[1]

But then it has been contended that the mortgagee is merely a trustee for the mortgagor because he is held to have purchased without the leave of the Court. But if the mortgagee is purchasing not under a mortgage sale of which he has the conduct, as would be the case under a power of sale contained in an English mortgage, then the prohibition upon purchasing is only to be found in the Civil Procedure Code, Order XXI, Rule 72, which is a reproduction of section 294 appearing first in the Code of 1877. The learned Counsel for the respondents sought to base his case upon the decision of Mr. Justice Macpherson in *S. M. Kamini Debi* v. *Ramlochan Sirkar*.[2] But that was a case where a simple money decree had been obtained for money which was secured by the mortgage. It was, therefore, not a case of a decree for a claim independent of the mortgage, as it is here, and the learned Judge in that case thought he was justified in applying the rule to be deduced from the English cases relating to sales where the seller has the conduct of the sale, such as sales under mortgages by mortgagees.

With regard to purchases by judgment-creditors without leave of the Court Lord Hobhouse delivering the decision of the Judicial Committee in *Mahomed*

[1] (1915) 37 All. 165.

[2] (1870) 5 Beng. L. R. 450.

Meera Ravuthar v. *Savvasi Vijaya Raghunadha Gopalar*[1] made the following observations in connection with another Calcutta case of *Sheonath Doss* v. *Janki Prosad Singh*.[2] He said : "In this case the Calcutta High Court dwelt on the necessity of great caution in granting leave to bid ; indeed, it laid down such conditions as would make the granting of leave a very rare thing, instead of being, as their Lordships believe it is, a very common thing. These conditions are drawn from English practice, partly from cases in which the applicant was a trustee or solicitor for the debtor, and they are applicable to a system under which the decree-holder has the conduct of the sale. Doubtless the conduct of the sale gives opportunities for influencing its course one way or another, which do not follow on the mere leave to bid. The Civil Procedure Code clearly throws on the Court the whole responsibility of conducting the sale." In view of these considerations it is difficult if not impossible to apply the provisions of section 90 of the Indian Trusts Act to the holder of a simple money decree not based upon a mortgage. It is not a rule of universal application that a judgment-creditor should not bid at a sale under his decree, for example under section 173 of the Bengal Tenancy Act of 1885 the judgment-creditor is expressly authorised to bid.

It appears to me that disregard of the statutory provision that leave to bid should be obtained by a judgment-creditor is merely an irregularity of practice, and is not a fundamental breach of trust which nullifies the apparent effect of the Court sale. It only makes the sale voidable according to the provisions of the rule of the Civil Procedure Code. But the application to set aside the sale upon that ground must be made within

(1) (1899) L. R. 27 I. A. 17 at p. 28. (2) (1888) 16 Cal. 132.

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the period of limitation, and that has not been done here.

The question remaining to be decided is what was in fact sold by the Court in 1902. That is substantially a question of fact depending upon the evidence of the documents in the execution proceeding, and it can only be treated as a question of law arising for disposal in second appeal on the basis of its involving the construction of the sale certificate. In our opinion the sale certificate is not free from ambiguity. It states that the whole property has been mortgaged by the defendant and that the defendant's right of redemption is sold. That does not in terms exclude any other existing right to redeem which there may have been in some other co-parcener. We are, therefore, not prepared to hold that the learned Judge of the trial Court was wrong in the conclusion he came to, that the 2nd plaintiff's share in the equity of redemption remained unaffected. We set aside the decree of the lower appellate Court and restore that of the trial Court. As to costs, we think that each party should bear his own costs of this appeal, but that the costs in the lower appellate Court should be borne by the present respondents. With regard to other costs, they are provided for in the judgment of the trial Court.

HEATON, J. :—I entirely agree that the sale of the equity of redemption which took place in 1902 cannot be treated as non-existent. It never was set aside in the way provided by law either by application or by suit. The Judge of first appeal recognises this, but he regarded the case as one, at least this is how I read his judgment, in which the mortgagee, in the peculiar circumstances of the case, had bought, not for himself, but as trustee for the mortgagor. He regarded the sale, therefore, as a perfectly good sale, but one under which the interest really belonged to the mortgagor and not to

mortgagee. He based this conclusion on the case of *Martand* v. *Dhondo*[1] but he did not find all the facts to exist which would enable the reasoning in *Martand* v. *Dhondo*[1] to apply. If a case of the kind considered in *Martand* v. *Dhondo*[1] arose now, we should, I apprehend, have to apply section 90 of the Trusts Act, and the first thing to do would be to find whether facts existed which made section 90 of the Trusts Act applicable. Such facts are not stated in the judgment of the Judge of first appeal, nor do they appear to exist. It seems to me, therefore, that the decision of that Judge is wrong. But supposing there had in truth appeared facts which did bring the case within section 90 of the Trusts Act, then in my opinion the decision might perhaps have been different, though I do not wish to express a positive opinion upon that point, for it is unnecessary to do so.

Decree reversed.

J. G. R.

[1] (1897) 22 Bom. 624.

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October 5.

Before Sir Basil Scott, Kt., Chief Justice and Mr. Justice Heaton.

RAMKRISHNA YESHWANT KAMAT ADARKAR (ORIGINAL DEFENDANT No. 2), APPELLANT *v.* THE PRESIDENT OF THE VENGURLA MUNICIPALITY (ORIGINAL PLAINTIFF), RESPONDENT.*

Provincial Small Cause Courts Act (IX of 1887), Second Schedule, Article 8—Suit for rent—Suit of a nature cognisable by the Court of Small Causes—Civil Procedure Code (Act V of 1908), section 102—Second appeal.

A suit for rent for an amount less than Rs. 500 was filed in the Second Class Subordinate Judge's Court. By a Government Notification contemplated by Article 8 of the Second Schedule of the Provincial Small Cause Courts Act, 1887, the Subordinate Judges of all districts in the Bombay Presidency

* Second Appeal No. 750 of 1915.