

1918.

SHIVBAI
v.
YESOO.

HEATON, J. :—I have very little to add to the judgment just delivered. I would, however, add this. We have here a case of a wrong which has been done to the applicant, because her property was sold under an *ex parte* decree wrongly obtained. She was ignorant of the decree and even of the sale which thereafter took place under it and therefore was unable within the period allowed by limitation to get the sale set aside by the ordinary application which must be made within one month. And if she is to get it set aside at all, it can only be either by suit or by an application of another kind. It has been decided by the District Court and against this decision there was no appeal, that this application should be treated as one under section 47. We are therefore only concerned with the question whether the Court has the power to set aside the sale. That question my learned Brother has dealt with and I agree to the order proposed.

Order set aside.

R. R.

APPELLATE CIVIL.

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

1918.

July 24.

MORU NARSU GUJAR AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS v. HASAN VALAD FATTEKHAN JUMMAL AND ANOTHER (ORIGINAL DEFENDANTS NOS. 1 AND 2), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), section 47, Order XXI, Rule 2—Decree—Execution—Court-sale—Adjustment, uncertified—Executing Court or a Court hearing suit precluded from recognising the adjustment—Redemption—Fraud—Court-sale not to be set aside after many years on a vague plea of fraud—Transfer of property Act (IV of 1882), section 52.

In 1884, M passed an unregistered mortgage bond for Rs. 30 in favour of the plaintiff. In 1899 plaintiff obtained a decree on the bond and in execution

* Second Appeal No. 1051 of 1916.

purchased the mortgaged property himself at a Court-sale in 1901. He obtained formal possession under his purchase but the actual possession remained with defendant No. 1 under subsequent registered mortgages executed by M in favour of the defendant in 1892, 1897, 1898, 1899 and 1900. In 1903 M sold her interest in the property to defendant No. 1. Defendant No. 2 was a purchaser from defendant No. 1. In 1912, plaintiff sued to recover possession of the property or in the alternative to redeem subsequent mortgages executed by M. The defendants denied the claim alleging in their written statement that the Court-sale under the decree of 1899 was fraudulently obtained as the decree was satisfied prior to the sale. The plaintiff contended in reply that the question of fraud could not be investigated upon the vague plea of fraud in the written statement in a redemption suit and that the plea of satisfaction of the mortgage decree prior to the Court-sale could not be entertained, since the adjustment had not been certified in view of the provisions of Order XXI, Rule 2:—

Held, (1) that under the provisions of section 47 of the Civil Procedure Code a question relating to the satisfaction of a decree was a question arising in execution which must be tried by the executing Court under that section or at the discretion of that Court by suit, in either of which cases the Court would be a Court precluded from recognising the adjustment ;

(2) that it was undesirable that the defendant should by a vague plea of fraud be permitted after the lapse of many years to call in question a title acquired at a Court-sale which was never challenged by the judgment-debtor though she was alive at the time of the trial of the suit.

(3) that the mortgages of 1899 and 1900 effected during the prosecution of the proceedings in the suit of 1899 were ineffectual as against the plaintiff.

SECOND appeal against the decision of J. A. Saldanha, Assistant Judge at Thana reversing the decree passed by B. D. Sabnis, Subordinate Judge at Mahad.

Suit to recover possession or in the alternative for redemption of mortgages.

The property in suit (survey No. 87, pot No. 1) originally belonged to one Haidarkhan. He sold it to his two daughters Mariam and Zuleika.

In 1884 Mariam alone mortgaged the property to plaintiff No. 1's father by an unregistered mortgage bond for Rs. 30 (Exhibit 100).

1918.

MORU'NARSU

v.

HASAN

VALAD

FATTEKHAN.

1918.

MORU NARSU
v.
HASAN
VALAD
FATTEKHAN.

In 1892, Zuleika and Mariam mortgaged the property with possession to defendant No. 1's father for Rs. 1,000 (Exhibit 52).

In 1897, Zuleika died. Thereafter Mariam created the following four mortgages on the land in suit in favour of defendant No. 1:—

- (1) Mortgage of 1897 for Rs. 700 (Exhibit 48).
- (2) Mortgage of 1898 for Rs. 400 (Exhibit 49).
- (3) Mortgage of 1899 for Rs. 3,000 (Exhibit 85).
- (4) Mortgage of 1900 for Rs. 995 (Exhibit 50).

In 1899, plaintiff No. 1's father filed a suit against Mariam to recover money due on the mortgage of 1884. He obtained a decree and in execution the property was put up for sale by the Court. On the 9th January 1901 it was purchased by plaintiff No. 2, who obtained formal possession on the 19th April 1901. The actual possession, however, remained with defendant No. 1 under the above mortgages.

In 1903, the property was sold by Mariam to defendant No. 1 from whom defendant No. 2 purchased it in 1910.

In 1912, the plaintiffs sued to recover possession of the property or in the alternative prayed for redemption of the mortgages executed in favour of defendant No. 1.

Defendants contended *inter alia* that defendant No. 1 was not bound by the decree of 1899 as he was not a party to the suit; that the sale in execution of the decree was fraudulently obtained as the decree was satisfied prior to the sale.

The Subordinate Judge held that the plea of fraud raised by the defendants was not proved; and that the mortgages, Exhibits 50 and 85, having been executed during the pendency of the suit of 1899 were not binding on the plaintiffs. He, therefore, passed a decree

allowing the plaintiffs to redeem the property on payment of Rs. 420 as proportionate share of the amount due on the first three mortgages (Exhibits 48, 49 and 52).

On appeal, the Assistant Judge reversed the decree and dismissed the plaintiffs' suit holding that the sale under the decree of 1899 was fraudulently obtained as the decree was satisfied by an adjustment prior to the sale.

Plaintiffs appealed to the High Court.

Bahadurji and Jayakar with V. B. Virkar, for the appellants:—Our first point is that the plaintiffs only have the right to redeem the defendants' mortgages. The plaintiffs purchased, at a Court-sale, the right, title and interest of the mortgagor in 1901 and thus added the equity of redemption to their previous interest as mortgagee: see *Shivram v. Genu*⁽¹⁾; *Radhabai v. Shamrao Vinayak*⁽²⁾; *Shivjiram v. Waman*⁽³⁾; *Hassanbhai v. Umaji*⁽⁴⁾; *Perumal v. Kaveri*⁽⁵⁾; *Rangasamy Naiken v. Komarammal*⁽⁶⁾; and *Umes Chunder Sircar v. Zahur Fatima*⁽⁷⁾.

Our second point is that the lower appellate Court is wrong in allowing investigation of the defendants' plea as to the fraudulent execution of the decree and the consequent Court-sale of 1901. The defendants claim through the original mortgagor Mariam. Mariam was a party to the suit of 1899 and to the execution proceedings therein. She not having challenged the validity of the Court-sale in those proceedings, the defendants who claim through her cannot now challenge the Court-sale. We, therefore, submit that

(1) (1882) 6 Bom. 515.

(2) (1881) 8 Bom. 168.

(3) (1897) 22 Bom. 939.

(4) (1903) 28 Bom 153.

(5) (1892) 16 Mad. 121.

(6) (1902) 26 Mad. 484

(7) (1890) 18 Cal. 164.

1918.

MORU NARSU

v.

HASAN

VALAD

FATTEKHAN.

1918.

MORU NARSU

v.

HASAN
VALAD

FATTEKHAN.

defendants' contention that the Court-sale was fraudulent is barred by *res judicata*: see section 47 and Order XXI, Rule 2, Civil Procedure Code, 1908, and *Prosunno Kumar Sanyal v. Kali Das Sanyal*⁽¹⁾.

Lastly, we submit that we are entitled to redeem the first three only out of the five mortgages in favour of the defendants under the principle of *lis pendens*: section 52 of the Transfer of Property Act, 1882.

Coyajee with *P. B. Shingne* for the respondents:—The defendants' mortgages being later than the mortgage of the plaintiffs in point of time the former is the puisne mortgagee and was a necessary party to the plaintiffs' suit of 1899. The effect of the omission to join him in it is that the decree is not binding on him and does not take away his right to redeem the plaintiffs' prior mortgage sued upon in 1899. The defendant, therefore, is entitled to redeem the plaintiffs' mortgage: see *Dulabhdas Devchand v. Lakshmandas Sarupchand*⁽²⁾ *Mohan Manor v. Togu Uka*⁽³⁾; and *Desai Lallubhai Jethabhai v. Mundas Kuberdas*⁽⁴⁾.

On the second point, our submission is that it is the Court executing the decree and not the Court trying the suit for redemption that is precluded from recognising an uncertified adjustment. Besides, the Court can *suo moto* take into consideration whether the execution of the decree and the sale under it were fraudulent. Looked at from this point of view the appellants' second point loses its significance and it becomes clear that the lower appellate Court was quite justified in considering the plea of fraud.

Lastly, we contend that section 52 of the Transfer of Property Act has no application here. That the

⁽¹⁾ (1892) 19 Cal. 683.⁽³⁾ (1885) 10 Bom. 224.⁽²⁾ (1885) 10 Bom. 88.⁽⁴⁾ (1895) 20 Bom. 390.

1918.

plaintiff, who purchased at the Court-sale, was a party to the suit of 1899 is merely an accident. If a stranger had purchased instead of the plaintiff, the principle of *lis pendens* would not have applied and therefore it does not apply here although the plaintiff, who purchased at the Court-sale, happened to be a party.

MORU NARSU
v.
HASAN
VALAD
FATTEKHAN.

Virkar, in reply:—The cases of *Dullabhdas Devchand v. Lakshmandas Sarupchand*⁽¹⁾; *Mohan Manor v. Togu Uka*⁽²⁾ and *Desai Lalubhai Jethabhai v. Mundas Kuberdas*⁽³⁾ do not apply here. The purchaser of the equity of redemption in those cases did not assert his right to redeem the puisne mortgagee and therefore this right was not considered therein.

As regards the point of *lis pendens*, I submit that the fact that the plaintiff was a party to the suit and purchased with the Court's permission is not an accident and has a significance of its own. The later two mortgages clearly affect the plaintiff's right under the decree and he can, therefore, resist them as a purchaser at the Court-sale held in execution of the decree.

SCOTT, C. J.:—The plaintiff sues for possession of survey No. 87, pot No. 1, from the defendant No. 2 or in the alternative for possession after redemption of a mortgage or mortgages upon it now vested in the defendant No. 2.

The plaintiff's father advanced Rs. 30 upon a mortgage of the land in question from one Mariam, one of two female co-owners of the property. The mortgage was unregistered.

A decree was obtained on this mortgage in suit No. 183 of 1899. The property was put up for sale by the Court in execution and on the 9th of January 1901

(1) (1885) 10 Bom. 88.

(2) (1885) 10 Bom. 224.

(3) (1895) 20 Bom. 390.

1918.

MORU NARSU

v.

HASAN

VALAD

FATTEKHAN.

was purchased with the Court's permission on account of the 2nd plaintiff, then a minor, who claimed as heir of the original mortgagee.

Formal possession under the purchase was obtained on the 19th of April 1901. Actual possession could not be obtained, for the land was in possession of the father of the defendant No. 1 under a subsequent but registered mortgage by Mariam or her co-owner Zuleika. Two further mortgages in favour of the 1st defendant were effected by Mariam pending the prosecution of the proceedings in Suit No. 183 of 1899. Zuleika had died prior to the Court-sale in 1901 and Mariam as her heir and in her own right was thus entitled to the whole outstanding equity of redemption. In 1903 Mariam purported to sell to the father of defendant No. 1 her interest in, *inter alia*, the land in suit and the defendant No. 2 claims as purchaser from the defendant No. 1.

The defendants in their written statement alleged that the decree and sale in the suit of 1899 were fraudulent.

In the trial Court the plea of fraud was negatived and the plaintiff was given a decree for redemption of the land in suit on payment of a sum of Rs. 420 as the proportion of the mortgage debt of Mariam to the defendant No. 1 applicable to the suit land, on the footing that the mortgages *pendente lite* were not effectual against the plaintiff.

On appeal, the lower appellate Court found that the Court-sale under the decree of 1901 was fraudulently obtained inasmuch as money of the judgment-debtor held for satisfaction of the decree was in the hands of those appearing for the 2nd plaintiff at the time of the sale and the plaintiffs' suit was dismissed. From that decree this appeal has been preferred.

It is contended that the question of fraud in the execution of the decree ought not to have been investigated upon a vague plea of fraud in the written statement in a redemption suit and that the plea of satisfaction of the mortgage decree prior to the Court-sale should not have been entertained since the adjustment had not been certified, in view of the provisions of Order XXI, Rule 2.

It is contended on the other side that it is only the Court executing the decree, and not the Court trying the suit for redemption, that is precluded from recognising an uncertified adjustment. If, however, the provisions of section 47 are observed it becomes apparent that a question relating to the satisfaction of the decree is a question arising in execution which must be tried by the executing Court under that section or at the discretion of that Court by suit. In either case the Court would be a Court precluded from recognising the adjustment : see *Prosunno Kumar Sanyal v. Kali Das Sanyal*⁽¹⁾. It is, I think, very undesirable that a defendant should, by a plea, such as we have in this suit, be permitted after the lapse of many years to call in question a title acquired at a Court-sale which was never challenged by the judgment-debtor though she was alive at the time of the trial of this suit and may still be alive. I am not prepared to acquiesce in the suggestion that this should be treated as a suit in which the question of satisfaction whether fraudulent or otherwise before the Court-sale may now be raised. The diametrically opposite conclusions arrived at by the trial and appellate Courts upon the recorded evidence, relating, as it does, to events of eleven or twelve years ago, demonstrate the advantage of allowing no deviation from the strict rules of procedure in connection with the issue in question. Nothing in this

1918.

MORU NARSU
v.
HASAN
VALAD
FATTEKHAN.

(1) (1892) 19 Cal. 683.

1918.

MORU NARSU

v.

HASAN
VALAD
FATTEKHAN.

judgment must be taken as throwing doubt upon the propriety of the Court in the exercise of its inherent powers allowing the investigation of a question of fraud in order to prevent injustice. Here there is no question of injustice. Any investigation of title prior to the defendant No. 1's purchase in 1903 would have disclosed the decree and Court-sale in the mortgage suit of 1899. The defendants, therefore, cannot complain if redemption is allowed on the footing of their interest, as mortgages still subsisting. The trial Court was right in holding that the mortgages effected during the prosecution of proceedings in the suit of 1899 were ineffectual as against the plaintiff.

We set aside the decree of the lower appellate Court and restore that of the trial Court with costs in the lower appellate Court and this Court on the defendants.

SHAH, J.:—I entirely agree.

I desire to add that apart from fraud, there can be no doubt about the plaintiff's right to redeem the mortgages now vested in defendant No. 2. The mortgage of 1884 was unregistered and therefore not entitled to priority over the subsequent registered mortgages in favour of defendant No. 1's father according to the provisions of section 50 of the Indian Registration Act. The plaintiff should have joined the subsequent mortgagee as a party to the suit of 1899 in view of section 85 of the Transfer of Property Act then in force; but the omission to join him does not involve the consequence that he loses his rights as a purchaser at the Court-sale with the leave of the Court in execution of his decree. It is needless to refer to the cases cited in the course of the arguments. On the facts it is clear that the plaintiff is entitled to redeem the mortgages in favour of defendant No. 1 as the purchaser of the right, title, and interest of Mariam, who was undoubtedly entitled to redeem them at the date of the Court-sale.

The last two mortgages out of the five in favour of defendant No. 1's father were effected during the pendency of the plaintiff's suit of 1899 and of the execution proceedings in that suit. It is clear that the plaintiff was actively prosecuting the suit and the execution proceedings from the date of the suit to the date of the Court-sale. Under section 52 of the Transfer of Property Act, Mariam, who was a party to the suit, could not transfer the property by way of mortgage so as to affect the rights of the plaintiff to bring the property to sale free from such burden. These mortgages clearly affected the plaintiff's right under the decree, which he could resist as a purchaser at the Court-sale in execution of that decree. The decisions in *Shivjiram v. Waman*⁽¹⁾ and *Rachappa v. Mangesh*⁽²⁾, though not under section 52 of the Transfer of Property Act, clearly support this view.

Decree reversed.

J. G. R.

⁽¹⁾ (1897) 22 Bom. 939.

⁽²⁾ (1898) P. J. p. 386.

APPELLATE CIVIL.

Before Mr. Justice Heaton and Mr. Justice Hayward.

RAMA BIN SANTU RANDIVE (ORIGINAL DEFENDANT), APPELLANT v. DAJI BIN NARU RANDIVE AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.^o

Hindu law—Widow—Reversioners—Whether award or compromise decree against widow binds reversioners.

The principle that a decree fairly obtained against a Hindu widow binds the reversioners does not apply to a compromise or an award decree, not shown to have been fairly obtained against the Hindu widow as representing the estate.

Jeram v. Veerbai⁽¹⁾, followed.

^oSecond Appeal No. 209 of 1917.

⁽¹⁾ (1903) 5 Bom. L. R. 885.

1918.

MORU NARSU
v.
HASAN
VALAD
FATTEKHAN.

1918

July 31.