

[APPELLATE CIVIL.]

Before Mr. Justice West and Mr. Justice Pinhey.

1878.
July 8.

R. S. JOSHI (ORIGINAL PLAINTIFF), APPELLANT, *v.* L. B. JOSHI (ORIGINAL DEFENDANT), RESPONDENT.*

Hindu law—Mortgage—Sale—Estoppel.

The three senior members of an undivided Hindu family—the remaining member of which had disappeared,—setting forth a ground of necessity, executed to the plaintiff, in November 1870, a mortgage, duly registered, of a piece of land which formed part of the family estate. Certain judgment-creditors of the absent member subsequently attached and sold his share in the said land under their decree. The plaintiff's undivided son purchased it, and in 1872 re-sold his right, title, and interest in it to the defendant's father, without disclosing the fact of his father's mortgage, but without any active fraud on the part of himself or his father to suppress the fact from the knowledge of his purchaser.

In 1874 the plaintiff obtained a decree upon his mortgage, and attached the land.

In a suit by the plaintiff to establish his right as against all the land included in his mortgage,

Held that the mortgage being, under the circumstances, a valid one, the sale of the absent son's share was subject to the lien created thereby, which lien was not disturbed by the purchase and subsequent sale of the share by the son of the mortgagee. The origin of the son's title was stated in the deed of sale to the new purchaser, who, by the fact of its being a sale of a *share*, was put upon inquiry.

The mere want of disclosure, by the plaintiff's undivided son, of his father's mortgage was not enough to create an estoppel against his father seeking to establish his claim under the mortgage.

There was a second appeal from the decree of Gopálráv Hari Deshmukh, Joint Judge of Tháná, amending the decree of the Subordinate Judge of Álibág.

The following are the facts of the case:—

Anant Bhat owned a piece of land at the village of Cheul, in the Kolába Sub-Collectorate. He left seven sons, of whom three died; a fourth, named Parashráv, absconded; and the remaining three, to relieve the necessities of the family, borrowed from the plaintiff a sum of Rs. 700 on the security of a duly-registered mortgage, dated the 20th November 1870, of a piece of land which was part of the family estate.

Subsequently to the mortgage, certain judgment-creditors of Parashráv attached and sold his share in the property under

* Second Appeal No. 118 of 1878.

their decree. The plaintiff's son purchased it, and in 1872 re-sold his right, title, and interest therein to the defendant's father, without disclosing to the latter the fact of the existence of the plaintiff's mortgage. The plaintiff and his son were united in interest.

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In 1874 the plaintiff obtained a decree against the mortgagors, and attached the property.

On the application of the defendant's father to the civil Court at Alibág, the plaintiff's attachment was removed, and the plaintiff thereupon brought this suit to establish his right to the whole piece of land.

The defendant contended that his purchase was free from the plaintiff's lien.

The Subordinate Judge of Alibág awarded the whole of the plaintiff's claim. The Joint Judge amended his decree by disallowing to the plaintiff the share of Parashráam, the absent son, for the following reasons, as stated in his judgment:—

“I think, as the plaintiff's son and the plaintiff are united in interest, the act of the former could not have been unknown to the latter. No notice was given to the defendant, by either, that the plaintiff had a lien on the land. The plaintiff's claim, to the extent of Parashráam's share, should, therefore, be set aside.”

Fándurang Balibhadra for the appellant:—The Joint Judge was wrong in holding that the sale to the respondent's (defendant's) father was binding as against the appellant, merely because his vendor was the undivided son of the latter. The vendor not being the appellant's agent, and not having purchased or sold the property on his behalf, the sale by him cannot affect the appellant's rights as mortgagee of the entire property. The sale deed to the respondent's father having expressly described the sale to be of the right, title, and interest of the absent son Parashráam, as conveyed by the certificate of sale, and the entire property of Parashráam's family having previously been mortgaged to the appellant for payment of ancestral debts, the respondent's purchase is subject to the mortgage. There is no evidence to show that the appellant was in any way aware of the sale to the respondent's father.

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for the respondent:—The non-disclosure, by the plaintiff's son, of his father's lien on the property in dispute was a fraudulent act on his part; and his father, who is united in interest with him, should not be allowed to take advantage of it.

The judgment of the Court was delivered by

WEST, J. :—The mortgage having been executed by the three senior members of a joint family, the remaining member of which had disappeared, and setting forth a ground of necessity, was presumably a valid transaction. Nothing has been adduced, in the way of evidence, to overthrow that presumption.

The sale of the one-sixth share belonging to Parashráj, the absent member, was subject to the lien thus created.

The purchase of that share by the mortgagee's son, and his sale of it to the respondent's father did not disturb this lien. The mortgage was registered, and the father, as that important transaction shows, was managing the family affairs. If he could be identified with his son, yet the sale-deed to the respondent's father sets forth distinctly the origin of the vendor's title. It was a purchase of a share, and this should have put the new purchaser upon inquiry.

The mere fact that, under such circumstances, the mortgagee's son bought and sold a share in the property mortgaged without disclosing the existence of the mortgage, was not enough to create an estoppel against the mortgagee. If there had been any active fraud, any artifice by which the mortgagee, directly or indirectly, had prevented the purchaser from his son from making the reasonable inquiry at the registration office, the case might be different.

We reverse the decree of the Joint Judge, and restore that of the Subordinate Judge, with costs throughout on respondent.

Decree of the Joint Judge reversed, and that of the Subordinate Judge restored.