

"I am of opinion that the bond is not properly stamped, and that it is chargeable with the aggregate amount of duties which would have been payable if the sixteen debtors had executed sixteen separate bonds with respect to the rice lent to each of them."

There was no appearance for the parties.

SARGENT, C. J.—The instrument must, we think, upon the proper construction of it, be regarded as comprising sixteen distinct contracts of loan for the several quantities of *bhāt* or paddy mentioned in the particulars, and, therefore, includes sixteen distinct matters within the contemplation of section 7 of Act I of 1879, and must be stamped accordingly.

ORIGINAL CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

PURMA'NANDDA'S JIWANDA'S, (ORIGINAL PLAINTIFF), APPELLANT,
v. JAMNA'BA'I, WIDOW OF MORA'RJI NA'NJI AND ADMINISTRATRIX
OF UDHA' NA'NJI AND NA'NUBA'I.*

1885.
July 31;
August 7 and
14.

Mortgage—Sale to mortgagee under power of sale—Effect of such purchase by mortgagee—Title acquired by him—Adverse possession by persons claiming a lien as against mortgagor—Limitation.

A mortgagee purchasing the mortgaged property with the consent of the mortgagor, under the power of sale contained in the mortgage deed, acquires an unimpeachable title derived from the power of sale, which is altogether distinct from and overrides his title as a mere incumbrancer: the effect of such purchase being to vest the ownership of, and the beneficial title to, the property for the first time in himself, who had been previously a mere incumbrancer.

Obstruction to the obtaining possession by a mortgagee under his mortgage by persons who while claiming a lien on the property admitted the mortgagor's title to the property, *held* not to be adverse possession as against the mortgagee's title as purchaser.

THE plaintiff in this suit was the assignee of a mortgage (dated 16th March, 1867,) of an undivided moiety of certain land with a dwelling-house thereon. The mortgagor having failed to pay the mortgage debt, the plaintiff on the 24th April, 1872, under a power of sale contained in the mortgage deed, put up the mort-

* Suit, No. 84 of 1882.

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gaged property for sale, and bought it in himself. In the present suit he sought to recover possession of the said property.

The facts were stated in the plaint as follows:—The plaintiff's uncle, one Runsordás Cánji, died in 1859, and by his will appointed Luckmidás Dámji, Bhánábhái Dwárkádás and Jairáz Chápsey his executors, and directed them to manage all his property until the plaintiff attained the age of twenty-one years, at which time the said property was to be made over to the plaintiff. The three persons above named duly took out probate of the said will. By a deed of mortgage dated the 16th March, 1867, one Goculdás Liládhar mortgaged (among other properties) to the three executors of the will an undivided moiety in certain land, with a dwelling-house thereon situate at Dongri Culi Street in Bombay, subject to a proviso for redemption thereof on payment, by the said Goculdás Liládhar, of the sum of Rs. 4,00,000, with interest thereon at 9 per cent. per annum, on the 17th May, 1867. The deed contained a power to sell the said premises in case default was made in payment of the said sum of Rs. 4,00,000, and also a power to the said three executors and their assigns to enter upon the said premises, and to hold and enjoy the same, and to recover the rents and profits thereof.

By a deed dated 11th May, 1870, the said three executors (*inter alia*) assigned to the plaintiff the said sum of Rs. 4,00,000, and all interest due thereon, and the benefit of all securities for the sum and all the premises comprised in the deed of 16th March, 1867.

Default having been made by Goculdás Liládhar in payment of the said mortgage debt, the plaintiff on the 24th April, 1872, put up for sale by public auction the said undivided moiety of the said piece of land and dwelling-house; but there being no offer for the said property higher than Rs. 14,000, the plaintiff bought it in the name of his brother-in-law, Purshotam Mulji.

The other undivided moiety in the said piece of land and dwelling-house belonged to one Udhá Nánji, who until his death was in receipt of the rents and profits of the whole of the land and dwelling-house. Udhá Nánji died in 1870, leaving the defendant, Jamnábái, his heir, and she obtained letters of adminis-

tration to his estate, and entered into possession and receipt of the rents of the whole of the said land and dwelling-house.

Purshotam Mulji died in 1877, leaving the second defendant, Nánubái, his heir.

The plaintiff alleged that there was still a large balance due to him for principal and interest upon the said mortgage, and he prayed, (1) that the defendant, Jamnábái, should be ordered to give up possession of the moiety of the said land and dwelling-house; (2) that, if necessary, the land and dwelling-house might be partitioned; (3) that, if necessary, the same might be sold, and that one-half of the proceeds paid to the plaintiff; (4) that an account might be taken of the rents and profits of the said land and dwelling-house received by the said Jamnábái, and that the plaintiff should be paid one-half of what might be found to have been received by her; (5) for an injunction against Jamnábái, and for a receiver.

In her written statement the defendant, Jamnábái, alleged that the premises mentioned in the plaint had been mortgaged on the 10th April, 1834, to the firm of Udhá Nánji by the then owner of the premises, one Mohanji Jaitha, the mortgage being taken in the name of one Murlidhar Nánji. In June, 1835, a suit was filed upon the said mortgage against the mortgagor, Mohanji Jaitha, and in execution of a decree obtained in that suit the premises were sold and bought by the said firm of Udhá Nánji in the name of the said Murlidhar Nánji. From the date of the said mortgage down to the date of this suit the said premises had been in possession of the firm of Udhá Nánji, to whose interest therein the defendant, Jamnábái, claimed to be entitled. On the 27th April, 1837, a deed was executed by the said firm of Udhá Nánji in the name of Murlidhar Nánji, in which it was declared that Goculdás Liládhár was entitled, as tenant in common, to a moiety of the premises. The said premises were not, however, partitioned, nor did Goculdás Liládhár ever obtain possession of his said moiety; his interest being always held by the firm of Udhá Nánji as security for certain moneys due by him to the said firm. The defendant alleged that at the date of the mortgage of 16th March, 1867, by

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which Goculdás Liládhar purported to mortgage his moiety to plaintiff's assignors, (the three executors), there was due by Goculdás Liládhar to the firm of Udhá Nánji a sum of Rs. 1,25,000; and she submitted that the said firm was entitled, in respect thereof, to a lien upon, and to retain possession of the interest of the said Goculdás Liládhar in the said premises.

The defendant further alleged that the plaintiff's assignors, (the three executors), on the 4th December, 1869, entered into possession of the other properties comprised in the mortgage of 17th March, 1867, but that she and others, as heirs of Udhá Nánji, refused to allow them to take possession of the said premises, or any part thereof, or in any way to recognise their title; and she alleged that ever since that time she had been in possession of the said premises adversely to the assignors of the plaintiff and to the plaintiff. She contended that this suit was barred by limitation; and she submitted that this suit, if maintainable at all, was only maintainable by Nánubái as heir of Purshotam Mulji, and not by the plaintiff.

At the hearing before Scott, J., the following issues were raised :—

- (1) Whether the plaintiff was entitled to maintain this suit;
- (2) Whether the first defendant was not entitled to a lien on the premises for the sum due from Goculdás Liládhar to the firm of Udhá Nánji;
- (3) Whether the suit was not barred by limitation.

From the evidence it appeared that the mortgagor, Goculdás Liládhar, was dead, and that his son did not raise any question as to the validity of the sale in 1872. It further appeared that the rents and profits of the whole property mentioned in the plaint had been received by the firm of Udhá Nánji, and that down to 1880 a moiety thereof had been always credited in the books of the firm to the account of Goculdás Liládhar.

The first issue was found for the plaintiff, the learned Judge being of opinion that Purshotam Mulji was only the plaintiff's nominee as purchaser of the premises at the sale in April, 1872, and that the plaintiff was the real purchaser; but on the third

issue his Lordship found for the defendant, holding that adverse possession had been proved, and he dismissed the suit with costs.

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The plaintiff appealed.

Telang (with *Inverarity*) for the appellant.—The possession of the defendant was not adverse to us. Our assignors sought to take *exclusive* possession, and were prevented from taking it. That is not adverse to our claim now for *joint* possession with the defendant. Further, if the possession of the defendant was adverse, it was adverse to our claim *as mortgagee*. We do not now rely on that claim. We sue now as *purchaser*, and in that character we represent rather the mortgagor than the mortgagee. The mortgagee, exercising his power of sale, really sells the mortgagor's interest in property as it stood at the time of the mortgage, under the power given to him in the mortgage deed—*Mulchand Kuber v. Lallu Trikam*⁽¹⁾; *Rájáh Kishandatt Rám v. Rájáh Mumtaz*⁽²⁾. And, to show that the mortgagor's claim is not barred, we rely on the entries in Udhá Nánji's books, in which the mortgagor is credited with a moiety of the rents. Limitation can only run against the plaintiff since the date of his purchase on the 24th April, 1882. If so, this suit is in time. He also cited *National Bank of Australasia v. The United Hand-in-hand and Band of Hope Company*⁽³⁾; *Dart's Vendors and Purchasers*, Vol. 2, p. 917 (5th ed.); *Shaik Abdulla v. Hají Abdulla*⁽⁴⁾; *Narsidás Jitrám v. Joglekar*⁽⁵⁾.

Latham (Advocate General) and *Macpherson* for the respondent, *contra*.—They cited *Heath v. Pugh*⁽⁶⁾; *Doe v. Massey*⁽⁷⁾.

SARGENT, C. J.—This is a suit to recover possession of a moiety of a dwelling-house situated in Dongri Culi Street. It was not disputed before us that the house in question belonged in equal moieties to one Goculdás Liládhur and the firm of Udhá Nánji, which is now represented by the defendant, Jamnábái. In 1867 Goculdás Liládhur mortgaged his share to the trustees

(1) I. L. R., 6 Bom., 404.

(5) I. L. R., 4 Bom., 57.

(2) L. R., 6 Ind. Ap. at page 160.

(6) 6 Q. B. D., 345. On appeal L. R.,

(3) L. R., 4 Ap. Cas., 391.

7 Ap. Cas., 235.

(4) I. L. R., 5 Bom., 8.

(7) 17 Q. B., 373.

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of plaintiff's settlement, who in 1870 assigned the mortgage to him. It appears that Goculdás Liládhur, who was a relation of the family of Udhá Nánji, managed the business of the firm for several years previously to 1867, in which year he became insolvent. The books of Udhá Nánji show that the rents of the house collected during that time were carried to the credit of the account of Goculdás with the firm and of Udhá Nánji's general account in equal shares. It appears from the evidence of Vussonji Morárji, who is now manager of the firm of Udhá Nánji, that after 1926 (A.D. 1869-70), Goculdás carried on a business in partnership with Vussonji Morárji, himself, and Haridás Ladhá in the name of Vussondás, Goculdás and Co. The account of this business was kept in the books of Udhá Nánji, and from time to time the half share of the rents was transferred by Goculdás' directions to that of Vussondás, Goculdás and Co. At the time of the insolvency of Goculdás in 1869 the firm of Vussonji, Goculdás and Co., according to the evidence of Vussonji Morárji, was largely indebted to the firm of Udhá Nánji. The business of Udhá Nánji was thenceforth managed by Vussonji Morárji. Goculdás' moiety of the rent of the house continued to be carried to the account of Goculdás down to 1933 (A. D. 1875-76); but from time to time the balance of that account was carried to the credit of the account of Vussonji, Goculdás and Co. After 1933 (A.D. 1875-76) Goculdás' moiety of the rent was carried at once to the credit of Vussonji, Goculdás and Co., and has continued to be so ever since.

In 1869 plaintiff's assignors endeavoured to get into possession of Goculdás' moiety of the house, but were successfully resisted by Udhá Nánji's people, who said that "there was a large claim against Goculdás Liládhur, and so they could not have possession;" and it is admitted that no portion of Goculdás' share of the rent has ever been paid to the plaintiff or his assignors. In 1872 the plaintiff put up the property for sale under the power of sale contained in his mortgage, and it was purchased by one Purshotam Mulji admittedly on the plaintiff's account.

The title which plaintiff thus acquired was liable to be impeached by the representatives of the mortgagor, Goculdás Liládhur; but the defect was subsequently cured by Goculdás' son

Madhowdás, giving an undertaking in a suit, No. 651 of 1879, which he brought against the plaintiff for the redemption of the mortgage, that he would not dispute the sale of the premises in question. The plaintiff now sues for possession of his moiety of the house so purchased.

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The defendant, Jamnábái, by the sixth clause of her written statement sets up as a defence to the plaintiff's claim that she has been in possession of the house since 4th December, 1869, adversely both to the assignors of the plaintiff and to the plaintiff, and that the suit is barred by the Statute of Limitations. It was but faintly contended for the plaintiff that the defendant's possession has not been adverse to the plaintiff and his assignors in their character of mortgagees since December, 1869. Mr. Telang, indeed, drew a distinction between divided and joint possession; but such distinction finds, in our opinion, no support in the evidence as to what occurred when the trustees endeavoured to take possession by obtaining a writing from the tenants.

But it has been argued that the purchaser under the power of sale in a mortgage acquires the mortgagor's title, and that there has been no possession by the defendant adverse to that title. On the other hand, it was contended for the defendant that the purchaser under a power of sale in a mortgage takes under the mortgagee; the effect of the exercise of the power being, it was said, simply to extinguish the equity of redemption, but that, in any case, the defendant's possession had been adverse to the mortgagor. It is doubtless true that as the purchaser takes under the power of sale, he in a certain sense takes under the mortgagee who exercises the power; but the real question is, what is the estate that passes by the exercise of the power and becomes vested in the purchaser?

Now, the power of sale, as ordinarily drawn, is, in terms, a power authorizing the mortgagee under certain circumstances to sell out and out the hereditaments which by the mortgage were vested in him merely as a security, and when the mortgagee exercises that power "the effect is," as stated by the Privy

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Council in *Rájáh Kishanlatt v. Rájáh Mumtaz*⁽¹⁾, "to destroy the equity of redemption, and the estate, if purchased by a stranger, passes into his hands free from all incumbrances." In other words, the purchaser acquires such title as the mortgagor possessed as the owner of the property at the time the mortgage was made, subject nevertheless to such title having been subsequently defeated by adverse possession under the operation of the Statute of Limitations. In the present case it is true the purchaser was the mortgagee himself, but by the mortgagor's assent on the 1st August, 1882, to the purchase, he then acquired an unimpeachable title derived from the power of sale, and which was altogether distinct from his title as a mere incumbrancer. The effect of his purchase was, we apprehend, analogous to that of a foreclosure decree, which, as stated by Lord Selborne in *Heath v. Pugh*⁽²⁾, is to vest the ownership of, and the beneficial title to, the land for the first time in the person who previously was a mere incumbrancer. And as in that case, to use the words of Lord Selborne, "the possession which he thenceforth claims and the right by virtue of which he seeks to recover it, are substantially different from the possession which he might before have claimed, and from the right by virtue of which he might have claimed it." If this be the correct view of the title acquired by the plaintiff by his purchase, the question whether it is barred must depend upon the nature of defendant's possession of the house as regarded Goculdás as the owner of the moiety of the house.

Now it is clear, we think, from the evidence on both sides, that when the trustees of plaintiff's settlement proceeded to take possession of their mortgagor's moiety of the house they were resisted by the firm of Udhá Nánji on the ground that the firm had a large claim against Goculdás Liládhur. Vussonji Morárji, who was then managing the business of the firm, says: "I admit that Goculdás was entitled to a half share, but I said we had a large claim, and had received the rents for many years." He further admitted that Goculdás' moiety of the rents had been always carried, in the first instance, to the private account of

(1) L. R., 6 Ind. Ap. at p. 160.

(2) 6 Q.B. Div., at p. 361.

Goculdás with the firm until 1933 (A. D. 1876-77); but that during the time when Goculdás managed the business of the firm, which was up to the time of his insolvency, he used himself to transfer the balance of that account from time to time to the credit of the account of Vussonji Goculdás, and that the same continued to be done after his insolvency. However, after 1933 (A. D. 1876-77) it appears Goculdás' account was closed, and the moiety of the rents was thenceforth carried at once to the credit of Vussonji Goculdás. This statement of the manner in which Goculdás' share of the rents was dealt with by the firm of Udhá Nánji can, we think, leave no doubt that there was never any attempt made by the firm of Udhá Nánji to collect the rents adversely to Goculdás' ownership of a moiety, at any rate before 1933 (A. D. 1876-77). As to the practice of transferring the balance of Goculdás' private account to that of Vussonji Goculdás, it would appear, according to the evidence of Vussonji Morárji, to have originated in an understanding with Goculdás during his management, and, in the absence of evidence to the contrary, must be deemed to have been continued, after he ceased to manage, in accordance with that understanding, and there is nothing in the evidence to show that it was ever done adversely to Goculdás or his son after his death in 1872.

We think, therefore, that the evidence establishes that there was no adverse possession as against Goculdás' title, at any rate before 1933 (A. D. 1876-77); and the suit having been brought in 1882 is, therefore, not barred.

As to the defendant's claim to a lien on Goculdás' moiety of the house, there is no evidence to establish it. Indeed, nothing short of a registered document could be admissible in evidence for that purpose.

With respect to plaintiff's claim to mesne profits, it was not till August, 1882, that he obtained an unimpeachable title, and till then we cannot regard defendant as taking the rents without color of title. We must, therefore, reverse the decree, and order that joint possession be given to the plaintiff of the house with the defendant, with liberty to either party to apply for a partition or sale. Defendant to pay plaintiff half the mesne profits of the

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house since 31st August, 1882, to be determined on execution, and to pay plaintiff his costs throughout up to the present time.

Attorneys for the appellant.—Messrs. *Little, Smith, Frere, and Nicholson.*

Attorneys for the respondents.—Messrs. *Thakorolis and Dhardansi, and Messrs. Craigie, Lynch, and Owen.*

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, Mr. Justice Vánábhái Haridás, and Mr. Justice Birdwood.

VISHNU KESHAV SA'THE, IN RE THE APPLICATION OF.*

1885.
July 9.

Stamp—Certificate of sale—Practice—Ad-valorem stamp duty—Sale, subject to mortgage lien, of property in several lots—Stamp duty payable by purchaser of one lot, how calculated.

In execution of a decree, certain immoveable property was attached and sold in eight lots to different persons, subject to a mortgage. The applicant was one of the purchasers and applied for a sale certificate. A question arose whether, in computing stamp duty, the whole amount of the principal mortgage debt, or only a proportionate amount of it, was to be deemed a part of the consideration. On reference to the High Court,

Held, that the whole amount of the principal mortgage debt, and not merely a proportionate amount of it, was to be added to the price, and the total amount to form the consideration upon which an *ad-valorem* stamp duty was to be calculated, each purchaser obtaining a separate sale certificate.

THIS was a reference by Ráv Sáheb Wáman M. Bodas, Subordinate Judge of Sásvad, under section 49 of the Stamp Act I of 1879. The reference was as follows:—

“In execution of a decree of the Court of the Subordinate Judge of Poona, certain immoveable property was attached and sold by this Court, subject to a mortgage-lien for Rs. 10,000, the mortgage being accompanied with possession, and not divisible. The property consisted of 18 fields, and was sold in as many separate lots to different persons, of whom the applicant was one. In the proclamation of sale, as also in the *libív-yádi*, all the fields together were described as subject to the mortgage-lien.

*Civil Reference, No. 7 of 1885.