

APPELLATE CIVIL.

Before Mr. Justice Birdwood and Mr. Justice Parsons.

1888.
January 24.

AGARCHAND GUMÁNCHAND, (ORIGINAL PLAINTIFF), APPELLANT, v.
RAKHMA HANMANT AND ANOTHER, (ORIGINAL DEFENDANTS),
(RESPONDENTS).*

Mortgage—Mortgaged land subsequently sold by mortgagee in execution of a money decree—Purchaser at such sale without notice of mortgage—Mortgagee estopped from subsequently enforcing his mortgage as against purchaser—Fraudulent concealment of lien—Registration not equivalent to notice in case of fraud—Limitation Act XV of 1877, Sch. II, Art. 138—Landlord and tenant—Tenant denying landlord's title—Notice to quit—Decree—Execution—Civil Procedure Code (VIII of 1859), Sec. 213.

Where a judgment-creditor in execution of a money-decree sells property, as belonging to his judgment-debtor, he is afterwards estopped from enforcing, as against the purchaser, a previous mortgage of the property which has been created in his own favour, but of which he has given no notice at the time of the sale, and in ignorance of which the purchaser has bid for the property and paid the full price. This principle applies even though the mortgage-deed has been registered.

In 1867, Rakhma and Gajia mortgaged certain lands to Gangáram by a registered deed of that date. In 1870, Gangáram obtained a money-decree against Rakhma and Gajia, and in execution put up the mortgaged land for sale. The plaintiff purchased it without notice of the mortgage; and in February, 1872, obtained possession through the Court. In the meantime, Gangáram brought another suit upon his mortgage against his mortgagors. He obtained a decree, and in April, 1872, ejected the plaintiff and obtained possession. In 1883 the plaintiff filed the present suit against Rakhma, Gajia, and Gangáram to recover the lands. He alleged that after he got possession in 1872 he had leased the property to Rakhma and Gajia.

They denied the letting by the plaintiff, and alleged that they were tenants of Gangáram.

Held, that the plaintiff was entitled to recover. Gangáram, (the mortgagee), when bringing the land to sale in execution of his decree was bound by section 213 of the Civil Procedure Code (VIII of 1859) to disclose the limited interest of his judgment-debtors in it. By concealing his lien he had induced the plaintiff to pay full value for the property, and he could not, therefore, retain his lien. By his omission he was estopped from disputing the plaintiff's title. The rule, that registration of a mortgage amounts to notice to all subsequent purchasers of the same property, does not apply to a case where there has been a fraudulent concealment by a judgment-creditor of the extent of his judgment-debtor's interest in the property brought by the judgment-creditor to sale.

* Second Appeal, No. of 679 of 1885.

Held, also, that as Rakhma and Gajia claimed only to be tenants of Gangáráám, they could not retain possession of the land, merely because the plaintiff had failed to prove that he had let the land to them. They denied the plaintiff's title, and were not, therefore, entitled to any notice to quit.

Held, also, that the plaintiff's suit was not barred by article 138 of Schedule II of the Limitation Act XV of 1877, inasmuch as the plaintiff had obtained possession through the Court within the twelve years preceding the suit.

SECOND appeal from the decision of M. B. Baker, District Judge of Násik, in Appeal No. 135 of 1884.

On the 20th June, 1867, one Rakhma and his brother Gajia (defendants Nos. 1 and 2) mortgaged certain lands to Gangáráám Motirám, (defendant No. 3), by a mortgage-deed of that date. The deed was registered.

On the 8th February, 1870, Gangáráám, the mortgagee, put up the mortgaged lands for sale in execution of a money-decree which he had obtained against Rakhma and Gajia. The plaintiff Agarchand was the purchaser at the court-sale. He obtained possession through the Court on the 12th February, 1872.

In his application for execution of his money decree, Gangáráám had fraudulently concealed the fact of his previous mortgage. Nor did he give any notice of his mortgage lien to the intending purchasers at the court-sale.

In 1871, Gangáráám as mortgagee sued Rakhma and Gajia, (the mortgagors), for possession of the mortgaged lands, and having obtained a decree, dispossessed the plaintiff on the 23rd April, 1872.

In 1883 the present suit was filed by the plaintiff, as auction-purchaser, to recover back the lands of which he had been dispossessed. He alleged that in February, 1872, immediately after getting possession through the Court, he had let the lands to Rakhma and Gajia for cultivation for one year, that their tenancy expired in March, 1873, and that they refused to deliver up possession at the instigation of Gangáráám.

The first and second defendants, Rakhma and Gajia, pleaded that they had never taken the land for cultivation from the plaintiff; that they were Gangáráám's tenants for several years; and that the suit was barred by limitation.

1888.

 AGARCHAND
 GUMÁNCHAND

 v.
 RAKHMA
 HANMANT.

1888.

AGARCHAND
GUMANCHAND
v.
RAKHMA
HANMANT.

Gangáráam, (defendant No. 3), pleaded that the lands had been mortgaged to him by Rakhma and Gajia for Rs. 200 under a mortgage bond dated the 20th June, 1867; that the mortgagors had been his tenants ever since the date of the mortgage; that in 1876 he had sued the mortgagors and obtained possession through the Court on the 23rd April, 1872; and that the plaintiff's claim was time-barred.

The Court of first instance found that the tenancy alleged by the plaintiff was not proved, and that his claim was time-barred. The suit was, therefore, dismissed.

On appeal the District Judge was of opinion that the suit was filed within time, limitation having begun to run against the plaintiff from the date of his dispossession by Gangáráam in April, 1872, and not from the date of his purchase at the court-sale. The District Judge, however, held, on the authority of *Lakshmandás Sarupchand v. Dasrat*⁽¹⁾, that the registration of Gangáráam's mortgage-deed was a sufficient notice to the plaintiff as auction-purchaser of the prior mortgage, and that, therefore, he must be taken to have bought only the equity of redemption. As the present suit was not one for redemption of the mortgage, the plaintiff's claim was rejected, and the lower Court's decree was confirmed with costs.

Against this decision the plaintiff appealed to the High Court.

Dáji Abáji Khare for the appellant:—Gangáráam gave no notice of his mortgage-lien to the intending purchasers at the court-sale. He allowed them to bid for the property as though it were free from any incumbrance or charge in his own favour. He is, therefore, estopped from disputing the title of the plaintiff who purchased. The registration of his mortgage-deed does not avail him. Refers to *Tukáráam v. Rámchandra*⁽²⁾, *Dullab Sírkár v. Krishna Kumár*⁽³⁾, and *Tinnáppá Chetti v. Murugáppá Chetti*⁽⁴⁾.

G. M. Tripathi for the respondent:—The plaintiff had constructive notice of the mortgage. The registration of the mortgage-

(1) I. L. R., 6 Bom., 168.

(2) I. L. R., 1 Bom., 314.

(3) 3 Beng. L. R., 407.

(4) I. L. R., 7 Mad., 107.

deed was a sufficient notice of our lien. We were not bound to give any further notice—*Lakshmandas Sarupchand v. Dasrat*⁽¹⁾; *Rádhábái v. Shámráv Vináyak*⁽²⁾. The suit is barred by limitation. It is a suit by an auction-purchaser to recover possession of the property he has purchased. The judgment-debtor is in possession. Article 183 of Schedule II of the Limitation Act (XV of 1877) applies. Then symbolical possession, such as the plaintiff obtained from the Court, does not save limitation—*Shotecnáth Mookerji v. Obhoy Nund Roy*⁽³⁾; *Krishna Lall Dutt v. Rádhá Krishna Surkhet*⁽⁴⁾; *Anand Coomári v. Ali Jámín*⁽⁵⁾.

BIRDWOOD, J. :—The third defendant (Gangáram) held a money decree against Rakhma and Gajia, the first and second defendants, and also a mortgage on the land in suit. He brought the land to sale on his money decree, but in his application for attachment concealed the fact of his mortgage. The plaintiff was the purchaser, and he now sues to eject the first and second defendants, who, as he says, became his tenants for one year after he had obtained possession under his sale, but refused to vacate at the end of the year. The sale took place in 1870. The plaintiff was put in possession by the Court in February, 1872. The third defendant, however, displaced this possession in April, 1872, under a decree for possession obtained by him on his mortgage bond against the first and second defendants. The present suit was brought in 1883.

It has been argued that it is barred under article 138 of Schedule II of Act XV of 1877; but we cannot apply that article to the claim, for the plaintiff obtained possession from the Court within the twelve years preceding the suit. The lower appellate Court has held that the plaintiff cannot succeed, because he must be held to have had notice of the third defendant's mortgage when he purchased, as that mortgage was registered, and that he purchased, therefore, only the equity of redemption; and both the Courts below have held that the alleged lease to the first and second defendants is not proved. But the decisions in such cases as *Lakshmandás Sarupchand v. Dasrat*⁽⁶⁾, in which it

1888.

AGARCHAND
GUMANCHAND
v.
RAKHMA
HANMANT.

(1) I. L. R., 6 Bom., 168.

(4) I. L. R., 10 Calc., 402.

(2) I. L. R., 8 Bom., 168.

(5) I. L. R., 11 Calc., 229.

(3) I. L. R., 5 Calc., 331.

(6) I. L. R., 6 Bom., 168.

1888.

AGARCHAND
GUMANCHAND
v.
RAKHA
HANMANT.

has been held that registration amounts to notice to all subsequent purchasers of the same property, clearly do not govern a case where there has been a fraudulent concealment by a judgment-creditor of the extent of his judgment-debtor's interest in the property brought by the judgment-creditor to sale. There was nothing in the circumstances of the court-sale in the present case to put the plaintiff on enquiry as to the title of the apparent owners of the property. The third defendant, when bringing the property to sale, was bound by section 213⁽¹⁾ of the Civil Procedure Code (VIII of 1859) to disclose the limited interest of his judgment-debtors in it. By concealing his lien he induced the plaintiff to pay full value for the property, and he cannot now retain his lien. By his omission he is estopped from disputing the plaintiff's title. See *Tukarām v. Rāmchandra* ⁽²⁾ and *Dullab Sirkar v. Krishna Kumār* ⁽³⁾.

As the first and second defendants claim to be only tenants of the third defendant, they cannot retain possession of the land, merely because the plaintiff has failed to prove the alleged letting. They deny the plaintiff's title, and are not entitled to any notice to quit. We, therefore, reverse the decrees of the Courts below, and award the claim with costs.

PARSONS, J.:—There can be no doubt on the authorities—*Dullab Sirkar v. Krishna Kumār* ⁽⁴⁾, *Tukarām v. Rāmchandra* ⁽⁵⁾, *Tinnápá Chetti v. Murugáppá Chetti* ⁽⁶⁾ and *Hari v. Lakshman* ⁽⁷⁾—that where a judgment-creditor sells property as that of his judgment-debtor he is estopped from setting up a previous mortgage which had been created in his own favour of which he has given no notice and in ignorance of which the purchaser has bid for the property and paid the full price. It is argued

(1) "Section 213.—When the application is for an attachment of any land or other immoveable property belonging to the defendant, it shall be accompanied with an inventory or list of such property, containing such a description of the property as may be sufficient to identify it, together with a specification of the defendant's share or interest therein, to the best of the applicant's belief, and so far as he has been able to ascertain the same * * *

(2) I. L. R., I Bom., 314.

(3) 3 Beng. L. R., 407.

(4) 3 Beng. L. R., 407.

(5) I. L. R., I Bom., 314.

(6) I. L. R., 7 Mad., 107.

(7) I. L. R., 5 Bom., 614.

that in the present case the mortgage-deed being registered, the purchaser had notice thereof—*Lakshmandas Sarupchand v. Dasrat*⁽¹⁾. That case, however, appears to have no bearing upon this case, for here the person who caused the property to be sold was the judgment-creditor himself. He was by section 213 of the Civil Procedure Code (VIII of 1859) bound to specify the judgment-debtor's interest in the property to the best of his belief. If he fraudulently conceals the fact of his mortgage, and specifies the judgment-debtor's interest to be that of an unincumbered ownership of the property, and if relying on that specification the purchaser gives what may fairly be considered to be the full value of the property, the judgment-creditor is clearly estopped from afterwards setting up his mortgage. He cannot reap the benefit of his fraud and obtain the full value of the property twice over.

1888.

AGARCHAND
GUMANCHAND
v.
RAKHM
HANMANT.

It is further argued that the plaintiff's suit is time-barred. As, however, the plaintiff was placed in possession after his purchase, and has been in possession within twelve years of suit, and as the defendant No. 3's possession admittedly commenced only in April, 1872, and the suit is brought within twelve years from that time, the suit is within time. The decree that the defendant No. 3 obtained against his mortgagors after he had caused their interest to be sold, was fraudulent and is null and void as against plaintiff. I concur in reversing the decrees of the lower Courts and awarding the plaintiff's claim, with costs throughout.

Decree reversed.

(1) I. L. R., 6 Bom., 168.