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Dhond Sávant(1) and *Maloji* v. *Sagaji*(2) is, therefore, in my opinion, the right construction. If the decree in the present case was so kept alive,—and this is a point on which the District Judge has recorded no finding,—then the plaintiff was entitled to redeem his property when he finally paid the mortgage debt; for, the payment having been made within twelve years from the date of the decree, execution could not have been barred by section 230 of the Code of Civil Procedure.

The dates of the several applications for execution, as given in the District Judge's judgment, do not show that the decree was kept alive till the 14th December, 1889. It is possible that the District Judge does not refer to all the applications made by the plaintiff. On the view he took of the law applicable to the case it was not necessary for him to enquire particularly into this point, or into the further question whether the applications were valid. Nor does the Subordinate Judge's judgment state the facts in sufficient detail to enable us to deal with these questions ourselves. We must, therefore, reverse the District Judge's order and remand the appeal to the lower appellate Court for a rehearing.

Order reversed and case sent back.

(1) I. L. R., 7 Bom., 467. (2) I. L. R., 13 Bom., 567.

APPELLATE CIVIL

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

1891. *September* 14.

DA'DOBA' ARJUNJI, (ORIGINAL PLAINTIFF), APPELLANT, *v.* DA'MODAR RAGHUNA'TH AND OTHERS, (ORIGINAL DEFENDANTS), RESPONDENTS.*

Mortgage—Decree for sale—Interest acquired by purchaser—Previous sale in execution of a money decree—Suit to recover possession by mortgagee purchaser—Right of previous purchaser to redeem.

A purchaser at a sale in execution of a decree on a mortgage acquires the estate of the mortgagor as it existed when he executed the mortgage.

K. and others mortgaged a certain property to D. A. and V.

Subsequent to the mortgage the property was sold in execution of a money-decree, and was purchased by D. R. and others, who were put in possession.

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Afterwards D. A. and V. upon their mortgage obtained a decree to which D. R. and others, the purchasers under the money decree, were not made parties. In execution of the mortgage-decree the property was purchased by D. A., to whom symbolical possession was given.

In a suit brought by D. A. against D. R. and others to recover actual possession,

Held, that D. R. and others were entitled to have an opportunity of redeeming the property from D. A.

Held, further, that had D. R. and others been made parties to the mortgage suit they would have been entitled to redeem on payment of what was then due on the mortgage, and that, therefore, these were the terms on which they must now be allowed to redeem.

THIS was a second appeal from the decision of M. P. Khareghát, Assistant Judge of Thána.

Suit to recover possession of a third share of a *vádi* (oart) and mesne profits.

The circumstances which led to the action were as follows :—

Three brothers—Krishna, Mánik and Náráyan Bhái—had contracted a debt under two promissory notes, dated 27th February, 1881. The plaintiff Dádobá Arjunji, and one Vináyak Rághoba, who were sureties under the notes, paid off the debt, and for the amount thereof took from the three brothers a registered deed, dated 20th February, 1882, under which the property in dispute was mortgaged. On the 20th August, 1882, the property was sold in execution to recover the costs of a partition decree obtained by defendants Dámodar Raghunáth, Madan Raghunáth and others, against the mortgagors, and was purchased by the defendants themselves with the permission of the Court. They were put in possession of the property on the 20th June, 1884. Subsequently, on the 24th June, 1884, the plaintiff and Vináyak Rághoba brought a suit against the mortgagors on the basis of the mortgage-deed, and obtained a decree on the 18th November, 1884. Dámodar Raghunáth and others, who had obtained possession of the property through the Court, were not made parties to this suit. The property was sold in execution of the mortgage decree, and was on the 20th November, 1885, purchased by the plaintiff with the permission of the Court, which gave him symbolical possession on the 12th November, 1886. Subsequently the plaintiff having gone to

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cultivate the land, defendants, Nos. 1 and 2, Málji Dádu and Jáni, caused obstruction to him. Hence the suit.

Defendants Nos. 1 and 2, against whom the present suit was originally brought, pleaded that they were tenants of Dámodar Raghunáth and Madan Raghunáth, who, being subsequently joined in the suit, set up their absolute title to the property under their purchase through the Court.

The Subordinate Judge (Ráo Sáheb K. N. Kher) allowed the plaintiff's claim.

Against the decree of the Subordinate Judge the defendants appealed to the District Court, which reversed the decree, and ordered the plaintiff to recover possession of the one-third *vádi* in suit, unless the defendants paid him Rs. 13 (that being the amount of the purchase-money paid by the plaintiff at the Court sale) within three months from the date of the decree; and if they did not, their right of redemption to be ever barred.

The Assistant Judge made the following remarks in his judgment:—

"Now the Subordinate Judge has held that the defendants bought in 1883 the property subject to plaintiff's mortgage which was registered. So far I agree with him; but he has subsequently argued that the plaintiff, being a purchaser in a suit against the original mortgagor under the prior mortgage, became entitled to the whole of the property free from every incumbrance subsequent to the mortgage to him, including the purchase by the defendants. I have to differ from him on that point. No doubt a prior incumbrancer is entitled to get his money before a subsequent one, but the prior incumbrancer must give the subsequent incumbrancer an opportunity of redeeming him before he sells the property out and out. The present plaintiff did not give the defendants that opportunity. I think the Subordinate Judge was misled by the wide language of the ruling at 7 Bom. H. C. Rep., A. C. J., 146. No doubt there are several conflicting rulings of the Bombay High Court as to what a purchaser at a sale under a mortgage decree purchases. Some of these rulings would seem to show that he purchases the whole right, title and interest of the mortgagor, as well as of the mortgagee, at date of mortgage (7 Bom. H. C. Rep.,

146; I. L. R., 5 Bom., 8; I. L. R., 6 Bom., 495); others would seem to show that he purchases only the right of the mortgagor, and not of the mortgagee (I. L. R., 8 Bom., 168); others that he purchases the right of the mortgagee at date of the mortgage, and no right of the mortgagor (I. L. R., 10 Bom., 88 and 224); others would seem to show that he purchases neither the mortgagee's, nor the mortgagor's, right. If he fails to join the subsequent incumbrancers he cannot be given an opportunity of proving his mortgage against the subsequent incumbrancers (P. J. of 1878, page 54). Lastly, others would seem to show as if he purchases the right of the mortgagee as it exists at the date of the mortgage and the right of the mortgagor as it exists at the date of sale (I. L. R., 6 Bom., 515). The most reasonable view I hold to be the last, *viz.*, that such a purchaser purchases the right, title, and interest of the mortgagee at date of mortgage, but that of the mortgagor at date of sale; and that if the mortgagee has failed to join the subsequent incumbrancers, the purchaser's claim should not wholly fail, but he should be taken as the mortgagee's representative *pro tanto* in a subsequent suit against such posterior incumbrancers.

* * * *

"The purchase-money in the present case is Rs. 13 (exhibit 46); and that is the amount the defendants will have to pay to plaintiff if they want to keep possession of the property in the suit, *viz.*, one-third of the *vádi*."

Against the decree of the District Court the plaintiff appealed to the High Court.

Shivrám Vithal Bhandárkar for the appellant:—The lower Court was wrong in holding that the respondent should pay us Rs. 13 only, the amount for which we purchased the property at the Court sale for the redemption of our mortgage lien. We submit that we are entitled to recover the amount due on the mortgage, and, therefore, the amount awarded to us by the mortgage decree should be taken to be the basis for further account —*Vásudev Báláji* v. *Náráyan Krishna*[1]; *Dullabhdás* v. *Lakshmandás*[2]. The lower Court has fallen into an error as to the gist of the rulings with respect to the right of mortgagee purchasers

(1) P. J. for 1882, p. 21. (2) I. L. R., 10 Bom., 88.

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at a Court sale. There are several rulings which, in effect, agree, and lay down that a purchaser at a Court sale acquires the mortgagor's rights as they existed at the time of the mortgage, and not at the time of the Court sale; and the subsequent incumbrancers get nothing—*Kasandás* v. *Pránjivan Asháram* (1); *S. B. Shringarpure* v. *S. B. Pethe*(2); *Sobhágchand* v. *Bháichand*(3); *Rupchand* v. *Davlatrám*(4); *Ali Hasan* v. *Dhirja*(5).

Gokuldás Kahándás Párekh for the respondents:—The mortgage-deed relied on by the appellant was not passed for any actual cash paid. It was passed merely because the appellant was a surety for the loans due by the respondents to another creditor. Under the Court sale we had taken actual possession, and we had no notice of the appellants' incumbrance. Even supposing that we had notice, still we have a right to redeem the appellant by paying him the amount for which he had purchased the property.

Shivrám Vithal Bhandárkar in reply:—The account should start with the amount of the decree, and interest should be calculated at the rate mentioned in the decree without the rule of *dam dupat* being made applicable. The rule of *dam dupat* applies only to contracts, and not decrees—*Bálkrishna* v. *Gopál*(6). The costs which we incurred in our mortgage-suit should also be awarded to us—*Dámodar* v. *Naro*(7).

SARGENT, C. J.:—The property in suit was mortgaged on the 20th February, 1882, to the plaintiff and Vináyak, who sued on the mortgage on the 24th June, 1884, and obtained a decree on the 18th November, 1884, in execution of which the plaintiff purchased the property on the 20th November, 1885. The defendants had previously, on the 20th June, 1884, been placed in possession of the property under their purchase, dated the 20th August, 1883, of the right, title, and interest of the plaintiff's mortgagors, which was sold in execution of a money decree against them. The defendants were not made parties to the mortgage suit of the

(1) 7 Bom. H. C. Rep., A. C. J., 146.
(2) I. L. R., 2 Bom., 662.
(3) I. L. R., 6 Bom., 193.
(4) I. L. R., 6 Bom., 495.
(5) I. L. R., 4 All., 518.
(6) I. L. R., 1 Bom., 73.
(7) I. L. R., 6 Bom., 11.

24th June, 1884. The plaintiff now sues to recover possession of the property with mesne profits; and the Assistant Judge has awarded possession, subject to the defendants' right to redeem the property within three months from the date of his decree, on payment of Rs. 13, that being the amount of the purchase-money paid by the plaintiff on the 20th November, 1885.

The Assistant Judge is mistaken in supposing that the rulings of the High Court, as to the interest acquired by a purchaser at a sale in execution of a decree on a mortgage, are conflicting. The authorities to which he refers, *viz.*, *Kasandás* v. *Pránjivan Asháram*[1]; *Shaik Abdulla Saiba* v. *Háji Abdulla*[2], *Rupchand* v. *Davlatrám*[3] are clear in laying down that he acquires the estate of the mortgagor as it existed when he executed the mortgage. The decisions in *Rádhábái* v. *Shámrám*[4], *Dullabhdás* v. *Lakshmandás*[5] and *Mohan* v. *Togu*[6] turn upon the question as to the right of a subsequent mortgagee, who has not been made a party to the suit in which the mortgage decree was passed, and in execution of which the property was sold. As to *Rádhábái* v. *Shámrám*, although the circumstances were of a special nature, it may perhaps be open to doubt whether the decision is reconcileable with the ruling in the cases first referred to. But here the circumstances are the same as in *Dullabhdás* v. *Lakhshmandás* and the defendants are, therefore, clearly entitled to have an opportunity of redeeming the property from the plaintiff; and we have only to consider whether the terms on which the Court below has allowed them to do so—against which the plaintiff appeals—are correct. Had the defendants been made parties to the mortgage suit, they would have been entitled to redeem on payment of what was then due on the mortgage; and such are the terms on which they must now be allowed to redeem, with this modification that, as they have been in possession throughout, they must now pay interest on the sum of Rs. 199, being that part of the sum of Rs. 318-4 found due by the decree of 18th November, 1885, which consisted of principal debt, but subject to

(1) 7 Bom. H. C. Rep., A. C. J., 146.
(2) I. L. R., 5 Bom., 8.
(3) I. L. R., 6 Bom., 495.
(4) I. L. R., 8 Bom., 168.
(5) I. L. R., 10 Bom., 88.
(6) *Ibid.*, 224.

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the rule of *dam dupat*. It was urged that defendants should not be allowed to redeem without also paying the costs of the plaintiff's mortgage suit, but there is no finding which would justify our holding that they were responsible for the plaintiff's having unnecessarily incurred the costs of that suit. As defendants set up a title as owners of the property, and have failed, they must pay the costs of this suit throughout. The decree must, therefore, be varied by directing that defendants may redeem on payment of Rs. 398, with the costs of this suit throughout, within three months from the date of this decree—and, in default of such payment, the defendants to be foreclosed, and possession of the property to be given to the plaintiff.

Decree varied.

ORIGINAL CIVIL.

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

1891.
October 9.

JAVERBA'I, (ORIGINAL PLAINTIFF), APPELLANT, *v.* KABLIBA'I AND ANOTHER, (ORIGINAL DEFENDANTS), RESPONDENTS.*

Hindu law—Will—Construction—Gift to a class not all in existence at testator's death—Rule in Tágore case—Void gift—Gift over, alternative or expectant on void gift—General power of appointment in a Hindu will, how far valid—Operation and effect of such a power—English rules of construction not followed.

Manchhárám Pitámbardás, by his will, dated 14th April, 1873, after appointing his brother, Jamnádás, to be his executor, bequeathed all his estate, &c., to Jamnádás, upon trust to pay debts, &c., and to stand possessed of the residue in trust (1) for his (testator's) wife Jáverbái and Ambávahu, the wife of his brother Jamnádás, during the life of both, or the survivor of them, for their or her sole use; and (2) from and after the decease of the survivor of them, in trust for the male issue of Jamnádás, if any there were; and (3) in default of such male issue, in trust for any person or persons, in any shares or share, and in such manner as his brother Jamnádás should, by any deed or deeds, or writing or writings, appoint, with or without power of revocation or new appointment.

Jamnádás proved the will, and as executor managed the estate until his death on the 17th October, 1888. He had no male issue, but two daughters, who were the defendants in this suit. On the 7th October, 1888, he made a will, by which, in accordance with the authority given to him by the last clause of the will of Manchhárám, he directed that twelve months after the death of Jáverbái (Ambá-

*Suit No. 235 of 1890.