

APPELLATE CIVIL.

Before Sir C. F. Furrer, Kt., Chief Justice, and Mr. Justice Candy.

MAGANLAL (ORIGINAL DEFENDANT No. 3), APPELLANT, v. SHAKRA
GIRDHAR (ORIGINAL PLAINTIFF), RESPONDENT.*

1897.

September 20.

Registration—Unregistered san-mortgage—Sale—Subsequent unregistered mortgage of same property—Decree on latter mortgage and sale in execution—Sale certificate registered—Priority—Interest passing on sale of mortgaged property in execution of a money decree and of a decree on mortgage.

One Harilal and his sons Baji and Chhagan executed a *san*-mortgage of certain ancestral property in plaintiff's favour in 1885. The mortgage was unregistered. In 1886 the same property was mortgaged by Chhagan alone by a deed which was also unregistered. In 1889 Chhagan's mortgagee obtained a decree on his mortgage for sale of the mortgaged property, and in execution put up the property to auction in 1892, when defendant purchased it. Defendant got his sale-certificate registered.

In 1894 the plaintiff brought this suit to enforce his mortgage-lien by sale of the mortgaged property. The defendant contended that, as to Chhagan's share, his certificate of sale having been registered, his claim had priority to the plaintiff's unregistered mortgage.

Held, that the plaintiff was entitled to a decree. His claim was superior to the defendant's. The defendant had purchased the interest which Chhagan had mortgaged in 1889. But that mortgage was unregistered and was, therefore, subject to the plaintiff's mortgage, which although also unregistered was earlier in date. The defendant by registering his certificate of sale could not enlarge the estate which the certificate conveyed to him.

By a sale of mortgaged property in execution of a decree obtained by a mortgagee against the mortgagor upon the mortgage, the interests both of the mortgagor and mortgagee passes to the purchaser. But by a sale of mortgaged property in execution of a money-decree obtained by the mortgagee against the mortgagor, the interest of the defendant (mortgagor) alone passes to the purchaser.

SECOND appeal from the decision of E. H. Leggatt, Assistant Judge of Ahmedabad.

The property in dispute belonged to one Haribhai and his sons Baji and Chhagan.

Haribhai and his sons executed a *san*-mortgage (mortgage without possession) for Rs. 50 in plaintiff's favour on 27th August, 1885. The mortgage was unregistered.

* Second Appeal, No. 877 of 1896.

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In 1886 the same property was mortgaged by Chhagan alone by an unregistered mortgage bond. Upon this bond the mortgagee obtained a decree against Chhagan in 1889, and brought the property to sale. Defendant No. 3 purchased the property at the Court-sale on 21st September, 1892. The certificate of sale was registered.

In 1894 plaintiff sued to recover Rs. 84-4-0 due under his *san*-mortgage of 1885, by sale of the mortgaged property.

Defendant No. 3, who alone defended the suit, pleaded (*inter alia*) that the *san*-mortgage was false and fictitious, and could not, under any circumstances, prevail over his registered certificate of sale.

The Court of first instance dismissed the suit, holding that the bond sued upon was not proved.

On appeal the Assistant Judge held the bond sued upon was proved, and that the defendant No. 3 purchased the property at the Court-sale subject to the plaintiff's *san*-mortgage.

The Assistant Judge, therefore, reversed the decree of the first Court, and directed the defendants to pay Rs. 84-4-0 to the plaintiff within six months, or in default the plaintiff was to recover the same from the *san*-mortgaged property.

From this decree defendant No. 3 preferred a second appeal to the High Court.

Ganpat Sulashiv Rao, for appellant (defendant No. 3):— Our certificate of sale being registered has priority over plaintiff's unregistered *san*-mortgage—Registration Act (III of 1877), section 50; *Jethabhai v. Girdhar*⁽¹⁾.

R. V. Desai, for respondent (plaintiff):—The registration of the certificate of sale cannot give it priority over the plaintiff's *san*-mortgage. The plaintiff's mortgage, though unregistered, is a valid charge. As a purchaser at a Court-sale the defendant bought the right, title and interest of Chhagan, the judgment-debtor, subject to all existing equities against the property sold—*Sobhagchand v. Bhaichand*⁽²⁾.

(1) I. L. R., 20 Bom., 158.

(2) I. R. R., 6 Bom., 193.

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FARRAN, C. J.:—Haribhai and his sons Baji and Chhagan executed a *san*-mortgage in favour of the plaintiff in 1885. This mortgage was not registered. The mortgaged property—a house—is found by the Assistant Judge to have been the joint property of Haribhai and his sons. In 1886 Chhagan alone mortgaged the same property. The mortgage was not registered. In 1889 Chhagan's mortgagee having sued Chhagan upon his mortgage, obtained a decree for the sale of the mortgaged premises and the same were sold in execution by auction-sale in 1892 when the defendant No. 3, Maganlal, purchased them. He caused his sale-certificate to be registered. The house appears to be in the actual possession of the defendants Nos. 4 and 5.

The plaintiff by the present suit seeks to have his *san*-mortgage realized by the sale of the mortgaged property. As to the shares therein of Haribhai and Baji, the plaintiff is clearly entitled to the relief which he seeks against the appellant (defendant No. 3), as that defendant has only purchased the share of Chhagan in the same. The substantial question in the appeal relates to Chhagan's interest which the defendant No. 3 has acquired under his registered sale-certificate. Had the plaintiff purchased at a sale held in execution of a money decree, the Full Bench decision in *Sobhagchand v. Bhaichand*⁽¹⁾ would have been conclusive in favour of the plaintiff's *san*-mortgage against the defendant No. 3 as purchaser at a Court-sale although the defendant No. 3's sale-certificate had been perfected by registration. "When the Court sells the right, title and interest of the judgment-debtor in property, it cannot be regarded as selling more than the judgment-debtor himself could honestly sell. He could honestly sell only subject to any equities existing against himself on the property; and if by concealment of a *san*-mortgage or other mortgage, he sold property as free of that charge, he would commit a fraud. The Court cannot be deemed to do that which would be a fraud if done by the judgment-debtor. If, then, the Court sell only the right, title and interest of the judgment-debtor, subject to all existing equities against the property sold, the registration of the Court's conveyance (the certificate of sale) cannot enlarge the scope of that conveyance, and thus discharge

(1) I. L. R., 6 Bom., 193.

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the property from any unregistered incumbrance, which was binding upon the judgment-debtor." Per Westropp, C. J., at p. 202. This must, we think, be taken now to be the settled law of this Court.

It is also clear that, if the mortgage by Chhagan had been registered when executed, the defendant No. 3 claiming under that mortgage would have had a preferential title to the plaintiff's claiming under an unregistered *san*-mortgage—*Jethabhai v. Girdhar*⁽¹⁾. This case was decided upon the language of section 50 of the present Registration Act (III of 1877).

The distinction between a decree for the sale of mortgaged property obtained by a mortgagee upon his mortgage, and a decree for the sale of such property under a money decree, is that notwithstanding the form of the words used in the proclamation of sale in the former case, the respective interests both of the mortgagee and of the mortgagor (the respective interests both of the plaintiff and of the defendant) pass to the purchaser, while in the latter case the interest of the defendant alone passes—*Kheeraj v. Lingaya*⁽²⁾ and *Sheshgiri v. Salvador*⁽³⁾. The defendant No. 3 consequently took under his purchase both the interest of Chhagan's mortgagee and that of Chhagan.

The mortgagee unaware of the plaintiff's *san*-mortgage would, it may be contended, commit no fraud in selling to the defendant No. 3 without informing him of the plaintiff's *san*-mortgage, and the Court, therefore, in selling the property would not be carrying out any fraud on the part of the mortgagee plaintiff; and hence the *ratio decidendi* in *Sobhagchand v. Bhaichand* (*supra*) does not apply.

The distinction is, we think, too fine and cannot be given effect to. It is clear that what the Court sells is the judgment-debtor's interest in the property as it existed at the date of the mortgage, *i. e.*, subject to all valid incumbrances existing at that date—*Kasandas v. Pranjivan*⁽⁴⁾; *Mohan Manor v. Togu Uka*⁽⁵⁾. The Court does not guarantee the property as having been

(1) I. L. R., 20 Bom., 158.

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

(2) I. L. R., 5 Bom., 2.

(4) 7 Bom. H. C. Rep., A. C. J., 146.

(5) I. L. R., 10 Bom., 224.

free from incumbrances at that time. The purchaser knows that he is purchasing under an unregistered mortgage and, therefore, subject to unregistered incumbrances of prior date. Therefore it would appear to follow that he is in no better position than the mortgagee under whose mortgage he purchases. The root of his title is an unregistered mortgage. The Court conveys to him that title and no more, and the reasoning in *Sobhagchand v. Bhaichand* (*supra*) then applies. He cannot by registration of his Court's conveyance enlarge the scope of the estate which the Court has by its certificate conveyed to him.

We think, therefore, that the plaintiff's *san*-mortgage has priority over the purchase of the defendant No. 3, and that the decree appealed against should be confirmed. Decree confirmed with costs.

Decree confirmed.

CRIMINAL REVISION.

Before Mr. Justice Parsons and Mr. Justice Ranade.

IN RE HARILAL BUCH.*

Criminal Procedure Code (Act X of 1882), Sec. 96—Search warrant—Issue of search warrant illegal, in the absence of any inquiry, trial or other proceeding pending before Magistrate—Power of revision in criminal cases—Revision.

Some treasure belonging to the Native State of Rádhampur was missing. The Administrator of Rádhampur sent a telegram to the District Superintendent of Police at Ahmedabad, stating that part of the missing treasure was in the possession of the accused, who was a resident of Ahmedabad, and asking that his house should be searched. In consequence of this telegram, the City Police Inspector applied for a search warrant to the City Magistrate of Ahmedabad. Thereupon the Magistrate issued a search warrant under section 96 of the Code of Criminal Procedure (Act X of 1882). In execution of this warrant the house of the accused was searched and the police seized and took away certain property belonging to the accused, to his wife, and to his servant. The accused was subsequently arrested under a warrant issued by the Political Superintendent of Pálanpur under section 11 of the Extradition Act XXI of 1879, but he was admitted to bail by the District Magistrate of Ahmedabad. On the 12th

* Criminal Revision, No. 213 of 1897.

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