

APPELLATE CIVIL.

Before Mr. Justice Russell, Acting Chief Justice, and Mr. Justice Beaman.

1906.
September 20.

PANDURANG JASVANT (ORIGINAL PLAINTIFF, PUISNE MORTGAGEE),
APPELLANT, v. SAKHARCHAND MALJI (ORIGINAL AUCTION-PURCHASER),
RESPONDENT.*

Prior mortgage—Puisne mortgage—Suit by prior mortgagee for sale—Puisne mortgagee not made a party—Sale in execution—Rights of the puisne mortgagee.

Where a prior mortgagee sues his mortgagor for the sale of the mortgaged property without making the puisne mortgagee a party to the suit, the latter is in no way affected by the suit or its results. Thus if the property is brought to sale in execution of the decree and is bought by a third person, the puisne mortgagee has, as against him, precisely the same rights as he had collectively against his mortgagor and the prior mortgagee. That is to say, he may sue to redeem the purchaser as mortgagee or thereafter as mortgagor to foreclose or suffer himself to be redeemed by him.

SECOND appeal from the decision of R. S. Tipnis, District Judge of Thána, reversing the order of Bhaskar Shridhar Joshi, First Class Subordinate Judge, in an execution proceeding.

One Sakharam Vithoba and his son Madan were the owners of a house and a chawl (range of buildings). On the 4th March 1891 they mortgaged both the properties to Sundrabai, widow of Rangnath Sadashiv, for Rs. 599. Subsequently Sakharam mortgaged the chawl only to Pandurang Jasvant Chemburkar for Rs. 379 under a deed dated the 29th November 1896. In the year 1901 Sundrabai brought a suit, No. 153 of 1901, against her mortgagors for the recovery of her mortgage-debt by sale of the mortgaged properties. On the 12th March 1902 she obtained a decree which ordered that the mortgagors should pay the decretal debt, namely Rs. 520, within six months and in default the amount should be realized by the sale of the mortgaged properties. The mortgagors having committed default Sundrabai, on the 4th November 1902, presented a darkhast, No. 322 of 1902, to make the decree absolute and for execution. The 30th January 1903 was the day fixed for making absolute the decree *nisi*. On the

* Second Appeal No. 575 of 1905.

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29th January 1903 Pandurang instituted a suit, No. 23 of 1903, against his mortgagor Sakharam and Sundrabai, praying as against Sakharam for the recovery of his mortgage-debt by the sale of the property mortgaged to him, namely the chawl, and as against Sundrabai that she should first proceed to sell the house, that is, the property not mortgaged to Pandurang, and in case of deficiency, to sell the chawl. A decree was accordingly passed on the 27th May 1903. On the 11th July 1903 the properties were sold under Sundrabai's decree in different lots, one after the other, for Rs. 705 in all. The house was sold for Rs. 450 and the chawl, which was purchased by Sakharchand Malji, was sold for Rs. 255. Pandurang, thereupon, made a miscellaneous application, No. 55 of 1903, for setting aside the sale of the chawl and it was set aside by the Court on the 30th October 1903. In the beginning of December 1903 Pandurang presented a darkhast for the execution of his decree in suit No. 23 of 1903, praying that as the chawl was being re-sold under Sundrabai's decree, he should be given out of the purchase-money the balance that might remain after the satisfaction of Sundrabai's claim in full. The chawl was re-sold for Rs. 310 and was purchased by one Krishnanath Chemburkar. Out of the entire purchase-money, namely Rs. 760, that is, Rs. 450 the price of the house plus Rs. 310 realized at the re-sale of the chawl, Rs. 592-13-6 were given to Sundrabai in satisfaction of her decree and the balance of Rs. 167-2-6 was given to Pandurang as prayed for by him. The District Court, however, on the 19th February 1904, in appeal No. 6 of 1903 against the order of the 11th July 1903 setting aside the sale to Sakharchand Malji, reversed the said order and restored the sale. The subsequent re-sale to Krishnanath Chemburkar having been thus set aside, Pandurang gave darkhast No. 173 of 1904 to execute the decree in his suit, No. 23 of 1903, producing with the darkhast Rs. 167-2-6, the balance money which he had taken at the re-sale, and prayed *inter alia* for the sale of the chawl in execution of his decree subject to the lien of Sakharchand for his purchase money.

A notice of the darkhast having been issued to Sakharchand, he replied that he had purchased the chawl in execution of Sundrabai's mortgage-decree which had priority over that of

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Pandurang, and that the said chawl was not liable to be sold again in execution of Pandurang's decree.

The Subordinate Judge ordered the sale of the chawl to take place with a direction that Sakharchand should be paid the amount of the purchase money first from the proceeds of the sale.

On appeal by Sakharchand the Judge reversed the said order and dismissed Pandurang's claim in execution of his mortgage-decree against the chawl for the following reasons :—

Although Sundrabai's mortgage had priority over Pandurang's mortgage, the only right which the puisne mortgagee had against the prior mortgagee Sundrabai was to redeem her mortgage. Sundrabai ought to have given Pandurang an opportunity to redeem her mortgage—*Dadoba v. Damodar*, I. L. R. 16 Bom. 486. The omission to make him a party in Sundrabai's suit gave Pandurang the right to redeem Sundrabai's mortgage by bringing a suit for that purpose. Instead, however, of availing himself of that course, Pandurang brought a suit against his mortgagor and Sundrabai, praying for a relief that Sundrabai should first proceed against the house and then, if necessary, against the mortgaged chawl. The lower Court passed a decree giving him that relief. Consequently Pandurang lost the chance of redeeming Sundrabai's mortgage by his own act.

Now when Sundrabai first proceeded against the house in execution of her decree, her decree was not satisfied from the sale-proceeds. Consequently the chawl had also to be sold in execution. The auction-purchaser of the chawl is Sakharchand. By order of the appellate Court the purchase by Sakharchand was confirmed—*Naigar Timaya v. Bhaskar*, I. L. R. 10 Bom. 444. Sakharchand, therefore, purchased not only the mortgagor's title in the house, but also the mortgagee's rights thereof—*Sankana v. Virupakshapa*, I. L. R. 7 Bom. 146. On account of, therefore, the terms of Pandurang's decree, Pandurang has nothing to complain about. He cannot now ask the Court to sell the chawl in execution of his decree; for, the mortgagor Sakharam has no equity of redemption outstanding in him any longer, nor do Sundrabai's mortgage-rights exist after the Court-sale to Sakharchand.

On the whole, I am of opinion that Pandurang cannot now proceed against the chawl.

Pandurang preferred a second appeal.

M. V. Bhat appeared for the appellant (puisne mortgagee) :— Under section 85 of the Transfer of Property Act, Sundrabai, the prior mortgagee, was bound to make us party to her suit. Our puisne mortgage was registered, she had, therefore, notice of

it at the time she brought the suit. Our rights as mortgagee of the equity of redemption were not affected by the proceedings in execution of Sundrabai's decree.

Both the mortgages being simple mortgages unaccompanied with possession, the only remedy which was open to us after the properties were directed to be sold under Sundrabai's decree, was marshalling against Sundrabai and for enforcing our security by sale of the chawl against our mortgagor Sakharam.

We, as puisne mortgagee, are not prevented from enforcing our security by sale of the mortgaged property even if it has been already sold in execution of the prior mortgagee's decree subject to his rights: *Debendra Narain Roy v. Ramtaran Banerjee*⁽¹⁾. This ruling shows that what is to be considered is, not what the rights of the puisne mortgagee would have been had he been made a party to the prior mortgagee's suit, but what his rights as puisne mortgagee are as he was not made a party.

The effect of our non-joinder to Sundrabai's suit was that the auction-purchaser, Sakharchand, merely stepped into the shoes of Sundrabai and he could not improve his position: *Gobind Lal Roy v. Ramjanam Misser*⁽²⁾.

The Judge was wrong in holding that the only right which we had was to redeem Sundrabai. We had also a right of marshalling under section 81 and a right to sell the property under section 67 of the Transfer of Property Act. Sections 75 and 48 read together with sections 96 and 97 of the Act clearly imply that the puisne mortgagee can sell the mortgaged property subject to the rights of the prior mortgagee. The proposition that the purchaser at a sale in execution of a decree obtained by the prior mortgagee in a suit to which the puisne incumbrancer was not a party does not displace the latter but stands only in the position of the prior mortgagee is fully supported by the rulings in *Dadoba Arjunji v. Damodar Raghunath*⁽³⁾; *Sivathi Odayan v. Ramasubbayyar*⁽⁴⁾, *Ganga Pershad Sahu v. The Land Mortgage Bank*⁽⁵⁾, *Girish Chunder Nandi v. Kedar Nath Kundu*⁽⁶⁾, *Dip Narain Singh v. Hira*

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(1) (1903) 30 Cal. 599.

(4) (1897) 21 Mad. 64.

(2) (1893) 21 Cal. 70.

(5) (1893) 21 Cal. 366.

(3) (1891) 16 Bom. 486.

(6) (1906) 33 Cal. 590.

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Singh⁽¹⁾. These rulings show that the price to be paid by the puisne mortgagee for redemption after the mortgaged property had been brought to sale in execution of a decree obtained by the prior mortgagee without making the puisne mortgagee a party to his suit, is the amount due upon the prior mortgage and not the sum paid by the purchaser at the auction-sale.

Further, Sakharchand bought the property during the pendency of our suit, therefore, he bought subject to the result of that suit. In other words Sakharchand stood in Sundrabai's shoes and was only entitled to the sum of Rs. 142 and odd, the balance left after deducting Rs. 450 realized by the sale of the house from Sundrabai's decretal debt of Rs. 592 and odd.

G. K. Dandekar appeared for the respondent (auction-purchaser) :—The present appeal arises in an execution proceeding initiated by the appellant (puisne mortgagee) in connection with a decree obtained by himself. He wants the Court executing the decree to go behind the decree or to grant him some reliefs which were not prayed for in the suit, nor awarded by the decree. In the suit he, as puisne mortgagee, sought for and obtained the relief for marshalling as against the prior mortgagee and by way of execution of the said decree he is seeking to redeem the prior mortgagee and to set aside or avoid the sale which took place in execution of the prior mortgagee's decree. Courts in execution have no power to grant such reliefs. The appellant has, by reason of his previous proceedings, lost the right to redeem the previous mortgagee.

The sale at which we purchased cannot be said to be *pendente lite*. The sale was the result of the execution proceeding which was not inconsistent with the decree obtained by the appellant.

The appellant had, when he instituted his suit and before the sale in execution of the prior mortgagee's decree, the opportunity to redeem the prior mortgagee, but instead of asking for that relief, he prayed for marshalling. He has, therefore, now no right to redeem the prior mortgagee or the purchaser at the auction-sale.

Bhat, in reply.

BEAMAN, J. :—This is a second appeal arising out of execution proceedings in the following circumstances. Sakharam was the original owner of a house and a chawl. He mortgaged both to Sundrabai. Subsequently he mortgaged the chawl only to Pandurang. Sundrabai sued on the mortgage, and got a decree for sale. Pandurang was not made a party to that decree. One day before the day fixed for making that decree absolute, Pandurang filed a suit against Sakharam and Sundrabai praying as against Sundrabai for marshalling, and as against Sakharam for sale of his equity of redemption. The Court on this decreed that Sakharam should pay to Pandurang the full amount found due on his puisne mortgage, and as to Sundrabai the Court decreed that in execution of her mortgage decree she should sell first the house, and if the proceeds were insufficient to satisfy her claim, then the chawl. Accordingly the house was sold first, and as it did not realize enough to pay off Sundrabai, the chawl was next sold to Sakharchand. That sale was set aside, and the chawl was re-sold to one Krishnanath at a higher figure. Out of the proceeds of the sales of the house and the chawl Sundrabai's decree was satisfied, and the balance amounting to Rs. 167 odd was paid over to Pandurang, who appears to have accepted it without protest; and there all might have ended satisfactorily but for the fact that on appeal the order setting aside the sale to Sakharchand was reversed and that sale was duly confirmed. Thereupon Pandurang repaid the money he had received as surplus after paying off Sundrabai, into Court, and put in the Darkhast with which we are now concerned, to have his decree against Sakharam and Sundrabai executed. The lower Court admitted the Darkhast and ordered that the chawl should be sold, Sakharchand being repaid what he had paid for it in the first instance, out of the sale-proceeds. Against that order he appealed, and the District Judge held that Pandurang had exhausted whatever remedies he might have had as a puisne mortgagee, who had not been a party to the prior mortgagee's suit, by his own subsequent suit against Sundrabai and his mortgagor Sakharam; therefore that Sakharchand had taken an absolute title to the chawl in the Court-sale, and that that property could not be sold again at the instance of Pandurang.

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We think that but for the rather peculiar facts of this case the law generally applicable presents no difficulty. But as we have heard an elaborate argument upon it, and have been referred to numerous cases, we think it as well briefly to state what we believe the correct law to be. Where a prior mortgagee sues his mortgagor for sale as in the present case, without making puisne mortgagees parties, the latter are in no way affected by the suit or its results. Thus if the property is brought to sale in execution of the decree, and is bought by a third person, the puisne mortgagee has against him precisely the same rights as he had collectively against his mortgagor and the prior mortgagee. That is to say, he may sue to redeem the purchaser as mortgagee or thereafter as mortgagor to foreclose, or suffer himself to be redeemed by him. That we take to be clear, and it is the same whether the prior mortgagee or a stranger buys at the sale. Had there then been no other transactions we should have found no difficulty in holding that Pandurang was entitled to redeem Sakharchand, as occupying the position and character of prior mortgagee, or again of foreclosing him, or insisting upon being redeemed by him, in his character of the original mortgagor. Both these characters have now merged in him, and he is entitled to avail himself of either or both. But we have to deal with the facts of this case, and those facts do occasion us much doubt and difficulty. For, in the first place there is a question of *lis pendens*. The sale in execution of Sundrabai's decree was not effected till after the institution and progress of Pandurang's suit against her and the original mortgagor. Thus it appears that on general principle the purchaser in execution of that decree would be affected by the doctrine of *lis pendens* and would be deemed to have bought subject to the decree in Pandurang's suit. That decree, as we understand it, forecloses the mortgagor while merely marshalling as far as the mesne mortgagee is concerned; and the result is anomalous; for it works out to this, that without having made any attempt to redeem the prior mortgagee, the puisne mortgagee has obtained for himself the equity of redemption; nor, as far as we can see, did he by this circuitous mode of procedure afford the prior mortgagee the opportunity of foreclosing him.

Be that as it may, it is plain that the equity of redemption can neither have altogether been annihilated, nor can it be in two persons, Pandurang and Sakharchand. In this complication we are inclined to think that it really is in Pandurang or would be, were it not for other considerations. But his conduct has to be considered. He appears to have assented completely to the execution-proceedings which were being carried out by Sundrabai, once it was understood that she was to sell the house first, and only in the event of that sale not having realised enough to pay her off, the chawl next. This is precisely what was done. And thereafter, as we have said, Pandurang, when at the second attempt the chawl brought in a fair price, accepted what was over after paying off Sundrabai, and evidently regarded the whole matter as being at an end. Suppose, instead of the first sale having been finally confirmed, the second sale had stood, could it be argued that in these circumstances Pandurang could have afterwards demanded execution of his decree against the purchaser, while retaining the balance of the purchase-money? We think not. And we regard what subsequently happened as a mere accident, in no way affecting the principle which would have shut Pandurang out, had that accident not occurred. In this view, though for altogether different reasons, we think that the decision of the Court below was right, and we would dismiss this appeal with costs. But we must add a direction that Pandurang is entitled to have back out of Court, where he deposited it, the sum of Rs. 112-2-6, being the surplus on the first sale; and the remainder of the money deposited in Court to be paid back to Krishnanath.

The balance of the total deposits by Sakharchand and Pandurang likewise to be paid to Krishnanath.

Decree confirmed.

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