

distance from that place, empowering the witness Juggobundhoo to bid for the property at the impending auction-sale. Then we have the fact clearly established that when the Collector came to Court, he did not make even any show of attempt to save the property. These facts leave no reasonable doubt in my mind that Bhim Sein accepted the agency on behalf of the plaintiffs to make an application under s. 6 of Act XI of 1859 with a view that he might with more facility carry out his intention of purchasing the property himself. This was clearly a fraud against the plaintiffs, and under these circumstances, it seems to me just and equitable that Bhim Sein should not be allowed to reap the benefit of his fraud. The plaintiffs are therefore entitled to the relief proposed to be given by my learned colleague.

1877  
 BHOOBUN  
 CHUNDER SEN  
 v.  
 RAM SOONDER  
 SURMA  
 MOZOOMDAR.

*Appeal dismissed.*

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*Before Mr. Justice Kemp and Mr. Justice Lawford.*

KUDOMEË DOSSEE AND OTHERS (DEFENDANTS) v. JOTEERAM  
 KOLITA (PLAINTIFF).\*

1877  
 August 27.

*Hindu Law—Divorce—Established Custom.*

Where a Hindu husband sued his wife for restitution of conjugal rights, and the defendant pleaded divorce, it was *held*, that though the Hindu law does not contemplate divorce, still in those districts where it is recognized as an established custom, it would have the force of law.

THE plaintiff in this case, who was a Hindu inhabitant of Assam, sued the female defendant, one of the special appellants in the High Court, for restitution of conjugal rights. The defendant, among other pleas, averred that the plaintiff had divorced her, and had executed a deed to that effect, and that he, consequently, was not entitled to maintain this action.

\* Special Appeal, No. 2812 of 1876, against the decree of W. E. Ward, Esq., Officiating Judge of Assam, dated the 6th September 1876, reversing a decree of Baboo Huro Kanto Surma, the Munsif of Gowhatty, dated the 30th March 1876.

1877

KUDOMER  
DOSSIE  
v.  
JOTIERAM  
KOLITA.

The Munsif dismissed the case of the plaintiff, holding that there was a custom in the Province of Assam "for men and women to assent to divorce by deed in this way." On appeal, the Judge held that the Hindu law of Bengal proper applied to Assam, and inasmuch as the Hindu law forbids divorce, even if such a custom should exist, of which there was no evidence, it would not override the law. Accordingly, he reversed the decision of the Munsif, and awarded a decree to the plaintiff. The defendants preferred a special appeal to the High Court.

Baboo *Bhobun Mohun Dass* appeared for the appellant.

The respondent did not appear.

The judgment of the Court was delivered by

KEMP, J. (who, after stating the facts, continued as follows):—  
In special appeal it is contended, that the Judge committed an error in law in holding that in Assam a Hindu cannot divorce his wife, and that he has also erred in law in holding that a custom, if proved, cannot have the force of law so as to override the Hindu law; further, that if the Judge thought there was no evidence of the custom he should have remanded the case to the first Court for the purpose of taking evidence on that point. We think that the Judge was right so far in holding that the Hindu law does not contemplate divorce; but we think that he was clearly wrong in holding, as he has done, broadly, that a custom, even if established, cannot override the general provisions of the Hindu law. There can be no doubt that the Hindu law has been affected in particular districts by particular usages, and these usages have hitherto been respected unless clearly repugnant to the principles of Hindu law: see page 387 of *Shama Churn's Vayvastha Darpana*. The text lays down that "reason and justice are more to be regarded than mere texts, and that wherever a good custom exists it has the force of law."

We, therefore, think that the Judge was wrong in holding, as he has done, that even if the custom were established it would not affect the Hindu law. Now the Munsif has found that there is evidence of this custom, and that it exists in the Province:

and we think that the Judge ought to have found on that part of the case, namely, whether the defendant No. 1 had established the custom set up by her in her defence. We, therefore, remand the case to the Judge to come to a finding on that point, taking evidence if necessary. Costs to follow the result.

1877

KUDOMRE  
DOSSEE  
v.  
JOTERRAM  
KOLITA.

*Appeal allowed.*

*Before Mr. Justice Jackson and Mr. Justice White.*

GOLUKNATH MISSER (PLAINTIFF) v. LALLA PREM LAL AND OTHERS  
(DEFENDANTS).\*

1877

*Sept. 14.*

*Mortgage, Effect of subsequent Mortgage—Extinguishment—Merger.*

A creditor holding a mortgage on the lands of his debtor does not necessarily surrender that mortgage, or lower its priority, by taking a subsequent mortgage, including the same lands with other lands, for the same debt. Whether the earlier mortgage becomes merged and extinguished or not is a question of intention.

Baboo *Mohini Mohun Roy*, Baboo *Tarucknath Dutt*, and Baboo *Juggudoolabh Basack* for the appellant.

Mr. *R. E. Twidale* and Baboo *Tarucknath Palit* for the respondents.

THE facts of this case are sufficiently stated in the judgment of the Court.

WHITE, J. (JACKSON, J., concurring).—It appears that in this case the defendants (who are grouped together as No. 1) borrowed from the special appellant (who is the plaintiff in the suit) on the 13th of Srawun 1271 F. S., Rs. 295 at 2 per cent. per mensem, and by a mortgage bond of that date, in order to secure the payment of that sum with interest, mortgaged to the plaintiff certain land which is described in the mortgage bond

\* Special Appeal, No. 2054 of 1876, against the decree of E. S. Mosely, Esq., Officiating Judge of Zilla Bhagalpore, dated the 6th of July 1876, affirming the decree of Baboo Gopinath Matey, Sudder Munsif of that District, dated the 4th of December 1875.