

S.B. Shringarpure Vs. S.B. Pethe

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Court : Mumbai

Decided On : Jul-15-1878

Reported in : (1878)ILR2Bom662

Judge : West and ;Pinhey, JJ.

Appellant : S.B. Shringarpure

Respondent : S.B. Pethe

Judgement :

West, J.

1. The plaintiff in this case is a purchaser, at an execution sale, of the interest of Dharma and others, sold to satisfy a mortgage effected and registered in 1864. The mortgage does not stipulate for possession, but does stipulate for a sale of the property in the event, which has happened, of nonpayment of the debt secured.

2. Before the decree on the mortgage, but apparently during the pendency of the suit, the defendant purchased the property from Dharma and other owners by a registered conveyance, and obtained possession. This he maintained against the purchaser (the judgment-creditor) under the sale to satisfy the prior mortgage, and the present suit is brought to establish the title of the execution purchaser.

3. By the mortgage in 1864 an interest in the property was conferred on the mortgagee by way of security for his advance of money, which interest became available against all subsequent purchasers or encumbrancers by the registration of the mortgage. This result was quite in accordance with the principles of the Hindu law as lately laid down in the case of *Lalubhai v. Bai Amrit* {supra, page 299) and in the case at 2 Macn. H.L. 308. When, therefore, the defendant purchased the property, he bought it subject to the rights derogating from the full ownership of his vendor already transferred to the mortgagee. These rights were made as effectual by registration as by possession, so as to prevent their being impaired by subsequent transactions.

4. The rights of the mortgagee included that of bringing the whole property, as it subsisted at the time of the mortgage, to sale. It was brought to sale, and the purchaser in execution thus acquired a right free from any created subsequently to the mortgage and subject to it. The possession of the intermediate purchaser, though it might make his right, as it existed, effective, and as against strangers might be essential to its efficacy, could not make his right itself different from what it was--a secondary and subordinate one, available only after the right of earlier creation had been satisfied. The purchaser at the execution sale, therefore, had a claim to possession superior to that of the vendee of the equity of redemption who represented the original mortgagor.

5. vendee, however, it is said, and under a registered conveyance, the defendants here ought to have been made a party in the mortgage's suit to enforce his security. It seems unlikely that he was, in fact, a purchaser certainly not a registered purchaser, when the suit on the mortgage was instituted. Becoming a purchaser during the pendency of the suit, he ought himself to have asked to be made a party if he desired to guard his newly acquired interest. But, apart from that, it was not incumbent on the registered mortgagee, desiring to enforce his lien, to search for subsequent incumbrancers or purchasers. It lay on them to inform him of the assignment of the equity of redemption or of the interest they had acquired. Registration of a subsequent sale did not supply the place of such notice; as the mortgagee, though he would properly look for prior incumbrances, could not be expected to keep up a constant search for those subsequent to his

own, and in the absence of notice would properly proceed against the person prima facie liable to him. And if his proceeding was right, the title acquired under it was complete so as to displace the defendant's title.

6. We must, therefore, reverse the decree of the Joint Judge, and amend that of the Subordinate Judge by awarding to the plaintiff possession of the whole lands sought, with costs in all the Courts.

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