

PRIVY COUNCIL.

BHAWANI KUWAR

v.

MATHURA PRASAD SINGH.*

P.C.^s
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June 25, 26,

27:

July 22.

[ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM IN BENGAL.]

Sale for arrears of revenue—Act XI of 1859, sections 53, 54—Purchase by mortgagee in execution of his mortgage decree of the mortgaged property—Subsequent arrears of revenue and sale for such arrears—Liability of Purchaser in execution of decree of Civil Court—Rights of purchaser at sale for arrears of revenue.

Section 54 of Act XI of 1859 enacts that when a share of an estate is sold "the purchaser shall acquire the share subject to all incumbrances, and shall not acquire any rights which were not possessed by the previous owner."

On 9th August 1886 a mortgage was granted in favour of the respondent over a certain share in 4 out of 71 villages. On 31st May he obtained a decree on his mortgage which was made absolute on 19th December 1899. He executed his decree and a sale took place on 19th March 1900, at which the respondent himself became the purchaser. On 28th March an instalment of Government revenue on the 71 villages fell into arrear, and the whole residuary share of 71 villages, including the 4 villages purchased by the respondent, was notified for sale. The respondent did not pay the revenue due, but on 23rd April he obtained a certificate confirming the sale of 19th March in execution of his decree. On 6th June 1900 the whole of the villages was sold for arrears of revenue and was purchased by the predecessor in title of the appellant. In a suit against the respondent for the share purchased at the execution sale :—

Held by the Judicial Committee (reversing the decision of the High Court), that the sale in execution of the mortgage decree took effect from the actual date of the sale, and not from its confirmation, and, therefore, from 19th March 1900 the respondent by his purchase became the proprietor of the estate sold, and not merely the purchaser of such right, title and interest in it as the mortgagor might have had. He was, therefore, notwithstanding the provisions of section 54 of Act XI of 1859 (which

* *Present* : LORD SHAW, SIR JOHN EDGE AND MR. AMEER ALI.

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in fact rather confirmed the view taken), not in a position to maintain as against himself, or as against third parties unconnected with mortgage transactions upon the property, the position that his mortgage still remained an incumbrance thereon. That incumbrance had become extinct by the mortgagee's overriding right when he became complete owner of the lands. To keep it alive, as the respondent sought to do, would introduce confusion into the mechanism of transfer and insecurity into the rights in immovable property which were not warranted by the Act.

APPEAL from a decree (10th January 1908) of the High Court at Calcutta, which reversed a decree (27th January 1905) of the Subordinate Judge of Gaya.

The plaintiff was appellant to His Majesty in Council.

The suit which gave rise to this appeal was brought against Mathura Prasad Singh and two *pro forma* defendants to obtain possession of a 5-anna and 1½ pies share of four villages named Kolhna, Khutowra, Khardih and Nawalchak, which had been on 9th August 1886 mortgaged by one Mahomed Baksh and others to the defendant Mathura Prasad Singh. These four villages were part of a "residue" share in 71 villages owned by the mortgagors in an estate called Azamgarh in the district of Gaya.

On 31st May 1899, Mathura Prasad Singh obtained on his mortgage bond a decree which was made absolute on 19th December 1899. The mortgagee executed his decree and purchased the mortgaged property at the sale on 19th March 1900. The sale was confirmed on 23rd April 1900 and a sale certificate was granted on 12th July; and on 18th December 1900 his name was registered as proprietor of the property in suit.

On 29th March 1900, the residue share fell into arrear for the March instalment of Government revenue amounting to Rs. 1,551-3, and was notified for sale by the Collector. On 6th June 1900, the whole of

that share was sold and purchased in the name of the second defendant by the third defendant. The second defendant obtained a sale certificate dated 3rd April 1901, and possession was delivered to him on 5th July 1901.

On 15th July 1901, the second defendant executed an agreement in favour of the third defendant admitting the latter to be the real purchaser, and on the application of the third defendant to the Sub-Deputy Collector's Court his name was registered as owner of the whole of the residue share. The first defendant Mathura Prasad Singh, however, appealed from the order of the Sub-Deputy Collector to the Collector of the district, who set it aside on 21st January 1902, and on a further appeal that decision was upheld by the Commissioner on 31st May 1902. Subsequently, on 20th September 1902, the third defendant conveyed, by a deed of gift, the property to his wife, the plaintiff, who on 31st March 1904 brought the present suit against the first defendant for possession of the share that defendant had purchased in execution of his mortgage decree, and in respect of which he had been registered as proprietor. The plaintiff prayed that her name might be entered in the Land Registration office as proprietor of the property in suit, and for mesne profits up to the date of the delivery of possession.

The defence of the first defendant was, *inter alia*, that the rights which the predecessor in title of the plaintiff acquired by his purchase at the revenue sale were governed by the provisions of section 54 of Act XI of 1859; that the residue share was sold subject to all incumbrances existing on 28th March 1900, the date of the default in payment of the Government revenue, and that, on that date the property in suit was subject to a debt of Rs. 18,973-6-3 due on the mortgage to the defendant; that the property in suit

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was purchased by the defendant for Rs. 9,200, leaving Rs. 9,773-6-3 still due on the mortgage decree, and until the plaintiff redeemed the mortgage by paying off the whole sum due under the defendant's decree, she could not claim possession of the property in suit; and that as the proceedings which terminated in the sale for arrears of revenue were taken during the pendency of the execution of the defendant's decree, the doctrine of *lis pendens* applied, and the plaintiff's purchase of the property in suit was, under the circumstances, wholly void.

Issues were settled, of which only the following were material on this appeal:

"2nd.—Whether the revenue sale of the ijmal share of Taluka Azamgarh has extinguished all the rights of the defendant No. 1 under the mortgage decree and under auction-purchase in execution of that decree,

"3rd.—Was the defendant No. 1 bound to pay the Government revenue for the March kist 1900? And was the defendant No. 1 aware of the property being in arrear?

"4th.—What incumbrance, if any, the defendant No. 1 had on the disputed property? And whether the plaintiff is entitled to recover possession of the disputed property without paying with interest the amount of incumbrance due to the defendant No. 1 from Mahomed Baksh Khan?"

The Subordinate Judge held on the 2nd and 4th of these issues that at the sale for arrears of revenue what was sold was the right, title, and interest of the defaulters as it existed at the time of the default, or of the sale, and that on 6th June 1900, the date of the revenue sale, the mortgagors had no title in the four villages which had been purchased by the first defendant in execution of his mortgage decree; and

therefore that the revenue sale of the ijmalī share did not extinguish the right of the first defendant under his auction-purchase. He also decided on issue 3rd that though the first defendant purchased the properties in suit on 19th March 1900, his title was not perfected until the 23rd April 1900 when the sale was confirmed, and therefore the mortgagors and not the first defendant were bound to pay the Government revenue, that the Government revenue on the whole ijmalī share was Rs. 4,000, and the arrears for which the estate was sold were Rs. 1,554-0-4; the revenue on the share in the four villages which the first defendant purchased was only Rs. 79; and that even if he was aware of the default, the first defendant could not be expected to pay the whole of the revenue due. The result was that the Subordinate Judge dismissed the suit with costs.

An appeal by the plaintiff to the High Court came before a Divisional Bench consisting of BRETT and MOOKERJEE JJ. who delivered separate judgments in which they differed from the decision of the Subordinate Judge, and came to the conclusion that the proper decree was one for possession of the property in suit subject to the plaintiff discharging the mortgage debt due to the first defendant.

BRETT J. (after stating that the three main contentions advanced on behalf of the plaintiff were (1st) that the decree on the mortgage having been made absolute before the arrears of revenue fell due, there was no encumbrance in existence on 29th March 1900 when the ijmalī share was found to be in default; (2nd) assuming that section 316 Civil Procedure Code, 1882, governs sales under the Transfer of Property Act, the title to the shares in the four villages sold in execution of the mortgage decree became vested in the mortgagor (the first defendant) on 19th March 1900

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when the property was sold to him, and not on 23rd April 1900 when the sale was confirmed; and (3rd) that the first defendant had ceased to be a mortgagee, and had become an owner of the property at the time of the revenue sale on 6th June 1900, and therefore under that sale all his rights passed to the purchaser) continued:—

“The ijmalī share was sold for arrears of revenue under the provisions of section 13 of Act XI of 1859 and the purchaser at that sale acquired (under section 54 of the same Act) the share subject to all incumbrances and did not acquire any rights which were not possessed by the previous owner or owners. I am unable to accept the view which the Subordinate Judge has taken that what was sold at the revenue sale was the right, title, and interest only of the defaulters. Such a view is contrary to the whole policy of the Revenue Law, and is opposed to the decisions of this Court in the cases of *Gungadeen Misser v. Kheeroo Munul* (1), *Debi Das Chowdhuri v. Bipro Charan Ghosal* (2), and *Anoda Prasad Ghose v. Rajendra Kumar Ghose* (3), which clearly show that what was sold was the share subject to incumbrances.

“The main question for determination then in this case is whether the mortgage by the defaulters to the first defendant was an incumbrance subject to which the share was sold, or had it ceased to exist as an incumbrance by reason of the purchase by the first defendant of the mortgaged properties on 19th March 1900, prior to the date of default, which purchase was confirmed on the 23rd April following.

“The case put forward for the defendants has been that the mortgage did not cease to exist as an incumbrance when the order absolute was obtained in the mortgage suit; that under the provisions of section 316, Civil Procedure Code the title to the property sold vested in the first defendant as against the mortgagor and persons claiming through or under him from the date of the sale certificate; that up to the date of such certificate the title of the first defendant as owner was inchoate and incomplete, and in fact subject to be lost; that until the sale was confirmed he was entitled to rely on his mortgage; that what was sold at the revenue sale was the property as it existed at the time of the default, and that at the time of the default the mortgage of the first defendant was an existing incumbrance. In support of these contentions reference has been made to section 28 of Act XI of 1859 and Schedule A, as showing that the title of the purchaser

(1) (1874) 14 B. L. R. 170.

(2) (1895) I. L. R. 22 Calc. 641.

(3) (1901) I. L. R. 29 Calc. 223.

at a revenue sale relates back to the date of default and it has been argued on this basis that the property purchased must be the property in suit as it existed at the date of the default.

“The first two points which have been advanced in support of the appeal may be considered together. It has been contended that the right of a purchaser to property sold in execution of a decree of the Civil Court accrues from the date of the sale, though it may not be complete till after confirmation, and in support of this view the cases of *Bhuprab Chunder Bundopadhyaya v. Soudamini Debi* (1), *Dagdū v. Pancham Singh Gangaram* (2), and *Adhur Chunder Banerjee v. Aghore Nath Aroo* (3), are relied on.

“No doubt these cases are ample authority for the contention that the title of the purchaser at an auction sale in a Civil Court will relate back from the date of confirmation to the date of sale so as to defeat all intermediate incumbrances or alienations, but these cases do not help us to determine whether what was sold at the revenue sale was the share as it existed on the date of default or on the date of actual sale. The cases of *Umatarā Gupta v. Uma Charan Sen* (4) and *Chowdhry Jogessar Mullick v. Khetter Mohun Pal* (5), to which we have been referred, no doubt lay down that a purchaser of an estate at a sale for arrears of Government revenue is not affected by any incumbrances or alienations created by the defaulter between the date of default and the date of sale, as under section 28 of Act XI of 1859 the title to the estate vests in the purchaser from the date of default. But in the present case, the question for determination depends not so much on the date when the title of the purchaser at the revenue sale vested as on the date when, if at all, the mortgage or incumbrance on the estate held by defendant No. 1 ceased to exist. Nor does the decision of the Full Bench of this Court in the case of *Bibijun Bibi v. Sarhi Bewa* (6) to which we have been referred, seem to me to assist us in determining the question which is before us. That case hardly supports the present contention of the appellant that the mortgage lien of the first defendant on the property, which he purchased on the 19th March 1900 in execution of his mortgage decree, was extinguished before his sale had been confirmed.

“I am unable, therefore, to hold that the two first contentions advanced on behalf of the plaintiff have been maintained. The case of *Prem Chand Pal v. Purnima Dasi* (7), on the other hand, goes to support the contention

(1) (1876) I. L. R. 2 Calc. 141.

(4) (1904) 3 Calc. L. J. 52.

(2) (1892) I. L. R. 17 Bom. 375.

(5) (1889) I. L. R. 17 Calc. 148.

(3) (1898) 2 C. W. N. 589.

(6) (1904) I. L. R. 31 Calc. 863.

(7) (1888) I. L. R. 15 Calc. 546.

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of the defendants, that on the date when the share fell into arrears for Government revenue the share was subject to the unconfirmed sale held in execution of the mortgage decree, and that the unconfirmed sale constituted an incumbrance on the mortgage property which formed part of the share sold.

“The third contention however raises a question of much difficulty and importance, *viz.*, whether because the sale to the first defendant had been confirmed on the 23rd April 1900, he became in consequence an owner of the property at the time of the revenue sale on the 6th June 1900, and therefore under that sale all his rights passed to the purchaser. In support of this contention reliance has been placed for the plaintiff on the decision of this Court in the case of *Amuda Prosad Ghose v. Rajendra Kumar Ghose* (1) and the decision of their Lordships of the Privy Council in the case of *Shyam Kumari v. Rameswar Singh* (2).”

After distinguishing those cases from the present one, the judgment continued :—

“The effect of applying to the present case the principle contended for on behalf of the appellant would apparently be to discharge the mortgage of the first defendant leaving him, as proprietor of the share in the four villages out of the 71 villages which made up the *ijmali kalam* which was sold for arrears of revenue, a share in the sale-proceeds, which would bear to the whole proceeds the same proportion as the value of the share in the 4 villages bears to the value of the whole *ijmali kalam*. The property at the revenue sale sold for Rs. 13,100, and such a share would cover only a small portion of the mortgage debt which was due to the first defendant under his decree.

“It has been held in the present case that the mortgage of the first defendant was a valid transaction for consideration. In due course he brought his suit to recover the debt due under the mortgage, obtained a decree and sold up and himself purchased the mortgaged property in part satisfaction of his debt. Subsequently, but prior to confirmation of his sale the property fell into arrears, a fact of which he appears to have been in ignorance, and his sale was confirmed before the property was brought up for sale for arrears of revenue. Apparently all the acts of the first defendant were perfectly *bonâ fide* and honest, while as to the acts of the other side, the Subordinate Judge, on the evidence, expresses some suspicion. The purchaser at the revenue sale claims to be entitled to recover possession of the mortgaged property purchased by the defendant on the ground

(1) (1901) I. L. R. 29 Calc. 223. (2) (1904) I. L. R. 32 Calc. 27.

I. R. 31 I. A. 176.

that at the time of the revenue sale the defendant was a part-proprietor. If the claim be allowed, the result will be that the first defendant having sued on his mortgage and executed his decree, will not be able to sue again on the mortgage deed. A portion of the amount recovered under the decree he may, as part-proprietor of the ijmalī kalam, be able to realize out of the sale-proceeds, and the balance of the decretal amount not recovered at the sale he may be able to realize by a personal decree under section 90 of the Transfer of Property Act against the mortgagors.

“The result then of accepting as the date on which the title of the purchaser at the revenue sale in the present case vested the date on which the sale actually took place, would be to cause the first defendant a serious loss for which he cannot be held to be responsible, as he was ignorant that the share was in default when he made the purchase.

“In the case before their Lordships of the Privy Council, the respondent, who purchased at the revenue sale, was aware that he had previously purchased the property in execution of the decree on his mortgage.

“If, on the other hand, the provisions of section 28 and of schedule A of the Act be accepted as determining the date from which the title of the plaintiff's vendor, as purchaser at the revenue sale, vested, the first defendant will be protected from what appears to be nothing less than serious injustice.”

MOOKERJEE J., whose judgment was to the same effect, summarised his conclusions briefly as follows:—

“(i) The view taken by the Subordinate Judge that the purchaser at the revenue sale purchased merely the right, title, and interest of the defaulting proprietor on the date of sale, and consequently purchased nothing, because his interest had already passed to the defendant, is not well founded; (ii) the view put forward on behalf of the appellant that as the purchase of the defendant at the mortgage sale had been confirmed before the revenue sale, the effect of the revenue sale was completely to extinguish his title and vest it in the purchaser at the revenue sale is equally unfounded; (iii) the view put forward by the appellant that the title of the defendant under his purchase at the mortgage sale was perfected with effect from the date of the sale is not well founded; (iv) although the purchase of the defendant at the mortgage sale was confirmed before the revenue sale, yet as it was confirmed after default and without any knowledge on the part of the defendant that default had been made, the defendant is entitled to rely upon his mortgage and use it as a shield for his protection against the purchaser at the revenue sale.”

Both the learned Judges also held that the first defendant had, notwithstanding his purchase of the

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properties in suit in execution, an equitable right to keep his mortgage alive, and to treat it as a subsisting incumbrance in the said properties, and that the plaintiff's purchase was subject thereto; and passed a decree as above stated.

On this appeal,

De Gruyther, K.C., and *G.R. Lowndes*, for the appellant, contended that the respondent's mortgage was not, at the date of the revenue sale on which the appellant's title was based, an incumbrance upon the properties in suit within the meaning of section 54 of Act XI of 1859; and that the respondent had no equitable right, after his purchase of the properties in suit in execution of his mortgaged decree to treat his mortgage as a subsisting incumbrance. Liability accrued as against the auction-purchaser from the date of the sale, and not from the date of the certificate of sale, and at the date of the revenue sale to the appellant the respondent was the proprietor of the purchased properties and all his interest became extinguished by the sale and passed to the purchaser (the appellant). Reference was made to Act XI of 1859, sections 10, 13, 14, 28, 53 and 54, and Schedule A: *Bhyrub Chunder Bundovadhya v. Soudaminee Dabee* (1), *Chatraput Singh v. Grindra Chunder Roy* (2), Civil Procedure Code (Act XIV of 1882) section 316, *Shyam Kumari v. Rameswar Singh* (3), *Gokaldas Gopaldas v. Puranmal Preamsukhdas* (4), *Mahomed Ibrahim Hossain Khan v. Ambika Pershad Singh* (5), Civil Procedure Code (Act V of 1908)

- (1) (1876) I. L. R. 2 Calc. 141, 145. (4) (1884) I. L. R. 10 Calc. 1035.
 (2) (1880) I. L. R. 6 Calc. 389. L. R. 11 I. A. 126.
 (3) (1904) I. L. R. 32 Calc. 27, (5) (1911) I. L. R. 39 Calc. 527, 555 :
 37, 38, 39 : L. R. 31 I. A. L. R. 39 I. A. 68, 81.
 176, 183, 185, 186.

section 65, *Abdool Bari v. Ramdass Coondoo* (1), *Dagdu v. Panchamsingh Gangaram* (2), *Adhur Chunder Banerjee v. Aghore Nath Aroo* (3), Transfer of Property Act (IV of 1882) section 89, *Bibi'an Bibi v. Sachi Bewah* (4). [MR. AMIR ALI referred to section 65 of Civil Procedure Code, 1908, and Order XXI rule 94 which, he said, appeared to leave the matter as it was under Act XIV of 1882.] The argument for the respondent was one which this Board rejected in *Shyam Kumari v. Rameswar Singh* (5), and should be rejected now. Even if the respondent had any such equitable right as the High Court allowed him, it did not extend to repayment by the appellant of the whole amount of his mortgage, but must in any case be restricted to repayment of the sum which the mortgaged properties had realised in execution.

Ross, for the respondent, contended mainly for the reasons, and on the grounds, on which the judgments of the High Court were based, that the liability of the purchaser (respondent) accrued only from the date of the certificate of sale, and that he was entitled to rely upon his mortgage, and use it as a shield for his protection against the purchaser at the revenue sale; and that the appellant was, therefore, not entitled to the relief he claimed. Reference was made to Act XI of 1859 section 28: *Shyam Kumari v. Rameswar Singh* (5) as to the time when the sale takes effect; Civil Procedure Code (Act XIV of 1882) section 316; and *Gokaldas Gopaldas v. Puranmal Premsukhdas* (6).

De Gruyther K. C. replied referring to the Limitation Act (XV of 1877) Schedule II, Article 109; and Roscoe's *Nisi Prius* (Ed. 18th) 135, 136, 140.

- (1) (1878) I. L. R. 4 Calc. 607. (5) (1904) I. L. R. 32 Calc. 27, 38 :
 (2) (1892) I. L. R. 17 Bom. 375. L. R. 31 I. A. 176, 186.
 (3) (1898) 2 C. W. N. 589. (6) (1884) I. L. R. 10 Calc. 1035 :
 (4) (1904) I. L. R. 31 Calc. 863, 868. L. R. 11 I. A. 126.

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The judgment of their Lordships was delivered by LORD SHAW. This is an appeal from a judgment and decree of the High Court of Calcutta, dated the 10th January 1908, which set aside a decree of the Subordinate Judge of Gaya in Bengal, dated the 27th January 1905.

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The suit was brought by the appellant as plaintiff to obtain possession of a certain share, amounting to 5 annas $1\frac{1}{2}$ pies, in four villages in the Gaya district which are named in the plaint. The appellant's rights are those of a purchaser who bought these properties at a revenue sale,—that is to say, a sale for arrears of revenue. The appellant pleads that he has received, in his character of purchaser and as from the date of sale, a right which cannot be defeated by the respondent. The respondent was a mortgagee holding a security over the property for money lent thereon, and in respect of this loan the property was sold in execution to him. It is out of this conflict between the rights of the former, who may be called the revenue vendee, and the latter, who was mortgagee and purchaser at the execution sale, that the suit has arisen.

As their Lordships are unable to agree with the views which have been taken with regard to this case, either by the Subordinate Judge or by the High Court, it is necessary to mention certain dates which are material, and to test crucially what were the rights of parties at those dates.

On the 9th August 1886 a mortgage for Rs. 5,000 was granted in favour of the respondent over the shares aforesaid of four out of seventy-one villages. On the 31st May 1899 the respondent obtained a decree on his mortgage bond, which was made absolute on the following 19th December. He executed his decree, a sale in the ordinary course took place, and on the

19th March, which is the first important date in the case, the mortgaged property was sold, and it was purchased by himself, the mortgagee.

Nine days thereafter, namely, on the 28th March 1900, the March instalment of Government revenue on the 71 villages, amounting to Rs. 1,554, fell into arrear, and the whole, including the four which had just been purchased by the mortgagee, were notified for sale by the Collector. The situation of matters accordingly then was that, so far as the ownership of the property was concerned, a transaction of sale thereof in favour of the mortgagee as purchaser had in point of fact taken place, and this at a time when, by the use of the ordinary information available as public facts, or upon enquiry with regard to the property purchased, it would have been found that the period of the falling due of revenue was almost at hand, and that proceedings preliminary to a sale in respect of arrears then left unpaid would inevitably be commenced.

The mortgagee, however, did not pay the revenue which fell due at the end of March. Without doing so, he went forward with proceedings to get the sale to himself in execution of the mortgage confirmed. On the 23rd April he obtained a certificate confirming the sale, the certificate bearing that he "has been declared the purchaser at sale by public auction on the 19th March, 1900 and that the said sale has been duly confirmed by this Court on the 23rd April 1900."

It was maintained in argument for the mortgagee that the true meaning of this was that the sale to him did not become a legal fact until the 23rd April. In their Lordships' opinion, this is an under-statement and a mis-statement of the mortgagee's rights. It is true that upon that date the sale was confirmed, but

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what was, as the certificate bears, confirmed, was a sale "by public auction on the 19th March 1900." There seems little reason to doubt that upon the 19th March all the lands sold had been transferred to the mortgagee, and that if there had been any accretions to the property between that date and the date of confirmation, those accretions would have become the property of the purchaser. On the other hand, there seems no legal principle which would leave un-transferred to the mortgagee any obligations which arose during the same period. Furthermore, if the properties which were the subject of sale were liable to attachment for sums due from the lands as revenue, and falling into arrear subsequent to the actual date of sale, namely, the 19th March 1900, it was not within the legal right of the mortgagee on the one hand to claim as against the mortgagor that the ownership of the property had been transferred, and at the same time to claim against the Government, or in respect of third parties unconnected with either mortgagor or mortgagee, that the mortgagor had not transferred the rights of ownership to the mortgagee, but himself remained in the position of owner. For the mortgagee to be permitted to say to the mortgagor that the ownership had been transferred, and to say to an outsider, like the Collector of Revenue, that the ownership had not been transferred, is a conclusion not supported by good sense and, in the opinion of their Lordships, they are not forced to it by any canon or rule of law.

If the date of sale be taken as the true and actual date in fact, which, in their Lordships' opinion, was, as explained, the 19th March 1900, it appears to their Lordships equally clear that what was in fact then sold was the estate itself and nothing other or less than this which might be denominated by the terms

“right, title, or interest” of the mortgagor only, or the like. And it would seem to follow as a necessary consequence that when the mortgagee thus became the purchaser and owner of the subjects mortgaged, he was not in a position to maintain as against himself, or as against third parties unconnected with mortgage transactions upon the property, the position that his mortgage still remained an incumbrance thereon.

In their Lordships’ opinion it is clearly unsafe to apply considerations as to the rights of prior and succeeding mortgagees to questions like the present. For in the present case no question arises as between a first and succeeding mortgagee, and no right or duty emerges with regard to the avoidance of an inequitable priority alleged to arise inferentially by acquisition of the estate. On the 19th March 1900, the crucial date in question, there were no interests of any kind to enter into account or consideration so as to impede the full and complete transfer of ownership of the estate as such.

In these circumstances, when the 29th March 1900 was reached, the property which fell then into arrear of revenue and became liable to subsequent sale was the property in fact and in law of no one but the purchaser, namely, the mortgagee. It is admitted,—the concession was logically unavoidable,—that if at the sale on the 19th March the mortgagee himself had not purchased, but a stranger or outsider had, then such purchaser would have stood liable for the obligations accruing on the property and been responsible to Government for the payment of revenue and for the consequences which would ensue if the revenue fell into arrear. It seems somewhat difficult to discern why these consequences, which would be inevitable in the case of a stranger purchaser, should be avoided because the mortgagee was purchaser himself.

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The above considerations seem substantially to dispose of the whole case and lead their Lordships to a conclusion the opposite of that reached by the High Court, who think that it was possible for a mortgagee to maintain the ownership of the property in himself with an incumbrance which he should use to defeat, or, to use the term which the learned Judges employ, as a "shield against" the rights of third parties.

Upon this subject it is true that the language of section 54 of the Act No. XI of 1859—the Bengal Statute as to Sales of Land for Arrears of Revenue—provides that when a share or shares of an estate may be sold "the purchaser shall acquire the share or shares subject to all incumbrances, and shall not acquire any rights which were not possessed by the previous owner or owners." This provision, however, appears to their Lordships—(i) to confirm the view that what is taken by a revenue vendee is nothing less nor more than what belonged to the former owner, and (ii) to negative the idea that it is open to an owner to protect himself as by "a shield" against the consequences of that full transfer by keeping incumbrances alive against the revenue vendee. These incumbrances had become extinct and lost in the mortgagee's overriding right when he became the complete owner of the lands. To keep them alive as sought would introduce confusion into the mechanism of transfer and an insecurity into the rights in real estate which are not warranted by the Act.

Their Lordships will humbly advise His Majesty that the judgments of the Courts below be reversed, and that the plaintiff be declared entitled to the lands in suit in terms of the plaint, that possession be delivered to the appellant of the properties in dispute the possession of the respondent being removed, that the name of the plaintiff be caused to be entered in the