APPELLATE CIVIL—FULL BENCH.

Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Oldfield and Mr. Justice Seshagiri Ayyar.

1920, January, 20, 21 and 23.

A. A. R. PONNAMBALA PILLAI AND THREE OTHERS (DEFENDANTS NOS. 1 TO 3 AND 6), APPELLANTS,

v.

ANNAMALAI CHETTIAR AND THREE OTHERS (PLAINTIFF AND FOURTH DEFENDANT LEGAL REPRESENTATIVES OF PLAINTIFF AND LEGAL REPRESENTATIVES OF FOURTH DEFENDANT), RESPONDENTS.*

Mortgage—Equity of redemption of moiety of mortgage property—Purchase by mortgagee—Extinction of mortgage.

In the absence of fraud, the purchase by the mortgagee in Court auction of the equity of redemption in some items of the mortgaged properties discharges that portion of the mortgage debt which was chargeable on those items, that is, it discharges a portion of the mortgage debt which bears the same ratio to the whole mortgage debt as the value of those items bears to the value of all the mortgaged properties.

Bisheshur Dial v. *Ram Sarup* (1910) I.L.R., 22 All., 284 (F.B.), followed.

Sami Rowappa v. *Kuppusami Iyengar* (1911) 2 M.W.N., 342, overruled.

APPEAL against the decree of C. V. VISVANATHA SASTRI, Subordinate Judge of Kumbakōnam, in Original Suit No. 42 of 1915.

The suit was on a mortgage bond for Rs. 3,000, executed on 17th May 1902 by first defendant. Defendants Nos. 2 and 3 were the sons of first defendant. The mortgaged property consisted of three items of immoveable property. In 1904, another creditor obtained a money decree against defendants Nos. 1 to 3 and in execution of it brought to sale two out of the three items of property mortgaged to plaintiff. On 9th November 1905 the equity of redemption of these two items was sold in Court auction and purchased by a person who was found by the Subordinate Judge to be an agent of the plaintiff in the present suit. On 24th December 1908 plaintiff sold outright the major portion of these two items for Rs. 3,750 and soon after sold the remainder for Rs. 1,629-5-6. He then brought a suit on 5th July 1915 for Rs. 11,500, being the principal and interest on the

* Appeal No. 190 of 1917.

mortgage amount after deducting Rs. 5,019-5-6, the amount of the sale price of the two items and interest thereon. The plea of the defendants was that the mortgage debt had been discharged by reason of the plaintiff's purchase of the two items in Court auction. The Subordinate Judge found that on the date of the Court sale the principal was Rs. 3,000, and the interest Rs. 1,845. He further found that the value of the items sold was Rs. 4,950 and that the value of the item now sought to be sold was Rs. 2,639-4-0. Following *Nand Kishore* v. *Raja Hari Raj Singh*(1) the Subordinate Judge held that the plaintiff was entitled to recover only "an ad valorem share of the mortgage debt" from the property in suit.

Plaintiff appealed, and the Appeal and Memorandum of Objections came on for hearing in the first instance before ABDUR RAHIM and OLDFIELD, JJ., who made the following

ORDER OF REFERENCE TO A FULL BENCH.

This appeal arises in a suit on a mortgage bond by which three items of property were mortgaged to the plaintiff. Out of the three items, two items were sold in execution of a Small Cause Court decree, and bought by a person who was found to be an agent of the plaintiff. The purchase money paid for both the properties was Rs. 200. The plaintiff now seeks to realize the amount due to him from the third item, and the question of law that arises is whether he ought to give credit to the mortgagor for the full value of the two items purchased by him, and proceed against the other property only for the balance.

As regards the value of the properties purchased, it has been argued for the appellants that the learned Subordinate Judge's estimate is not correct, but we are unable to agree with this contention. It is not necessary to go into the details but it is sufficient to mention the fact that the plaintiff sold the property three years afterwards for Rs. 3,750 except the roofing of the house. We think the Subordinate Judge is right in accepting that figure. As regards the other properties there is no reason to doubt the correctness of the valuation.

Before we deal with the question of law raised by the appellant, it is convenient to dispose of the memorandum of objections. The bond provides for the payment of 15 per cent simple interest,

(1) (1898) I.L.R., 20 All., 23 (F.B.).

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and in default of payment at the specified date, compound interest with one yearly rests at 18 per cent. We think the Subordinate Judge has rightly held this to be penal, and we are unable to say that 18 per cent simple interest allowed by him is not sufficient compensation.

Upon the question of law, there is one ruling of this Court—*Sami Rowappa* v. *Kuppusami Iyengar*(1). There it has been held by AYLING and SPENCER, JJ., that where a mortgagee purchases one out of two properties subject to the mortgage, if the value of the property purchased is equal to, or exceeds, the mortgage amount, then the mortgage debt must be taken to be satisfied. In coming to this conclusion they followed the ruling of the Allahabad High Court in *Nand Kishore* v. *Raja Hari Raj Singh*(2). That was a ruling by a Full Bench of that Court of which BLAIR and BANERJI, JJ., were members. There it was held that the purchase of a part of the mortgaged property by the mortgagee subject to his mortgage has not necessarily the effect of fully discharging the mortgage without regard to the value of the property purchased and the price paid for it, whether such purchase be made in execution of a simple decree for money or in execution of a decree obtained by the mortgagee himself upon a subsequent mortgage, although it is possible that under some circumstances such purchase may have the effect of extinguishing the mortgage. The view suggested is that if the value of the property purchased is equal to or exceeds the amount of the mortgage debt then the mortgage must be held to be satisfied. But in a later Full Bench decision of the same Court, *Bisheshur Dial* v. *Ram Sarup*(3), a different proposition was laid down after a full consideration of the authorities, and it should be noted that BLAIR and BANERJI, JJ., the latter of whom delivered the judgment of the Full Bench, were parties to this decision. The head note is in these words: "When a mortgagee buys at auction the equity of redemption in a part of the mortgaged property, such purchase has, in the absence of fraud, the effect of discharging and extinguishing that portion of the mortgage debt which was chargeable on the property purchased by him, that is to say, a portion of

(1) (1911) 2 M.W.N., 342. (2) (1898) I.L.R., 20 All., 23 (F.B.).
(3) (1900) I.L.R., 22 All., 284 (F.B.).

the debt which bears the same ratio to the whole amount of the debt as the value of the property purchased bears to the value of the whole of the property comprised in the mortgage." In coming to this conclusion they mainly proceeded on the provisions of section 82 of the Transfer of Property Act, which lays down that where several parcels of property are mortgaged to secure one debt, every parcel is liable for the whole amount of the debt, but as between themselves each parcel is liable, in the absence of a contract to the contrary, to contribute to the debt in the proportion which its value bears to the value of the whole property comprised in the mortgage. They point out that if the property had been bought by a stranger, then it could not be contended that that property in his hands would be liable for a larger amount than what would be proportionate to its value. It may be observed that section 82 of the Transfer of Property Act was not brought to the notice of the learned Judges who decided *Nand Kishore* v. *Raja Hari Raj Singh*(1), or of AYLING and SPENCER, JJ., who decided the Madras case—*Sami Kowappa* v. *Kuppusami Iyengar*(2). There is also a ruling of the Bombay High Court in *Lakhmidas* v. *Jamnadas*(3), in support of the view taken in *Bisheshur Dial* v. *Ram Sarup*(4). But the learned Advocate-General has referred us to a decision of the Privy Council in *Dulichand* v. *Ramkishen Singh*(5). The facts of that case are somewhat complicated. But it would be sufficient to mention that the plaintiffs there were the purchasers of a Mouza called Korina and they also stood in the shoes of the Bank of India, which held the first encumbrance on that Mouza. The appellant, the defendant in the suit, held a mortgage both of Korina and the Mouza Nandan, the mortgage on the Mouza Korina being a second mortgage and that on Nandan being the first mortgage. It appears that the appellant bought Mouza Nandan, and it was found that the value of that property after deducting the purchase-money of the equity of redemption exceeded the mortgage debt due to the appellant. Upon these facts the Privy Council held, that the appellant's mortgage was satisfied,

(1) (1898) I.L.R., 20 All., 23 (F.B.).
(2) (1911) 2 M.W.N., 342.
(3) (1898) I.L.R., 22 Bom., 304 (F.B.).
(4) (1900) I.L.R., 22 All., 284 (F.B.).
(5) (1881) I.L.R., 7 Calc., 648 (P.C.).

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and that therefore he could not proceed for any portion of the mortgage amount against the Mouza Korina. At page 651 their Lordships say:

"It has been found by the Courts that its value, beyond the purchase-money, exceeded the amount due upon the appellant's mortgage, and was sufficient to cover not only that amount, but the Rs. 19,416 due to Lutf Ali Khan, if that sum was really due to him. Under these circumstances, it must be taken that the mortgage debt was satisfied by the purchase of Nandan and the value of that estate."

At page 653 they say:

"It has been shown that at the time that this payment of Rs. 78,393 was made by the respondents to the appellant, the debt had been satisfied by his purchase of Nandan under the circumstances above stated. He has, therefore, received it twice over, and it is obvious that, in such a case, it is inequitable that he should hold the money paid to him, under compulsion, by the respondents. It is to be observed that the appellant had only a second mortgage upon Korina, but in the view their Lordships have taken of the case, it is unnecessary to go into the question of marshalling the securities."

If their Lordships had satisfied themselves with saying that the appellant's mortgage on Korina was a second mortgage and therefore postponed to the mortgage of the Bank it could not be contended there would be any conflict between this decision and the ruling in *Bisheshur Dial* v. *Ram Sarup*(1). But that is apparently not the ground on which they based their conclusion. They held that upon the facts stated by them in their judgment, the appellant's mortgage was satisfied because of the value of the property having exceeded the debt. It must, however, be observed that the question whether the plaintiffs were entitled or not to proceed against the other Mouza for a proportion of the debt was not at all discussed at the bar and this case, as the head note itself would show, is regarded as an authority with reference to another question as to whether payment made by a person to save his property threatened to be sold in execution of a decree is a voluntary payment or not, and not upon the present question. The matter is one of some importance, and the correctness of the ruling in *Sami Rowappa* v. *Kuppusami Iyengar*(2) seems to be open to doubt. We

(1) (1900) I.L.R., 22 All., 284 (F.B.). (2) (1911) 2 M.W.N., 342.

therefore think that the question ought to be settled by a Full Bench of this Court, whether, when a mortgagee buys at auction the equity of redemption in a part of the mortgaged property, such purchase has, in the absence of fraud, the effect of discharging and extinguishing the mortgage debt if the value of the property purchased be equal to the amount due on the mortgage decree as held in *Sami Rowappa* v. *Kuppusami Iyengar*(1), or whether the true rule is as enunciated in *Bisheshur Dial* v. *Ram Sarup*(2).

ON THIS REFERENCE—

The Hon'ble *the Advocate-General* for the appellants. I contend that *Sami Rowappa* v. *Kuppusami Iyengar*(1), lays down the correct principle. Where a mortgagee purchases the equity of redemption of part of the property and the actual value of that moiety is greater than the whole mortgage debt, the latter is extinguished and discharged, and he has to account for the full value. I rely on *Dulichand* v. *Ramkishen Singh*(3). When a mortgagee buys a portion of the mortgaged property he is on a different footing to a stranger purchaser and the law of contribution does not apply. See *Nand Kishore* v. *Raja Hari Raj Singh*(4). *Bisheshur Dial* v. *Ram Sarup*(2), is against me, but it rests entirely on section 82 of the Transfer of Property Act. I have a number of cases to show that that section does not apply as between mortgagor and mortgagee. See *Krishna Ayyar* v. *Muthukumarasawmiya Pillai*(5), *Venkata Subba Reddi* v. *Bagiammal*(6). In *Nawab Azimut Ali Khan* v. *Jowahir Singh*(7), there is no question of the mortgagee purchasing the property. This decision is not in point, and later cases have been misconceived. *Dulichand* v. *Ramkishen Singh*(3), is directly in point. The principle to be elucidated from it is, that where the mortgagee buys the equity of redemption he is considered to have liquidated his mortgage.

K. Bhashyam Ayyangar for respondents. There was no merger of rights and the doctrine of contribution embodied in section 82 Transfer of Property Act, applies equally to

(1) (1911) 2 M.W.N., 342.
(2) (1900) I.L.R., 22 All., 284 (F.B.).
(3) (1881) I.L.R., 7 Calc., 648 (P.C.).
(4) (1898) I.L.R., 20 All., 23 (F.B.).
(5) (1906) I.L.R., 29 Mad., 217.
(6) (1916) I.L.R., 39 Mad., 419.
(7) (1870) 13 M.I.A., 404.

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a mortgagee purchaser as to a stranger. His position as mortgagee is different from his position as owner of the equity of redemption: *Nawab Azimut Ali Khan* v. *Jowahir Singh*(1). In *Sami Rowappa* v. *Kuppusami Iyengar*(2), the Judges expressly find fraud and proceed on that finding. There is no discussion of the principle and they really follow *Nand Kishore* v. *Raja Hari Raj Singh*(3) which has been expressly overruled by *Bisheshur Dial* v. *Ram Sarup*(4). *Dulichand* v. *Ramkishen Singh*(5), has not been followed on this point anywhere, and there was no question of contribution there. The observations of their Lordships regarding the mortgagee purchaser's liability to account for the full value must be taken with the facts as found. Except the cases *Dulichand* v. *Ramkishen Singh*(5) and *Sami Rowappa* v. *Kuppusami Iyengar*(2), all the High Courts are in my favour. See *Nawab Azimut Ali Khan* v. *Jowahir Singh*(1), *Lakhmidas* v. *Jamnadas* (6), *Mir Eusuff Ali Haji* v. *Panchanan Chatterjee*(7), and *Bisheshur Dial* v. *Ram Sarup*(4). After the enacting of sections 60 and 82, Transfer of Property Act, *Dulichand* v. *Ramkishen Singh*(5), no longer applies. I contend therefore that the principle in *Bisheshur Dial* v. *Ram Sarup*(4) is correct. Reference also was made to *Appayya* v. *Rangayya*(8), *Perumal Pillai* v. *Raman Chettiyar*(9), Fishers' Law of Mortgages, Sixth Edition, section 1937, and *Knight* v. *Marjoribanks*(10).

The OPINION of the Court was delivered by

WALLIS, C.J.

WALLIS, C.J.—We agree with the decision of the Full Bench of the Allahabad High Court in *Bisheshur Dial* v. *Ram Sarup*(4), which was in accordance with the earlier Bombay decision, *Lakhmidas* v. *Jamnadas*(6), and has been followed in Calcutta in *Mir Eusuff Ali Haji* v. *Panchanan Chatterjee*(7). We have not been referred to any English authority in support of the opposite view. On the other hand, as pointed out in the last mentioned case, LORD COTTENHAM, in *Knight* v. *Marjoribanks*(10),

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(1) (1870) 13 M.I.A., 404.
(2) (1911) 2 M.W.N., 342.
(3) (1898) I.L.R., 20 All., 23 (F.B.).
(4) (1900) I.L.R., 22 All., 284 (F.B.).
(5) (1881) I.L.R., 7 Calc., 648 (P.C.).
(6) (1898) I.L.R., 22 Bom., 304 (F.B.).
(7) (1910) 6 I.C., 842.
(8) (1908) I.L.R., 31 Mad., 419 (F.B.).
(9) (1917) I.L.R., 40 Mad., 968 (F.B.).
(10) (1849) 2 Mac. & G., 10.

cited with approval the statement in Sugden's Vendors and Purchasers, Vol. 3, page 227, Tenth Edition :

"that a sale by a mortgagor to a mortgagee stands on the same principle as a sale between parties having no connexion with each other, and can only be impeached on the ground of fraud,"

And added

"that inadequacy of price would not be sufficient ground to impeach such a sale."

The decisions that a mortgagee by purchasing a part of the mortgaged property extinguished the mortgage debt, which were overruled in *Nand Kishore* v. *Raja Hari Raj Singh*(1), and the further decisions that such a mortgagee purchaser must credit the difference between the purchase price and the real value of the property purchased in discharge of the mortgage debt, which were overruled in *Bisheshur Dial* v. *Ram Sarup*(2), appear to be quite irreconcilable with the above statement. In this Court we have been referred to the decision of the Privy Council in *Dulichand* v. *Ramkishen Singh*(3), which is discussed in the Order of Reference The judgment no doubt contains passages which may be read as meaning, that the mortgage was discharged because the value of the property purchased by the mortgagee after deducting the purchase price exceeded the mortgage debt, but there is no discussion of the principle involved, and in the absence of the judgment of the Lower Court and of any report of the arguments it is not easy to say what was intended. If it had been a ruling after contest, it would have been dealt with in the head note to the report of the case. On the other hand, in the earlier case of *Nawab Azimut Ali Khan* v. *Jowahir Singh*(4), the rule that the part of the mortgaged property purchased by the mortgagee was only chargeable with a proportionate part of the mortgage debt was treated as plainly applicable. That is the rule embodied in section 82 of the Transfer of Property Act, by which we are governed. If the legislature had intended to make an exception in the case of mortgagee-purchasers, it would no doubt have done so in express terms, as in the case of the special

(1) (1898) I.L.R., 20 All., 23 (F.B.).
(2) (1900) I.L.R., 22 All., 284 (F.B.).
(3) (1881) I.L.R., 7 Calc., 648 (P.C.) ; 8 I.A., 93.
(4) (1870) 13 M.I.A., 404.

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restrictions imposed upon them by the now repealed section 99. Not only is there no provision to that effect, but the case of a mortgagee acquiring a share of the equity of redemption is expressly dealt with in the last clause of section 60 which recognizes the mortgagor's right to redeem his own share in such a case upon payment of a proportionate amount of the mortgage debt, leaving the balance to be borne by the mortgagee purchaser, thus applying to this case the general rule provided in section 82. We answer the question in the negative, and overrule *Sami Rowappa* v. *Kuppusami Iyengar*(1).

M.H.H.

(1) (1911) 2 M.W.N., 342.