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rulings of this Court has been to hold that a purchaser at auction in execution of a mere money-decree acquires merely the rights and interests which the judgment-debtor had at the time of the sale, and cannot benefit by any lien that the decree-holder may have had under the bond. On the principle of *stare decisis*, I would reply to that effect to this reference.

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BEFORE A FULL BENCH.

(*Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie, and Mr. Justice Oldfield.*)

KHUB CHAND (DEFENDANT) v. KALIAN DAS (PLAINTIFF)*

Bond—Mortgage—Money-decree—Sale in Execution—Condition against Alienation.

Nothing passes to the auction-purchaser at a sale in execution of a money-decree but the right, title, and interest of the judgment-debtor at the time of the sale.

Where, therefore, the holder of a simple mortgage-bond obtained only a money-decree on the bond, in execution of which the property hypothecated in the bond was brought to sale and was purchased by him, he could not resist a claim to foreclose a second mortgage of the property created prior to its attachment and sale in execution of his decree. The view of the Full Bench of the Calcutta High Court in *Montuzooddeen Mahomed v. Rajcoomar Dass* (1) and the decision in *Ramu Naikan v. Subbaraya Mudali* (2) dissented from.

Held further that the holder of the money-decree in this case could not avail himself of a condition against alienation contained in his bond to resist the foreclosure. *Rajah Ram v. Binnu Madho* (3) impugned.

On the 10th July, 1865, the owners of the property in suit, a fractional share in a certain village, executed a bond for the payment of money personally to Khub Chand, defendant, in which they hypothecated the property as collateral security for such payment,

* Special Appeal, No. 43 of 1875, against a decree of the Judge of Mainpuri, dated the 27th November, 1874, affirming a decree of the Subordinate Judge, dated the 10th September, 1873.

(1) 14 B. L. R. 408; S. C., 23 W. R. *Goburdhun Lall Mohasohree*, 24 W. R. 187; this case has been followed in 210.
Aruh Soar v. Juggunnath Mohapattur, 23 W. R. 460; see also *Byjnath Singh v.* (2) 7 Mad. H. C. R. 229.
(3) H. C. R., N.-W. P., 1873, p. 81.

stipulating to make no transfers of it until payment. In 1868 Khub Chand sued on this bond, obtaining only, however, a decree on the personal obligation. On the 28th March, 1869, the owners of the property mortgaged it to the plaintiff. The property was subsequently attached in execution of Khub Chand's decree, and was eventually brought to sale on the 20th November, 1871, when it was purchased by Khub Chand.

The plaintiff now sued to foreclose his mortgage.

The lower Courts gave him a decree.

On special appeal to the High Court by the defendant, the Court (Turner and Oldfield, JJ.) referred the case to the Full Bench, the order of reference being as follows:—

The plaintiff has brought this suit to obtain possession of property by foreclosure of a mortgage under a deed dated the 28th March, 1869, executed by one Sukh Lal, and, *inter alia*, to have declared null and void the right of the defendant Khub Chand to the mortgaged property as purchaser at an auction-sale on the 20th November, 1871, of the rights and interests of Sukh Lal and Akhe under a money-decree obtained by him apparently in 1868 against them on their bond dated the 10th July, 1865.

It appears that the bond in favour of Khub Chand hypothecated the property, and contained a stipulation on the part of the obligors that they would not make transfers of the property hypothecated, and Khub Chand has contended amongst other pleas that the mortgage under which the plaintiff claims is in contravention of this stipulation and therefore in defraud of his rights, and that his purchase must be held free of the plaintiff's claim.

Khub Chand also pleaded that the plaintiff was in collusion with Sukh Lal to defraud him, but the lower Courts have decided that the plaintiff's mortgage is a *bonâ fide* transaction so far as the plaintiff is concerned.

The question which arises, and which we refer to a Full Bench is this, whether, under the circumstances stated, Khub Chand, by his purchase at auction-sale, stands merely in the place of his judgment-debtor and is bound by his act, or whether he has, in

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consideration of his bond, a further right, and can successfully contest the plaintiff's claim under the subsequent mortgage executed by his judgment-debtor by reason of the latter having executed it in contravention of the stipulation in the deed of 1865.

Amongst other decisions bearing more or less on the question, we notice the following of this Court:—*Rajah Ram v. Baine Madho* (1); *Lahan Bibi v. Gauri Parshad* (2); *Sheobart Lal v. Ramnandan Lal* (3); *Kulwant Sahu v. Ragho Nath* (4); *Oomrao Singh v. Shimbhoo Nath* (5); also of the Calcutta Court—*Momtazooddeen Mahomed v. Rajcoomar Dass* (6); and of the Madras Court—*Ramu Naikan v. Subbaraya Mudali* (7).

Babu *Oprokash Chandar* for the appellant, relied on *Rajah Ram v. Baine Madho* (1).

Munshi *Hanuman Parshad* (with him *Maulvi Mehdi Hussain*) for the respondent.—The decree in execution of which Khub Chand purchased the property in suit was a money-decree only, and did not enforce his lien on the property. The purchaser at a sale in execution of a money-decree purchases the rights and interests of the judgment-debtor at the time of the sale, and therefore, if the property he purchases is encumbered at the time of the sale he purchases it subject to the encumbrance. He referred to *Madho Das v. Maina Bibi* (8) and *Kelly v. Seth Gobind Das* (9). As auction-purchaser Khub Chand cannot avail himself of the condition against alienation, because as such he is not a party to the bond, and cannot therefore make use of the condition.—*Koondun Lal v. Wazeer Ali* (10).

STUART, C. J.—My answer in this reference is that, under the circumstances stated, Khub Chand's purchase cannot prevail against or be held free of the plaintiff's claim, but that the plaintiff is entitled to a decree against the property under his foreclosure suit. Khub Chand's decree was merely a money-decree, and the condition in his bond against alienation to others was merely personal to him and Sukh Lal, and although it might give Khub Chand a claim for

(1) H. C. R. N.-W. P., 1873, p. 81.

(2) Unreported.

(3) Unreported.

(4) Unreported.

(5) H. C. R., N.-W. P., 1870, p. 38.

(6) 14 B. L. R. 408; S. C., 23 W. R. 187.

(7) 7 Mad. H. C. R. 229.

(8) Unreported.

(9) Unreported.

(10) H. C. R., N.-W. P., 1871, p. 205.

damages against his debtor, it could in no way affect the right of a subsequent mortgagee in enforcing his lien. No other or further right can be allowed to Khub Chand, and he therefore cannot be permitted to contest the plaintiff's claim.

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PEARSON, J.—The rights and interests of his judgment-debtors were sold, not in virtue and pursuance of the lien created by the instrument of the 10th July, 1865, but in execution of the decree of 1868, which was merely a money-decree, and were purchased by Khub Chand subject to the rights which had been acquired by the plaintiff under the instrument of the 28th March, 1869. The stipulation in the earlier instrument, by which the mortgagor was precluded from alienating the property hypothecated for the purpose of securing the debt while the debt should remain unpaid, was only intended to preserve and fortify the lien which the hypothecation created and cannot be enforced apart from that lien. Khub Chand has never enforced that lien; he contented himself with a money-decree, and chose to buy himself the rights and interests remaining to his debtors in the property at the time of the auction-sale. The rights and interest which they had conveyed to the plaintiff by the instrument of the 28th March, 1869, were not affected by that sale; and so long as Khub Chand abstains from enforcing his prior lien, he cannot plead the stipulation in the instrument executed in his favour as invalidating the transfer subsequently made to the plaintiff. That stipulation does not place him on the footing of a purchaser in virtue of the lien to which the stipulation is attached. On the contrary, the position which he holds at present is no better than would be that of any stranger who might have purchased the property which he purchased in execution of his own decree. It cannot be pretended that any stranger so purchasing it could have claimed to be protected in the purchase by reason of the stipulation in the bond. The sale did not carry with it the lien which belonged to the bondholder, but only disposed of such rights and interests as still belonged to the bond-debtors. The foregoing remarks embody the opinion which I desire to express in answer to the question referred to the Full Bench.

TURNER, J.—To determine the question raised in this reference it is necessary to consider the nature and incidents of a simple mortgage. A simple mortgage cannot be better defined than in

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the terms adopted by Mr. Justice Macpherson in his work on mortgages. It is an arrangement by which the borrower, binding himself personally for the re-payment of a loan, pledges his land as a collateral security. It comprises then two contracts, a personal obligation on the part of the mortgagor to pay the debt, and a contract empowering the mortgagee to have recourse to the property pledged as a collateral security. The pledge does not directly confer on the mortgagee the power of sale. In order to make his security available he must obtain an order of a Civil Court directing a sale. The mortgagee, in the case of a simple mortgage, has in the event of default being made in the payment of the debt, two causes of action, the one arising out of the breach of the personal obligation, and the other arising out of the contract of hypothecation.

He may put both these causes of action in suit at once or he may pursue the one remedy at one time and the other at another. If he sues on the personal undertaking only he obtains what is known as a money-decree; if he sues on the contract of hypothecation, he obtains only an order for the sale of the property.

Notwithstanding the pledge the mortgagor remains the owner of the property, and may deal with it in any manner he pleases not inconsistent with the condition of the mortgage. Subject to the charge created by the mortgage, he may aliene his property in part or wholly.

Such being the nature and incidents of a simple mortgage, I proceed to consider whether there is any, and if any, what distinction between the interest which passes to a purchaser of the mortgaged property if it be sold under a decree pronounced in a suit brought to enforce the charge and ordering the sale, and the interest which passes to a purchaser if the mortgaged property be sold under a money-decree obtained on the personal obligation.

It appears to me there is a great difference in the two suits and a great difference in the operation of the decrees which can be obtained in the two suits. If the holder of a simple mortgage elects to enforce his pledge and that pledge be, as it usually is, a pledge of immoveable property, he must bring the suit in the district in which the property is situated, and if he sues solely on the contract of hypothecation, he can obtain only a decree ordering the sale of

the pledge; he cannot have recourse to the other property of the judgment-debtor. But the sale will pass not merely the rights of the judgment-debtor existing at the time of the sale but the rights of the judgment-debtor existing at the date of the pledge and will be binding on all persons who are parties to the suit. To a suit then to enforce the hypothecation it is advisable for the creditor, though it is not incumbent on him, to make all subsequent encumbrancers parties, and if such encumbrancers apply to be made parties the Court should admit them under s. 73, Act VIII of 1859, and I may add, although it is not the custom in these Provinces, that in passing a decree in such a suit to which subsequent encumbrancers are made parties, the Court ought to give subsequent encumbrancers an opportunity to come in and redeem the prior encumbrance.

Of course such subsequent encumbrancers, if they are not made parties, might at any time before sale come in and redeem and they will not be bound by the decree, but if they do not redeem and a sale takes place their liens will be defeated unless they can show something more than the existence of their subsequent encumbrances, some fraud or collusion which entitled them to defeat the first encumbrance or to have it postponed to their own.

It appears to me doubtful whether it is necessary for the holder of a decree ordering a sale for the enforcement of a lien to proceed in execution by attachment and order for sale. If the decree is properly drawn up, he has already obtained an order for sale. The Procedure Code is I think defective in that it contains no special provision for the execution of such decrees. They do not fall under ss. 199, 200, 201, or 202, and the provisions of s. 232 appear to apply to such decrees as are mentioned in s. 201. In practice no doubt such decrees have been in default of special provisions executed in the same manner as money-decrees.

On the other hand, if the holder of a simple mortgage puts in suit merely the personal obligation of the mortgagor, he need not necessarily sue in the district in which the property which is the subject of collateral security may be situated. To such a suit subsequent encumbrancers would not properly be made parties; the decree would be a mere money-decree, conferring on the decree-

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holder the right to obtain its satisfaction by levying the amount from any property of the judgment-debtor. He is not confined to the estate under mortgage. He must proceed by attachment and sale, and what he attaches and sells is the property of the judgment-debtor, that is to say, the rights and interests of the judgment-debtor subsisting at the time of the sale—*Mahomed Buksh v. Mahomed Hossein* (1). Such property passes by the sale as the judgment-debtor could convey by private sale.

In *Syud Nadir Hossein v. Pearoo Thovildarinee* (2) Mr. Justice Pontifex has ruled that a sale of the mortgaged property under a money-decree passes with it the lien; and in *Momtazooddeen Mahomed v. Rajcoomar Dass* (3), the majority of the Court declared that, where a creditor under a bond by which property is mortgaged takes a money-decree and proceeds to attach and sell the mortgaged property, he thereby transfers to the purchaser the benefit of his own lien and the right of redemption of his debtor, and if there be no third party interested in the property it becomes absolutely vested in the purchaser. The reasons on which these rulings proceed I understand to be the following—the mere taking of a money-decree does not destroy the lien, and it continues an incident to the debt when it passes from a contract-debt into a judgment-debt—as the creditor cannot sell the property and retain the lien, it must continue in existence so far as is necessary for the protection of the purchaser. It cannot be doubted that the mere taking of a money-decree does not destroy the lien, and that it continues a collateral security for the debt when it has merged in a judgment-debt, but I fail to see on what ground it can be held that the collateral security has passed by the sale or continues in existence to protect the purchaser. The mortgagee has not in the case supposed elected to avail himself of the collateral security. The lien subsists nevertheless until the debt is discharged, when the object for which it was created fails, and it ceases.

We have not now to consider whether the holder of a simple mortgage, if he proceeds on the personal undertaking, and, obtaining a money-decree, brings to sale the mortgaged property, can 'after-

(1) H. C. R., N.-W. P., 1868, p. 171.

(2) 14 B. L. R. 425 note.

(3) 14 B. L. R. 408; S. C., 23 W. R., 187.

wards sue the auction-purchaser to enforce his lien for any sum that may not have been satisfied by the sale in execution of the money-decree. In such a case it may be that, unless he gives notice at the sale of his intention to retain the lien, it would be held he had waived it. We have to consider whether the interests of third parties and the liens of intermediate encumbrancers can be defeated by a sale of the mortgaged property under a mere money-decree. In *Ramu Naikan v. Subbaraya Mudali* (1), it was held that the purchaser under a money-decree could avail himself of the lien of the original encumbrancer as a shield and so defeat subsequent encumbrancers, and doubtless this ruling is supported by the dicta of the High Court of Calcutta to which I have referred, namely, that the collateral security passes to the auction-purchaser. The Calcutta High Court allowed that the fact that property is mortgaged to one is no bar to the mortgage or sale of the equity or right of redemption to another. Let it be assumed that the mortgagor sells his interest absolutely, then if the mortgagee sues on the personal undertaking only he must sue the original mortgagor, he cannot implead the purchaser, and if he obtains a decree he can enforce it only against the property of the mortgagor who *ex hypothesi* has no interest left in the mortgaged property, and if, instead of selling the mortgaged property he sells the property of the mortgagor, no interest in the collateral security can pass by such a sale to the purchaser.

In the case now before the Court the mortgagor, instead of making a transfer of the whole of his interest in the property pledged, aliened it in part by the creation of a subsequent encumbrance in the nature of a conditional mortgage. He thereby conferred on the conditional mortgagee the right to redeem the first mortgage at whatever time it could have been redeemed by the mortgagor, and the right in the event of default being made in payment of the debt due to him to foreclose and hold the property subject to the first encumbrance. The estate of the second encumbrancer having been created before the attachment and sale in execution of the money-decree cannot be destroyed by the sale, for in my judgment the original mortgagor did not take the steps necessary to entitle him to enforce his collateral security, and the

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sale in execution of his decree on the personal obligation passed only the rights and interests of the mortgagor subsisting at the time of the sale, and those rights in the mortgaged property were then burdened with the charge created in favour of the conditional mortgagee.

It remains to be considered whether an auction-purchaser in execution of a money-decree can avail himself of a condition in the mortgage-deed prohibiting alienation. I was a party to the decision of this Court in the case of *Rajah Ram v. Baine Madho* (1), in which it was held that the existence of such a condition enabled the auction-purchaser to resist the claim of a second encumbrancer. On fuller consideration I am not prepared to support that ruling. The condition is attached to the charge and not to the personal obligation of the mortgagor, and if the first mortgagee, who can only enforce the charge by suit, elects to abstain from pursuing that remedy and sues on the personal obligation only, I am of opinion that the auction-purchaser cannot plead the condition attached to the lien any more than he can plead the lien. I would reply that Khub Chand, having purchased under a mere money-decree the interest at the time of sale remaining in the judgment-debtor, stands in the place of the judgment-debtor in respect of the interest he acquired by the purchase, and that he cannot resist the claim of the plaintiff to obtain possession of the property.

SPANKIE, J.—On the case stated to us I should say that Khub Chand, by his purchase at auction-sale, stands merely in the place of his judgment-debtor and is bound by his act, and that he has not, in consideration of his bond, a further right, and cannot successfully contest the plaintiff's claim under the subsequent mortgage executed by his judgment-debtor by reason of the latter having executed it in contravention of the stipulation in the deed of 1865. It seems to me that we have decided a very similar point in Full Bench in the case of *Akhe Ram v. Nand Kishore* (2).

OLDFIELD, J.—Looking to the course of rulings by this Court on the question raised in this reference and the rule *stare decisis*,

(1) H. C. R., N.-W. P., 1872, p. 81.

(2) Preceding case.

ly to this reference that the auction-purchaser at a sale
 on of a mere money-decree acquires only the rights
 in his judgment-debtor at the time of sale.

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 APPELLATE CIVIL.

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(*Mr. Justice Turner and Mr. Justice Oldfield.*)

ARIM BAKSH AND ANOTHER (PLAINTIFFS) v. BUDEHA (DEFENDANT)*

Public Thoroughfare—Obstruction—Jurisdiction—Act X of 1872, s. 521.

suit for obstructing a public thoroughfare can be maintained in a Civil
 without proof of special injury.

was a suit for the removal of a portion of a "chabutra,"
 encroachment on a certain road, the plaintiffs alleging that
 the encroachment was such that carts and other wheeled convey-
 ances were unable to pass along the road.

The lower court found that the road was not a public
 thoroughfare. In consequence of this finding, it gave
 judgment in favour of the defendant. On appeal, it was
 held that the road was a public thoroughfare, and that the
 plaintiffs were entitled to a decree.

The lower appellate Court held, on the assumption that the road
 was a public thoroughfare, that, as the plaintiffs alleged no special
 injury, the suit was not maintainable.

On special appeal by the plaintiffs to the High Court it was
 argued that the road was not a public thoroughfare, and that, even
 if it were, the lower appellate Court was wrong in holding that the
 suit was not maintainable.

Pandit *Bishambar Nath*, Pandit *Ajudhia Nath*, and Babu
Oprokash Chandar, for the appellants.

* Special Appeal, No. 172 of 1876, from a decree of the Judge of Allahabad,
 dated the 12th February, 1876, reversing a decree of the Munsif, dated the 31st
 July, 1875.