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limitation. My brother Knox and I, in common with the learned Chief Justice, are agreed that where a question of this kind is not specifically taken in the memorandum of appeal, involving as it does primarily a matter of Court-fees and the other incidental inquiries that necessarily arise in regard thereto, it should not be entertained. That being so, we have to consider whether there is any ground for this appeal. The learned pleader has not seriously contended that the finding of the learned Judge that the plaintiff-appellant was never in possession of the property to which he seeks a declaration of his title, is not strongly in favor of the view that the plaintiff had no title in respect of which he could claim to have a declaration. The appeal is dismissed with costs.

Appeal dismissed.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight and Mr. Justice Mahmood.

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TULSA (PLAINTIFF) *v.* KHUB CHAND (DEFENDANT).*

Mortgage—Prior and subsequent mortgages—Rights of persons advancing money to pay off a prior mortgage—Suit to sell mortgaged property under mortgage—Form of decree to be given.

Where in a suit to bring certain immovable property to sale under a mortgage it was found that the predecessor in interest of one of the defendants had advanced money upon a mortgage of the same immovable property in order to save a portion thereof from sale under two prior mortgages: *held* that such defendant was entitled to the benefit of the payment so made, and that the proper decree in the suit should be that the plaintiff could only bring that portion of the property in suit to sale on payment to the said defendant of the money advanced as aforesaid, with interest from the date of payment to the date of the receipt of the final decree by the Court of first instance together with proportionate costs; such payment to be made within 90 days from the ascertainment of such amount and the receipt of the final decree by the Court of first instance; otherwise the plaintiff to be absolutely debarred from all right to redeem that particular portion of the property mortgaged.

The facts of this case are fully given in the judgment of the Court.

Pandit *Sundar Lal* and Babu *Durga Charan Banerji*, for the appellant.

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* Second Appeal No. 1141 of 1888 from a decree of H. F. Evans, Esq., District Judge of Aligarh, dated 23rd April 1888, reversing a decree of Babu Abinash Chandar Banerji, Subordinate Judge of Aligarh, dated 6th October 1885.

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Babu *Jogindro Nath Chaudhri*, for the respondent.

EDGE, C. J., and STRAIGHT, J.—The suit out of which this second appeal has arisen was brought on the 8th of February 1882, by Khub Chand against Musammat Tulsa and Bhupal upon an hypothecation bond which had been executed by Bhupal in favour of Khub Chand on the 15th of June 1872, and by which Bhupal had hypothecated, amongst other things, his ancestral zamindári share of 1 biswa, 6 biswansis, 16¾ kachwansis in mauza Salempur, Pironda. The plaintiff by his suit sought to bring the mortgaged property to sale.

We are not concerned with the case of Bhupal. He is not a party to this appeal. Musammat Tulsa defended the suit as to 15 biswansis of the 1 biswa, 6 biswansis, 16¾ kachwansis zamindári share on the ground that she had a prior lien. The circumstances upon which her claim of lien depends are as follows :—

By two bonds, dated respectively the 22nd of December 1865, Bhupal had hypothecated the 15 biswansis in question to Desraj. Desraj died, and after his death his widow and his son, Khub Chand, obtained on those bonds decrees for sale of the 15 biswansis share. The sale was fixed for the 20th of July 1877. In order to satisfy the amounts of those decrees and thus save the 15 biswansis from sale, and for other purposes, Bhupal, on the 10th of July 1877, borrowed Rs. 1,200 from Baldeo Das, and, in consideration of the moneys advanced, executed on that date a bond in favor of Baldeo Das hypothecating his proprietary rights in the zamindári share of 1 biswa, 12 biswansis, which included the 15 biswansis in question. It was expressly stated in the bond of the 10th of July 1877 that the Rs. 1,200 was borrowed partly to satisfy those two decrees. On the 12th of July 1877, Bhupal, out of that Rs. 1,200 paid into Court, in the one suit, Rs. 204-4-6, and in the other, Rs. 295-11-6, in all Rs. 500, and thus satisfied the two decrees and saved the 15 biswansis share from sale. Baldeo Das died before the commencement of the suit. His widow, Musammat Tulsa, has vested in her such rights and interests as Baldeo Das acquired by the mortgage of the 10th of July 1877.

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On the above facts the Subordinate Judge dismissed the plaintiff's claim to have the 15 biswansis share brought to sale. On appeal the District Judge set aside that portion of the decree of the Subordinate Judge which exempted the 15 biswansis share from sale and decreed their sale, but provided that a sale of the 15 biswansis share should only be resorted to in the event of the proceeds of a sale of the balance of the 1 biswa, 6 biswansis, 16¾ kachwansis, that is, 11 biswansis, 16¾ kachwansis, being found insufficient to discharge the amount due to the plaintiff under the mortgage of the 15th of June 1872. The defendant, Musammat Tulsa, has appealed.

Mr. *Durga Charan Banerji* for the appellant and Mr. *Jogindro Nath Chaudhri* for the respondent respectively cited many authorities, all of which, with one exception, have been considered, since this appeal was argued, in the Full Bench case of *Matadin* v. *Kazim Husain* (1). The exception was an unreported decision of this Court of the 27th of March 1888, in the case of *Musammat Deva Kuar* v. *Bhojraj* and *Debi Sahai*.

Mr. *Jogindro Nath Chaudhri* contended that the reported cases relied upon by Mr. *Durga Charan Banerji* were not in point, as they were either cases in which a mortgagee had subsequently to his mortgage acquired the equity of redemption, or cases in which a purchaser of the equity of redemption had redeemed a mortgage. As to the unreported case he admitted that it was in point but contended that it was not supported by authority. He pointed out that it was Bhupal and not Baldeo Das who on the 12th of July 1877 paid the Rs. 500 into Court in satisfaction of the two decrees, and contended that if it was the intention of Bhupal and Baldeo Das that the prior liens should be kept alive as shields for Baldeo Das, Baldeo Das would have obtained an assignment of the two decrees. The District Judge had in his judgment referred to the case of *Mohesh Lal* v. *Mohant Bawan Das* (2), and applied it by drawing the inferences which their Lordships of the Privy Council drew on the facts of that case, pointing out, however, that there

(1) I. L. R., 13 All., 432. (2) L. R. 10 I. A. 62; s. c. I.L.R. 9 Calc. 961.

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was in that case no intermediate incumbrance. In our opinion that fact made the case of *Mohesh Lal* v. *Mohant Bawan Das* inapplicable to this case. In that case their Lordships of the Privy Council, after referring to the rule enunciated by the Master of the Rolls in *Adams* v. *Angell* (1), are reported (at page 71 of the Report) to have said :—"applying that rule to the present case, it must be presumed, in the absence of any expression of intention to the contrary, that Mangal, who, when he borrowed the money to pay off Lachmi Narain's mortgage, claimed to be the owner of the estate and was stated on the face of the bond to be so, intended that the money should be applied in paying off that mortgage, and in extinguishing the charge, there being no intermediate incumbrance."

It is obvious to us that if there had been in that case an intermediate incumbrance their Lordships would not have held that there must have been any such presumption, and that they would have held that there must, unless the contrary appeared, have been the opposite presumption. The judgment of their Lordships of the Privy Council in *Gokul Doss Gopal Doss* v. *Ram Bux Seochand* (2), appears to place that question beyond doubt.

In this case it was clearly to the interests of Bhupal and Baldeo Das that the liens created by the mortgages of 1865 and 1869 and and the decrees upon those mortgages should not be destroyed but should continue for their respective benefits as shields against the mortgage of 1872. There is nothing to show that in satisfying those decrees Bhupal or Baldeo Das intended to destroy those liens. Indeed the contrary may be inferred from the statement in the bond of the 10th of July 1877, to which we have referred.

The observations of their Lordships on *Tomlmin* v. *Steere* (3) reported at page 133 of L. R. 11 I. A., show that no inference is to be drawn from the fact that there was no formal transfer of the decrees of 1877 and no intention to keep the liens alive ever formally expressed. In *Gokul Doss Gopal Doss* v. *Ram Bux Seochand* (4), their Lordships of the Privy Council are reported (at p. 134) to have

(1) L. R. 5 Ch. D. 634.
(2) L. R. 11 I. A. 126. s. c. I. L. R. 10 Calc. 1035.
(3) 3 Mer., 210.
(4) L. R., 11 I. A., 126.

said :—"The ordinary rule is that a man having a right to act in either of two ways shall be assumed to have acted according to his interests. In the familiar instance of a tenant for life paying off a charge upon the inheritance, he is assumed, in the absence of evidence to the contrary, to have intended to keep the charge alive. It cannot signify whether the division of interests in the property is by way of life estate and remainder or by way of successive charges. In each case it may be for the advantage of the owner of a partial interest to keep on foot a charge upon the *corpus* which he has paid."

Such protection as justice, equity and good conscience, according to the passage just quoted from the judgment of their Lordships of the Privy Council, as applied to the facts of this case, affords to Bhupal or afforded to Baldeo Das, Musammat Tulsa, as the representative of Baldeo Das the mortgagee of 1877, is entitled to.

The plaintiff, so far as the 15 biswansis are concerned, did not admit Musammat Tulsa's right of lien; what he asked was that the 15 biswansis should be sold. He has not made out a case for the relief which he asked. We, however, have come to the conclusion that the plaintiff should have a decree entitling him to bring the 15 biswansis share to sale upon payment to Musammat Tulsa of the Rs. 500 and interest at the rate of 6 *per centum per annum* thereon with proportionate costs in all Courts. Applying the analogy of the Transfer of Property Act, we allow the plaintiff 90 days from the date when the amount of the principal sum of Rs. 500 and the interest thereon calculated at the rate of 6 rupees *per centum per annum* from the 10th of July 1877 to the date of our decree has been ascertained and our final decree has been received in the Court of first instance for payment of such principal and interest with the proportionate costs of this suit in all Courts. If the payment be not made within such 90 days, this suit will stand dismissed with costs, so far as the claim to bring to sale the 15 biswansis is concerned, and the plaintiff will be absolutely debarred of all rights to redeem the 15 biswansis in question. To that extent we vary and modify the decree below. As the plaintiff did not seek the proper

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relief and absolutely denied Musammat Tulsa's right of lien, we do not allow him any costs as against Musammat Tulsa.

MAHMOOD, J.—I agree entirely with the first portion of the judgment delivered by the learned Chief Justice, namely, the portion which ends where the decree in the case begins. I also agree with him as to the latter portion of the judgment so far as it deals with the decree to be made in this case, because I understand that the learned Chief Justice and my brother Straight are of opinion that the judgment of the majority of the Full Bench of this Court in Second Appeal No. 1210 of 1888 requires such a decree. I am bound by the majority of this Court, and I therefore agree also in the decretal order.

Decree Modified.