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any such prohibition as could render s. 276 applicable to the case. In support of what I have just said, I may mention the case of *Bishen Chunder Surma Chowdhry* v. *Mun Mohinee Dabee* (1) in which it was held that s. 270 of the old Code, corresponding to a part of the present s. 295, did not apply to a case in which property had *not* been sold in execution of a decree.

I hold therefore that because the application of the 31st August, 1881 was not an application for execution by attachment of the property in suit, because it did not end in an order for attachment, because the order passed, even supposing it were an order for attachment, was never duly intimated and notified, there was no such attachment of the property as could render the prohibitions of s. 276 available to the present defendants for the purposes of executing their decrees against the property sold under the sale-deed of 3rd January, 1882.

There was Manni Ram's decree under which the property was attached; but that attachment could only invalidate such alienations as could be taken to be in derogation of his rights, so far as the decree, in execution whereof he attached the property, is concerned. But since the defendants never properly attached the property in execution of the decrees which they now seek to execute against that property, since that property has by a valid sale passed from the hands of their judgment-debtor and become the property of the plaintiff—a *bonâ fide* purchaser for value—they cannot either avoid the deed of sale or execute their decrees against the property. For these reasons, the appeal must be dismissed with costs.

Appeal dismissed.

1885
March 18.

Before Mr. Justice Brodhurst and Mr. Justice Mahmood.

RODH MAL (DEFENDANT) *v.* RAM HARAKH AND ANOTHER (PLAINTIFFS)*

Mortgage—Purchaser of part of mortgaged property without notice—Suit for sale of whole property in satisfaction of mortgage—Marshalling—Apportionment.

The equities which apply to a puisne incumbrancer in the marshalling of securities apply also to a *bonâ fide* purchaser for value, without notice, of a portion of property the whole of which was subject to a prior incumbrance. *Tulsi*

* Second Appeal No. 1590 of 1883, from a decree of G. E. Knox, Esq., District Judge Mirzapur, dated the 31st August, 1883, affirming a decree of Munshi Madhofal, Munsif of Mirzapur, dated the 23rd January, 1883.

(1) 8 W. R. 501.

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RODH MAL v. RAM HARAKH.

Ram v. *Munnoo Lal* (1), *Nowa Koer* v. *Abdul Rahim* (2), *Bishonath Mookerjee* v. *Kisto Mohun Mookerjee* (3), and *Khetoosee Cherooria* v. *Banee Madhub Doss* (4), referred to.

The mortgagees of two properties, one of which had, subsequently to the mortgage, been purchased for value *bonâ fide* by one who had no notice of the incumbrance, brought a suit to enforce their lien against both the properties originally owned by the mortgagor, impleading as defendants both the mortgagor and the purchaser.

Held that, while there was no doubt that, if the purchaser was compelled to pay more than the share of the mortgage debt apportioned on the property purchased by him, he would be entitled to contribution, yet, in a suit so framed, and having regard the array of parties, such an apportionment could not be made at the stage of second appeal.

THE facts of this case were as follows :—Jaipal, Bindraban, Parmanand, and Ramanand owned a three annas two pies and eight karants share in a village called Misarpura, and a one anna seven pies and four karants share in a village called Bhawalpura. The four persons owned these shares in the following proportions :—Jaipal was owner of one-third only, Bindraban was owner of one-third only, Parmanand and Ramanand owned the remaining one-third. These persons, on the 17th July, 1875, made a simple mortgage of their rights and interests in the above-named villages to the plaintiffs in this case, Ram Harakh and Sheo Prasad. Subsequently, on the 20th July, 1877, the rights and interests of Jaipal in Bhawalpura were sold in execution of a simple money-decree, and purchased by Rodh Mal, defendant in this case, the equity of redemption in the other village, namely, Misarpura, remaining in the hands of Jaipal. On the 15th April, 1878, Bindraban made a simple mortgage of his third share in both the villages to the same mortgagees. On the same day, Parmanand and Ramanand made a similar mortgage of their share in both the villages in favour of the same mortgagees. The effect of these mortgages was to pay off the money due by them on account of the mortgage of the 17th July, 1875. The present suit was instituted by Ram Harakh and Sheo Prasad, with the object of enforcing the mortgage of the 17th July, 1875, to the extent of the third share originally owned by Jaipal in both the villages. To this suit were impleaded Jaipal himself and Rodh Mal as the purchaser of his rights and interests in mauza Bhawalpura. There were various pleas set up by the defendant

(1) 1 W. R., 353.
(2) W. R., January to July, 1864, p. 374.
(3) 7 W. R., 483.
(4) 12 W. R., 114.

Rodh Mal, but it is necessary to notice only the second and fourth, which related to the questions which required determination in second appeal. These pleas, in substance, were—(1) that the defendant-appellant having purchased the property for value and without notice of the prior mortgage, it (the property) was not liable to be sold again to satisfy the mortgage of 1875; (2) that even if it were liable to be so sold, it was only liable to the extent of the mortgage-debt that might be apportioned on the property purchased by the defendant-appellant. Upon this state of things, the Court of first instance decreed the claim, and the lower appellate Court dismissed the appeal of the defendant Rodh Mal, and confirmed the decree. The defendant appealed to the High Court.

Pandit *Ajudhia Nath*, for the appellant.

Munshi *Hanuman Prasad*, and Munshi *Kashi Prasad*, for the respondents.

MAHMOOD, J.—In the second appeal before us, two questions have been argued, the first one relates to marshalling, and the second relates to contribution or apportionment. It is admitted that when this property was brought to sale, the mortgage of the 17th July, 1875, was not notified, and no evidence was adduced by the plaintiff to show that the defendant-appellant had notice of the aforesaid mortgage. Is the defendant-appellant then entitled to a decision in his favour on the two questions? In the first place, I refer to the formulation of the rule in s. 81 of the Transfer of Property Act (IV of 1882), not because the rule is literally applicable to this case (which it is not), but because the principle of this rule applies equally to the facts of the present case. Now s. 81 runs as follows :— "If the owner of two properties mortgage them both to one person, and then mortgages one of the properties to another person, who has not notice of the former mortgage, the second mortgagee is, in the absence of a contract to the contrary, entitled to have the debt of the first mortgagee satisfied out of the property not mortgaged to the second mortgagee, so far as such property will extend, but not so as to prejudice the rights of the first mortgagee, or of any other person having acquired for valuable consideration an interest in

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either property." This of course relates only to a puisne mortgage of a portion of the property, the whole of which was subject to a prior mortgage ; but there is no reason why this doctrine should not be applied to the case of the defendant-appellant. The rule has been followed in several cases, and I now proceed to refer to some of the cases which are important. The first case I would refer to is the case of *Tulsi Ram* v. *Munnoo Lal* (1). In this case the mortgagor, a few days after hypothecating a village as security to the Government, mortgaged the same village with other property to the plaintiff in that case. The deed of mortgage was immediately registered, but the security-deed was not registered till long afterwards, and under the Registration Act, XIX of 1841, the Court in that case considered that the mortgage-deed had priority over the security-bond. The village having been sold by the Collector on account of a sum due under the security-bond, it was held by Morgan (now Sir Walter Morgan) and Shumboo Nath Pandit, JJ., that though the purchaser took subject to a prior mortgage, yet the mode in which the property had been dealt with by the mortgagor entitled the purchaser to require that the other property should first be applied in satisfaction of the mortgage-debt. The second case that I would refer to is the case of *Nowa Koer* v. *Abdul Rahim* (2). In that case Mr. Justice Jackson is reported to have said as follows :—"It appears that the plaintiff in this case had a lien on three estates belonging to the debtor, and that a third party, having obtained a decree for money due from the same debtors, recovered the money by the sale of one of the plaintiff's three mortgaged estates. This sale does not release that estate from the mortgage, but it forces the plaintiff to take measures, in the first place, to recover the amount due to him from the remaining estates included in his mortgage-deed. If any balance remains after he has realized all which he can realize from these two remaining estates, he can then return to the third estate to recover the balance. No injustice is done to the plaintiff by requiring him to take satisfaction out of funds which are within his power for this purpose, and so placed by the deed ; while, on the other hand, very great injustice might be done to other parties by allowing the plaintiff to proceed against the estate which has

(1) 1 W. R., 353. (2) W. R., January to July, 1864, p. 374.

been already sold." And then, referring to facts very similar to those that exist in this case, the learned Judge went on to say: -- "If, then, the plaintiff has entered into any new and subsequent contract, varying the terms of the first contract, he cannot thereby injure the rights of parties who have succeeded to the interest of his debtor prior to the subsequent contract." The principle of equity on this subject is very clearly laid down in the text-books (chap. XII, Story's *Equity Jurisprudence*). There is another case—*Bishonath Mookerjee* v. *Kisto Mohun Mookerjee* (1)—but I wish to rely principally on the judgment of Norman, J., in that case, who has taken the same view as I take in this case. After laying down this rule with reference to a puisne mortgagee, that learned Judge proceeds to observe (p. 484)—"Of course, a subsequent purchaser of one of the estates has just as great an equity as an incumbrancer." There is another case—*Khetoosee Cherooria* v. *Banee Madhub Doss* (2), in which the learned Judges doubted whether the doctrine of marshalling of securities should be introduced in this country. There is, however, no authority which goes the other way. I hold that the equities which apply to a puisne incumbrancer in the marshalling of securities apply also to a *bonâ fide* purchaser for value without notice, such as the defendant-appellant in this case.

In Mr. Justice Story's work on *Equity Jurisprudence*, vol. I, there is a note at page 613 to the following effect:—"Where a judgment-debtor owned two tracts, subject to the lien of the judgment, and sold one tract, the vendee had a right to have the other tract first applied to the judgment, and this right is paramount to that of subsequent creditors having a lien only on the unsold property, to have the prior creditor, who had a lien on both, satisfy himself from the estate which had been sold.—McCormick's Appeal 57, Pem. St. 54. And that *bonâ fide* purchasers from judgment-debtors have a right to have the debts satisfied from the unsold estate or that last sold."

I have not been able to refer to the authorities upon which this proposition is based, but this view of the law, as I have already shown, has been taken in various cases in this country. It is clear to me that the decree of the lower Courts cannot stand in

(1) 7 W. R., 483. (2) 12 W. R., 114.

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the present form. I must now consider the second question—as to apportionment. There is no doubt that if the defendant is compelled to pay more than the share of the debt apportioned on the property, he is entitled to contribution. But the question in this case is, whether in a suit framed like the present, in which the plaintiff sues to recover a certain sum of money, and having regard to the array of parties, such a question can be determined? I am of opinion that such an apportionment cannot be made in this case at this stage after the manner in which it has been tried. In my opinion, the appeal should be partially decreed, and the decrees of the lower Court modified to the effect that the rights and interests of the defendant-appellant in mauza Bhawalpura should not be brought to sale till the plaintiff has, in the first instance, resorted to the share of Jaipal in Misarpura for recovering the mortgage-money, and that the share of the defendant-appellant be brought to sale for the purpose of recovering such balance as may remain due after the sale of Jaipal's rights in Misarpura. I would modify the decree of the lower Courts accordingly, but make no order as to costs.

BRODHURST, J.—I concur in modifying the decree of the lower appellate Court as proposed by my learned colleague.

1885
March 23.

Before Mr. Justice Oldfield and Mr. Justice Mahmood.

MUHAMMAD AWAIS (PLAINTIFF) *v.* HAR SAHAI (DEFENDANT).*

Muhammadan Law—Inheritance—Devolution not suspended till payment of deceased ancestor's debts.

A creditor of *A*, a deceased Muhammadan, under a hypothecation bond, obtained a decree on the 20th December, 1876, for recovery of the debt by enforcement of lien against *M*, one of *A's* heirs, who alone was in possession of the estate; and, in execution of the decree, the whole estate was sold by auction on the 21st March 1878, and purchased by the decree-holder himself. *J*, another of *A's* heirs, was not a party to these proceedings. On *J's* death, her son and heir *A. H.* conveyed to *M. A.* the rights and interests inherited by him from his mother, namely, her share in *A's* estate. The purchaser of the share thereupon brought a suit against the decree-holder for its recovery.

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* Second Appeal, No. 736 of 1884, from a decree of Muhammad Nasir Ali Khan, Subordinate Judge of Moradabad, dated the 5th April, 1884, affirming a decree of Maulvi Ahmad Hasan, Munsif of Amroha, dated the 21st September, 1883.