1903
March 7.

FULL BENCH.

Before Sir John Stanley, Knight, Chief Justice, Mr. Justice Blair and Mr. Justice Burkitt.

WAHID-UN-NISSA AND OTHERS (DEFENDANTS) *v.* GOBARDHAN DAS (PLAINTIFF) AND KAIM ALI KHAN AND OTHERS (DEFENDANTS).*

Mortgage—Prior and subsequent incumbrancers—Suit by prior incumbrancer not making subsequent incumbrancer a party—Suit for redemption and sale by puisne mortgagee—Rights of purchaser at auction sale under the decree in the first suit and of the assignee of the original mortgagee.

One K, holding a first mortgage on certain property, brought a suit for sale on his mortgage and obtained a decree. B, a creditor of K, attached the decree, and having put up the mortgaged property for sale, purchased it himself. After this G, a puisne mortgagee of the same property who had not been made a party to K's suit, brought a suit to redeem K's mortgage and sell the property. K. transferred his rights as mortgagee to P, who was thereupon made a defendant. G obtained a decree for redemption and sale.

Held that P was entitled to the whole amount which G had to pay for redemption of the prior mortgage with the exception of the amount of the purchase money paid by B at the auction sale, which amount, and that only, would be due to B or his representatives. *Dip Narain Singh* v. *Hira Singh* (1) approved.

THE facts of this case are as follows. On the 19th of April, 1878, Musammats Habiban and Bina made a simple mortgage of 544 bighas 2 biswas in favour of Kaim Ali Khan, Mazhar Ali Khan and Nazar Ali Khan for Rs. 1,500. On the 29th of January, 1886, Musammat Habiban alone mortgaged a one-fourth share of the same property to one Gobind Ram. The first mortgagees brought a suit upon their mortgage against one of their mortgagors and the heirs of the other, and obtained a decree for sale on the 1st of August, 1889. To that suit the puisne mortgagees were not made parties. One Bansidhar held a simple money decree against Kaim Ali Khan and others the first mortgagees, and in execution thereof caused their decree on the mortgage of the 19th of April, 1878, to be attached. As attaching creditor he took out execution of the decree, caused the mortgaged property to be sold by auction on the 24th of March, 1894, and purchased it himself for Rs. 1,050. On the 24th of November, 1884, Bansidhar sold the said property to

* Appeal No. 43 of 1900, under section 10 of the Letters Patent.

(1) (1897) I. L. R., 19 All. 527.

Wahid-un-nissa and Jan Muhammad for Rs. 4,400, and the vendees on the same date made a usufructuary mortgage of it to Dungar Singh and others for Rs. 6,000, and the usufructuary mortgagees were put into possession.

Gobind Ram, the second mortgagee, brought a suit for sale on his mortgage and obtained a decree on the 23rd of February, 1892. When in execution of that decree he sought to bring the mortgaged property to sale he was not permitted to do so by reason of the prior sale of the 24th of March, 1894. He thereupon, on the 4th of November, 1894, assigned his decree to one Gobardhan Das.

On the 7th of December, 1894, Gobardhan Das instituted a suit for redemption of the mortgage of 1878. The ground of his claim was that as Gobind Ram had not been made a party to the suit brought by the first mortgagees, the decree obtained in that suit and the auction sale held in execution of that decree were not binding upon him; that as subsequent mortgagee of the property he had still a right to redeem the first mortgage, and that consequently the plaintiff by virtue of his assignment from Gobind Ram was entitled to redeem. The plaintiff prayed for a decree for redemption of the mortgage of 1878, upon payment of Rs. 1,050, the amount of sale consideration paid for the mortgaged property, or such other sum as the Court might declare to be payable, and for possession of the property comprised in the first mortgage.

After the institution of this suit, namely on the 17th of December, 1894, the first mortgagees conveyed to one Prasadi Lal all their rights under the mortgage of 1878 and the decree obtained on that mortgage, and Prasadi Lal was accordingly added as a defendent to the suit.

Wahid-un-nissa and Jan Muhammad denied the right of the plaintiff to redeem the first mortgage, and asserted that as Gobind Ram was the mortgagee of only one fourth of the property, the claim to redeem the remaining three fourths was not maintainable, and that redemption could take place, if at all, only upon payment of the whole amount due under the mortgage of 1878, which they alleged to be Rs. 9,182-0-6, and not upon payment of the sale price.

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The defence of Dungar Singh and others mortgagees from these defendants was very similar, only that they alleged a larger sum to be due upon the first mortgage.

Prasadi Lal urged that the plaintiff was not entitled to redeem except upon payment of the whole amount due upon the mortgage, and claimed to be entitled to the whole of that amount with the exception of Rs. 1,050, the amount of consideration paid by Bansidhar.

The Court of first instance (Subordinate Judge of Aligarh) was of opinion that as Gobind Ram was a mortgagee of a one fourth share of the property, the plaintiff was entitled to redeem that share only on payment of a fourth part of the mortgage money, which the parties admitted amounted to Rs. 10,000 on the date of the decree of that Court. The claim for possession was dismissed, and a decree was made for sale upon payment of Rs. 2,500 to which it declared Prasadi not to be entitled.

From this decree the plaintiff appealed, and Prasadi Lal filed objections under section 561 of the Code of Civil Procedure.

The lower appellate Court (District Judge of Aligarh) held that the plaintiff was entitled to redeem the whole of the property in suit upon payment of Rs. 10,000 admitted to be due upon the first mortgage on the 30th of September, 1896, and further interest on the said amount up to the date of the decree of the appellate Court. The learned Judge next proceeded to consider the respective rights of the rival defendants to the said amount, and came to the conclusion that Wahid-un-nissa and Jan Muhammad were entitled to the Rs. 1,050 paid by Bansidhar and interest on that amount, and that Prasadi Lal as representing the first mortgagees was entitled to the balance. He also held that the plaintiff should be granted a decree for sale.

Against this decree the defendants Wahid-un-nissa and Jan Muhammad appealed to the High Court. The appeal came before a Division Bench (1), the members of which differed in opinion as to the proper application of the Rs. 10,000, Banerji, J, holding that Prasadi Lal was entitled to the whole amount paid for redemption of the prior mortgage, except the amount of the purchase money paid by Bansidhar at the auction sale and interest

(1) I. L. R., 22 All., 453.

thereon, which amount alone was payable to Bansidhar or his representatives; while Aikman, J, was of opinion that the auction purchaser, or his representative, was entitled to the whole amount. Under section 575 of the Code of Civil Procedure the decree of the Court below was affirmed, and from this decree the defendants preferred an appeal under section 10 of the Letters Patent.

Messrs. *Karamat Husain* and *Abdul Raoof*, for the appellants.

Pandit *Sundar Lal*, Pandit *Moti Lal Nehru* and Munshi *Ratan Chand*, for the defendants.

STANLEY, C. J.—The facts of this case are fully stated in the judgments of this Court, which are reported in the Indian Law Reports, 22 Allahabad, at page 453. It may be convenient, however, for me to state a few of them. Musammats Habiban and Bina, being the owners of certain property made a simple mortgage of it in favour of Kaim Ali Khan, Mazhar Ali Khan and Nazar Ali Khan on the 19th of April, 1878, to secure a sum of Rs. 1,500, and on the 29th of January, 1886, Musammat Habiban alone mortgaged a fourth share in the same property to one Gobind Ram, and subsequently made two other mortgages. The first mortgagees brought a suit on their mortgage against one of the mortgagors and the heirs of the other, and obtained a decree for sale on the 1st of August, 1889. The puisne mortgagees were not impleaded in that suit. Bansidhar, one of the defendants in the suit out of which this appeal has arisen, held a simple money decree against Kaim Ali and the other first mortgagees, and in execution of that decree he caused the decree of the first mortgagees to be attached, and as attaching creditor he took out execution of the decree, and caused the mortgaged property to be sold by auction on the 24th of March, 1894, and purchased it himself for Rs. 1,050. On the 24th of November, 1894, he sold the property to the defendants, Wahid-un-nissa and Jan Muhammad, for Rs. 4,400, and these purchasers on the same date made a usufructuary mortgage of it in favour of Dungar Singh and others, the fourth party defendants, to secure Rs. 6,000. Gobind Ram, the second mortgagee, who, as I have said, had not been impleaded in the suit of the first mortgagees, brought a suit for sale on his mortgage, and obtained a decree on the 23rd of

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February, 1892. In consequence of the prior sale of the 24th of March, 1894, he was unable to bring to sale the mortgaged property, and consequently he assigned his decree to the present plaintiff, Gobardhan Das, on the 4th of November, 1894, and as assignee of this decree Gobardhan Das brought the present suit on the 7th of December, 1894. On the 17th of December, 1894, Prasadi Lal (the fifth party defendant) purchased the interest of the first mortgagees in the mortgaged property and in the decree which the first mortgagees had obtained, and was added as a defendant to the suit. The claim of the plaintiff is based on the fact that Gobind Ram was not made a party to the suit brought by the first mortgagees, and that consequently the decree obtained in that suit and the auction sale held in execution of it were not binding on Gobind Ram, and therefore, as subsequent mortgagee, Gobind Ram had the right to redeem the first mortgage, and the plaintiff as assignee of the interest of Gobind Ram was likewise entitled to redeem. It is unnecessary to state in detail the various proceedings in the lower Courts; suffice it to say that it was ultimately held on appeal from the Court of first instance that the plaintiff was entitled to redeem the whole property upon payment of Rs. 10,000, the sum admitted to be due on the first mortgage on the 30th September, 1896, and further interest from that date up to the date of the decree of the appellate Court. It was held by the lower appellate Court that Wahid-un-nissa and Jan Muhammad, the transferees of the interest of Bansidhar, the auction purchaser, were entitled, out of the moneys so paid, to Rs. 1,050, being the sum paid by Bansidhar for the purchase of the property and interest on that amount, and that Prasadi Lal, as representing the first mortgagees, was entitled to the balance. The Court also held that the plaintiff was entitled to a decree for sale, and made a decree accordingly.

From this decree an appeal was preferred to this High Court, and was heard before my brothers Banerji and Aikman, who differed in opinion as to the proper application of the Rs. 10,000, Banerji, J., holding that Prasadi Lal was entitled to the whole amount paid for redemption of the prior mortgage, save and except Rs. 1,050, the amount of the purchase

money paid by Bansidhar at the auction-sale, and interest on that sum, and that this latter amount, with interest, alone was payable to Bansidhar or his representatives; while Aikman, J., was of opinion that the auction purchaser or his representatives were entitled to the whole amount. Under the provisions of section 575 of the Code of Civil Procedure the decree of the Court below was affirmed.

From this decree the present appeal has been preferred under section 10 of the Letters Patent. The appeal has been exhaustively and ably argued by the learned counsel and advocate for the parties interested in the only question submitted for our determination. This is the question: to whom the sum of Rs. 10,000 payable for redemption of the prior mortgage is to be paid?

Mr. *Karamat Husain* on behalf of the appellants contended that Bansidhar, the auction purchaser, having purchased at the auction-sale the interest in the property of as well the first mortgagees as the mortgagor, no interest in the property was left for the benefit of the first mortgagees, that the auction purchaser having acquired the equity of redemption of the mortgagor as also the interest of the first mortgagees, he, and he alone, became entitled to the redemption money, and the first mortgagees or their assignees have no right to share in it.

Pandit *Sundar Lal* on behalf of the respondents contended that the auction purchaser was under the circumstances only entitled to hold up the first mortgage, to satisfy which the sale took place, as a shield; that the measure of the shield was the amount due on the first mortgage; but that in no event could the amount recoverable by him or his assignee exceed the sum which he had actually paid for the property.

It is not disputed that in every suit brought for sale by a prior mortgagee a puisne mortgagee of whose interest the plaintiff has notice should, under section 85 of the Transfer of Property Act, be joined as a party in order that he may have an opportunity of exercising his right of redemption, and that where a prior mortgagee has obtained a decree for sale without making the subsequent mortgagee a party to his suit, the right of redemption of the latter does not become extinct, that he is

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entitled to exercise it even after a sale has taken place in execution of a decree obtained by the first mortgagee. He is entitled, according to the rulings of this Court, to be placed in the same position as he would have occupied if he had been made a party to the suit. It is also conceded that, as was held in the case of *Dip Narain Singh* v. *Hira Singh*, (1) he could redeem the prior mortgagee only upon payment of the whole amount due upon the mortgage. The puisne mortgagee in fact cannot be prejudiced by a sale which has taken place behind his back and in contravention of the express provisions of section 85 of the Act to which I have referred. Let us see what the position of the auction purchaser was. He knew, or must be taken to have known at the time of the sale, that there was a puisne incumbrance affecting the property, and that the puisne incumbrancer had not been impleaded in the suit brought by the first mortgagees. It is admitted that he must be taken to have had such notice. In purchasing therefore at the auction-sale he was aware, or must be taken to have been aware, that it was open to the puisne incumbrancer to institute a suit for redemption of the first mortgage, and for sale of the mortgaged property. His position was therefore not that of an innocent purchaser, and he cannot claim the favourable consideration which an innocent purchaser might be entitled to, or any exceptional treatment whatsoever. He purchased the property with the knowledge that it might be redeemed by the puisne mortgagee, but possibly in the expectation that it would not be redeemed. He purchased it, no doubt, with the knowledge that if it were redeemed he would at least recover back the amount of his purchase money, and would therefore meet with no serious loss. The value of the property was, in the eyes of the purchasers, no doubt depreciated by the fact that there was every likelihood of the institution of a suit for redemption. Bansidhar purchased in fact a law-suit, and it may be, as things have turned out, a costly law-suit. But he must abide by the consequences following on the purchase of a bad title. Can it be said that a purchaser purchasing property under such circumstances for a sum of Rs. 1,050

(1) (1897) I. L. R., 19 All., 527.

can rightly claim the entire moneys, namely Rs. 10,000, which the puisne mortgagee was liable to pay for redemption, and which, I am entitled to assume, he would have paid to the first mortgagees if he had had an opportunity of redeeming the property before the auction-sale took place, as he was entitled to do? The assignees of Bansidhar can stand in no higher position than that which he occupied. Let us next see what the position and right of the puisne incumbrancer were. He had a right to pay off the amount due under the first mortgage, and upon such payment become the holder of the first charge on the property with power to realize that charge, as also the amount of his puisne incumbrance, by a sale of the mortgaged property, unless the auction-purchaser as owner of the equity of redemption chose to redeem him. Section 74 of the Transfer of Property Act in express terms gives him this right. The tender under that section must be made to the prior mortgagee. This was undoubtedly the right of the puisne mortgagee. I may here also observe that a puisne incumbrancer in redeeming a prior mortgage has an interest in seeing that the redemption money reaches the hands of the prior mortgagee, inasmuch as the payment to the prior mortgagee relieves his debtor, the mortgagor, from the incubus of the prior mortgagee's debt. It is in the interest of a creditor that his debtor should be a solvent person. If, as is contended for here on the part of the appellants, the entire redemption money is to go into the pockets of the auction purchaser or his assignees, the debt of the first mortgagees, so far as it has not been satisfied by the proceeds of the auction-sale, will remain a subsisting debt, in respect of which the first mortgagees will be entitled to apply for and obtain an order against the mortgagor under section 90 of the Transfer of Property Act. Therefore, notwithstanding the fact that the puisne incumbrancer has paid money sufficient to satisfy the prior mortgagee's debt, that debt so intended to be satisfied would, according to the appellants' contention, remain to a large extent unsatisfied and subsisting. Again, if the appellants' contention be correct, the puisne mortgagee, if upon the sale of his security the proceeds of sale should prove insufficient to satisfy the money due to him on foot of his mortgage, as also the sum paid for the redemption

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of the prior mortgage, would have the right to apply for a decree under section 90 of the Transfer of Property Act against the mortgagor in respect of such deficiency. The mortgagor would thus be liable to have two decrees passed against him under that section for recovery of the same debt, one at the instance of the first mortgagees, and the other at the instance of the puisne incumbrancer. From no point of view can this result be regarded otherwise than as inequitable. In his judgment my brother Aikman observes:—"The only defect in the purchaser's title to the property is that the property is still liable for the amount of the mortgage, owing to the second mortgagee not having been made a party to the suit on the first mortgage." This language does not appear to me to be strictly accurate. The defect, I would say, was that he purchased a defeasible title, that is a title capable of being defeated by the redemption of the first mortgage by the puisne mortgagee. The property in the hands of the purchaser was not merely liable for the amount of the second mortgage, but it was liable, on redemption of the first mortgage by the second mortgagee, to be sold for the realization of the debt due to the second mortgagee, including the sum so paid for redemption. The right then of the puisne mortgagee being, in the first instance, to redeem the first mortgage by payment of the mortgage debt, the question is to whom is such paymant to be made? Clearly the mortgage-debt must be discharged by him, and presumably it ought to be paid to the first mortgagees, or their assignees. The right which a puisne incumbrancer enjoys, as prescribed by section 74 of the Transfer of Property Act, is "to tender to the next prior mortgagee" the amount due to him and acquire in respect of the mortgaged property all the rights and powers of such prior mortgagee. It has not been, and could not be, contended in this case that the auction purchaser is the assignee of the entire mortgage-debt. He is merely the purchaser of the mortgaged property. The remedies of the first mortgagees for recovery of their debt were not exhausted when the auction-sale was completed. They had still a right to proceed against their mortgagors under section 90 of the Transfer of Property Act to recover the balance remaining due to them. The auction purchaser therefore could clearly not

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give a good discharge for the entire mortgage-debt. Such a discharge could only be given by the first mortgagees in conjunction with the auction purchaser. All the rights of the first mortgagees certainly did not pass on the auction-sale to the purchaser. Again, my brother Aikman says:—"Now supposing the said mortgagee pays in the amount due under the first mortgage, from what source will this amount ultimately come? It is clear that it will come out of the property, for unless the property is of sufficient value to satisfy both the first and second mortgages, the second mortgagee will not, in order to recover a comparatively small sum, as in this case, risk the loss of a very large amount." I am unable clearly to understand this observation. It does not seem to me necessarily to follow if the second mortgagee pay in the amount due under the first mortgage, that this amount will ultimately come out of the property. It is impossible to say what amount will be realized on a sale. If, however, the proceeds of the sale of the property should prove insufficient to satisfy the amount paid by the second mortgagee, the second mortgagee will have a remedy over against the mortgagor for recovery of any deficiency. I have no hesitation, after a consideration of the facts and the arguments which have been presented to us, in coming to the conclusion that my brother Banerji's view on this question is correct. The argument presented to us in favour of the other view was ingenious and plausible, but it is supported, so far as I can discover, by no principle of equity. In the case of *Dip Narain Singh* v. *Hira Singh* (1) my brothers Banerji and Aikman thus stated the rule in such a case:—"In this case subsequent mortgagees are seeking to redeem the prior mortgage, and as the property of which the plaintiffs are the subsequent mortgagees, was liable for the whole amount of the prior mortgage, they cannot relieve that property from liability under the prior mortgage without paying the whole of that amount. The fact that the mortgagee himself has purchased the property cannot, in our opinion, make any difference in this respect. Had a third party purchased the property, and had his purchase money discharged the prior mortgage in full,

(1) (1897) I. L. R., 19 All., 527.

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he would undoubtedly have been entitled to claim that a subsequent mortgagee, who, by reason of his not being a party to the prior mortgagee's suit, had the right to redeem him, must pay him the full amount of the prior mortgage. But if the purchase money paid by such a purchaser did not fully satisfy the amount of the prior mortgage, he is not entitled upon redemption by a puisne mortgagee to the whole amount of the prior mortgage. The subsequent mortgagee would, in our opinion, have to pay the full amount due upon the prior mortgage, but that amount would be apportioned between the purchaser whose purchase money satisfied the mortgage in part, and the mortgagee to whom the balance of the mortgage money is due. Where there are more purchasers than one the apportionment should be made between them *pro ratá*, and the balance should go to the mortgagee. But in no case can redemption be allowed except upon payment of the whole amount due under the mortgage." This passage fully supports the ruling of the District Judge in regard to the apportionment of the money to be paid for redemption of the first mortgage. My brother Aikman, however, observes in his judgment in the case before us that "the passage which I have cited was not necessary for the decision of the case before the Court, and must therefore be regarded as an *obiter dictum*;" and that the argument of the learned counsel for the appellants had satisfied him that the opinion expressed in the passage was erroneous. I am wholly unable to agree with him as to this. It appears to me that the passage in question accurately defines the rights of the parties in accordance with every principle of equity. In Mr. Ghose's treatise on the Law of Mortgage in India, 3rd Edition, at page 740, a passage is quoted from a judgment of Mr. Justice Bradley of the United States Supreme Court, which puts the matter clearly and forcibly. It is as follows:—"To redeem property which has been sold under a mortgage for less than the mortgage-debt, it is not sufficient to tender the amount of the sale. The whole mortgage-debt must be tendered or paid into Court. The party offering to redeem proceeds upon the hypothesis that as to him the mortgage has never been foreclosed and is still in existence. Therefore he can only lift it by paying it, the money being

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subject to distribution between the mortgagee and the purchaser in equitable proportions so as to reimburse the latter his purchase money and pay the former the balance of his debt." This ruling appears to me to be consonant with good sense, and with the principles of equity and good conscience. If the appellants had elected to pay off the puisne mortgage, as they might have done, no difficulty would have arisen. They have not done so, however, but have insisted upon the puisne mortgagee redeeming the prior mortgage.

For these reasons I am of opinion that the conclusion arrived at by my brother Banerji is entirely correct, and I would therefore dismiss this appeal.

BLAIR, J. — The parties immediately interested in this appeal are the representative of the first mortgagees of certain immovable property, and the representatives of a purchaser thereof at an auction-sale held in execution of a decree for sale obtained by such first mortgagees in a suit upon their mortgage in which a puisne incumbrancer was not impleaded. The suit out of which this appeal arises is a suit by the puisne incumbrancer, in which he has obtained from the lower appellate Court a decree for sale subject to his redeeming the prior mortgage. Under that decree the sale in the suit of the first mortgagee was treated as a nullity. It has been agreed that the amount due upon the first mortgage up to September 30th, 1896, should be taken to be Rs. 10,000. That sum has been paid by the second mortgagee, and the only point before us for decision is whether the purchaser at the auction-sale is entitled to the whole amount as paid, or whether it belongs to the representative of the prior mortgagees, whose mortgage was redeemed by the payment, subject only to the right of the purchaser to the return of the purchase money paid by him, and subject to his option of redeeming the puisne incumbrancer in his turn. The Court of first appeal has held that the purchaser's right is limited to the amount paid by him at the sale. On appeal to this Court that decision has been affirmed by Mr. Justice Banerji. On the other hand, Mr. Justice Aikman has held that the purchaser is entitled to the whole of the money paid for redemption of the first mortgage. It appears to me that if, setting aside

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what may be delusive formulæ, we direct our attention exclusively to the facts of the case, we shall find that a satisfactory answer is not far to seek. The first mortgagees, in consideration of a pecuniary advance to the mortgagor, obtained from him the execution in their favour of a mortgage-deed. That document, either by express words or by implication of law, embodies a promise to repay the amount advanced, plus the stipulated interest. So far it differs not substantially from an ordinary money bond. It is, however, distinguished from a mere money bond by the further provision that the executant pledges certain immovable property for the repayment of the amount due. It is this incidental provision for the repayment of the money that forms the characteristic feature of, and gives the name to, a mortgage bond. In this country under the provisions of the Transfer of Property Act, it is an essential feature of this combination of a promise to pay with the assignment of specified property as security for such payment that the right of the mortgagee to put in force the ordinary remedies for the unpaid money debt is postponed to the remedy against the security in case he proposes to have recourse to that security. The mortgagee must first satisfy, as far as possible, his claim by the sale of the mortgaged property, and then, and then only, if the price received at the sale fail to satisfy the obligation, can he properly apply to a Court to decree such reliefs as are appropriate to an obligation under a simple money bond, that is to give him a decree under section 90 of the Transfer of Property Act. It is common ground that Bansidhar purchased the property in suit at the sale held in execution of the decree obtained by the first mortgagees. That decree was the ordinary decree for sale on failure to pay the mortgage money within a prescribed time. That Bansidhar had notice, actual or constructive, that he was purchasing a defeasible title must be taken for granted. He must be taken to have known that the sale at which he bought was voidable at the will of the second mortgagee, who had only to redeem the first mortgage to enable him to put up the property for sale in satisfaction of both incumbrances. As against the second mortgagee he had acquired absolutely no title. However, the second mortgagee has redeemed the first mortgage, and

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has totally nullified the purchase by Bansidhar and all devolutions which derive from him. As against the second mortgagee, he has of course no shadow of right to a pice of the sum paid by him to clear off the first incumbrance. So far as the second mortgagee is concerned, the money deposited in Court was deposited to the credit of the first mortgagees solely. *Primâ facie* the money is the money of the prior mortgagees only. The question now to be decided is whether Bansidhar has any equity against the first mortgagees to recover from them any part of the redemption money paid by the second mortgagee, who on such payment has obtained an absolute right to sell the mortgaged property. As it turns out, the first mortgagees sold nothing, and Bansidhar bought nothing. Each party must be taken to have contemplated that contingency. The Court below has given him the price he paid at the sale, and Mr. Justice Banerji has confirmed that decision. He has been treated as a party to a contract where there has been a total failure of consideration. He has been restored to the status he occupied before the sale. The first mortgagees having received from the second mortgagee every penny of the second mortgage money due to them, have received also Rs. 1,050 from Bansidhar. To that sum they have no equitable title. They have received it twice over. As paid by Bansidhar it would have gone *pro tanto* to the reduction of their mortgage debt, and then the second mortgagee would have paid off by redemption the whole of that debt, including the Rs. 1,050, part and parcel of it. The propriety of the judgment of the lower appellate Court upon this point is not in controversy. Neither the first mortgagees who obtained a decree which was a fraud upon the puisne incumbrancer, nor the purchaser who with his eyes open bought under an indefensible decree, merit any special consideration. It is to both in some measure owing that the second mortgagee has been forced into costly and unnecessary litigation. It seems to me that the price paid by Bansidhar at the auction-sale and the price paid by Prasadi Lal for the rights of the first mortgagee are absolutely immaterial, but it is very material to consider what they respectively bought. What Bansidhar bought has been set forth above. What Prasadi

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Lal bought is thus described in the judgment of the first appellate Court:—"Prasadi Lal purchased the rights and interests under the decree and mortgage of defendants first party." That purchase took place after the confirmation of the auction-sale at which Bansidhar bought in the property. Therefore as between Prasadi Lal and the first mortgagees he bought all the remedies to which they were entitled on the failure of the sale upon the mortgage decree to satisfy their claim; that is to say he bought their right to a decree under section 90 of the Transfer of Property Act, their remedy against the hypothecated property having been exhausted. But he bought also the right to have the property redeemed by the second mortgagee, if the latter should seek to enforce his against the mortgaged property. That right never passed to Bansidhar either on his attachment of the mortgage decree or on the sale under that decree. Indeed the right to the personal decree under section 90 does not arise until the mortgaged property has been sold, and the net proceeds of the sale have proved insufficient to pay the amount due upon the mortgage. Unless that ulterior or supplemental right had by some means or other passed to Bansidhar, I can conceive no legal or equitable doctrine under which he can claim from the first mortgagees or their representative the sum paid to them for the redemption of their mortgage beyond the price he paid upon the abortive sale. It seems to me indisputable that on redemption of the first mortgage the right to a decree under section 90 passed to the second mortgagee to be exercised in case the sale under their decree should not satisfy the aggregate sum due in respect of both mortgages. I regret to find myself unable to follow the argument of my brother Aikman, which is, as I understand it, that the money paid to redeem the first mortgage comes ultimately out of the mortgaged property, and that the first mortgagee having exhausted his rights against the property by the sale is not entitled to receive anything more out of that property. But the sale has been nullified by the decree of the Court below, and the price paid at the sale has been ordered to be refunded to the purchaser. Unless, therefore, the first mortgagee is permitted so retain the redemption money, he will have obtained nothing whatever out of his security. As

I have pointed out before, the first mortgagee did not by the sale part with the personal remedy against the mortgagor. For that right he will have received no consideration whatever if the redemption money be ordered to be paid to the purchaser. I therefore concur in the order passed by the Chief Justice, and would dismiss this appeal.

BURKITT, J.—I have had an opportunity of perusing the judgments just delivered by the learned Chief Justice and my brother Blair. I fully concur in the conclusions at which they have arrived, and in the reasons given therefor. I have nothing to add.

BY THE COURT.—The order of the Court is that the appeal be dismissed with costs.

Appeal dismissed.

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P. C.
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March 20.
April 30.

TIRLOK NATH SHUKUL AND OTHERS (PLAINTIFFS) *v.* LACHMIN KUNWARI AND ANOTHER (DEFENDANTS).

[On appeal from the High Court of Judicature at Allahabad.]

Act No. I of 1872 *(Indian Evidence Act), section* 112—*Presumption as to paternity of child born after death of husband—Burden of proof—Illness of husband rendering act of begetting child improbable.*

Where a child was born after the death of the husband, under such circumstances as to give rise to the presumption under section 112 of the Evidence Act (I of 1872). *Held* in a suit by the appellants to dispute the paternity of the child that the burden of proof lay on them, and that on the evidence the presumption was not rebutted (1).

APPEAL from a decree (7th August, 1899) of the High Court at Allahabad, which reversed a decree (22nd March, 1897) of the Subordinate Judge of Gorakhpur.

The suit was brought by the appellants against the respondents to have it declared that the first respondent Musammat Lachmin Kunwari had no son, and that she was not pregnant by her husband at the time of his death.

Present :—Lord DAVEY, Lord ROBERTSON, SIR ANDREW SCOBLE and SIR ARTHUR WILSON.

(1) See *Narendra Nath Pahari* v. *Ram Gobind Pahari*, I. L. R., 29 Calc., 111, Reporter's Note.