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profits and costs. It could never be contended that if before he executed the decree he sold the property or a portion of it that this sale deed without express words would carry with it the right to the mesne profits and costs. In the decision of this Court in *Ram Sahai v. Gaya* (1) Mr. Justice Mahmood has further illustrated the difference between a transfer of property and a transfer of a decree. It is the respondents' misfortune, if, when obtaining a sale deed of the property, they neglected to provide either that the decree should be assigned to them or that the decree-holder should be bound to execute the decree and put them into possession. We wish to point out that in deciding this appeal in favour of the appellant, we do so on the ground that no application could legally be made to execute the decree under section 232. We make this remark lest our present decision should prejudice any suit which the respondent may be advised to institute in order to get the benefit of their sale deed. As a result, we must allow the appeal, set aside the order of the lower appellate Court and restore that of the Court of first instance with costs.

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June 3.

Before Mr. Justice Aikman.

KANIZ FATIMA (DEFENDANT) v. WALI-ULLAH AND OTHERS (PLAINTIFFS).
Benamidar - Suit for sale on a mortgage - Decree giving benamidar a right to redeem - Right to redeem not availed of - Subsequent suit for redemption by alleged beneficial owner barred.

A decree for sale on a mortgage was passed giving a right of redemption to a puisne mortgagee. The puisne mortgagee did not redeem and the decree became absolute. *Held* that no subsequent suit for redemption would lie by a person alleging that he was the real puisne mortgagee and that the person whose name appeared in the decree as puisne mortgagee was merely a benamidar.

THE facts of this case are as follows :—

IN 1891 the predecessor in title of one Musammat Sadiq-un-nissa made a mortgage in favour of Hakim Waris Ali of the property in suit. On the 18th of January 1897 Sadiq-un-nissa and her husband made a mortgage of the same property in favour of

* Second Appeal No. 599 of 1906, from a decree of Pitambar Joshi, Subordinate Judge of Bareilly, dated the 12th of April 1906, confirming a decree of Banko Bihari Lal, Munsif of Bareilly, dated the 30th of June 1905.

(1) (1884) I. L. R., 7 All., 107.

one Ali Jan. In 1900 Hakim Waris Ali brought a suit upon his mortgage, making Ali Jan the puisne mortgagee, a party to the suit. In that suit Hakim Waris Ali got a decree for sale, an opportunity being given both to the mortgagor and to Ali Jan, to redeem Waris Ali's mortgage. The mortgage was not redeemed, and an order absolute was passed under section 89 of the Transfer of Property Act. The present suit was brought by one Wali-ullah, who came into Court alleging that he was the real mortgagee of the mortgage of 1897, and that Ali Jan was his benamidar, and he sued on the strength of his secret title to bring the property to sale after redeeming Waris Ali's mortgage. There is no suggestion that the prior mortgagee knew that Ali Jan was merely a benamidar. The Court of first instance (Munsif of Bareilly) gave the plaintiff a decree and this decree was confirmed on appeal by the Subordinate Judge. The present appeal was preferred by one of the defendants, Kaniz Fatima, who purchased the property from Musammamat Sadiq-un-nissa in 1893.

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Mr. Muhammad Ishaq Khan and Munshi Jang Bahadur Lal, for the appellant.

Maulvi Ghulam Muftaba, for the respondents.

AIKMAN, J.—This appeal arises out of a suit brought by the plaintiff Wali-ullah for sale upon a mortgage after redemption of a prior mortgage. It appears that in 1891 the predecessor in title of one Musammamat Sadiq-un-nissa made a mortgage in favour of Hakim Waris Ali of the property in suit. On the 18th of January 1897 Sadiq-un-nissa and her husband made a mortgage of the same property in favour of one Ali Jan. In 1900 Hakim Waris Ali brought a suit upon his mortgage, making Ali Jan, the puisne mortgagee, a party to the suit. In that suit Hakim Waris Ali got a decree for sale, an opportunity being given both to the mortgagor and to Ali Jan to redeem Waris Ali's mortgage. The mortgage was not redeemed, and an order absolute was passed under section 89 of the Transfer of Property Act. The respondent, Wali-ullah, now comes into Court alleging that he was the real mortgagee of the mortgage of 1897, and that Ali Jan was his benamidar, and he sues on the strength of his secret title to bring the property to sale after redeeming Waris Ali's mortgage. There

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is no suggestion that the prior mortgagee knew that Ali Jan was merely a benamidar. The Courts below have given the plaintiff a decree. Kaniz Fatima, who purchased the property from Musammatt Sadiq-un-nissa in 1893, comes here in second appeal.

In my opinion the first plea in the memorandum of appeal must be sustained. The plaintiff's benamidar was given an opportunity to redeem and failed to avail himself of it. In my opinion it is now too late for the plaintiff to come in and treat the order absolute passed against his benamidar as a nullity. It has been held in many cases that a decision passed in a suit brought by a benamidar binds the beneficial owner. I see no reason why a similar rule should not be applied to the case of a suit brought against the benamidar. In my opinion the plaintiff is bound by the decree in Waris Ali's suit and he has lost his right of redemption. It may be that, as representing Ali Jan, he may pay the money due to the prior mortgagee if an application is made for the sale of the property, but in my opinion his suit, as brought, ought to have been dismissed.

For the above reasons I allow the appeal and set aside the decrees of the Courts below. The appellant will have her costs in all Courts.

Appeal decreed.

REVISIONAL CIVIL.

Before Mr. Justice Aikman.

ABDUL HAMID (PLAINTIFF) v. RIAZ-UD-DIN (DEFENDANT).*

Civil Procedure Code, section 506—Arbitration—Reference made orally, but reduced to writing by the Court—Irregularity.

Where both parties to a pending suit consented to a reference to arbitration and an order of reference was then and there made by the Court in the presence of the parties, though not upon a written application, it was held that it was not open to the Court, having regard to the provisions of section 510 of the Code of Civil Procedure, to supersede that reference, the arbitrator not having declined to act. *Nasserwanjee Pestonjee v. Meer Mynooddeen Khan* (1) distinguished. *Shama Sundram Iyer v. Abdul Latif* (2) and *Lukumibai v. Hajee Widina Cassum* (3) followed.

THIS was an application for the revision of a decree of the Court of Small Causes at Agra. The applicant filed a suit against

* Civil Revision No. 34 of 1907, against the decree of Muhammad Sirajuddin, Judge of the Court of Small Causes, Agra, dated the 9th of March 1907.

(1) (1855) 6 Moo. I. A., 134.

(2) (1899) I. L. R., 27 Calc., 61.

(3) (1899) I. L. R., 23629.

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June 18.