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DURGA
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that a substantial error or defect in procedure has taken place, which affords a ground of second appeal under section 584." This decision, which we are bound to follow, is conclusive against this appeal. The lower appellate court did, we think, exercise its discretion, and having exercised its discretion no second appeal will lie. For these reasons we dismiss the appeal with costs.

Appeal dismissed.

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January 18.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.
SARJU PRASAD AND OTHERS (PLAINTIFFS) v. BINDESHRI BAKHSII PAL
SINGHI AND OTHERS (DEPENDANTS).*

Civil Procedure Code (1882), section 317—Prior and subsequent mortgagees—Purchase of part of mortgaged property in execution of decree on prior mortgage—Suit on second mortgage—Auction purchaser alleged to be benamidar of mortgagor—Act No. IV of 1882 (Transfer of Property Act), section 43.

A portion of certain mortgaged property was purchased by a third party at auction sale in execution of a decree on a prior mortgage.

Held on suit for sale by the subsequent mortgagee that it was not open to the subsequent mortgagee to bring this portion again to sale upon the ground that the auction purchaser was merely a benamidar for the mortgagor. Ram Narain v. Mohanian (1) followed.

THIS was a suit brought by the representatives of the original mortgagee to enforce a mortgage executed by one Bindeshri Bakhsh Pal Singh on the 20th August, 1895, and comprising shares in several villages. So far as the share in one village—Rusia—was concerned, the suit was resisted upon the ground that it had been purchased at an auction sale in execution of a prior mortgage decree by Musammatt Jairaj Kunwari, the wife of Bindeshri Bakhsh Pal Singh. The plaintiffs alleged that this purchase was made merely as the *benamidar* of Bindeshri Bakhsh Pal Singh. Musammatt Jairaj Kunwari's defence was that this contention was not open to the plaintiffs in view of the provisions of section 317 of the Code of Civil Procedure, 1882. The court of first instance (Additional Subordinate Judge of Gorakhpur) dismissed the suit except as regards a very small portion of the mortgaged property. The plaintiffs appealed to the High Court.

* First Appeal No. 1 of 1909 from a decree of Banke Behari Lal, Additional Subordinate Judge of Gorakhpur, dated the 24th of September, 1908.

Babu *Jogindro Nath Chaudhri* (with him Babu *Satyra Chandra Mukerji* and Babu *Binoy Kumar Mukerji*), for the appellants.

Mr. *M. L. Agarwala*, *Munshi Govind Prasad* and *Munshi Iewar Saran*, for the respondents.

STANLEY, C. J., and BANERJI, J.—The suit out of which this appeal arises was brought by the plaintiffs appellants, to enforce a mortgage of the 20th of August, 1895, made by the defendant, *Bindeshri Bakhsh Pal Singh* for himself and as general attorney of his brother's widow, *Musammat Lakhpat Kunwari*, in favour of *Hari Singh*, the predecessor in title of the plaintiffs. The property comprised in the mortgage consisted of a 6 anna 8 pie share in the village *Rusia*, a 2 anna 8 pie share in the village *Tejpur* and a 2 anna 8 pie share in a third village *Nakahi Nagahi*. There is no controversy in this appeal as regards the share in *Tejpur*. The court below has made a decree for the sale of that share and also of a 10½ pie share in *mauza Nakahi Nagahi*. As regards the share in *mauza Rusia*, it has dismissed the claim. That share was purchased at auction in execution of a decree obtained on an earlier mortgage by *Musammat Jairaj Kunwar*, the wife of the first defendant. The share in *Nakahi Nagahi* was sold by the mortgagors to the respondent, *Ram Kumar Naik*, on the 5th of August, 1905. What we have to consider in this appeal is whether the plaintiffs appellants are entitled to a decree for sale of the share in *mauza Rusia* and of the whole of the 2 anna 8 pie share in *mauza Nakahi Nagahi* mortgaged under the mortgage deed executed in favour of *Hari Singh*. As regards the share in *mauza Rusia*, which was purchased at auction by *Musammat Jairaj Kunwari*, the allegation of the plaintiffs is that this purchase was in reality by *Bindeshri Bakhsh Pal Singh* and that *Musammat Jairaj Kunwari* was only his *benamidar*. They say that, as the real purchaser was *Bindeshri Bakhsh Pal Singh*, and he mortgaged it to them, they are entitled to a decree for sale of the share in the aforesaid village. On behalf of the respondent, *Musammat Jairaj Kunwari*, it is urged that the claim against her is barred by the provisions of section 317 of Act No. XIV of 1882, which was the Act applicable at the date of the institution of the present suit.

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We think that, in view of the ruling of the Full Bench in *Ram Narain v. Mohanian* (1), this contention must prevail. In that case it was held that a mortgagee who derived his title from his mortgagor is precluded by the provisions of the aforesaid section from bringing a suit for a declaration that the auction purchaser of the mortgaged property was the *benamidar* of the mortgagor and was not the beneficial owner. This is what the plaintiffs seek to do in the present suit. They seek to have it declared that Musammât Jairaj Kunwari is the *benamidar* of their mortgagor, Bindeshri Bakhsh Pal Singh, from whom they derive title as mortgagees. In view of that ruling the claim as against Musammât Jairaj Kunwari is not maintainable, and this part of the decree of the court below must be upheld, though not on the ground on which that court has made it.

As regards the share in Nakahi Nagahi, it was mortgaged jointly by Bindeshri Bakhsh Pal and Musammât Lakhpat Kunwari. If the mortgage was made by both of them, Ram Kumar Naik purchased the share mortgaged subject to the mortgage, but assuming that the mortgage was not a valid mortgage on behalf of Lakhpat Kunwari, the plaintiffs are in our judgement still entitled to a decree for sale of the 2 anna 8 pie share mortgaged to them. The ground on which we think the plaintiffs are entitled to such a decree is that Bindeshri Bakhsh Pal purported to mortgage the 2 annas 8 pie share on the representation that he was authorized to mortgage that share. If Musammât Lakhpat Kunwari owned part of that share, her interests were admittedly those of a Hindu widow, who succeeded to her husband, and therefore amounted only to a life interest. She is dead and therefore the life interest has determined. Ram Kumar Naik, as purchaser from her, has no longer any right to the property acquired by him under his purchase from her. That property has passed to Bindeshri Bakhsh Pal as the next reversioner. As Bindeshri Bakhsh purported to mortgage the whole of the 2 anna 8 pie share on a representation that he was authorized to make the mortgage, and as he is at present the sole owner of the 2 anna 8 pie share, the mortgage will operate on the 2 anna 8 pie share under the provisions of section 43 of the Transfer of

Property Act. In this view the plaintiffs are entitled to a decree for sale of a 2 anna 8 pie share in Nakahi Nagahi and the decree of the court below must be varied as regards the share in that village comprised in the mortgage.

We accordingly vary the decree of the court below so far that we make a decree for sale of 2 anna 8 pie share of the village Nakahi Nagahi, instead of 10½ pie as decreed by the court below. The appellants will get their costs of this appeal and also in the court below from Ram Kumar Naik, defendant. Musammatt Jairaj Kunwari will get her costs of this appeal from the plaintiffs appellants. We extend the time for payment of the mortgage money for a period of six months from this date. In other respects we affirm the decree of the court below. The objections preferred by Ram Kumar Naik necessarily fail and are dismissed with costs.

Decree varied.

APPELLATE CRIMINAL.

Before Mr. Justice Karamat Husain.

EMPEROR v. BRADSHAW. *

*Criminal Procedure Code, sections 462 (3), 537—European British subject—
Jury—Jury not chosen by lot—Illegality.*

Held that the provisions of section 460 (3) of the Code of Criminal Procedure are imperative, and if there is no choosing of the jury by lot, as provided for by the section, the result is that the whole trial is vitiated—*Brojendra Lal v. King-Emperor* (1) referred to.

IN this case one T. Bradshaw was committed to the Court of the Sessions Judge of Lucknow on charges under sections 474 and 417 of the Indian Penal Code. The date fixed for the trial was the 7th October, 1910. For that date ten European jurors were summoned to attend the Judge's Court at 10 o'clock, but up to 10-35 a.m., only three out of those summoned had appeared, and these were all empanelled without being chosen by lot. The accused was convicted, and appealed to the High Court, urging that the jury which tried him had not been constituted in the manner provided for by the Code of Criminal Procedure.

Mr. C. Dillon (with him Mr. R. F. Bahadurji), for the accused.

* Criminal Appeal No. 825 of 1910 from an order of H. Warburton, Sessions Judge of Lucknow, dated the 10th of October, 1910.

(1) (1901) 7 C. W. N., 188.

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