cannot be revived in order to remedy the error of the court or a party in the pre-emption suit.

In my opinion, the respondents have no right to sue the appellants upon the mortgage of 1884, and their suit should have been dismissed.

I would allow this appeal and dismiss the respondent's suit with costs in all three courts.

KARAMAT HUSAIN, J.—I agree with my learned colleague in the order proposed by him.

BY THE COURT.—The order of the Court is that the appeal be allowed and the respondents' suit be dismissed with costs in all courts.

Appeal allowed.

Before Mr. Justice Karamat Husain and Mr. Justice Chamier.

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January, 20.

RASHIK LAL (DEFENDANT) *v.* RAM NARAIN AND OTHERS (PLAINTIFFS)*

Act No. IX of 1872 (*Indian Contract Act*), *section* 39—*Contract—Mortgage—Part of consideration unpaid—Effect of such non-payment.*

Where on execution and registration of a mortgage an interest in the mortgaged property has vested in the mortgagee the fact that part of the mortgage money as specified in the deed of mortgage has not been paid neither renders the mortgage invalid nor entitles the mortgagor to rescind it at his option. *Gokal Chand* v. *Rahman* (1) dissented from. *Tatia* v. *Babaji* (2), *Subba Rau* v. *Devu Shetti* (3), *Bajrangi Sahai* v. *Udit Narain Singh* (4) and *Baijnath Singh* v. *Paltu* (5) referred to.

THE facts of the case were as follows :—

Bachu Lal and Gulzari Lal were the owners of an indigo factory. They executed a usufructuary mortgage of half of it in favour of Cheda Lal, the father of the plaintiff, in August, 1894. Subsequently they sold the whole of it to Rashik Lal in May, 1895, and left Rs. 750 to be paid to Cheda Lal for the usufructuary mortgage. On 29th August, 1898, Rashik Lal, the defendant, executed a mortgage by way of conditional sale of the indigo factory and the zamindari property in favour of Cheda Lal for Rs. 5,000, which consisted of a hundi for Rs. 2,000, Rs. 125 cash paid

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*Second Appeal No. 355 of 1911 from a decree of H. E. Holme, District Judge of Jhansi, dated the 19th of January, 1911, confirming a decree of Girdhari Lal, Subordinate Judge of Jhansi, dated the 25th of November, 1910.

(1) Punj. Rec., 1907, 274.
(2) (1896) I. L. R., 22 Bom., 176.
(3) (1894) I. L. R., 18 Mad., 126
(4) (1905) 10 C. W. N., 932.
(5) Weekly Notes, 1908, p. 35.

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before execution, Rs. 125 paid on registration, and Rs. 750 on account of the prior usufructuary mortgage. The hundi was, however, stolen by Cheda Lal, and it was not cashed. The defendant served a notice, dated the 28th of September, 1898, on Cheda Lal, threatening to sue him for damages for breach of contract and to prosecute him for fraud and theft; but no such steps were taken. The plaintiffs, who are the sons of Cheda Lal, sue for recovery of Rs. 1,000 and interest thereon, and in default for foreclosure. The defence was fraud, failure of consideration and other like pleas. The court of first instance gave a decree as prayed for; on appeal the learned District Judge confirmed it, but held that the hundi was stolen by Cheda Lal. The defendant appealed to the High Court.

Pandit *Mohan Lal Sandal*, for the appellant, contended that owing to partial failure of consideration, the mortgage deed in suit was invalid and the plaintiffs were not entitled to sue thereon. He relied on *Gokal Chand* v. *Rahman* (1). If the mortgage be held valid, the plaintiffs were entitled to interest up to 28th September, 1898, when notice was served. He relied on section 39 of the Contract Act, and the case of *Subba Rau* v. *Devu Shetti* (2). He distinguished *Bajrangi Sahai* v. *Udit Narain Singh* (3). He referred further to *Ajudhia Prasad* v. *Sidh Gopal* (4) and *Abhai Narain Singh* v. *Padarath Singh* (5).

The Hon'ble Pandit *Sundar Lal*, for the respondents, contended that section 39 of the Contract Act did not apply, inasmuch as a mortgage was a transfer of an interest in the property; it was not a mere contract. As soon as the mortgage deed was executed, the interest in the property passed, and the remedy open to the mortgagor was to sue for recovery of the consideration; but he did not sue. He relied on *Baijnath Singh* v. *Paltu* (6).

Pandit *Mohan Lal Sandal* was heard in reply.

KARAMAT HUSAIN, J.—On the 26th of August, 1898, the defendant, Rashik Lal, executed a conditional sale in favour of Cheda Lal, the predecessor in interest of the plaintiffs, to secure a sum of Rs. 5,000. He stipulated that he would pay the principal

(1) Punj. Rec., 1907, 274.
(2) (1894) I. L. R., 18 Mad., 126.
(3) (1906) 10 C. W. N., 932.
(4) (1887) I. L. R., 9 All., 330.
(5) S. A. No. 1174 of 1910, decided on 11th July 1911 (unreported).
(6) (1908) I. L. R., 30 All., 125.

and interest on Kuwar Sudi Puno, Sambat 1956 (*i. e.*, 18th October, 1899), and would redeem the zamindari property, and that if he failed, the property should be deemed to have been sold, and the consideration was acknowledged to have been received as follows :—

		Rs.
Deducted	...	750
Received before execution of mortgage	...	125
Shall receive at registration ...	...	125
Received a hundi drawn by Cheda Lal	...	4,000

The plaintiffs brought an action for the recovery of Rs. 1,000 principal and Rs. 1,790-1-3 interest, or for possession of the property sold conditionally. They alleged that the sum of Rs. 4,000 had not been paid.

The pleas in defence were that no consideration for the mortgage was paid by Cheda Lal; that the mortgage was obtained by fraud; that compound interest was barred by time and that the plaintiffs were liable to pay damages in consequence of the loss suffered by the defendant on the ground of non-payment of Rs. 4,000. The suit was decreed by the court of first instance. The defendant appealed and contended that the mortgage deed was obtained by fraud; that the sum of Rs. 1,000 sued for was not advanced; that the mortgage contract was rescinded by the defendant; that the mortgage was unenforceable because of its breach by Cheda Lal; that compound interest was not to be awarded, and that the defendant was entitled to damages caused by the non-payment of Rs. 4,000.

The lower appellate court found on all the points raised before it against the defendant appellant, and, dismissing the appeal, confirmed the decree of the court of first instance. In second appeal it is urged that as the sum of Rs. 4,000 was not paid, the mortgage was invalid; that even if it was valid, the defendant, in consequence of the non-payment of Rs. 4,000, rescinded it by his notice, dated the 28th of September, 1898; that he was entitled to do so under section 39 of the Indian Contract Act, 1872 (see 18 Madras, 126; Punjab Record for 1907, p. 274; 10 C. W. N., 923), and that the whole of the mortgaged property cannot be foreclosed. There is no force in

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any of the points taken by the learned vakil for the appellant. There is a fundamental distinction between a contract and a conveyance, *i. e.*, a transfer of an interest in land, and for this reason the rights and duties of the parties to a contract are quite different from the rights and duties of the parties to a conveyance. In the case before us, I am concerned with one of those distinctions which is recognised in section 54 of the Transfer of Property Act.

In a sale, in the absence of any contract to the contrary, the ownership of the property sold passes from the vendor to the vendee as soon as the sale deed is registered. Neither the delivery of possession nor the payment of the price is a condition precedent to the passing of the ownership. The latest case of this Court on the subject is *Baijnath Singh* v. *Paltu* (1).

A mortgage under section 58 of the Transfer of Property Act, is "the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability." The definition shows that a mortgage under the Transfer of Property Act is a transfer of an interest in the land mortgaged and not a mere contract. It therefore follows that no sooner a valid mortgage deed is registered, an interest in the property mortgaged, in the absence of any contract to the contrary, vests in the mortgagee notwithstanding the fact that the mortgage money has not been paid by the mortgagee to the mortgagor. The mere non-payment of the mortgage money cannot have the effect of rendering the mortgage invalid. The remarks of FARRAN, C. J., in *Tatia* v. *Babaji* (2) are worth noticing. He says :—" I am not, however, as at present advised, prepared to assent to the train of thought which puts conveyances of lands in the mofussil perfected by possession or registration where the consideration expressed in the conveyance to have been paid has not in fact been paid in the same category as contracts void for want of consideration. The radical distinction between a perfected conveyance and a contract does not seem

(1) Weekly Notes, 1908, p. 38. (2) (1896) I. L. R., 22 Bom., 176 (183).

to me to have been sufficiently borne in mind throughout the judgement."

Of course, if there is a contract to the contrary in the mortgage deed, no interest in the property mortgaged vests in the mortgagee on the registration of the mortgage deed, but in the mortgage deed of the 29th of August, 1898, there is nothing to that effect. For the above reasons I would hold that the mortgage deed, dated the 29th of August, 1898, was a valid mortgage.

The next point is that the mortgagor by his notice, dated the 28th of September, 1898, rescinded the contract of mortgage on the ground that out of the consideration Rs. 4,000 were not paid by the mortgagee. The operative part of the notice is to the following effect:—"You must return the hundi to us or the money together with the loss suffered by us owing to the non-payment of Rs. 4,000. If you do not do so we shall sue you on the ground of your fraud, dishonesty and breach of contract." There is nothing in the notice, as I read it, to express any intention of rescinding the so-called contract of mortgage. It simply threatens to sue the mortgagee for breach of contract. Supposing that it does convey the meaning contended for, I am of opinion that section 39 of the Indian Contract Act has no application, for the simple reason that it deals with contracts, and a mortgage when registered is not a contract but a transfer. In *Subba Rau* v. *Devu Shetti* (1) MUTTUSAMI AYYAR, J., observed:—"Under section 39 of the Contract Act the mortgagee was entitled to cancel the contract of mortgage on the ground that the mortgagee in contravention of his agreement incapacitated himself for performing it in its entirety."

The terms of the mortgage are not before me, and I am therefore not in a position to say whether there was or was not a specific agreement between the mortgagor and the mortgagee, that no interest in the property mortgaged would pass without the payment of the entire mortgage money. If there was no such stipulation, then, with due respect to the learned Judge, I am unable to hold that section 39 of the Contract Act empowers a mortgagor to rescind a mortgage in which an interest in the property mortgaged has already vested in the mortgagee.

(1) (1894) I. L. R., 18 Mad., 126.

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In *Gokal Chand* v. *Rahman* (1) it was held by a Full Bench that, in the absence of a specific contract postponing payment, failure to pay full consideration as agreed upon whether to the mortgagor or to a prior incumbrancer after the said payment has been demanded by the mortgagor avoids the mortgage and destroys the mortgagee's lien and right to possession even on subsequent tender of the unpaid consideration it being immaterial, whether the non-payment has or has not caused inconvenience or loss to the mortgagor." The previous rulings of the Punjab Chief Court were conflicting and the Full Bench put an end to the conflict. No reason whatsoever is given for the rule laid down, and the radical distinction between a contract and a transfer of an interest in land is totally ignored. With due respect, I am unable to accept the view taken by the Full Bench.

In *Bajrangi Sahai* v. *Udit Narain Singh* (2) MACLEAN, C. J., said:—"I do not for myself see why the mortgage, which was registered, is not a perfectly good mortgage to the extent of the money actually advanced. It is said that this view is inconsistent with that taken by the Madras High Court in the case of *Subba Rau* v. *Devu Shetti* (3). But when we come to examine that case, I do not think it is an authority for the proposition contended for. There the Court found in effect that the mortgagor had a right to cancel the contract and cancelled the contract, and it was also found that the mortgagee had acquiesced in that cancellation for about eight years. Whether there was any power in that case to cancel the contract is a question which we need not enter into. There is no such suggestion in the present case. There is no suggestion that the mortgagor has cancelled the contract or that he had power to do so." The Calcutta case of *Bajrangi Sahai* is, in my opinion, no authority for the proposition that a mortgagor, when the interest in the land mortgaged passed to the mortgagee, has any power to cancel the mortgage. I may note that the reference to the Madras case is wrong. The correct reference is I. L. R., 18 Mad., 126.

(1) 4 Punj. Rec., 1907, 274. (2) (1906) 10 C. W. N., 932.
(3) (1894) I. L. R., 18 Mad., 126.

Section 4 of the Transfer of Property Act does not put an end to the vital distinction between a contract and a transfer of an interest in land, for it only enacts that the chapters and sections of the Transfer of Property Act which relate to contracts shall be taken as part of the Indian Contract Act, 1872. But in a mortgage as soon as an interest in the land mortgaged vests in the mortgagee, the transaction ceases to be a contract and becomes a transfer of immovable property to which section 4 of the Transfer of Property Act does not apply.

The mortgage, dated the 29th of August, 1893, was a single transaction, and the entire property mortgaged was subjected to every pie of the mortgage money advanced. The mortgage of the entire property mortgaged was, in my opinion, therefore, perfectly good to the extent of the sum of Rs. 1,000 (one thousand), which, according to the finding of the lower appellate court, was actually advanced by the mortgagee. The plaintiffs are entitled to recover the sum of Rs. 1,000, with interest at the rate agreed upon. If the defendant fails to pay, they are entitled to foreclose the whole of the property mortgaged. For the above reasons, I would dismiss the appeal with costs. I extend the time for redemption to the 20th of July 1912.

CHAMIER, J.—This was a suit by the respondents upon a mortgage by way of conditional sale made in favour of their father, Cheda Lal, by the appellant, Rashik Lal, on August 29th, 1898. The consideration for the mortgage consisted of a cash advance of Rs. 250, a sum of Rs. 750, due upon a previous mortgage, and a hundi for Rs. 4,000 drawn by Cheda Lal in favour of the appellant upon a firm in Cawnpore. The hundi was stolen from the appellant by a man in the service of Cheda Lal, and the latter failed to make good the amount of the hundi to the appellant. The respondents admit that the greater part of the consideration failed in this way. They have sued for recovery of the sum of Rs. 1,000 and interest thereon in accordance with the deed and for foreclosure in case of non-payment. The suit was resisted upon the ground that as the mortgagee had failed to carry out his part of the contract, his sons were not entitled to enforce the mortgage according to its terms. This defence having been rejected by the courts below, the mortgagor

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has appealed to this Court. He relies upon the decision of a Full Bench of the Punjab Chief Court in *Gokal Chand* v. *Rahman* (1) and the decision of the Madras High Court in *Subba Rau* v. *Devu Shetti* (2). The respondents rely upon the decision of the Calcutta High Court in *Bajrangi Sahai* v. *Udit Narain Singh* (3), a number of decisions of this Court, the last of which is that in *Baijnath Singh* v. *Paltu* (4), and two decisions of the Bombay High Court, cited in the case last mentioned. The cases in this Court and in the Bombay High Court were all cases in which the purchaser of immovable property had failed to pay part of the purchase money, and it was held that the sale was nevertheless a completed transaction and passed title to the purchaser. In this Court it has been held in many cases of the kind that a purchaser suing for possession of property who has not paid the whole purchase money may be required to pay the balance before he is allowed to execute a decree for possession. The Bombay High Court have held distinctly that a vendor of immovable property by a registered sale deed is not entitled to rescind the sale on the ground that part of the purchase money has not been paid. There appears to be no distinction in principle between the case of a sale and that of a mortgage. The reasons for holding that where the ownership of immovable property has been transferred by way of sale, the seller cannot rescind the transaction because the purchaser refuses to pay the price promised, but must sue for the same, seem to apply with equal force to the case where an interest in immovable property has been transferred by way of mortgage and the mortgagee refuses to advance part of the money agreed to be advanced. I think, therefore, that the decision of this Court and of the Bombay High Court support the contention of the respondents. The Calcutta High Court in the case cited gave a decree for foreclosure to a mortgagee, though he had failed to pay the whole of the mortgage money to the mortgagor. The decision of the Punjab Chief Court, no doubt, goes the whole length of the appellant's contention in the present case, but the learned Judges do not seem to have regarded the mortgage as a transfer of an

(1) Punj. Rec., 1907, 274.
(2) (1894) I. L. R., 18 Mad., 126.
(3) (1906) 10 C. W. N., 932.
(4) Weekly Notes, 1908, p. 38.

interest in immovable property or to have distinguished between a contract to mortgage and a completed mortgage. They seem to have decided as they did upon the broad ground that it is inequitable to allow a mortgagee to sue upon a mortgage where he has failed to advance part of the money agreed to be advanced. The Madras decision rests upon the view that in such a case a mortgagor is entitled to rescind the mortgage, and the court seems to have held that the mortgage, in question in the case had in fact been cancelled by the mortgagor. I am not prepared to say that the court is bound in every case to enforce the mortgage according to the letter where the whole of the mortgage money has not been advanced. For example where the mortgagee sues for possession, he may, I think, be required to pay the balance of the mortgage money before he takes out execution of his decree, and there may be other cases in which he may properly be put upon terms. In the present case there seems to be no reason for not passing a decree as prayed. Under the decree, the appellant mortgagor will be given an opportunity of repaying the amount which he received from the mortgagee. Even if the mortgagor in such a case is entitled to rescind the mortgage, he can do so only upon repaying the amount advanced to him. It was suggested in the course of the argument for the appellant that he had in fact rescinded the mortgage. There is no evidence of this. The communication relied upon so far from evincing a desire to rescind shows that he intended to enforce the mortgage. In my opinion, he was not entitled to rescind and never made any attempt to do so. I agree that the appeal should be dismissed, but I would extend the time for redemption to the 20th of July next.

BY THE COURT.—The order of the Court is that the appeal will be dismissed with costs. The defendants will have time to redeem up to the 20th of July, 1912.

Appeal dismissed.