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exercise of its revisional powers on the criminal side under section 439 of the Code of Criminal Procedure to interfere with such orders. The Full Bench ruling in the case referred to is binding upon me. The learned vakil for the applicants prays that permission may be given to him to alter the application into a civil revision, inasmuch as the order passed by the Assistant Collector of the first class is based on the statements of the witnesses who were not allowed to be cross-examined by the applicants. In *Chota Sadoo Peadah* v. *Bhoobun Chuckerbutty* (1) it was laid down that the preliminary inquiry need not be held in the presence of the accused, and in *Queen-Empress* v. *Matabadal* (2), it was ruled that when a Magistrate takes action under section 476 of the Code of Criminal Procedure, it is not necessary to the validity of his order that he should hold a preliminary inquiry. I am, therefore, of opinion that the Magistrate in refusing to give the applicants an opportunity to cross-examine the witnesses did not act in the exercise of his jurisdiction illegally or with material irregularity. For the above reasons, I reject the application.

Application rejected.

APPELLATE CIVIL.

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January, 18.

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

JUGAL KISHORE AND OTHERS (DEFENDANTS) v. RAM NARAIN AND OTHERS (PLAINTIFFS).*

Act No. IV of 1882 (*Transfer of Property Act*), *section* 101—*Purchase—Satisfaction of mortgage on property purchased—Intention of purchaser to keep mortgage alive for his benefit—Presumption.*

In considering the question whether an incumbrance should be deemed to continue to subsist on the ground that the continuance of it was for the benefit of the person who has acquired the property, the point of time to be regarded is the date of the acquisition of the property. If an intention to keep alive a charge on property is inconsistent with the real intention of the parties to the deed by which the purchaser of the property takes an assignment of it, the charge cannot be treated as still subsisting simply because the purchaser afterwards finds that it would have been better for him to have kept the charge alive. *Liquidation*

* Second Appeal No. 416 of 1911, from a decree of H. E. L. P. Dupernex, District Judge of Mainpuri, dated the 21st of February, 1911, confirming a decree of Banke Behari Lal, Subordinate Judge of Mainpuri, dated the 29th of June 1910.

(1) (1868) 9 W. R., C. R., 3. (2) (1893) I. L. R., 15 All., 392.

Estates Purchase Co. v. *Willoughby* (1) followed. *Bindeshuri Singh* v. *Pandit Balraj Sahai* (2) and *Mohesh Lal* v. *Bawan Das* (3) referred to.

THE facts of this case were as follows :—

Adhar Singh and others executed a mortgage for Rs. 405 in favour of Shiva Singh and others, the predecessors of the present plaintiffs, on the 8th of January, 1884. This deed was registered on the 11th of January, 1884. On the 17th and 18th of January, 1898, the mortgagors executed two sale deeds in respect of the mortgaged property in favour of the mortgagees, part of the consideration being the mortgage of the 8th of January. Subsequently a suit for pre-emption was brought by the defendants respondents, which succeeded. The plaintiffs then brought the present suit on their mortgage of 1884. The defendants pleaded that the mortgage was extinguished by the sale deeds of 1898. The court of first instance held that, the pre-emptors having obtained possession of the property, the mortgagees had not acquired any right of ownership therein, and were therefore entitled to sue on their mortgage. He decreed the suit. The lower appellate court confirmed this decree. The defendants appealed.

Babu *Jogindro Nath Chaudhri* (with him Mr. *A. P. Dube*), for the appellants :—

The mortgage must be deemed to be extinguished under section 101 of the Transfer of Property Act. The sale was complete, and the pre-emptor merely stepped into the shoes of the mortgagees. There is no evidence that the latter intended to keep the mortgage alive, or that its continuance would be for their benefit. He cited *Mohesh Lal* v. *Mahant Bawan Das* (3), *Ram Kishan Upadhia* v. *Dipa Upadhia* (4), *Baldeo Prasad* v. *Uman Shankar* (5) and *Ahmad Shah* v. *Wali Dad Khan* (6).

[CHAMIER, J., referred to the ruling in 10 Oudh Cases, p. 49.]

Munshi *Gokul Prasad*, for the respondents :—

The case in 9 Calc., 961, merely held when a prior charge merged into a subsequent security. It is a question of intention, and should be decided in the circumstances of each particular case. No general rule can be inferred from this ruling. *See*

(1) [1898] A. C., 321.
(2) (1906) 10 Oudh Cases, 49.
(3) (1883) I. L. R., 9 Calc., 961
(4) (1891) I. L. R., 13 All., 581.
(5) (1907) I. L. R., 32 All., 1.
(6) Punj. Rec., 1906, 348.

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Ghosh on Mortgage, p. 470. The prior security revives when the latter is ineffectual. See 9 Calc., 961 at p. 975. Merger is not necessarily created by the vesting of the proprietary and mortgagee rights in the same person. Even when there may be a merger, a court of equity will hesitate in holding it so; *Forbes* v. *Moffat*, 18 Ves., 384. Intention may be presumed from the subsequent suit for pre-emption. The continuance of the mortgage would be for the benefit of a mortgagee, whose purchase may be liable to be defeated by the claim of a pre-emptor. In the cases in 10 Oudh cases and the Punjab Record for 1906, the mortgagee desired to enforce his mortgage as well as to remain in possession. This is not the present case. The property has passed out of the possession of the mortgagees. The ruling in 10 Oudh cases refers to an English case which was subsequently upset on appeal.

Babu *Jogindro Nath Chaudhri* was not heard in reply.

CHAMIER, J.—This was a suit for a decree for sale upon a mortgage, dated the 8th of January, 1884, made by Adhar Singh and others, in favour of the respondents. On the 17th and 18th of January, 1898, the mortgagors by two deeds sold the mortgaged property to the respondents for an ostensible consideration of Rs. 1,800, of which Rs. 500 were said to have been retained by the respondents on account of a mortgage of January 11th, 1894. There was no mortgage of that date—the intention was to refer to the mortgage of the 8th of January, 1884. The mistake in the day of the month seems to have been due to the fact that the mortgage of the 8th of January, 1884, was registered on the 11th of January, and the mistake in the year seems to have been a purely clerical error. In 1899, the appellants brought a suit for pre-emption saying that there was no such mortgage as the one referred to in the sale deed, and that the statement in the deed that Rs. 500 had been retained on account of a previous mortgage had been made for the purpose of making it appear that the consideration was larger than it really was. The respondents produced two witnesses, who swore that there was a previous mortgage of the date given in the sale deed. That evidence was disbelieved, and at the last moment the respondents produced a copy of the mortgage of the 8th of January, 1884,

and said that a mistake had been made in the sale deed, and the sum of Rs. 500 had been retained on account of that mortgage. That explanation was rejected and a decree was made for pre-emption on payment of Rs. 1,300. The respondents appealed on another point, saying in their grounds of appeal that they would enforce their rights under the previous mortgage by a separate suit. They brought the present suit in July, 1909. The defence of the appellants was, and is, that if there was any mortgage in existence in favour of the respondents when they (the respondents) bought the property in 1898, it must be taken to have then ceased to exist according to the rule contained in section 101 of the Transfer of Property Act. The respondents contend that the mortgage must be deemed to have continued to subsist, as the continuance of it was for their benefit. The rule contained in section 101 of the Transfer of Property Act reproduces a rule well known to English Courts of Equity, with reference to which many cases are to be found in the English and Indian Reports. Upon the authorities it is quite clear that in considering the question whether an incumbrance should be deemed to continue to subsist on the ground that the continuance of it was for the benefit of the person who has acquired the property the point of time to be regarded is the date of the acquisition of the property. One of the latest English cases in which the rule was considered is that of the *Liquidation Estates Purchase Co.* v. *Willoughby* (1). In his judgement in that case the Master of the Rolls said:—"We take it to be clear that if an intention to keep alive a charge on property is inconsistent with the real intention of the parties to the deed by which the purchaser of the property takes an assignment of it, that charge cannot be treated as still subsisting simply because the purchaser afterwards finds that it would have been better for him to have kept the charge alive." The decision of the Court of Appeal was reversed by the House of Lords on the facts, but the correctness of the statement of the law contained in the judgement of the Master of the Rolls was not challenged. In fact, at page 339 of the report, Lord Macnaghten quotes the following passage from his judgement with approval:—"The answer to this question depends upon the intention

(1) [1898] A. C., 321.

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of the parties at the time and that intention must be found from the terms of the deed and the circumstances under which it was executed". It was contended by Mr. *Gokul Prasad* that at the time of the sale deeds it was for the benefit of the purchasers that the mortgage should continue to subsist in view of the probability or possibility of a claim for pre-emption being preferred. But I do not understand how a mortgage on the property could defeat a claim for pre-emption. A pre-emptor must pay the price actually and in good faith paid for the property by the purchaser, however the price may be made up. The mortgage money was overdue, therefore any person obtaining the property by pre-emption could pay it off, whether the mortgagees consented or not. There might have been some ground for the argument if the mortgage had been with possession for a long term of years as in *Bindeshuri Singh* v. *Pandit Balraj Sahai* (1), but even in such a case, I think, it should be held that the continuance of the mortgage was not for the benefit of the purchaser. In the present case, in the view which I take of the law, there seems to be no ground whatever for holding that the continuance of the mortgage was for the benefit of the respondents. The fact that it would now be convenient for the respondents to be able to set up the mortgage has no bearing on the question. See *Mohesh Lal* v. *Bawan Das* (2). The respondents have themselves to thank for what has happened. They accepted a deed of sale containing incorrect particulars of a previous mortgage and they followed this up by producing absurd evidence in the pre-emption suit. We were asked to hold that the appellants were estopped by their conduct in the pre-emption suit from denying the continued existence of the mortgage, but it seems to be impossible to do that. The appellants were not parties to either the mortgage or the sale. It is not shown that they knew anything about the mortgage. The respondents set up a mortgage in order to prove that the price was Rs. 1,800 and failed to prove it, with the result that the appellants obtained the property free from incumbrances for Rs. 1,300. That was the fault of the respondents. The mortgage was non-existent at the date of the pre-emption suit, and it

(1) (1906) 10 Oudh Cases, 49. (2) (1883) I. L. R., 9 Calc., 961.

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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.

1912 *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

*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. 38.