

entitled to their share of these movables as inherited property.

It will be seen therefore that their Lordships are of opinion that the judgement of the learned Judge of first instance was right on all points. Both plaintiffs and defendants appealed from his decision to the High Court. That Court allowed the plaintiffs' appeal and dismissed that of the defendants. The defendants appealed from both of these decisions. In their Lordships' opinion the High Court ought to have dismissed both appeals. They will accordingly humbly advise His Majesty that the order of the High Court allowing the plaintiffs' appeal should be discharged with costs, and the decree of the Subordinate Judge restored, and that the order of the High Court dismissing the defendants' appeal should be affirmed. The plaintiffs must pay the costs of the defendants' appeal to His Majesty in Council, and the defendants must pay the costs of their unsuccessful appeal.

Solicitors for the appellants:—*Ranken, Ford, Ford and Chester.*

Solicitors for the respondents:—*Barrow, Rogers and Nevil.*  
J. V. W.

## APPELLATE CIVIL.

*Before Mr. Justice Sir Harry Griffin and Mr. Justice Chamier.*

BAKHSI RAM (DEFENDANT) v. LILADHAR AND OTHERS (PLAINTIFFS).\*

*Mortgage—Suit for sale against auction purchaser of mortgaged property—Evidence, admissibility of—Recital of receipt of consideration—Estoppel.*

*Held* that an admission made by a mortgagor in a mortgage deed and also before the registering officer as to the receipt of consideration is admissible in evidence against the purchaser of the mortgaged property at an auction sale in execution of a simple money decree. *Bihari Lal v. Mahdum Bakhsh* (1) followed. *Manohar Singh v. Sumirta Kuar* (2) not followed. *Mahomed Mozuffer Hossein v. Kishori Mohun Roy* (3) referred to.

*Held* also that a purchaser at auction of the right, title and interest of the father alone in joint family property which had been mortgaged by the father was not entitled to raise the plea that the mortgage was made without legal

\* Second Appeal No. 874 of 1912 from a decree of J. L. Johnston, Second Additional Judge of Aligarh, dated the 28th of March, 1912, modifying a decree of Kunwar Sen, Additional Subordinate Judge of Aligarh, dated the 30th of May, 1911.

(1) (1913) I. L. R., 85 All., 194. (2) (1895) I. L. R., 17 All., 428.

(3) [(1895) I. L. R., 22 Calc., 909.

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necessity so long as there was yet time for the sons to challenge the purchase. *Muhammad Muzamil-ullah Khan v. Mithu Lal* (1) distinguished.

THE facts of this case were as follows :—

The suit was brought on the basis of three mortgage deeds, of which one only was the subject of dispute when the case came in second appeal before the High Court. This was a mortgage executed by Kallu, on the 15th of March, 1890, in favour of the respondents. The appellant was the purchaser of the equity of redemption at an auction sale held on the 20th of January, 1909, in execution of a simple money decree against Kallu alone. Kallu and his sons and the appellant were made defendants in the suit. The appellant alone contested it. He questioned the execution and the payment of consideration, and stated that Kallu had no necessity to borrow at all. The plaintiffs examined only one attesting witness to the deed in question and he deposed that the mark of the executant Kallu had not been made in his presence. The court of first instance held the execution and part of the consideration proved and allowed the claim to that extent. On appeal the District Judge decreed the claim in full, holding that the recital of receipt of consideration in the bond and the registration endorsement were sufficient evidence, which was unrebutted, against the appellant. As to the plea of want of legal necessity the District Judge refused to entertain it, on the ground that the plea had not been specifically raised in the court of first instance, which had framed no issue regarding it. The defendant appealed.

Dr. *Satish Chandra Banerji* (for Babu *Durga Charan Banerji*), for the appellant :—

The plaintiffs have not proved that the bond was properly attested within the meaning of section 59 of the Transfer of Property Act. There is no mortgage; *Shamu Patter v. Abdul Kadir Ravuthan* (2). Secondly, the recital in the bond is not binding upon the appellant who is an auction purchaser; *Manohar Singh v. Sumirita Kuar*, (3) *Bisheswar Dayal v. Harbans Sahay* (4). In the recent case of *Bihari Lal v. Makhdrum Bakhsh* (5) the case of an auction-purchaser was left open. There the purchaser was one who had obtained a private transfer. It has been held in

(1) (1911) I. L. R., 33 All., 783. (3) (1895) I. L. R., 17 All., 428.

(2) (1912) I. L. R., 35 Mad., 607. (4) (1907) 6 C. L. J., 659.

(5) (1913) I. L. R., 35 All., 194.

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some cases that an estoppel which is operative against the judgment-debtor need not necessarily be operative against the auction-purchaser; *Mahomed Mozuffer Hossein v. Kishori Mohan Roy* (1). Thirdly, the District Judge should have entertained the plea of want of legal necessity. The plea was raised in the written statement. A purchaser is entitled to raise the plea; *Muhammad Muzamil-ullah Khan v. Mithru Lal* (2).

Babu *Sarat Chandra Chaudhri* (for Babu *Jogindro Nath Chaudhri*), for the respondents, was heard on the first and the third points:—

The case was decided by the two lower courts previous to the publication of the ruling of the Privy Council cited by the appellant. According to the view which prevailed before that ruling the bond in dispute would be regarded as validly attested and sufficiently proved, as the materials now stand on the record. Under the circumstances an opportunity ought to be given to the respondents to produce the other attesting witnesses and prove the document in the light of that ruling.

Then, the appellant is the auction purchaser of Kallu's interest alone and not of that of the sons. His position is no higher than that of Kallu, and he can not raise any pleas not permissible to Kallu himself. Therefore, he is not entitled to raise the question of want of legal necessity. In the case in I. L. R., 33 All., relied on by the appellant, the purchaser, besides being a transferee from the mortgagor alone, had acquired by adverse possession a title to the whole of the family property as against all the members of the family. In the present case the appellant has acquired nothing beyond Kallu's interest.

Dr. *Satish Chandra Banerji*, in reply:—On a sale in execution of a simple money decree against the father alone it is not only the interest of the father that can pass, but the whole family property including the sons' interest can pass, unless the sons prove that the debt was tainted with immorality. In the absence of any such action on the sons' part it must be taken that the appellant purchased the whole family property and is thus entitled to raise the plea of legal necessity.

GRIFFIN and CHAMIER, JJ:—This was a suit by the respondents on three mortgages, dated the 18th of August, 1878, the 15th of

(1) (1895) I. L. R., 22 Cal., 909.

(2) (1911) I. L. R., 33 All., 783.

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March, 1890, and 13th of November, 1898, but for the purposes of the present appeal we may regard it as a suit on the mortgage of the 15th of March, 1890, only. The first defendant to the suit was Kallu, the executant of the mortgage. Defendants 2, 3 and 4 were the sons of Kallu. Defendant 5 was a lessee of the mortgaged property, and defendant 6, who is the appellant here, is a purchaser of the property in execution of a money decree obtained by him against the defendant Kallu. The appellant put the respondents to proof of the mortgage and of the passing of the consideration and he also pleaded that the mortgage had been made without necessity. The first court held that the execution of the mortgage was proved by the evidence of two witnesses Raghunath Prasad and Bhudeo, but that the passing of a portion of the consideration had not been proved. That court accordingly gave the respondent a decree for part only of the sum secured by the mortgage. On appeal the District Judge agreed with the court of first instance that the execution of the mortgage had been proved and held that it was not open to the present appellant to challenge the deed on the ground that it was not supported by necessity. On the evidence he came to the conclusion that the passing of the whole of the consideration for the deed had been proved and he varied the decree of the first court accordingly. In second appeal it is contended:—(1) that the District Judge was wrong in holding that an admission as to the receipt of the consideration made by the executant Kallu in the deed and again before the registering officer was admissible in evidence against the appellant, the auction-purchaser of the property, (2) that the appellant was entitled to raise the question of legal necessity, and (3) that the evidence relied on as proof of the execution of the deed did not as a matter of law amount to proof of the execution of the deed.

The question whether admissions such as those made by Kallu in the present case are admissible against a subsequent auction-purchaser of the property was left open by our decision in *Bihari Lal v. Makhdam Baksh* (1). All that was held in that case was that such admissions are admissible against a subsequent purchaser of the property by a private treaty. But on the authorities we must hold that there is no real ground for distinguishing between

(1) (1913) I. L. R., 35 All., 194.

the case of an auction-purchaser and the case of a purchaser by private treaty. The decision of this Court in *Manohar Singh v. Sumirta Kuar* (1) has been relied on as authority for the proposition that such admissions are not admissible against a subsequent auction-purchaser of the property. The decision in that case was pronounced shortly before the decision of their Lordships of the Privy Council, in *Mahomed Mozuffer Hossein v. Kishori Mohun Roy* (2) was received in this country. In that case their Lordships said that "where one man allows another to hold himself out as the owner of an estate and a third person purchases it for value from the apparent owner in the belief that he is the real owner, the man who so allows the other to hold himself out shall not be permitted to recover upon his secret title unless he can overthrow that of the purchaser by showing either that he had direct notice or at least constructive notice of the real title" and their Lordships decided that this rule applied to a subsequent auction-purchaser of the property. Their Lordships said:—"This principle applies to Abdul Ali, and the appellants are in the same position, as they purchased only his right, title and interest and are equally bound by it." If such an estoppel is binding upon a subsequent auction-purchaser, there can be no doubt that an admission made with reference to property is admissible in evidence against a subsequent auction-purchaser of the property. The value of the admission is another matter. The appellant in the present case must be held to be the representative in interest of Kallu and the statements made by Kallu in the deed and before the registering officer are therefore admissible against him. If there is no ground for distinguishing between the case of an auction-purchaser and the case of a purchaser by private treaty, there can be no doubt of the admissibility in evidence of the statements made by Kallu. On this point there are several recent decisions of this Court. The first ground of appeal, therefore, fails.

With regard to the second ground of appeal, the appellant must be regarded as a purchaser of the rights of Kallu only. His purchase was made as recently as 1909 and might yet be challenged by Kallu's son. He is, therefore, in a different position

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from that occupied by the purchaser in the case of *Muhammad Muzamil-ullah Khan v. Mithu Lal* (1). In that case it was held by the majority of the Court that the purchaser was entitled to challenge a mortgage made by one member of a Hindu family, because he had acquired title to the property, by adverse possession against all the members. We must, therefore, hold that the appellant is not entitled to raise the question of the validity of the mortgage.

With regard to the third ground of appeal we think there ought to be a further inquiry by the lower appellate Court. It appears that there were three supposed attesting witnesses to the mortgage. One named Raghunath Prasad, who was called, said that Kallu did not sign the deed in his presence, therefore, he was not an attesting witness. There is evidence that another supposed attesting witness named Sundar Lal is dead. Nothing is known about the third attesting witness. The respondent in all probability relied on a decision of this Court according to which the evidence of Raghunath Prasad, if believed, was sufficient evidence of the execution. In view of a recent decision of the Privy Council it must be held on the record as it stands that the bond in suit has not been proved. In the circumstances we think that the respondent should be given a further opportunity of producing evidence. We direct that the record be returned to the court below for a fresh finding on the question whether the mortgage deed of the 15th of March, 1890, has been proved. Further evidence will be taken; and on return of the finding ten days will be allowed for objections.

*Issue remitted.*

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## APPELLATE CRIMINAL.

*Before Mr. Justice Sir Harry Griffin and Mr. Justice Chamber.*

EMPEROR v. ALLAHDAD KHAN.\*

*Act (Local) No. IV of 1910 (United Provinces Excise Act), section 63—Criminal Procedure Code, section 537—Unlawful possession of excisable article—Search warrant—Conviction not invalidated owing to absence of warrant.*

Where the superintendent of police and a sub-inspector searched the house of a person suspected of being in illicit possession of excisable articles and such

\* Criminal Appeal No. 123 of 1913 by the Local Government, from an order of R. G. Tute, additional Sessions Judge of Meerut, dated the 30th of November, 1912.