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May, 30.

Before Mr. Justice Muhammad Rafiq and Mr. Justice Piggott.

SARDAR SINGH AND OTHERS (PLAINTIFFS), v. RATAN LAL (DEFENDANT.) *
Act No. IV of 1882 (Transfer of Property Act), section 99—Civil Procedure Code (1908), order XXXIV, rule 14—Hindu law—Joint Hindu family—Mortgage by father alone—Suit on mortgage ending in money decree—Sale of mortgaged property in execution—Suit by sons for redemption.

One N. S., the father and managing member of a joint Hindu family, executed a simple mortgage of joint family property in favour of R. L. R. L. brought a suit for sale on this mortgage against N. S. alone, not impleading his sons, but in that suit he released the security and took a simple money decree against N. S., in execution of which he attached and brought to sale the mortgaged property and purchased it himself. The sons of N. S. neither objected to the passing of the decree against their father nor to the sale of the property, but subsequently filed a suit against R. . for redemption of the mortgage.

Held that the mortgagee could not, by taking a simple money decree for his debt and bringing the mortgaged property to sale in execution of such decree, divest himself of his character as a mortgagee, and that the sons of the mortgagor, not having been made parties to the original suit for sale, were still entitled to sue for redemption of the mortgage made by their father. *Mayan Pathuti v. Pakwan* (1), *Martand Balkrishna Bhat v. Dhondo Damodar Kulkarni* (2), *Pancham Lal Chowdhury v. Kishun Pershad Misser* (3) and *Khtarajmal v. Daim* (4) referred to. *Debi Singh v. Jia Ram* (5), *Tara Chand v. Imdad Husain* (6), *Parmanand v. Daulat Ram* (7), *Banh Bal v. Manni Lal* (8), *Muhammad Abdul Rashid Khan v. Dilsukh Rai* (9), *Kishan Lal v. Umrao Singh* (10) and *Mulhu v. Karuppan* (11) distinguished.

THE facts of the case were as follows :—

On the 28th of September, 1893, Nandan Singh, father of the plaintiffs, executed a mortgage in favour of Ratan Lal. The latter brought a suit in 1898 against Nandan Singh, but prayed only for a simple money decree, which he obtained on the 13th of September, 1898, and in execution of which he attached and brought to sale the mortgaged property and purchased it himself. The sons of Nandan Singh brought the present suit to redeem the mortgage of the 28th of September, 1893, on the ground that the right to redeem was not extinguished and they had not been parties to the original suit.

* Second Appeal No. 290 of 1913, from a decree of I. B. Mundle, Additional Judge of Bareilly, dated the 12th of December, 1912, reversing a decree of Pirthwi Nath, Subordinate Judge of Bareilly, dated the 20th of March, 1912.

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| (1) (1899) I. L. R., 22 Mad., 347. | (6) (1896) I. L. R., 18 All., 325. |
| (2) (1897) I. L. R., 22 Bom., 624. | (7) (1902) I. L. R., 24 All., 549. |
| (3) (1910) 14 C. W. N., 579. | (8) (1905) I. L. R., 27 All., 450. |
| (4) (1905) I. L. R., 32 Calc., 296. | (9) (1905) I. L. R., 27 All., 517. |
| (5) (1902) I. L. R., 25 All., 214. | (10) (1908) I. L. R., 30 All., 146. |
| (11) (1907) 17 M. L. J., 163. | |

The first court decreed the claim subject to payment of the mortgage money *plus* interest up to the date of sale. The lower appellate court allowed the appeal and dismissed the suit. The plaintiffs appealed to the High Court.

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Babu *Sital Prasad Ghosh*, for the appellant, submitted that the father of the plaintiffs as manager had executed a mortgage of ancestral property and the sons as interested in that property had a right to redeem the mortgage. The defendant must show that the right of the sons to redeem had been extinguished. The suit brought against the father and the decree thereon had not the result of extinguishing the equity of redemption, because there was no decree giving the plaintiff's father a right to redeem on failure of which the right would be extinguished. The sale at which the defendant purchased the property was a sale in contravention of section 99 of the Transfer of Property Act and could not vest the full proprietary right in the defendant. The plaintiffs in the present suit were not repudiating the mortgage which was made by their father but accepting it were suing to enforce their right to redeem. The defendant mortgagee could not, by violating the provisions of the law and by purchasing the property in violation of section 99 of the Transfer of Property Act, by his own act deprive the sons of their right to redeem. He relied on *Khیارajmal v. Daim* (1), *Jhabba Lal v. Chhajju Mal* (2), *Mayan Pathuti v. Pakuran* (3) and *Ghose on Mortgages*, page 375.

Babu *Lalit Mohan Banerji* (with him *Babu Piari Lal Banerji*), for the respondent, urged that the real question was what was the effect of the suit of 1898 and the decree and sale which followed. If as a result of the decree and the sale the plaintiffs' father's right to redeem was extinguished, then the right of the sons also was extinguished, because the father sufficiently represented the sons for all purposes according to the recent decision of the full Bench of this Court; *Hori Lal v. Munman Kuwar* (4). When in execution the property was attached, the father had an opportunity to object, and the omission of the father to object estopped him and all those whose interest he sufficiently represented,

(1) (1905) I. L. R., 32 Cal., 296.

(3) (1899) L. L. R., 22 Mad., 347.

(2) (1903) 4 A. L. J., 787.

(4) (1912) I. L. R., 34 All., 549.

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namely, his sons the present plaintiffs. The sale, therefore, had the result of vesting the full proprietary right in the defendant and the sons could not raise questions which could and ought to have been raised before the sale had been confirmed. It was settled law that a sale, even though in contravention of section 99 of the Transfer of Property Act, was not a nullity, and if confirmed could not be set aside; *Kishan Lal v. Umrao Singh* (1), *Ashutosh Sikdar v. Behari Lal Kirtania* (2) and *Thaleri Pathamma v. Thandora Mammad* (3).

The sale not being capable of being set aside now, the plaintiffs could not exercise their right to redeem by reason of the failure of their father to set up such a claim. The right to redeem had therefore been extinguished.

There was another aspect of the case. The sons here were seeking to recover property which had passed out of the family, and they must, according to the law laid down by this Court, show that the transaction by means of which the property passed out was immoral or otherwise not binding on them. The property had passed out of the family by means of the auction sale held in execution of the decree obtained against the father. That constituted a debt binding on the father which was not immoral or illegal and the sons were bound by the sale unless they could show that the decree was for an immoral debt. The sons were seeking to avoid the sale, because, if the sale stood, the position of the defendant was not that of a mortgagee but one of a full and absolute owner.

Babu *Sital Prasad Ghosh* was not heard in reply.

MUHAMMAD RAFIQ, J.—This case has been referred to a Bench of two Judges, as when it came up before a learned Judge of this Court it was stated that, whatever his decision might be, an appeal would be preferred under the Letters Patent.

The question raised in the appeal is whether the sons who formed a joint Hindu family with their father can sue to redeem the property belonging to the joint family, which has been sold and purchased by the mortgagee at a court sale in execution of a decree obtained against the father in a suit on a mortgage bond given

(1) (1908) I. L. R., 30 All., 146. (2) (1907) I. L. R., 35 Cal., 61.

(3) (1900) 10 M. L. J., 110.

by the father, but where the security of the property was released and a simple money decree asked for and granted. The facts which led to the present appeal and the points under discussion are as follows. The plaintiffs appellants and their father Nandan Singh were members of a joint undivided Hindu family. On the 28th of September, 1893, Nandan Singh alone executed a deed of simple mortgage in favour of one Ratan Lal in lieu of Rs. 99, in respect of some of the joint family property. Ratan Lal brought a suit on foot of his mortgage against Nandan Singh only. He did not implead the sons of the latter, and, releasing the security of the property, asked for a simple money decree, which was passed in his favour on the 13th of September, 1898. In execution of his decree Ratan Lal attached the mortgaged property, as also some other property of the joint family, on the 7th of November, 1898. Both the attached properties were sold on the 22nd of August, 1899. Ratan Lal bought the mortgaged property, and the other property was purchased by a stranger at the court sale. On the 26th of September, 1899, the sale in favour of Ratan Lal was confirmed. On the 21st of August, 1911, the plaintiffs appellants, the sons of Nandan Singh, instituted the suit which has given rise to the present appeal in the court of the Subordinate Judge of Bareilly for redemption of the mortgage of the 28th of September, 1893. They based their claim on the allegation that they and their father were members of a joint undivided Hindu family; that the property sought to be redeemed was joint family property; that they were no parties to the decree of the 13th of September, 1898, and that the sale to Ratan Lal was voidable in view of section 99 of Act IV of 1882. They further stated that they had asked Ratan Lal several times out of court to allow redemption and render an account of the property since his possession as a purchaser, but he had declined to accede to their request. The cause of action accrued to the plaintiffs on the 1st of August, 1911, the date of the last refusal of Ratan Lal, and therefore they sued for redemption of the mortgage of the 28th of September, 1893, on the payment of Rs. 158, or whatever sum the court found due and for mesne profits on a rendition of accounts by Ratan Lal since his possession over the property. Ratan Lal resisted the claim on various pleas. He said that there was no subsisting mortgage capable of redemption; that the sale in

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his favour was valid; that it could not be impeached after confirmation; that section 99 of Act IV of 1882 was inapplicable; that there was a prior mortgage in favour of a third party which should also be paid off, and that a much larger sum than that offered by the plaintiffs was due on the mortgage of the 28th of September, 1893. The learned Subordinate Judge decreed the claim. On appeal by Ratan Lal the decree of the first court was set aside and the claim of the plaintiffs was dismissed. The learned Additional Judge found against the plaintiffs on the ground that their father being the *karta* of the family executed the mortgage of the 28th of September, 1893, in his representative capacity and the decree of Ratan Lal was passed against him in that capacity and as he, Nandan Singh, had not objected to the sale and allowed it to be confirmed, he must be taken to have waived his rights. The plaintiffs have come up in second appeal to this Court. They contend that the learned Additional Judge did not appreciate the real issue in the case and misapplied the law of waiver or estoppel.

The fact that the mortgage was given by Nandan Singh or that the decree was passed against him in his capacity as *karta* of the family does not affect the merits of the present case, nor does his silence in the execution proceedings of 1899 amount to a waiver or estop his sons from bringing the present suit for redemption. The real issue in the case is, not the status of Nandan Singh or the effect of his silence in the execution proceedings of 1899, but whether a mortgagee can, by obtaining a money decree for a mortgage-debt and purchasing the equity of redemption in execution of that decree, relieve himself of his obligations as mortgagee and deprive the mortgagor of his right to redeem. It is argued for the plaintiffs appellants that the mortgagee cannot do so in view of the provisions of section 99 of Act IV of 1882. In support of his contentions the learned counsel for the plaintiffs appellants relies on the following cases:—*Mayan Pathuti v. Pakuran* (1), *Martand Balkrishna Bhat v. Dhondo Damodar Kulkarni* (2), *Pancham Lal Chowdhury v. Kishun Pershad Misser* (3), *Khizarajmal v. Daim* (4).

(1) (1898) I. L. R., 22 Mad., 347.

(3) (1910) 14 C. W. N., 579.

(2) (1897) I. L. R., 22 Bom., 624.

(4) (1905) I. L. R., 32 Cal., 296.

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In the Madras case the facts were that a mortgagee in execution of a simple money decree against the mortgagors sold the mortgaged property subject to his mortgage and purchased it himself. The mortgagors brought a regular suit to have the sale set aside on the ground that it was in contravention of the provisions of section 99, Act IV of 1882. The defence of the mortgagee was that a regular suit for the cancellation of the sale was not maintainable, as the question whether the sale was liable to be set aside or not was one relating to the execution, discharge or satisfaction of the decree and should have been raised and could only be raised and decided in the execution proceedings. The learned Judges of the Madras High Court accepted the plea in defence and held that the suit of the mortgagors was not maintainable. But they further held that in spite of the confirmation of the sale and the fact that a suit to set it aside did not lie, the mortgagors were not precluded from suing to redeem the mortgaged property on payment of the amount given credit for by the mortgagee in respect of the sale.

In the Bombay case three persons, viz., Shankarji, his son and grandson, formed a joint undivided Hindu family. Shankarji executed a usufructuary mortgage in favour of one Hamir Mul in respect of some of the joint family property. After the death of the mortgagor Hamir Mul, in execution of a simple money decree for a debt other than the mortgage debt, sold the mortgaged property and purchased it *benami* in the name of his dependants. The grandson of Shankarji sued to redeem the mortgaged property, on the ground that the sale was *benami* for Hamir Mul and contravened the law laid down by section 99 of Act IV of 1882. The claim was resisted on the ground that no objection had been taken to the sale and therefore the sale was valid. The plea in defence was disallowed, and it was held that the mortgagee could not by such sale and purchase free himself from the liability to be redeemed. The learned Chief Justice who decided the case referred to the proposition of law laid down in the case of *Bhuggobutty Dossee v. Shamachurn Bose* (1). The proposition was that "a mortgagee is not entitled by means of a money decree obtained on a collateral security, such as a bond or covenant,

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to obtain a sale of the equity of redemption, separately, because by so doing he would deprive the mortgagor of the privilege which, upon the principle of considering the estate as a pledge, a court of equity always accords to a mortgagor, namely, a fair allowance of time to enable him to discharge the debt and recover the estate. This privilege is an equitable incident of the contract of mortgage, and it would be inequitable to permit the mortgagee to evade it; to do that circuitously which he could not do directly." "That is the principle", the learned Chief Justice went on to say, "which, in an extended form, is enacted as law in section 99 of the Transfer of Property Act." It should be observed here that the learned Chief Justice of the Bombay High Court referred to the principle of equity in support of his decision, as the sale objected to had taken place before the passing of Act IV of 1882.

In the case of *Pancham Lal Chowdhury v. Kishun Prasad Misser* (1) the facts were that a mortgagee obtained a simple money decree on the basis of a hand note. In execution of that decree he sold the mortgaged property subject to the mortgage and himself purchased it. He obtained mutation of names in his favour and no objection was taken on behalf of the mortgagor. The sons of the mortgagor sued for redemption of the mortgage. The claim was resisted on the grounds that their father had waived his rights by acquiescence in the sale, and that they could not ask for redemption without having the sale first set aside. It was held that it was a well established principle that a purchase by a mortgagee of the equity of redemption in execution of a simple money decree, constitutes him a trustee for the mortgagor and that he does not, unless there is a release of the equity of redemption or other circumstance which in law barred the right of redemption, acquire an irredeemable title. It was further held that the mortgagor was under no necessity to have the sale set aside before he could sue for redemption. He could sue for redemption within the period of limitation allowed by law. The plea of waiver was also disallowed.

The facts of *Khizarajmal v. Daim* (2) were complicated and it would serve no useful purpose to recite them in detail here. It is sufficient to refer to the principle approved of by their Lordships,

(1) (1910) 14 C. W. N., 579. (2) (1904) I. L. R., 32 Calc., 296.

which bears directly on the point under discussion. Their Lordships are reported to have said, at page 316 of the Report, that they "throw no doubt on the principle which has been acted on in many cases in India, that a mortgagee cannot, by obtaining a money decree for the mortgage debt, and taking the equity of redemption, in execution, relieve himself of his obligation as a mortgagee or deprive the mortgagor of his right to redeem on accounts taken and with the other safeguards usual in a suit on the mortgage." It will be observed that their Lordships have stated the principle in less general and more guarded language than that used in the Calcutta and Bombay cases and limit its scope to the case of a mortgagee who obtains a simple money decree in respect of his mortgage debt and in execution of that decree sells and purchases the equity of redemption. The provisions of section 99 went further than the principle approved of by their Lordships. The law as enacted in the Transfer of Property Act has been altered and brought into consonance with the principle enunciated by their Lordships in *Daim's* case, vide order XXXIV, rule 14, of the Code of Civil Procedure. In the present case, however, the mortgaged property was sold and purchased by the mortgagee in execution of a simple money decree obtained for the mortgage-debt. The alteration in the law does not, therefore, affect the issue between the parties to this case. It is clear from the authorities just discussed that the appellants can redeem the property purchased by Ratan Lal in execution of his simple money decree for the mortgage debt.

But the respondent argues that the law under which the appellants claim redemption, viz., section 99 of Act IV of 1882 or, to be more accurate, order XXXIV, rule 14, is inapplicable to the present case, for three reasons. First, the sale of joint family property held against a Hindu father can be avoided by the sons to the extent of their shares only, if they were no parties to the decree and the debt for which the decree was passed was such that under the Hindu law they were not bound to pay it. In support of this reason the case of *Debi Singh v. Jia Ram* (1) is referred to. Secondly, a sale of the mortgaged property, once confirmed, though in favour of a mortgagee and held in execution of

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a simple money decree obtained for the mortgage debt, cannot be subsequently questioned and set aside at the instance of the mortgagor or his sons. And thirdly, that the failure of the mortgagor to object to the sale before its confirmation amounts to a waiver of the benefit given by the law, and he or any other member of the joint family is estopped from challenging the sale. In support of the last two reasons the following cases are relied upon:—*Tara Chand v. Imdad Husain* (1), *Parmanand v. Daulat Ram* (2), *Banh Bal v. Manni Lal* (3), *Muhammad Abdul Rashid Khan v. Dilsukh Rai* (4) and *Kishan Lal v. Umrao Singh* (5). I shall discuss the three objections urged on behalf of the respondent in their order.

The rule of Hindu law alleged by the respondent that the sons in a joint Hindu family can avoid a decree passed against their father, only on the grounds that they were no parties to the decree and that the debt for which the decree was passed was such that they were not under the Hindu law bound to discharge it, has no application to the present case. In the present case the sons are not seeking to evade the payment of their father's debt. They are offering to discharge the mortgage, that is, to pay the debt contracted by their father. They want to avail themselves of the provisions of a law that gives them the right to redeem under certain circumstances, in spite of the sale of the joint family property in execution of a decree against the father. The first objection of the respondent has therefore no force.

The first case in support of the second objection is that of *Tara Chand v. Imdad Husain* (1). In that case one Imdad Husain mortgaged with possession his zamindari property and his share in a house to one Dwarka Das. The latter then leased the mortgaged lands to Muhammad Husain, who fell into arrears with his rent. Dwarka Das obtained a decree for arrears of rent and in execution of his decree had the share of the house mortgaged sold. One Tara Chand purchased the said share in the house and then sued in a Civil Court for partition of the share purchased by him. Muhammad Husain resisted the suit on the ground that the

(1) (1895) I. L. R., 18 All., 325.

(3) (1905) I. L. R., 27 All., 450.

(2) (1902) I. L. R., 24 All., 549.

(4) (1905) I. L. R., 27 All., 517.

(5) (1908) I. L. R., 30 All., 146.

sale of the share of the house in suit was in contravention of section 99 of Act IV of 1882. It was held that Muhammad Husain could not dispute the validity of the sale in the civil suit brought by the purchaser for partition. In the case of *Parmanand v. Darul Ram* (1) the purchase by the mortgagee was under a decree obtained under section 67 of Act IV of 1882. It was held that a sale under such a decree did not offend against the law enacted in section 99 of Act IV of 1882.

In the case of *Bank Bal v. Manni Lal* (2) a mortgagee obtained a simple money decree in respect of a debt other than the mortgage debt. He then transferred the decree to a third party. The latter in execution of the decree sought to sell the equity of redemption of the mortgagor, who objected on the basis of the provisions of section 99, Act IV of 1882. The objection was disallowed on the ground that section 99 of Act IV of 1882 did not preclude a third party from bringing to sale the equity of redemption of the mortgagor.

The facts of the case of *Muhammad Abdul Rashid Khan v. Dilsukh Rai* (3) were somewhat complicated and need not be reproduced here in detail. The main facts were that one Ram Bakhsh executed a mortgage in respect of certain property in 1863 in favour of one Debi Das. Subsequent to the mortgage, Ram Bakhsh sold his equity of redemption to third parties. After the sale of the equity of redemption Debi Das in execution of a decree for costs and mesne profits brought the equity of redemption in the hands of the purchasers to sale and bought it himself. About 20 years after, the purchasers of the equity of redemption sued to redeem the mortgaged property treating the sale to the mortgagee as a nullity. They failed to implead some of the necessary parties. It was held that the suit must fail for want of proper parties, and that the sale to the mortgagee was not void but voidable and could not after the lapse of 20 years be impeached.

The facts of the case of *Kishan Lal v. Umrao Singh* (4) were as follows. One Umrao Singh gave a mortgage to one Kishan Lal. The latter brought a suit on foot of his mortgage, but abandoned his security and asked for a simple money decree, which

(1) (1902) I. L. R., 21 All., 549.

(3) (1905) I. L. R., 27 All., 517.

(2) (1905) I. L. R., 27 All., 450.

(4) (1903) I. L. R., 30 All., 146.

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was granted. The decree-holder then assigned the decree to another person whose name was also Kishan Lal. The assignee in execution of the decree sold and purchased the mortgaged property. The mortgagor applied under section 311 of the Code of Civil Procedure (old) to have the sale set aside, but was unsuccessful and the sale was confirmed. About three years after the mortgagor again applied to have the sale set aside on the ground that it was held in contravention of section 99 of Act IV of 1882. His application was rejected by the first court, but allowed by the Judge. On appeal to this Court the order of the first court was restored. It was held that the sale objected to had taken place and had been confirmed to the knowledge of the mortgagor, and he could not, after the lapse of three years from confirmation, question it and defeat the title of the purchaser on the ground that the court executing the decree ought not to have allowed the sale in violation of section 99 of Act IV of 1882.

The only case that bears on the point is that of *Muhammad Abdul Rashid Khan v. Dilsukh Rai* (1). In that case a suit for redemption was brought after a sale in violation of section 99 of Act IV of 1882 had taken place and had been confirmed. The claim in that case was disallowed for three main reasons, as would appear on a perusal of the report of the case. The reasons were that the sale objected to had taken place prior to the passing of the Transfer of Property Act, that the disqualification of the mortgagee to purchase the equity of redemption was limited to a case where he became the purchaser in execution of a simple money decree obtained for the mortgage debt and that proper parties had not been impleaded.

Now in the present case none of these reasons holds good. The sale in the present case took place long after the passing of the Transfer of Property Act, and it was held in execution of a decree obtained for the mortgage debt. There is no question as to the omission of any necessary parties. The case of *Abdul Rashid Khan* is not therefore of any assistance to the respondent. The case reported in 24 All. is not in point at all. In that case the sale took place in execution of a decree obtained under section 67 of Act IV of 1882.

(1) (1905) I. L. R., 27 All., 517.

The other three cases, viz., 18 All., 325, 27 All., 450 and 30 All., 146, are distinguishable on the ground that the sale in those cases was not in favour of the mortgagee but of a third party. The law as enacted in section 99 of Act IV of 1882 does not preclude a third party a person other than the mortgagee, whether an assignee of the decree from the mortgagee or a complete stranger, from purchasing the equity of redemption in execution of a money decree obtained by the mortgagee or any other debt.

In the case of *Muthu v. Karuppan* (1) it was laid down that "a sale in contravention of section 99 of Act IV of 1882 is not void but voidable only, and when the mortgagee himself becomes the purchaser he cannot by such sale and purchase free himself from his liability to be redeemed. But this equity does not arise against a stranger, auction purchaser. Moreover, the three cases in question did not lay down that a mortgagor could not sue to redeem after a sale in contravention of section 99 of Act IV of 1882 had been confirmed. On the other hand there is distinct authority for the proposition that he need not seek to have the sale set aside and can sue for redemption, *vide*, I. L. R., 22 Mad., 347, 14 C. W. N., 579-583. The second objection for the respondent therefore fails.

The third objection is based on the silence of Nandan Singh, his failure to object to the sale. It is said that as he did not choose to object to the sale he must be taken to have waived the right given to him by the law and if he waived his right to object to the sale on the ground of section 99 of Act IV of 1882, his sons, the plaintiffs appellants cannot avail themselves now of the benefit of that section. The passage reported at page 149 of I. L. R., 30 All. is relied upon in support of this contention. The passage is as follows:—"What we have to decide is whether, the order for sale having been passed to the knowledge of the judgment-debtor and having been allowed by him to become final, he can now, at this late stage, have the sale set aside and the purchaser divested of his title on the ground that the court ought not to have ordered the property to be sold. In our opinion the decree of the court of first instance is right." The first court disallowed

(1) (1907) 17 M. L. J., 163.

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the application of the mortgagors on the ground that it was made too late. I do not think that this passage is an authority for the proposition that the silence of Nandan Singh, in the execution proceedings, amounts to a waiver of the benefit given by section 99 of Act IV of 1882 to a mortgagor or that if it were it would bind and estop his sons from availing themselves of that benefit. Moreover the silence or laches of a mortgagor may defeat his objection to sale and yet not deprive him of his right to sue for redemption. I would again refer to the case of *Pancham Lal Chowdhury v. Kishun Pershad Misser* (1), where the point was raised and decided against the mortgagee purchaser. In that case the mortgagor had not only kept silent but had accepted the validity of the execution proceedings against the mortgaged property. In disposing of the plea of acquiescence the learned Judge referred to a remark made by their Lordships of the Privy Council in the case of *Khizarajmal v. Deim* (2). The remark was that "neither exclusive possession by the mortgagee for any length of time, short of the statutory period of 60 years, nor any acquiescence by the mortgagor, not amounting to a release of the equity of redemption will be a bar or defence to a suit for redemption if the parties are otherwise entitled to redeem." The third objection for the respondent, therefore, fails also.

I would, therefore, allow the appeal and set aside the decree of the lower appellate court. But as that court disposed of the appeal on a preliminary point and did not decide the other points raised in the appeal before it, I would remand the case to that court for disposal according to law.

PIGGOTT, J.—I concur.

BY THE COURT.—The order of the Court is that this appeal is allowed, the order of the lower appellate court is set aside, and the appeal is remanded to it for disposal according to law. Costs will abide the event.

Appeal decreed and cause remanded.

(1) (1910) 14 C. W. N., 579. (2) (1904) I. L. R., 32 Calc., 296.