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of the trustees that he or they are wasting the *corpus* of the property, and the court below had before it no allegation that the trustees, or any of them, were misappropriating the income of the property for purposes other than those laid down in the trust deed. On this state of facts it seems to us that the order under appeal cannot be maintained. We are naturally reluctant to interfere with the exercise of discretion in such a matter on the part of a trial court, more especially after a Government official has been appointed trustee and has presumably taken charge of the property, but we do not find it possible to uphold the order of the court below in this case. The result is that this appeal succeeds, and we set aside the order appointing the Deputy Commissioner of Gonda to take charge of the property in suit as trustee. The court below will replace the defendants, the trustees under the deed of the 28th of April, 1917, in such possession as they were previously enjoying. There is nothing, however, to prevent the court from receiving accounts from the Deputy Commissioner of Gonda regarding his period of management and passing suitable orders as to the disposal of any balance which might have accumulated to the credit of the estate during this period of management. We allow the appellant his costs of this *proceeding, here and in the court below.*

Appeal decreed.

Before Mr. Justice Walsh and Mr. Justice Ryves.

RAMA NAND BHARTI (DEFENDANT) *v.* SHEO DAS (PLAINTIFF) AND RAM KHELAWAN AND OTHERS (DEFENDANTS).*

1920. *November*, 19.

Act No. IV of 1882 (*Transfer of Property Act*), *section* 55, *clause* (4) (*b*)—*Sale - Pre-emption—Part of purchase money left with vendee to pay to creditor of vendor, but not so utilized—Unpaid vendor's lien.*

On a sale of immovable property a suit for pre-emption was brought and succeeded. At the time of the sale part of the purchase money had been left in the hands of the purchasers to pay off an incumbrance on the property, of which fact the pre-emptors had notice. As a matter of fact, however, owing to the suit for pre-emption, the incumbrance was not paid off. *Held* that the vendor had a lien on the property in the hands of the pre-emptors to the extent, at any rate, of the unpaid purchase money. *Gur Dayal Singh* v. *Karam Singh* (1) discussed.

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* First Appeal No. 35 of 1920 from an order of Piari Lal Rastogi, Second Additional Subordinate Judge of Basti, dated the 17th of December, 1919.

(1) (1916) I. L. R., 38 All., 254.

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RAMA NAND BHARTI v. SHEO DAS.

THIS was an appeal from an order of remand passed by an appellate court. The facts of the case are thus stated in the judgment under appeal:—

"On the 6th of June, 1912, plaintiff appellant executed a sale-deed for Rs. 999 in favour of the ancestors of defendants second party. Rupees 201 out of the sale consideration was left in the hands of the purchasers for payment to defendant third party on account of a mortgage, dated the 28th of July, 1909. Defendants first party acquired the property in suit by right of pre-emption through court by filing a suit against defendants second party. Neither the original purchasers nor the pre-emptors paid the money due to defendant third party on account of his mortgage referred to above. Defendant third party, therefore, sued the plaintiff and obtained a decree for sale of the mortgaged property on foot of his mortgage. Thereupon plaintiff executed a mortgage, dated the 20th of December, 1918, for Rs. 406-15-0 in favour of defendant third party and satisfied the decree. He then brought this suit for recovery of the said amount by sale of the property which had been sold to the ancestors of defendants second party, and which was now in the hands of defendants first party.

"Plaintiff claimed to be entitled to a charge on the property sold, under section 55, clause (4) (*b*) of the Transfer of Property Act for the amount in question. The learned Munsif relying on *Gur Dayal Singh* v. *Karam Singh* (1) and *Abdulla Beary* v. *Mammali Beary* (2) held that there was an agreement between the vendor and the vendees for payment of a portion of the consideration to a creditor of the vendor, that the defendants (vendees and the pre-emptors) having failed to pay the said money, there was a breach of contract on the part of defendants for which plaintiff could sue them for damages, and that the amount in question not being payable to the plaintiff there could be no charge in his favour. He therefore dismissed the suit; hence this appeal.

"The question for determination is whether there can be a charge in favour of the plaintiff under the circumstances given above or not, and whether it can be enforced against defendants.

(1) (1916) I. L. R., 38 All., 254. (2) (1910) I. L. R., 33 Mad., 446.

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The leading case on the point is *Webb* v. *Macpherson* (1). It is an authority for the proposition that the seller can enforce the charge mentioned in section 55, clause (4)(*b*), against the property in the hands of a subsequent purchaser who has notice of the fact that the purchase money in the first transfer or some part of it has not been paid.

"It cannot be denied in this case that defendants first party (who acquired the property in question through court by pre-emption) had notice of the fact that the mortgage money due to defendant third party (which was left in deposit with the vendees) had not been paid. If there is a charge it can, therefore, be enforced against defendants first party. It is contended on behalf of defendants that the agreement in this case was to pay not to the vendor but to the creditor of the vendor, that the charge created by the statute in favour of the vendor is only securing for purchase money *payable to him*, and that a contract to the contrary arises by implication to negative the statutory charge. This view was taken by the Madras High Court in *Abdulla Beary* v. *Mammali Beary* (2); but in that case there was a distinct stipulation that upon the failure of the vendee to discharge the liabilities of the seller, he shall be liable for any damages resulting from such default. There is no such stipulation in the sale-deed in suit in this case. The Hon'ble Sir SUNDAR LAL, J., expressed some doubt about the correctness of the interpretation put upon the sale-deed by the Madras High Court. Assuming the interpretation to be correct, there is no such stipulation in the sale-deed in suit as there was in the Madras case. That case is, therefore, not in point. The Hon'ble Sir SUNDAR LAL, on page 1038 of XII A. L. J. R., in a case similar to the present case, observed :—'Under the terms of the sale-deed now in suit, it is not possible to say that the money was not payable to the plaintiffs. It was at the plaintiffs' request left in the hands of the vendee to pay for and on behalf of the vendors, and in that sense the money was payable to the vendors and they have a lien for the money so long as it was not paid.'

"In a similar case, *Harchand* v. *Kishori Singh*, (3) it was held that the fact that the money was left with the vendee for

(1) (1903) I. L. R., 31 Calc., 57. (2) (1910) I. L. R., 33 Mad., 446.
(3) (1910) 7 Indian Cases, 639.

payment to a creditor of the vendor was in no way inconsistent with the continuance of the lien.

"Following the above rulings I am of opinion that there was a charge in favour of the plaintiff for the money remaining unpaid by the defendants. The ruling in *Gur Dayal Singh* v. *Karam Singh* (1) is distinguishable in that the subsequent transferees in that case were held to have had no notice of the unpaid purchase money. As the lower court has dismissed the suit on a preliminary point, the decree of the lower court is reversed. I remand the suit with direction to readmit the suit on its original number and to proceed to determine it according to law."

Munshi *Iswar Saran*, for the appellant.

Babu *Piari Lal Banerji*, for the respondents.

WALSH and RYVES, JJ. :—This order was clearly right. We cannot improve upon the admirable judgment of the lower appellate court. There is obviously a serious question as to whether the plaintiff can establish a charge for more than Rs. 201, the only ground upon which he suggests it in his plaint being an allegation of negligence on the part of the defendants, in paragraph 6. But in this case notice is clearly found, and in the authorities relied upon there was no notice. Great reliance has been placed upon the decision in the case of *Gur Dayal Singh* v. *Karam Singh* (1), in which case there was no notice, and particularly upon the dictum contained on page 260 of the judgment, where it was said that in a case where by an agreement part of the consideration is left in the hands of the vendee to pay a creditor, such agreement and the money payable thereunder is not "unpaid purchase money." That dictum was not necessary for the decision of that case and we think that probably at some future date it will require further consideration. The appeal must be dismissed with costs.

Appeal dismissed.

(1) (1916) I. L. R., 38 All., 254.