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followed the ruling of a Division Bench in *Bhawani Prasad v. Ghulam Muhammad* (1). It is true that both these latter cases related to transactions of sale. Those were cases in which the vendee sought to get back the purchase money from his vendor when it was found that possession could not be obtained inasmuch as the transaction involved the transfer of *sir* land and the relinquishment of ex-proprietary rights. We agree with the view taken by Mr. Justice CHAMBER in the case above-mentioned that to enforce an agreement of this kind would be contrary to the provisions of section 24 of the Contract Act. Under that section the entire contract is deemed to be void, and that being so, the personal covenants upon which the plaintiff relies in this case and which are embodied in these three mortgage bonds, must fall along with the contract of mortgage. The decision of the court below must be upheld. The appeal fails and is dismissed with costs.

Appeal dismissed.

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March, 17

*Before Sir Grimwood Mears, Knight, Chief Justice, and Justice
Sir Pramada Charan Banerji.*

KARAMAT ALI AND ANOTHER (DEFENDANTS) v. THE GORAKHPUR
BANK, LIMITED (PLAINTIFF).*

*Mortgage—Contribution—Liability of auction purchaser of part of mortgaged
property.*

Certain property which was subject to a mortgage was sold in execution of a simple money decree and was purchased by three separate purchasers in equal shares. Purchaser No. 2 then mortgaged his share to a Bank, which brought a suit on its mortgage and having obtained a decree, became the purchaser of that one-third share. The original mortgagees then brought a suit for sale on their mortgage. As to purchaser No. 1, they agreed to release his share on payment of Rs. 1,383-5-4 and also agreed to compensate him for any additional amount which he might be made to pay on account of the decree. As to purchaser No. 3, his share was sold by auction and realized Rs. 4,200. As to the Bank, its share was also sold by auction and realized Rs. 10,000 and the decree was satisfied. The Bank then sued purchasers Nos. 1 and 3 and the mortgagees for contribution.

Held that the plaintiff had no claim either as against the mortgagees or as against purchaser No. 3, but only as against purchaser No. 1 in whose case the suit had been dismissed and plaintiff had not appealed. *Shanto Chandar*

* First Appeal No 403 of 1919, from a decree of Gobind Prasad, Subordinate Judge of Azimgarh, dated the 19th of September, 1919.

(1) (1895) I. L. R., 18 All., 121.

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Mukerji v. Nain Sukh (1), distinguished. *Hari Itaj Singh v. Ahmad-ud-din Khan* (2) referred to.

THE facts of this case are fully stated in the judgment of the Court.

Mr. B. E. O'Connor and Maulvi Iqbal Ahmad, for the appellants.

Mr. G. W. Dillon, for the respondent.

MEARS, C. J., and BANERJI, J. :—The facts of this case are these. On the 15th of June, 1888, one Hasnu mortgaged a three anna share to the defendants 3 and 4. The mortgaged property was sold in execution of a simple money decree, and a one anna share was purchased by one Kali Charan, who was the predecessor in title of the defendants 1 and 2. Another one anna share was purchased by Sarju Prasad, and the third one anna share was purchased by Wazir Ali, the defendant No. 5. Sarju Prasad mortgaged the one anna share purchased by him to the Gorakhpur Bank. The Bank obtained a decree upon that mortgage and caused the one anna share to be sold by auction, and it became the purchaser of that share. The defendants 3 and 4, the mortgagees under the mortgage of 1888, brought a suit on the basis of that mortgage against the defendants 1 and 2, the Gorakhpur Bank and Wazir Ali, the defendant No. 5, and obtained a decree for sale. In the suit in which that decree was passed a compromise was entered into between the mortgagees and the defendants Nos. 1 and 2, by which the latter agreed to pay to the mortgagees Rs. 1,333-5-4 and the mortgagees undertook to release from liability the one anna share purchased by their father, Kali Charan. The aforesaid amount appears to have been paid to the decree-holders and a sum of Rs. 14,200 was the balance outstanding under the decree. The decree-holders caused the one anna share of Wazir Ali to be sold by auction, and this sale realized Rs. 4,200. They then put up to sale the one anna share purchased by the Gorakhpur Bank, and this sale realized Rs. 10,000, which fully discharged the decree. After this auction sale the present suit was instituted by the Gorakhpur Bank against the defendants 1 and 2, the defendants 3 and 4 and Wazir Ali, the fifth defendant. The Bank's contention was that the one anna share, of which it was the purchaser, was liable for one-third

(1) (1901) I. L. R., 23 All., 355. (2) (1897) I. L. R., 19 All., 545.

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of the mortgage debt, that it had contributed more than its rateable share, and that the Bank was, therefore, entitled to be recouped the amount which the sale of its property had fetched in excess of its share of liability, and on this ground the Bank claimed Rs. 4,822-3-7 and interest. The court below dismissed the claim as against the defendants 1 and 2; it also dismissed the claim against Wazir Ali; but it made a decree against the defendants Nos. 3 and 4, the decree-holders, on the ground that under the compromise between them and the heirs of Kali Charan they had undertaken to compensate the heirs of Kali Charan for any amount which they might have to pay on account of the decree in addition to the amount which they had undertaken to pay. The decree-holders, the defendants nos. 3 and 4, have preferred this appeal, and it is contended on their behalf that if the claim could be maintained against any one, it could be maintained against defendants 1 and 2 and the decree of the court below as against them (defendants 3 and 4) was an erroneous decree. We may mention that the Gorakhpur Bank did not prefer any appeal against that part of the decree of the court below which dismissed the claim against Wazir Ali and against the defendants 1 and 2. In our opinion the decree of the court below as regards Wazir Ali is correct. No doubt the one anna share which Wazir Ali purchased was rateably liable for one-third of the mortgage debt; but Wazir Ali surrendered that share and it was sold by auction. Therefore no claim for contribution could be brought forward against him. He was not in possession of any part of the mortgaged property after the auction sale of his one anna share, and no claim could be advanced against him as no personal liability was incurred by him. The only persons against whom the Gorakhpur Bank, which undoubtedly had contributed more than its rateable share of liability, could maintain its claim, were the defendants 1 and 2, whose share in the mortgaged property has not yet been sold, but the court below exempted those defendants from the claim on the ground that the decree-holders, defendants 3 and 4, had undertaken by the compromise to pay up any amount for which the defendants 1 and 2 might be liable. This part of the judgment of the learned Subordinate Judge is, in our opinion, erroneous. There was no privity of contract between the plain-

tiff (*i. e.* the Gorakhpur Bank) and the decree-holders, defendants 3 and 4, and, therefore, by virtue of the compromise the Gorakhpur Bank could have no claim as against the defendants Nos. 3 and 4. The right of the Gorakhpur Bank to obtain contribution from the defendants 1 and 2 could not be deemed to attach to the decree-holders, defendants 3 and 4, by reason of their agreement with the defendants 1 and 2 to release their one anna share from liability for the mortgage. It was, however, contended by Mr. *Dillon* on behalf of the Bank that the defendants 3 and 4, being auction purchasers of the one anna share of the Gorakhpur Bank, were liable to the Bank to make good the amount which the Bank had to pay in excess of its share of liability. In our opinion the position of the defendants 3 and 4 was that of auction purchasers of the one anna share of the Gorakhpur Bank. As such auction purchasers, they could not be held liable to contribute towards the mortgage money. An auction purchaser in execution of a decree obtained upon a mortgage purchases the rights of the mortgagor and the mortgagee at the date on which the mortgage was made and any subsequent equities or liabilities which arose in respect of the mortgaged property could not attach to him inasmuch as he acquired the property free from any such liabilities or equities. Mr. *Dillon* has failed to draw our attention to any authority in which it has been held that a claim like the present could be brought against the auction purchaser. He referred to the case of *Shanto Chandar Mukerji v. Nain Sukh* (1), but that was not a case like the present and the circumstances of that case are wholly distinguishable from those of this case. The case which is applicable to the appeal before us is that of *Hari Raj Singh v. Ahmad-ud-din Khan* (2). In that case it was held that a suit for contribution could be brought only against the holder of the portion of the mortgaged property which had remained unsold. In this view the decree of the court below cannot be supported, and this appeal must prevail. We accordingly allow the appeal, set aside the decree of the lower court and dismiss the suit with costs.

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Appeal allowed.

(1) (1901) I. L. R., 23 All., 355. (2) (1897) I. L. R., 19 All., 545.