Court itself was divided as to the rule of subrogation in the circumstances of this case and there are conflicting decisions of other High Courts. Opinion is likely to differ as to how far the Privy Council cases in *Dinobundhu Shaw* v. *Jogmaya Dasi* (1) and *Mahomed Ibrahim Hossain* v. *Ambika Pershad* (2) quoted above affect the decisions of the High Courts. In the circumstances, the rule laid down by the legislature would be a safe guide to follow as laying down correctly the rule of justice, equity and good conscience for cases arising before the passing of Act XX of 1929.

The result is that in our opinion the question for our decision must be answered in favour of the appellants, and we must hold and do hold that the appellants are subrogated to the position of the first mortgagee.

We direct that the case be returned to the Bench making the reference with the answer given above.

APPELLATE CIVIL.

Before Sir Shah Muhammad Sulaiman, Chief Justice, and Mr. Justice Young.

1932 May, 25

BADRI PRASAD MISIR (PLAINTIFF), *v.* BIJAI NAND TEWARI AND ANOTHER (DEFENDANTS).*

Agra Pre-emption Act (Local Act XI of 1922), *section* 4(10)—*"Sale"—Sale of property not in possession of vendor and requiring litigation to recover it—Sale consideration a fixed sum and unaffected by the future litigation—Accretion to value of property by vendee's successful litigation for its recovery—Pre-emptor entitled to benefit of accretion but must pay the costs of the vendee's litigation—Transfer of Property Act (IV of* 1882), *section* 54.

Where the property sold was not in the possession of the vendor but was held by a third party against whom a suit had

*Second Appeal No. 1534 of 1930, from a decree of Rup Kishan Agha, District Judge of Allahabad, dated the 15th of June, 1930, modifying a decree of Muhammad Taqi Khan, Munsif of Mirzapur, dated the 9th January, 1928.

(1) (1901) I.L.R., 29 Cal., 154. (2) (1912) I.L.R., 39 Cal., 527.

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to be instituted in order to recover its possession, and the sale consideration was the sum of Rs.5,000, and the vendor was neither to get any advantage nor to suffer any liability whether the contemplated suit by the vendee for recovering the property succeeded or failed, it was *held* that the transaction was a sale within the definition of section 54 of the Transfer of Property Act and section 4(10) of the Agra Pre-emption Act.

Held, also that the vendee was not entitled to claim the enhanced value of the property as it stood after the removal of the cloud on the title, but he should, both on the principles of equity and on the analogy of the Muhammadan law, get the total costs incurred by him, whether in court or out of court, in recovering possession of the property.

Mr. *S. N. Verma*, for the appellant.

Mr. *Shiva Prasad Sinha*, for the respondents.

SULAIMAN, C. J., and YOUNG, J. :—This is a plaintiff's appeal arising out of a suit for pre-emption of a part of the property sold under a sale deed by the vendor in favour of the vendee. At the time of the sale the property transferred was not in the possession of the vendor, but was held by a third party against whom a suit had to be instituted in order to recover its possession. The vendor was not in a position to raise money and was consequently unable to sue for recovery of the property and merely transferred his entire proprietary interest to the vendee for a sum of Rs.5,000 which included certain prior debts as well.

The vendee then brought a suit and subsequently recovered the property from the third party. It was after this that the present suit for pre-emption was instituted by the plaintiff.

The learned Subordinate Judge in a careful judgment came to the conclusion that the sale was pre-emptible and that the plaintiff should pay the market value of the property as it now stands free from all

debts. On appeal the lower appellate court has dismissed the suit, holding that the sale was not pre-emptible at all. In our opinion the view taken by the lower appellate court was quite wrong. Under the sale deed the only benefit which the vendor obtained was the receipt of Rs.5,000 as consideration. He was not to get any more advantage if afterwards the vendee succeeded in recovering the property from the third party. He was also not liable if the suit failed. Thus the total consideration which passed to the vendor was the sum of Rs.5,000, neither more nor less. He transferred his entire ownership in the property to the vendee in exchange for this cash consideration. The transaction therefore falls within the definition of "sale" under section 54 of the Transfer of Property Act. Under section 11 of the Agra Pre-emption Act such sale is pre-emptible.

The learned advocate for the defendants relies on the case of *Kalyan* v. *Desrani* (1). In that case the vendor had not sold the whole of the property which was in the possession of a third party to the vendee, but had transferred only a part of it for cash consideration. In addition to paying the price mentioned in the deed the vendee undertook to fight out the litigation and incur all the costs in restoring the vendor's share to him free from all trouble. Thus the total consideration which the vendor received was cash plus an undertaking to restore his property to him. It was merely held by the Bench of this Court that such a transaction was not a "sale" pure and simple, as defined in section 54 of the Transfer of Property Act. The present case is obviously distinguishable, because here the vendor got no other consideration except the cash consideration mentioned.

The next question is whether the vendee is entitled to any compensation for the improvement that has been

(1) (1927) I.L.R., 49 All., 488.

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effected in removing the cloud on the title. We have already pointed out that the vendee might have waited for the expiry of one year during which a suit for pre-emption could be brought. The result of the litigation launched by him has certainly improved the value of the estate. The vendee should, both on the principles of equity and on the analogy of the Muhammadan law, get at least a proportionate amount of the total costs incurred by him, whether in court or out of court, in recovering possession of the property. We do not think that he is entitled to claim the enhanced value of the property as it now stands, after the cloud has been removed, independently of the costs incurred by him. The enhanced value subsequent to the sale deed is in the nature of an accretion to the estate and we do not see why the vendee should get the benefit of it when there was no pressing necessity for him to sue within a year. The pre-emptor is entitled to step into the shoes of the vendee and take the whole estate and pay for all that the vendee has had to pay. The benefit of the subsequent enhancement in value would go to him. In this view of the matter we think that the vendee can only insist upon payment to him of a proportionate amount of the actual costs incurred by him. The courts below have gone into the present market value of the property, but they have not decided what costs the vendee had to incur in recovering the estate. We cannot dispose of the appeal finally without a clear finding on the last mentioned question.

[The appropriate issue was then remitted.]