

Clauses 16 and 17 of the Letters Patent also do not show that the High Court has any such original jurisdiction as is suggested on behalf of the applicant. We are, therefore, of opinion that the application made to this Court has been misconceived. It was not a case of the winding up of a company where in the course of the inquiry the company Judge came to the conclusion that an offence has been committed, in which event he may order an inquiry under section 237 of the Indian Companies Act. The matter is not pending before the High Court at all and the Court has been moved for the first time by the applicant. We therefore think that if the case were committed to the High Court under section 194(1) of the Criminal Procedure Code or proceedings were started on an application of the Advocate-General under section 194(2) or were transferred to it under section 526 of the Criminal Procedure Code, then the High Court would have jurisdiction to try the accused; but that it would not have jurisdiction to try the accused merely on an application made under section 85 of the Indian Companies Act.

The answer to the second question referred to us is therefore in the negative.

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### APPELLATE CIVIL

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*Before Sir Shah Muhammad Sulaiman, Chief Justice, and  
Mr. Justice Bennet*

CHHOTAY LAL (PLAINTIFF) *v.* SUDARSHAN LAL AND  
ANOTHER (DEFENDANTS)\*

1936  
September,  
10

*Benefit conferred on another's estate—Payment of money due by another person—Re-imbusement—Same property sold successively to two vendees—Vendee under invalid sale paying off mortgage on the property—Suit for possession by lawful vendee—Whether the discharged mortgage can be held up as a shield—Transfer of Property Act (IV of 1882),*

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\*Appeal No. 24 of 1935, under section 10 of the Letters Patent.

1936  
HARISH  
CHANDRA  
*v.*  
KAVINDRA  
NARAIN  
SINHA

1936

CHHOTAY  
LAL  
v.  
SUDARSHAN  
LAL

section 92—*Contract Act (IX of 1872), section 69—Transfer of Property Act, section 61 (old).*

The same property was sold, successively, to two different vendees; and, in the circumstances, the title of the first prevailed. In each case money had been left with the vendee to pay off a simple mortgage on the property; and the second vendee paid off the simple mortgage, as well as a usufructuary mortgage, and obtained possession. More than three years after the payment the first vendee brought a suit for possession, on the strength of his title, against the second vendee, and the latter claimed that the plaintiff's possession should be made conditional on his re-imbursing the defendant on account of the two mortgages which the defendant had paid off:

*Held* that so far as the usufructuary mortgage was concerned, the defendant's claim was well founded. He had obtained possession only by redeeming the usufructuary mortgage, and was entitled to hold up that mortgage as a shield and could not be dispossessed by the plaintiff unless and until the plaintiff redeemed him. But so far as the simple mortgage was concerned, as it did not confer any right to possession and it was not by virtue of having redeemed it that the defendant had obtained possession, he could not resist the plaintiff's claim for possession by holding up the payment of that mortgage as a shield and demanding re-imbusement of the money as a condition precedent to the plaintiff being awarded possession. If the suit had been brought within three years of the payment by the defendant of the simple mortgage, the defendant would have been entitled to be recouped under section 69 of the Contract Act and the plaintiff would have been put on terms in respect of that payment.

The provisions of section 61 (old) of the Transfer of Property Act did not entitle the defendant to claim that as the plaintiff was bound to redeem him in respect of the usufructuary mortgage, the plaintiff could not be allowed to do so without at the same time paying him off in respect of the earlier simple mortgage.

*Ram Charan Lonja v. Bhagwan Das Maheshri* (1) and *Ramarayaningar v. Maharaja of Venkatagiri* (2), distinguished. *Bijai Saran Sahi v. Rudra Bageshwari Prasad* (3), applied.

(1) (1926) I.L.R., 48 All., 443. (2) (1926) I.L.R., 50 Mad., 180.

(3) [1930] A.L.J., 531.

Mr. *B. Malik*, for the appellant.

Mr. *M. L. Chaturvedi*, for the respondents.

SULAIMAN, C.J., and BENNET, J.:—Letters Patent appeal No. 24 of 1935 is a plaintiff's appeal arising out of a suit for a declaration of title and for recovery of possession of a half share in a shop. This shop had belonged to Bijai and Sri Gopal in equal shares. In 1917 Bijai mortgaged his half share in this shop along with his share in another house to one Gulzari Lal, who sold his mortgagee rights to Babu Ram. On the 12th of August, 1918, Bijai first executed a sale deed of his half share in the shop in favour of the present plaintiff, but declined to get it registered. On the 15th of August, 1918, on the other hand, he executed a sale deed of the same half share in favour of the defendant Sri Gopal, and presented it for registration on the 20th of August, 1918. The present plaintiff then applied before the District Registrar for compulsory registration of his sale deed, which was registered on the 29th of November, 1918. Money had been left in the hands of the plaintiff and also in the hands of Sri Gopal for payment of the earlier mortgage of 1917. In 1919 both these vendees appear to have deposited the mortgage money under section 83 of the old Transfer of Property Act, but the mortgagee took out the amount deposited by Sri Gopal. Sri Gopal had thus paid Rs.440 in discharge of the prior mortgage of 1917. The plaintiff on the other hand took out the money which he had deposited to the credit of the mortgagee. Later on Sri Gopal redeemed another usufructuary mortgage which was for Rs.300 and has remained in possession since. In the present suit it has now been found by the lower appellate court that the defendant was aware of the previous contract in favour of the plaintiff and that accordingly the sale deed in favour of the plaintiff, though registered subsequently, must prevail as against the sale deed in favour of the defendant and the plaintiff's title to the property must be conceded. The defendant had also pleaded that the

1936

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CHHOTY  
LAL  
v.  
SUDARSHAN  
LAL

1936

CHHOTAY  
LAL  
v.  
SUDARSHAN  
LAL

plaintiff should not be given a decree for possession unless and until he paid the amounts which the defendant had paid in discharge of the two earlier mortgages. So far as the discharge of the usufructuary mortgage is concerned, there can be no doubt that the defendant is entitled to recover that amount. He could not obtain possession by virtue merely of the sale deed taken from the vendor but got possession when he redeemed the usufructuary mortgage. He is certainly entitled to hold up this mortgage money as a shield and cannot be ousted unless and until he has been redeemed. Indeed this part of the decree has not been challenged before us.

The difficulty arises as regards the claim of the defendant to be reimbursed on account of the payment made by him in discharge of the earlier mortgage of 1917. It may seem fair that the defendant who has freed the property from this earlier liability should be allowed to recoup himself, particularly as the plaintiff had undertaken in his sale deed to discharge this earlier mortgage. There was accordingly an obligation on the plaintiff to discharge this mortgage and the defendant has in fact discharged it. If the suit had been brought within three years of the payment made by the defendant we would have felt no difficulty, because under section 69 of the Contract Act the defendant would have been entitled to be recouped, and we would have put the plaintiff on terms.

The difficulty in the present case is created by the circumstance that the suit was brought more than six years after the payment but within 12 years of the mortgage and of the date when the mortgage money had fallen due, the date in the mortgage deed being two years. The question which arose in this case was whether a person who has purchased property from the vendor under a deed which has to be set aside and who has discharged a prior simple mortgage is entitled to use such payment as a shield and resist the plaintiff's claim

for possession until he has been paid such amount. The learned single Judge of this Court considered that the case was governed by the principle laid down by their Lordships of the Privy Council in the case of *Ram Charan Lonia v. Bhagwan Das Maheshri* (1). That was a somewhat peculiar case. One Gopal Das and adult sons of his had previously executed a mortgage deed carrying a high rate of interest. There was no suit brought to recover the amount but interest was accumulating fast. In 1912 Gopal Das entered into a contract with one Mst. Muhammad-un-nissa for the sale of 16 annas share in one of the three mortgaged villages. Subsequent to this he entered into a contract to sell the entire mortgaged property to the defendants appellants before their Lordships. As observed by their Lordships: "Gopal Das apparently soon repented of both contracts and would perform neither." But at the time of the second contract, the first contract was still in force. Mst. Muhammad-un-nissa got the matter settled, but the defendants brought a suit for specific performance of the contract in 1915, which was decreed in February, 1917, and a sale deed was executed compulsorily and possession was delivered under the order of the court in 1918. Under the sale deed, which was executed under the authority of the court, money was left in the hands of the purchasers to discharge the earlier mortgage. The mortgage was actually discharged by the defendants and they paid a large sum of money out of the purchase price towards it. In the meantime in September, 1916, the suit which went up in appeal to their Lordships of the Privy Council was instituted by the sons of Gopal Das, with the exception of one who had joined in the previous transaction. Their Lordships held that the transaction was a prudent one, but that the contract for sale was invalid and was not binding on the plaintiffs. It had therefore to be set aside. The question then arose whether the order of the High Court directing that the

1936

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 CHHOTAY  
 LAL  
 v.  
 SUDARSHAN  
 LAL

(1) (1926) I.L.R., 48 All., 443.

1936

---

CHHOTAY  
LAL  
v.  
SUDARSHAN  
LAL.

plaintiffs should, as a condition precedent to their taking over possession, pay the amount of the previous mortgage debt which had been discharged by the defendants, was correct or not. Their Lordships observed that the earlier mortgage had in no way been impeached or questioned in the suit by the plaintiffs and its terms were such that in substance they were neither excessive nor unconscionable, and that upon that view the mortgage was valid. Their Lordships pointed out that in strictness, possibly, the defendants' obligations as purchasers under an invalid contract should be alone dealt with in the suit, and their rights as mortgagees, whatever they were, be reserved for determination in another proceeding. But their Lordships agreed with the observations of one of the learned Judges in this Court that it was pre-eminently a case in which the court, being seised of the whole matter, should make such an order as may terminate the controversy and do justice between the parties. Their Lordships accordingly held that it was just that the mortgage should for that purpose be treated as a usufructuary mortgage—and the possession of the defendants be treated as possession thereunder—with the result that during that possession they would be entitled to no interest, but, on the other hand, would not be accountable for profits, and that the plaintiffs must redeem them. In that case the suit had been instituted even before the payment by the defendant, and therefore it could not be suggested that three years had expired before the suit was filed so as to deny to the defendants their rights under section 69 of the Contract Act. It was in the circumstances of such a case that their Lordships held that the defendants were entitled to be repaid the amount which they had paid. The suit had been brought by Hindu sons for setting aside an alienation which had been made as a result of the contract entered into by the manager and other adult members of the family and the amount had been paid by the defendants in discharge of a mortgage which was binding

on the family, and was therefore for legal necessity. It seems to us that the facts of that case are quite different from those of the present case and the principle laid down by their Lordships in that ruling cannot be applied to the case before us.

On the other hand, the present case has a very close resemblance to the case of *Bijai Saran Sahi v. Rudra Bageshwari Prasad* (1). In that case the plaintiffs had priority of title by virtue of an auction purchase, whereas the defendants' purchase was on account of a subsequent sale deed; but the defendants had taken the sale deed and entered into possession by virtue of it. It also appeared that the defendants had some earlier simple mortgages on the property which were subsisting at the time of the suit brought by the plaintiffs. The claim for the plaintiffs was based on their prior title and was one for possession and mesne profits. The defendants, however, pleaded in the alternative that the plaintiffs must redeem the earlier mortgages which the defendants held over the property. This High Court repelled this contention and their Lordships of the Privy Council upheld the decree. Their Lordships pointed out that the only question for consideration was whether the plaintiffs were entitled to oust the possession of the defendants without redeeming certain mortgages of 1904, which the trial court had held were valid and subsisting mortgages, and then remarked: "Now admittedly these mortgages were not usufructuary mortgages, and as the plaintiffs (respondents) have been held to be and are the owners of the equity of redemption it is impossible to see under what title the defendants (appellants) can claim to resist the decree for possession." Their Lordships accepted the view expressed in this Court to the effect that "The defendants got possession by virtue of the sale of 1908 . . . If the sale is invalid they must surrender possession of the same because their mortgages did not give them any right to possession."

1936

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 CHHOTAY  
 LAL  
 v.  
 SUDARSHAN  
 LAL

(1) [1930] A.L.J., 531.

1936  
 CHHOTRY  
 LAL  
 v.  
 SUDARSHAN  
 LAL

Their Lordships further observed that whatever rights they had under their mortgages they could no doubt enforce in proper proceedings taken for the purpose, but there was no principle or authority which enabled the defendants, as contended by them, to set up their mortgages as shields against the plaintiffs-respondents' claim for possession.

The only distinction that can be pointed out is that in that case the defendants had themselves held the earlier simple mortgages and had not paid off such mortgages. In the present case the defendant has paid off an earlier mortgage. But, under section 92 of the Transfer of Property Act, by paying off such a mortgage the defendant acquired the same rights as the mortgagee. We therefore fail to see any material distinction between this case and that decided by their Lordships of the Privy Council. In our opinion the present case is governed by that ruling.

As regards the defendant's Letters Patent Appeal No. 46 of 1935, the only point urged before us is that in view of the provisions of the old section 61 of the Transfer of Property Act the plaintiff must redeem all the mortgages together and must therefore discharge not only the amount due under the usufructuary mortgage but also the amounts due under the previous simple mortgages. Reliance is placed on the ruling of their Lordships of the Privy Council in the case of *Ramaramanagar v. Maharaja of Venkatagiri* (1). That, however, was a case where two documents were executed on the same date, one being a possessory mortgage and the other a lease by the mortgagee to the mortgagor. Under the latter document there was a liability for regular payment of rent and a charge was created for the arrears. Their Lordships on page 190 accepted the contention urged on behalf of the defendant appellant that the two deeds should be read together as they formed parts of one transaction, the lease being in the nature of a

(1) (1926) I.L.R., 50 Mad., 180.



machinery for the purpose of realising the interest due on the mortgage, and accordingly applied the provisions of section 61 of the Transfer of Property Act and held that the defendant was entitled to add the sums due on account of arrears to his claim for the mortgage money with interest. Indeed their Lordships observed (page 192): "If the defendant did not set up his charge for the arrears of rent in this suit serious questions might well arise as to whether he would be entitled subsequently to bring a suit to enforce that charge." That was a case of an anomalous mortgage or at least a combination of a simple and a usufructuary mortgage in one single transaction. We do not think that their Lordships intended to lay down that if there is a usufructuary mortgage and there are also earlier simple mortgages, the plaintiff cannot redeem the usufructuary mortgage without paying the amounts due under the simple mortgage and cannot insist on the mortgagee bringing his suit to recover the amounts due on the simple mortgages. The case is therefore clearly distinguishable.

We accordingly allow the appeal of the plaintiff with costs and setting aside the decree of the learned Judge of this Court restore that of the lower appellate court. The defendant's appeal is dismissed with costs.

1936

CHHOTAY  
LAL  
v.  
SUDARSHAN  
LAL