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Pillai (1). But the point that arises in the case before us was not argued there and no decision has been given on that point. Reference has also been made to the case of *Abdul Hussein v. D. J. Mistri & Co.* (2). In that case also the point which arises before us was not considered. Furthermore, it was pointed out by the learned CHIEF JUSTICE in that case that the court may in the exercise of its discretion refuse to make an order in favour of the judgment-creditor. The two courts below having concurrently exercised their discretion in favour of the respondent, we see no reason to overrule them and to hold that the appellant's application should have been granted.

For the reasons given above, we dismiss this appeal with costs.

Before Justice Sir Edward Bennet and Mr. Justice Verma

RAMESHWAR DAYAL AND OTHERS (DEFENDANTS) v.
HARI KISHEN (PLAINTIFF)*

1940
January, 17

Transfer of Property Act (IV of 1882), section 55(4)—Vendor's lien—Sale of mortgaged property—Money left with vendee to pay off the mortgage—Mortgage satisfied by payment of less amount—Vendor's right to recover the balance from vendee—Equity.

Certain property, which was subject to a simple mortgage, was sold by the mortgagor for Rs.3,000, out of which Rs.928-8-0 was left with the vendee to pay off the mortgagee. Due to the passing of the U. P. Agriculturists' Relief Act, however, the vendee obtained the benefit of reduction of interest, so that the mortgage debt was discharged by the payment of Rs.732-13-0 only, and a balance of Rs.195-11-0 remained in the hands of the vendee: *Held*, that the vendor was entitled to recover this balance, which was part of the purchase money remaining unpaid, from the vendee, and there were no equities in favour of the vendee which could allow him to retain for himself the benefit of a smaller sum having to be paid to the mortgagee.

Where the money left by the vendor in the hands of the vendee for payment to a third person is a part of the specified

*Second Appeal No. 572 of 1937, from a decree of S. M. Munir, Civil Judge of Shahjahanpur, dated the 7th of January, 1937, reversing a decree of L. N. Misra, Munsif of Shahjahanpur, dated the 19th of October, 1936.

(1) (1916) 34 Indian Cases 407.

(2) (1921) I.L.R. 46 Bom. 702.

sale consideration itself, any part of such money remaining unpaid in the hands of the vendee belongs to the vendor and is due to be paid to him as part of the purchase money.

Mr. *L. N. Gupta*, for the appellants.

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

BENNET and VERMA, JJ.:—This is a second appeal by the defendants against a decree of the lower appellate court in favour of the plaintiff. The facts are that in 1929 Indarjit and his son, Ram Chandra, executed a simple mortgage deed of zamindari for Rs.540 in favour of Mewa Ram. On the 1st of December, 1930, the mortgagors sold their equity of redemption to defendants 1 to 3 for Rs.3,000, of which Rs.928-8-0 was left to pay to Mewa Ram. In 1936 the vendees defendants tendered payment under the terms of the Agriculturists' Relief Act and learned counsel refers to section 12 of that Act although this section is not mentioned in the judgments of the courts below. The amount of interest was reduced under that Act and the debt was discharged by payment of Rs.732-13-0 and therefore there was a difference of Rs.195-11-0. Indarjit died and Ram Chandra sold to the plaintiff the right to recover the balance of Rs.195-11-0 from the vendees. One defence in the trial court was that the sale deed was spurious but the court held it to be genuine. The second defence was that the defendants vendees were entitled to the benefit of reduction of interest and should retain the balance. The trial court decided in favour of the vendees on this point and dismissed the suit. The plaintiff appealed and the lower appellate court has granted a decree for Rs.195-11-0 in favour of the plaintiff. It appears to us that the matter is governed largely by a Full Bench ruling of this Court, *Naima Khatun v. Sardar Basant Singh* (1). The Full Bench held: "Where property has been transferred by a vendor to a vendee, and there is a direction to the vendee to pay off a third person, the transaction may be one of any of the three following characters: (1) The amount left in the

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hands of the vendee may be part of the purchase money remaining unpaid, in which case it is obviously money belonging to the vendor and if not paid as directed is still due to be paid to the vendor; or (2) it may amount to a covenant with an undertaking to relieve the vendor from his existing liability, in which case a suit on the covenant may lie; or (3) it may be a mere promise to perform an act for consideration, or a contract of indemnity, in which case a suit for damages incurred on the breach of the contract would lie under section 125 of the Contract Act; but it must be proved that loss has been sustained. Where the money left in the hands of the vendee is in substance a part of the purchase money itself, there is a statutory charge created by section 55 which is enforceable as such."

Now some argument was made that this ruling would not apply to anything except the second class which was the particular case before the Full Bench. We do not think that this argument is sound. When the Full Bench divided the possible cases into three classes we must follow it. The present case clearly comes within the first class as the amount of the sale consideration was specified as Rs.3,000 and a part of that sale consideration was left for the payment of this particular mortgage debt. A reference was made by learned counsel to a ruling of their Lordships of the Privy Council, *Izzat-un-nisa Begam v. Partab Singh* (1), as quoted by the court below. In this ruling there was a case before their Lordships of a purchase at an auction sale and their Lordships made a general observation as follows: "It seems to depend on a very simple rule. On the sale of property subject to encumbrances the vendor gets the price of his interest, whatever it may be, whether the price be settled by private bargain or determined by public competition, together with an indemnity against the encumbrances affecting the land. The contract of indemnity may be express or implied. If the purchaser covenants with

(1) (1909) I.L.R. 31 All. 583(589).

the vendor to pay the encumbrances, it is still nothing more than a contract of indemnity. The purchaser takes the property subject to the burden attached to it."

Now, the case mentioned by their Lordships comes within the second class of the Full Bench, that is, it is a case of a covenant with an undertaking to relieve the vendor from his existing liability, but a case where the amount to be paid in doing so does not form part of the purchase price. Therefore, in our opinion, the observations of their Lordships of the Privy Council are not intended to apply to a case like the present.

The present case is one in which there was this inclusion of the amount of Rs.928-8-0 in the purchase money, and by the unforeseen circumstance that the Agriculturists' Relief Act was passed in the year 1934 the defendants were in a position to pay off the loan for a less amount than would otherwise have been due. Under the Agriculturists' Relief Act an application under section 12 is governed by section 24 and under that section the reduction can only be obtained if both the applicants and the original debtor were agriculturists. Therefore the defendants took advantage of the fact that the loan was incurred by an agriculturist originally. Some argument has been made in regard to the equities of the situation, but we do not see any reason why the defendants should be allowed to retain this benefit. The defendants contracted to pay Rs.3,000 for the property, and if the benefit is not given to them then the sum which they will pay is Rs.3,000 for which they contracted. There is no reason why they should be able to discharge their obligations under the sale deed for a less amount. We consider that there is a clear legal right of the plaintiff to recover this amount as it is unpaid purchase money. His suit to recover it is within a period of six years from the date of the sale deed even if the payment in 1936 would not give a fresh start for limitation.

For these reasons we dismiss this second appeal with costs.

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