assessment of such land and the making the settlement of it with the person in actual possession as proprietor (see s. 89). Taking this view we hold that the suit was properly dismissed, and we dismiss this appeal with costs.

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ZALIM SINGH v. UJAGAR SINGH.

Appeal dismissed.

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December 20

FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, Mr. Justice Oldfield, and Mr. Justice Straight.

RAM SARAN LAL (DEFENDANT) *v.* AMIRTA KUAR AND OTHERS (PLAINTIFFS).*

Vendor and Purchaser—Sale—Mortgage—Redemption—Condition against alienation.

The co-sharers of a certain estate sold it to *R*. On the same day as the vendors executed the conveyance of such estate to *R* the latter executed an instrument whereby he agreed that the vendors might redeem such estate or any portion thereof, within a certain term, on repayment of the purchase-money or a proportionate share thereof, and in such case the sale would be considered cancelled; provided that the vendors paid the money out of their own pockets and did not raise it by a transfer of the property and not otherwise. The heir of one of the vendors sold his share of such estate to *A* and *A* sued *R* to redeem such share.

Held by the Full Bench (STUART, C. J., doubting) that the nature of the transaction between *R* and his vendors must be determined by looking at both the conveyance and the agreement, and, both those documents being regarded, the transaction between them was one of mortgage, and the vendors had a right of redemption, and the proviso in the agreement was inequitable and incapable of enforcement against them or their representatives in title.

Held also by PEARSON, J., that the agreement was not of the nature of a personal contract enforceable only by the original vendors and not by their representatives; that, assuming that a transfer of the property was prohibited by the agreement, *R* could not, as implied by the Full Bench ruling in *Doolchore Rai* v. *Hidayat-ullah* (1), treat as a nullity the sale which had been made to *A* and *A's* right to redeem could not be reasonably denied and resisted; and that a transfer was not positively but only implicitly prohibited by the agreement, *R* merely declaring that he would not recognize the transferees as having acquired the equity of redemption or cancel his own sale-deed, and such a declaration was beyond his competence and had no legal effect.

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* Second Appeal, No. 1224 of 1879, from a decree of J. W. Power, Esq., Judge of Gházipur, dated the 13th May, 1879, reversing a decree of Maulvi Mahmud Bakhsh, Additional Subordinate Judge of Gházipur, dated the 21st December, 1878.

(1) N.-W. P. H. C. Rep., F. B., 1866-67, p. 7.

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On the 26th August, 1862, a nine-anna six-ganda share of a village called Rampur Jiwan was transferred by way of absolute sale to the defendant in this suit, Ram Saran. On that same day Ram Saran executed an instrument whereby he reserved to the vendors of that share the right of redemption, the material portion of that instrument being as follows: —"I Ram Saran.........declare that, whereas I have under a deed of absolute sale dated this day purchased a nine-anna six-ganda share, the property of Bisheshar Rai, Zalim Rai, and other persons, zamindars of mauza Rampur Jiwan.........for Rs. 1,800, I therefore agree that the said vendors may within a term of ten years, that is to say, on Jaith Sudi 15th, 1279 fasli (corresponding with 21st June, 1872), before sunset, pay the entire sale-consideration, the deed of absolute sale being (in that case) considered as standing cancelled: in the event of the whole sum not being paid, any one of the vendors paying his quota of the sale-consideration as specified in the deed of sale, the sale in respect of his share shall be invalid: if the sale-consideration is not paid at the time fixed and I have to foreclose and bring a suit, I shall be entitled to realize the costs from the vendors personally and from their other property:............the whole sale-consideration, or a portion thereof paid by any of the vendors on account of his own share, if paid from their own pockets, without transferring the property sold in any way, shall be received by me; but if it is paid, or deposited in court, being raised by tranfer of the property sold, it shall not be received by me, nor shall the sale made by the vendors in my favour be considered cancelled." On the 1st May, 1878, the grandson of one of the vendors sold his share of such nine-anna six-ganda share, a three-anna two-ganda share, to the plaintiffs in this suit, who offered to redeem the share purchased by them. Ram Saran having refused to allow them to redeem such share, the plaintiffs, on the 17th September, 1878, instituted the present suit against Ram Saran for the redemption of such share, founding their claim on the agreement of the 26th August, 1862. The defendant denied the plaintiffs' right to redeem, stating as follows:—"The plaintiffs' claim on the basis of the agreement dated the 26th August, 1862, is untenable, as the defendant is not bound to abide by the agreement as against the plaintiffs: the condition of restoring the share was limited to the vendors, and there

is nothing therein authorising the heirs or representatives of the vendors to enforce that condition : a deed or stipulation, the application of which is restricted to a particular person, cannot be made the basis of a claim by another person: it is also provided by the agreement that the payment of the mortgage-money shall be accepted, if the vendors pay it out of their own pockets, without transferring the property; but that should they procure money by transfer and offer or deposit it in court, it should not be accepted: it is evident that the money in this case has been procured by a transfer of the property, and therefore the property should not be released from mortgage." The Court of first instance held that the plaintiffs could not be allowed to redeem, as the money for redemption had been raised by the transfer of the property, in violation of the condition contained in the agreement of the 26th August, 1862; and dismissed the suit. The material portion of its judgment was as follows :—"The purchaser of the property cannot derive any authority for redemption from the agreement, which prohibits the transfer of the property: the privilege granted by the purchaser to the vendors at the time of the execution of the agreement had for its real object the preservation of the property in the family of the vendors: the condition of restitution contemplated the regaining of the property by the vendors, should they by any chance succeed in procuring money within ten years: if the vendors or their heirs had borrowed the money and paid it, the property would have been considered redeemable, as then there would have been nothing against public policy or law; but to do so after transfer of the property, which is clearly prohibited, is calculated to defeat the intention of the vendors and the purchaser to preserve the property in the family of the vendors: to concede the right to redeem and to take possession to the present purchasers (plaintiffs), contrary to the agreement in question, is inexpedient: such concession would involve a violation of the condition prohibiting transfer: the plaintiffs' claim is therefore improper." On appeal the lower appellate Court held that the plaintiff was entitled to redeem the property in suit, the material portion of its decision being as follows: "I find that the question has been finally settled by a Full Bench decision of the Allahabad High Court,—

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Dookchore Rai v. *Hidayat-ullah* (1): in that case there was a stipulation against alienation; therefore the mortgagee contended that redemption could not be had by transfer of the property; also that the contract was a personal one between the mortgagor and the mortgagee; the Judges, however, ruled that such a stipulation against alienation could not operate to annul a *bonâ fide* conveyance to a third party, for the purpose of paying off the original mortgage; they further held that certain old rulings favouring the contention of the respondent in that case, as regards the contract being a personal one, did not commend to their mind: there is another ruling also bearing strongly on this point, and in which the Judges held the same view,—*Muhammad Zaka-ul-lah* v. *Beni Parshad* (2): there is also a third ruling, which is more clear to my mind, and almost similar to the present case,—*Ram Rup Singh* v. *Thakur Parshad* (3); in this case the Judges held that, as long as the mortgage was not absolutely foreclosed, the mortgagee retained his possession as that of a trustee for the mortgagor; he therefore cannot object to the mortgagor making any alienation of his property to a third party on more advantageous terms............ I may also observe that the stipulations mentioned in the agreement are opposed to the principles of the law of mortgage, which expressly empowers the mortgagor, his heirs, or assigns to sue for redemption, by depositing the money in court,—Macpherson on Mortgages, 5th ed., p. 104." The defendant appealed to the High Court, the first three grounds of appeal set out in the memorandum of appeal being (i) that, as the plaintiffs claimed under the agreement of the 26th August, 1862, they were bound by the terms and conditions thereof, and such terms and conditions showed that they were not entitled to redeem; (ii) that the agreement of the 26th August, 1862, was a personal agreement between the defendant and his vendors, and the plaintiffs could not claim thereunder; and (iii) that the cases cited by the lower appellate Court were not applicable, as they related to agreements of a special nature. The appeal came for hearing before Stuart, C. J., and Pearson, J., who referred the question "whether the stipulation against alienation

(1) N.-W. P. H. C. Rep., F. B., 1866-67, p. 7.

(2) N.-W. P. H. C. Rep., 1869, 13th April, 1869.

(3) 24 W. R., 429.

by any of the vendors was good, so as to invalidate any alienation not made according to the agreement" to the Full Bench.

The order of reference was as follows:—

STUART, C. J.—In this case the two principal questions referred to at the hearing were, first, whether the agreement allowing the vendors mortgagors to redeem within ten years was merely personal to the original vendors and was not operative against their heirs or representatives. The second question discussed was whether the stipulation against alienation by any of the vendors was good, so as to invalidate any alienation not made according to the agreement. On the first question it is quite clear to me that the original agreement must be taken as part and parcel of the whole transaction, and that it is not only operative against the original vendors themselves personally, but that it was transmissible to and operative against their heirs and successors or others in their right; in fact, that the agreement was in the same position as if it had been incorporated with the original sale-deed, the two documents making really one contract. But with regard to the second question, as to the validity of the condition in the agreement against alienation, I entertain some doubt, and I would refer the question to the Full Bench. If I was of opinion that the Full Bench ruling in *Dookchore Rai* v. *Hidayut-ullah* (1), relied on by the respondents at the hearing, applied to this case, I would have no difficulty in dismissing the appeal. But I am rather inclined to think, although with some doubt, that the peculiarity of the stipulation in this case against alienation by any one of the conditional vendors takes the case out of the principle laid down by the Full Bench; and I concur in the observations on that ruling in a judgment by a Division Bench of this Court (Pearson and Turner, JJ.,) in *Muhammad Zaka-ullah* v. *Beni Parshad* (2), where it was remarked: "This ruling is, in our opinion, applicable to cases in which the debt is at once discharged by means of the transfer, and does not sanction a gradual discharge of it by instalments, such as is provided by the sale-deed of 8th September, 1865. A mortgagee may fairly object to an arrangement which would compel

(1) N.-W. P. H. C. Rep., F. B., 1866-67, p. 7.

(2) N.-W. P. H. C. Rep., 1869, 13th April, 1869.

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him to look for the payment of his debt piecemeal during a protracted period to a person other than the one with whom he had originally dealt, and the objection can only be obviated by the debt being paid before the property liable for it is transferred." In such observations I entirely concur, and they appear to me to go a considerable way in favour of the appellant's contention in the present case.

The facts raising the question in this case are as follows:—By a deed of absolute sale, dated 26th August, 1862, certain persons, Bisheshar Rai, Zalim Rai, and others, zamindars of mauza Rampur, &c., &c., sold that property to Ram Saran Lal, the defendant, appellant, for the consideration of Rs. 1,800. On the same day and immediately after the execution of this sale-deed, Ram Saran Lal, the vendee, made an agreement with his vendors by which he consented to their redeeming the property sold to him within a term of ten years from the date of sale, by paying "on Jaith Sudi 15th, 1279 fasli, before sunset, the *entire* sale-consideration, the deed of absolute sale being (in that case) considered as standing cancelled." This applies to the whole transaction, but then the agreement goes on to provide "that in the event of the whole sum not being paid, any one of the vendors paying his quota of the sale consideration as specified in the sale-deed, the sale in respect of his share shall be invalid." The agreement further provides "that the whole sale-consideration or a portion thereof by any one of the vendors on account of his share, if paid from their own pocket, without transferring the sold property in any way, will be received by me; but if it is paid or deposited in court, being raised by transfer of the property sold, the money so raised will not be received by me, nor will the sale made by the sellers in my favour be considered as cancelled." In the Full Bench case to which I have referred the condition against alienation was in the usual general terms, "that the mortgagor should not alienate or mortgage the land, and that any such attempt at transfer should be void." In the present case, however, the agreement against alienation is precise and special, and I am not sure that the Munsif is not right when he suggested in his judgment that "the privilege granted by the vendee to the vendors at the time of the execution of the agree-

ment had for its real object the preservation of the property in the family of the vendors. The condition of restoration contemplated the regaining of the property by the vendors, should they by some chance succeed in procuring money within ten years." And the Munsif goes on to give it as his opinion that the intention of the vendors as well as of the vendee was the preservation of the property in the family of the vendors. But irrespective of such a consideration, it can be very well understood that the vendee, or, as he may be called, the mortgagee, had a clear interest to keep the whole property in his hands till the entire debt had been paid off, and I do not see why he should not be entitled to make such an agreement as the condition on which the vendors or mortgagors would be entitled to redeem. The vendee, in fact, appears to me to say by this agreement: "You, the vendors, have sold me this property absolutely for Rs. 1,800; I have paid you the money and the transaction is complete; but I am willing, notwithstanding, to allow you to receive the property should you repay the sale-price within ten years, on the condition, however, that my right as mortgagee and my security over the entire property is not to be disturbed or interfered with by any partial alienation on the security of any portion of the property. At the same time I am willing to accept any payment by any one of the vendors towards discharge of the mortgage-debt, if they can find the money in any other way. Such is the condition on which alone I consent to your redeeming within ten years." Now was not the vendee, mortgagee, entitled to make such an agreement and to have it enforced? I am inclined to think he was.

But the question is, as I have already said, not unattended with doubt and difficulty, and I would therefore refer it to the Full Bench of the Court.

PEARSON, J.—Having been prepared since the 24th April last to deliver judgment in this case, which was heard by us on the 15th idem, I regret that its disposal should be further indefinitely postponed by a reference to the Full Bench, which, in my opinion, is unnecessary, although in courtesy I assent to it. The object of the proposed reference is not professedly to call in question the correctness of the Full Bench ruling in *Dookchore Rai* v. *Hidayut-*

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ullah (1), but only its applicability to the present case. Now it may be conceded that the ruling aforesaid is not directly applicable in the case now before us. In the case which came before the Full Bench, the mortgagor had expressly contracted not to alienate the mortgaged property by sale or mortgage; and it was held that such a stipulation could not operate to avoid a *boná fide* conveyance by the mortgagor of his equity of redemption to a third person for the purpose of paying off the mortgage-debt. In the present instance, no such contract was entered into by the mortgagors; but, in the instrument by which the sale was converted into a redeemable mortgage, the mortgagee declared that he would only receive back from them the sale-consideration, which had become the mortgage-debt, if paid out of their own pockets, and that, if it were raised by transfer of the property, he would not receive the money back from them, nor cancel the deed of sale which had been executed in his favour. Strictly speaking, no question arises "whether the stipulation against alienation by any of the vendees was good, so as to invalidate any alienation not made according to the agreement." If the above-mentioned declaration were equivalent to a prohibition of alienation, the principle of the Full Bench ruling, that not even a contract on the part of the mortgagors not to alienate would invalidate a *boná fide* alienation, would *á fortiori* apply to a simple prohibition of alienation on the part of the mortgagee. But the declaration is not a positive and direct, but at the most an implicit, prohibition of mortgage. It is only a refusal in the event of a transfer to recognize the transferee of the equity of redemption as having acquired such an equity by the transfer, and to cancel the deed of sale which had been executed in his own favour. The real question which calls for determination is whether such a declaration possesses any legal force or effect, or was not beyond the competence of the mortgagee, or may not equitably be disregarded.

The plaintiffs in this suit have only purchased a portion of the mortgaged property and sue for the recovery of that portion by payment of a proportionate part of the mortgage-debt. By the instrument executed by the vendee on the 26th August, 1862,

(1) N.-W. P. H. C. Rep., F. B., 1866-67, p. 7.

whereby the sale was converted into a mortgage, he agreed that "the whole sale-consideration *or a portion thereof by any one of the vendors on account of his share* (if paid from their own pockets without transferring the property sold to me in any way) will be received by me." The frame of the suit is not therefore objectionable. The claim to partial redemption is not open to exception, if the plaintiff's right to redeem cannot be denied; partial redemption by a vendor's representative affects the security no more than partial redemption by one of the vendors. The substantial right of the mortgagee is to recover the money lent by him; the transfer of a share of the mortgaged property to the plaintiffs has provided for the payment of a proportionate share of the mortgage debt; and such a condition as that imposed by the deed of the 26th August, 1862, that the money must come out of the mortgagors' pockets, and may not be raised by a transfer of the right of redemption, appears to be a condition of a wanton, arbitrary, and oppressive nature, such as the Courts would hesitate to enforce, as being opposed to those principles of justice and equity which govern their decisions.

The *Senior Government Pleader* (Lala *Juala Prasad*) and Munshi *Hanuman Prasad*, for the appellant.

Pandit *Ajudhia Nath* and Munshi *Sukh Ram*, for the respondents.

The following judgments were delivered by the Full Bench :—

STRAIGHT, J., (PEARSON, J., SPANKIE, J., and OLDFIELD, J., concurring).—The single question submitted to us by this reference is whether the condition in the agreement of the 26th August, 1862, by which redemption of the property sold under the deed of the same date is hampered, can be enforced, so as to defeat *bonâ fide* purchasers for value of a portion of the rights and interests of the mortgagors. The answer to this depends upon whether the transaction between the parties was in reality a sale, or amounted simply to a contract of mortgage, under which the mortgagors would necessarily reserve their right to redeem. In our opinion, in face of the agreement as to redemption, it is impossible to hold that there was any sale. The complexity given to the

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bargain between the parties by the execution of two instruments, one qualifying the other, cannot alter its true character, the precise legal description of which must be determined by reading both of them as a single and indivisible contract. The relation created thereby between the parties was essentially that of mortgagors and mortgagee, and until the mortgagee took the prescribed steps to foreclose and establish his absolute proprietorship, their relative positions continued the same, and down to the last day of the twelve months' period of notice of foreclosure the rights of the mortgagors or those acquiring their interests remained in existence and could at any moment be exercised. The substance of the contract was the pledge of the estate for the debt, and the time of its repayment was not of its essence, and Courts of Equity invariably relieve against the forfeiture of the estate by sanctioning redemption at any time upon paying the mortgage-debt with interest. The mortgagors in the present case, therefore, having the ordinary right to redeem, the sole point for further consideration is, was the condition of the agreement of the 26th August, 1862, inconsistent with their position, and of such a nature as to place them at a disadvantage? We entirely concur in the observations of Mr. Justice Pearson upon this point, and we regard the condition as most inequitable and incapable of enforcement, either against the original mortgagors or their representatives in title.

STUART, C. J.—I am not disposed, on reconsideration of this case, to express a dissent from the opinion recorded by my colleagues, although I retain the doubt I suggested in my referring order respecting the second question I there considered, *viz.*, whether the stipulation against alienation by any of the vendors was good, so as to invalidate a sale not made according to the agreement, or in other words, as my colleagues put it, "whether the transaction between the parties was in reality a sale or amounted simply to a contract of mortgage." My colleagues are of opinion that the transaction was a mortgage, and I am free to acknowledge that the opinion I myself expressed in the referring order, "that the agreement was in the same position as if it had been incorporated with the original sale-deed, the two documents making really one contract," goes to support that view of the case; and

there are allusions in the so-called agreement which I admit may fairly be said to have the same effect. Thus I observe it is stipulated that, "if the sale-consideration is not paid at the time fixed, and I the executant have to foreclose and to bring a regular suit, I shall realize the costs from the persons and other properties of the vendors." And there can be no doubt that this stipulation supports the view that the transaction was a mortgage and not a sale out and out. A very careful consideration of the record, however, causes me considerable hesitation in holding that such was the real understanding of the parties towards each other. In the first place there was really no agreement, that is, no mutual agreement between the parties at all. What was so called was entirely a one-sided document expressed in the name of Ram Saran Lal the defendant and vendee alone, and this document appears to me to amount to nothing but a promise of a favour or privilege in the nature of a *nudum pactum*, which did not change the transaction into a mortgage, or in any way invalidate it as a sale, and if that was so there could have been no reservation on the part of the defendants of their right to redeem; and it appears to me that the agreement itself shows this. That document, as I have said, runs exclusively in the name of Ram Saran Lal the defendant and vendee, the plaintiffs being no parties to it; and on the recital "that, whereas I have under a *deed of absolute sale* dated this day purchased a nine-anna six-ganda share, the property of &c., for Rs. 1,800," it proceeds to state, "I, therefore, while in a sound state of health and reason, without coercion and reluctance, of *my own free will and accord*, agree and record that the aforesaid vendors may within a term of ten years, that is, on Jaith Sudi 15th, 1279 fasli, before sunset, pay the entire sale-consideration, the deed of absolute sale being (in that case) considered as standing cancelled;" and the same unilateral character of the document appears to me to qualify all the other portions of it, even including the clause I have referred to as appearing to favour the idea that a sale and not a mortgage was intended. If so, the transaction might, I think, be fairly considered to fall within the principle laid down in Sugden's Vendors and Purchasers (14th edition, 1862, p. 199):—"If a power to re-purchase be given upon a condition * * the right

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(that is, the right to re-purchase) cannot be enforced unless the condition has been complied with, *for it is a privilege* conferred." To the same effect is the law laid down in a case decided by the Privy Council in 1860, that of *Shaw v. Jefferey* (1). This was a case relating to several deeds, and at p. 461 of the judgment it is stated: —"Upon the plain language of the instruments, and on consideration of the circumstances existing at the time of their execution, their Lordships think it clear that this was nothing like a mortgage, but was an absolute sale, to which was attached a conditional right of re-purchase, to be exercised, if at all, on the happening of a certain event, the period for the happening of which was fully and equally within the knowledge of both parties."

As to the right to redeem which my colleagues seem to consider has been reserved, there was really no such reservation, certainly no express reservation, nor even one by implication, so far as relates to the mind and intention of both the parties, but was rather a favour or privilege voluntarily granted or conferred by the vendee and therefore not forming part of the contract in its mutuality. These are my doubts, but I do not entertain them so strongly as to feel induced to record a dissent from the opinion of my colleagues.

On the case coming again before the Division Bench (STUART, C. J., and PEARSON, J.,) for disposal, the following judgments were delivered:—

STUART, C. J.—I consider it unnecessary to offer any further observations in this case, but content myself with stating that the decision of the Full Bench, viewed in relation to the pleas on the record, is that the reasons assigned in the memorandum of appeal must be disallowed and the appeal dismissed with costs.

PEARSON, J.—The particulars of the case and the reasons of the decisions of the lower Courts are clearly set forth in their judgments and need not be recapitulated. We have to deal with the grounds of appeal. If the agreement executed on the 26th August, 1862, by the defendant, whereby the sale just before made to him was converted into a redeemable mortgage was of the nature of a personal contract enforceable only by the original vendors and

(1) 13 Moore's P. C. C., 432.

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not by their representatives, it follows that the plaintiffs' vendor, who is the grandson of one of the original vendors or mortgagors, would be incompetent to redeem his share from mortgage. The proposition that, in the event of the death of any of the original mortgagors before the foreclosure of the mortgage, the agreement relating to the redemption of his share determined, is not supported by any express provisions to that effect, and is not warranted by the mere fact that there are not any express terms extending the right of redemption to the heirs of the original mortgagors. If the opinion of the Court of first instance be correct that the object in view was the preservation of the property in the family of the vendors, that object would have been defeated by the construction which should deprive their heirs of the right of redemption. I cannot perceive any sufficient ground for concluding that the plaintiffs' vendor had not the right of redemption. He has transferred it by sale to the plaintiffs and the validity of the transfer is the next question. In the case which came before the Full Bench—*Dookchore Rai* v. *Hidayut-ullah* (1)—the mortgagor had contracted not to alienate the mortgaged property by sale or mortgage, but it was held, and the ruling is binding upon us, that such a stipulation could not operate to avoid a *bonâ fide* conveyance by the mortgagor of his equity of redemption to a third person for the purpose of paying off the original mortgage-debt. In the present case the mortgagors did not so contract, after the conversion of the sale into a redeemable mortgage, but the mortgagee on his part was pleased to declare that he would only receive back from them the sale-consideration which had become the mortgage debt if paid out of their own pockets, and that, if it were raised by transfer of the property, he would not receive the money from them, nor cancel the deed of sale which had been executed in his own favour. Even were a transfer prohibited, if he could not, as the Full Bench ruling above-mentioned seems to imply, treat as a nullity the sale which has been made to the plaintiffs, the right of the latter to redeem the property could not be reasonably denied and resisted. The defendant, if he had been injured by the act of the plaintiffs' vendor in making the transfer, might have his remedy; but the transfer would not otherwise affect his right as

(1) N.-W. P., H. C. Rep., F. B., 1866-67, p. 7.

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mortgagee to the recovery of his mortgage-debt than by providing for the repayment of a part thereof, and would be maintainable. But a transfer is not positively, but only implicitly, prohibited by the terms used in the instrument executed by the mortgagee converting the sale into a redeemable mortgage. What he says is that he will not recognise the transferee as having acquired by the purchase the equity of redemption or cancel his own sale-deed. Such a declaration appears to be beyond his legal competence and to be of no effect.

For the above reasons, and those recorded by me on the 11th August last, and in reference to the opinion expressed by the Full Bench on the 30th November last, on the question referred to it by the Chief Justice in this case, I would disallow the first three pleas in appeal. I would also disallow the two remaining pleas, for the money has been deposited, and nothing has been found to be due on account of embankments and wells. I would therefore dismiss the appeal with costs.

Appeal dismissed.

APPELLATE CIVIL.

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December 22.

Before Mr. Justice Spankie and Mr. Justice Straight.

MUKHI (JUDGMENT-DEBTOR) *v.* FAKIR (DECREE-HOLDER).*

Dismissal of appeal for appellant's default—Appeal—Act X of 1877 (*Civil Procedure Code*), *ss.* 2, 540, 556, 558.

An order under s. 556 of Act X of 1877 dismissing an appeal for the appellant's default is not a "decree," within the meaning of s. 2, and is not appealable.

THE judgment-debtor in this case appealed from the order of the Court executing the decree disallowing his objections to its execution. On the day fixed for hearing the appeal the appellate Court ordered the appeal to be "struck off," on the ground that neither the judgment-debtor nor his pleader were present. The judgment-debtor thereupon applied to the appellate Court for the re-admission of the appeal, under s. 558 of Act X of 1877, and the Court

* Second Appeal, No. 62 of 1880, from an order of J. W. Power, Esq., Judge of Ghazipur, dated the 29th March, 1880, affirming an order of Chaudhri Jagan Nath, Munsif of Saidpur, dated the [illegible] January, 1880.