Before Sir Louis Stuart, Knight, Chief Judge, and Mr. Justice Wazir Hasan.

1926 *September, 15.*

DARSHAN SINGH AND OTHERS (PLAINTIFFS-APPELLANTS) *v.* ARJUN SINGH AND OTHERS (DEFENDANTS-RESPONDENTS).*

Mortgage—Usufructuary mortgage, whether extinguished by subsequent sale of property to mortgagee—Pre-emption—Merger—Pre-emptor, whether entitled to invoke the principle of merger.

A usufructuary mortgage of the property in suit was executed in favour of *M*, the head of a joint Hindu family. Under the terms of the mortgage the mortgagee was laid under an obligation to pay the mortgagor a sum of Rs. 80 per annum as profits in excess of the interest and was to remain in possession for thirty years as such. About seven years after the mortgagor sold the property in suit to the joint family, the sale-deed being executed in favour of the eldest son of *M*, and the mortgage-money was made payable to *M*. The plaintiff then brought the present suit for pre-emption of the property sold. The plaintiff's title to pre-emption was admitted and the question was whether the mortgage was extinguished by the sale and the plaintiff was entitled to get actual possession or whether he was entitled only to a decree for possession of the equity of redemption.

Held, that according to the general rule the mortgage shall be deemed, *prima facie*, to be extinguished, but the presumption in favour of extinction may be rebutted by showing that the owner of the property has declared by express words or necessary implication that the incumbrance shall continue to subsist or that such continuance would be for his benefit.

Held further, that the "benefit" contemplated by the rule must be a benefit accruing to the vendee on the date of the sale and not merely a possible benefit which may arise in future on the happening of a possible contingency.

Held, therefore, that there being no incumbrance on the property, except that in favour of the vendee himself, there

* Second Civil Appeal No. 167 of 1925, against the decree, dated the 23rd of December, 1924, of Jitendra Mohan Basu, Second Additional District Judge of Lucknow, at Unao, modifying the decree, dated the 21st of May, 1923, of Tika Ram Misra, Subordinate Judge of Unao, decreeing plaintiffs' suit.

was no reason to preserve the covenant as a shield against any existing incumbrance. Indeed the extinction of the covenant had the advantage of relieving the mortgagee from the obligation of the payment of the surplus profits of Rs. 80 per annum to the mortgagor.

Held also, that there was no reason why the principle of merger could not be invoked by a pre-emptor in his favour. The continuance or extinction of an incumbrance is an advantage which runs with the land and is not personal to the vendee. [3 Mer., 210; (1884) L. R., 11 I. A., 126; 5 Ch. D., 634; (1896) L. R., 1 Ch. D., 726; (1898) A. C., 321; I. L. R., 34 All., 268 and 10 O. C., 49, relied upon.]

Messrs. *St. G. Jackson*, *Ali Zaheer* and *Lakshmi Narayan*, for the appellants.

Messrs. *John Jackson* and *A. P. Sen*, for the respondents.

STUART, C. J., and HASAN, J.:—This is the plaintiffs' appeal from the decree of the Additional District Judge of Lucknow at Unao, dated the 23rd of December, 1924, modifying the decree of the Subordinate Judge of Unao, dated the 21st of May, 1923.

The facts are as follows:—

Arjun Singh and Mohan Singh, defendants Nos. 1 and 2 respectively in the suit, out of which this appeal arises, constitute, as now agreed, a joint Hindu family. Mohan Singh is the father of Arjun Singh. Another member of the family is Daya Shankar Singh, minor, younger son of Mohan Singh. The property in suit is certain zamindari shares in three villages which originally belonged to one Sheoraj Singh. On the 10th of September, 1914, Sheoraj Singh made a usufructuary mortgage of the property in suit in favour of Mohan Singh for a sum of Rs. 8,000. The mortgage also included a small area of land which is not the subject-matter of the present suit. It is agreed that in pursuance of the term

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of the mortgage the mortgagee entered into the possession of the mortgaged property and is still in possession of it. It is also agreed that the mortgage must be taken to have been made in favour of the joint family of which Mohan Singh is the managing member. According to the covenants of the mortgage the mortgagee was laid under an obligation to pay to the mortgagor a sum of Rs. 80 per annum as profits in excess of the interest. According to the same covenants the mortgagee was to remain in possession for thirty years as such. On the 13th of June, 1921, Sheoraj Singh sold the property in suit to the joint family for a sum of Rs. 10,000 and the deed of sale was executed in favour of Arjun Singh, defendant No. 1, the elder son of Mohan Singh. The plaintiffs' suit seeks the relief of pre-emption in respect of the sale of the 13th of June, 1921.

The plaintiffs' title to pre-empt was admitted all along and the two questions which now survive for decision relate, *first*, to the amount of the price of the property in suit, and, *secondly*, the subsistence or extinction of the mortgage of the 10th of September, 1914, after the sale of the 13th of June, 1921, in so far as the covenant relating to the mortgagee's possession for thirty years is concerned.

On the question of the price, we are of opinion that the matter is concluded by the finding of the lower appellate court. That court has found that the sale price of Rs. 10,000 is not shown to have been fixed in bad faith and that even if it were so fixed, the market value of the property in suit is the same. Ground No. 5 in the memorandum of appeal to this Court must, therefore, be rejected and we accordingly do so.

The only other question which remains for decision is the effect of the sale on the term of thirty years'

possession in the character of a mortgagee under the mortgage of the 10th of September, 1914. The trial court was of opinion that the sale had the effect of extinguishing the mortgage for the reason that the latter merged into the former and that the plaintiffs were consequently entitled to actual possession. On appeal by the defendants the lower appellate court disagreed with the trial court and held that the plaintiffs were entitled to a decree for possession of the equity of redemption only on payment of the difference between the mortgage-money and the sale price, that is the sum of Rs. 2,000. In second appeal before us the correctness of the opinion of the lower appellate court is challenged and the opinion of the trial court is insisted upon.

The argument on the matter now under consideration proceeded as it had in the courts below on the line as to whether the mortgage of the 10th of September, 1914 had, or had not, merged in the sale of the 13th of June, 1921. The principle of merger is well known to English law. In its broadest aspect it was stated by Sir WILLIAM GRANT, M. R., in the case of *Toulmin* v. *Steere* (1). The dictum of the learned Master of Rolls was quoted by their Lordships of the Privy Council in the case of *Gokuldass Gopaldass* v. *Rambux Seochand* (2). It is as follows :—

> " The cases of *Greswold* v. *Marsham* (3) and *Mocatta* v. *Murgatroyd* (4) are express authorities to show that one purchasing an equity of redemption cannot set up a prior mortgage of his own, nor consequently a mortgage which he has got in, against subsequent incumbrances of which he had notice."

(1) 3 Mer., 210.
(2) (1884) L.R., 11 I.A., 126.
(3) 2 Ch. Cas., 170.
(4) 1 P. Wms., 393.

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The subsequent decisions of the Chancery Courts in England, however, show that the scope of the rule enunciated by Sir WILLIAM GRANT was very much circumscribed by exceptions. The proper scope of the rule may be found in the observations of JESSEL, M. R., in the case of *Adam* v. *Angell* (1). The Master of Rolls says:—

> "Now in a court of equity it has always been held that the mere fact of a charge having been paid off does not decide the question whether it is extinguished. If a charge is paid off by a tenant for life, without any expression of his intention, it is well established that he retains the benefit of it against the inheritance. Although he has not declared his intention of keeping it alive, it is presumed that his intention was to keep it alive, because it is manifestly for his benefit. On the other hand, when the owner of an estate in fee or in tail pays off a charge, the presumption is the other way, but in either case the person paying off the charge can, by expressly declaring his intention, either keep it alive or destroy it. If there is no reason for keeping it alive, then, especially in the case of an owner in fee, equity will, in the absence of any declaration of his intention, destroy it; but if there is any reason for keeping it alive, such as the existence of another incumbrance, equity will not destroy it. So, in the case of a purchase, there is no doubt that the purchaser who pays off a charge, though merely equitable, may have it assigned to a trustee

(1) 5 Ch. D., 634.

> for himself, and it will protect him against mesne incumbrances, if there are any. So, also, it is admitted, that if without going through the ceremony of the assignment of an equitable charge—an assignment which really passes nothing—a declaration is inserted in the deed that the charge shall be treated as remaining on foot for the purpose of protecting the purchaser against mesne incumbrances, then the charge is treated as remaining on foot and protects him."

The whole of the above quotation was reproduced with approval by LINDLEY, L. J., in the case of *Liquidation Estates Purchase Company* v. *Willoughby* (1). One part of the principle as stated by JESSEL, M. R., finds expression in a crystallised form in section 101 of the Transfer of Property Act, 1882, which is as follows:—

> " When the owner of a charge or other incumbrance on immovable property is or becomes absolutely entitled to that property, the charge or incumbrance shall be extinguished, unless he declares, by express words or necessary implication, that it shall continue to subsist, or such continuance would be for his benefit. "

According to the general rule, therefore, the mortgage of the 10th of September, 1914 shall be deemed, *prima facie*, to be extinguished, but the presumption in favour of extinction may be rebutted by showing that the owner of the property has declared by express words or necessary implication that the incumbrance shall continue to subsist or that such continuance would be for his benefit. In the

(1) (1896) L.R., 1 Ch. D., 726.

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present case it is agreed that there is no such declaration. The precise question, therefore, which falls to be decided is as to whether it has been shown, or not, that the continuance of the mortgage of the 10th of September, 1914 would be for the benefit of the vendee.

The contents of the sale-deed afford very little help in this direction. So far as they go they are against the defendants' contention. The sale purports to be the sale of the physical *zamindari* property and not of the equity of redemption. The sale price of Rs. 10,000 is made up of the mortgage-money amounting to Rs. 8,000 and of another sum of Rs. 2,000 partly due to Mohan Singh and partly to other persons. The details of the total amount of the sale price are given at the foot of the sale-deed and the mortgage-money is the first item of those details and is made payable to Mohan Singh with directions that the vendee is to pay the sum on behalf of the vendor to Mohan Singh. The argument which found favour with the lower appellate court and which was repeatedly pressed on us on behalf of the defendants-respondents at the hearing of the appeal was that the sale in question was effected with full consciousness of the danger of a claim for pre-emption and in the event of the happening of the dreaded contingency and its success it would have been manifestly to the benefit of the mortgagee to retain the advantages of the covenant of thirty years' possession in the mortgage of the 10th of September, 1914.

We are unable to accept the argument. There was no incumbrance on the property in suit except the mortgage of the 10th of September, 1914, and that was, it must be taken, in favour of the vendee himself. This being so, there was no reason to preserve the covenant as a shield against any exist-

ing incumbrance. Indeed the extinction of the covenant had the advantage of relieving the mortgagee from the obligation of the payment of the surplus profits of Rs. 80 per annum to the mortgagor. The "benefit" contemplated by the rule must be a benefit, as we understand it, accruing to the vendee on the date of the sale and not merely a possible benefit which may arise in future on the happening of a possible contingency. This was expressly decided by LINDLEY, L. J., in the case of *Liquidation Estates Purchase Company* v. *Willoughby* (1). The decision of the Court of Appeal in the case just now mentioned was reversed by the House of Lords in *The Liquidation Estates Purchase Company* v. *Willoughby* (2), but, as pointed out by CHAMIER, J. (now Sir EDWARD CHAMIER) in the case of *Jugul Kishore* v. *Ram Narain* (3), that was on the facts and the correctness of the statement of the law contained in the judgment of the Master of Rolls was not questioned. In fact at page 339 of the Report, Lord MACNAGHTEN quotes the following passage with approval from the judgment of the Master of Rolls :—

> "The answer to this question depends upon the intention of the parties at the time, and that intention must be found from the terms of the deed and the circumstances under which it was executed."

In this connection the lower appellate court and the learned Counsel for the defendants-respondents before us also rely upon the allegations made by the plaintiffs in paragraph 4 of the plaint of the present suit. Those allegations, however, as we pointed out in the course of the arguments, are part of the plaintiffs' case of fraud which has admittedly failed and have no bearing on the question of merger.

(1) (1896) 1 Ch. D., 726 (733). (2) (1898) A.C., 321.
(3) (1912) I.L.R., 34 All., 268.

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It appears to us that in the circumstances which have been proved in this case there is no ground whatsoever for holding that the continuance of the mortgage of the 10th of September, 1914 was for the benefit of the vendee. The view which we have taken is also supported by the underlying principle of the decision of a Bench of the late Court of the Judicial Commissioner of Oudh in the case of *Bindeshuri Singh* v. *Balraj Sahai* (1).

In the course of the arguments before us a question arose as to whether the principle of merger can be invoked by a pre-emptor in his favour. We see no reason why it cannot be. The continuance or extinction of an incumbrance is an advantage which runs with the land and is not personal to the vendee.

The result is that we allow this appeal, set aside the decree of the lower appellate court and decree the plaintiffs' suit with costs in all courts on condition of their paying the sum of Rs. 10,000 in court within three months of this date for the benefit of the vendees-defendants. In case the money is not paid within the time hereby prescribed the suit shall stand dismissed, and in that event the plaintiffs will pay the costs of the defendants-vendees in all the courts.

Appeal allowed.

(1) (1907) 10 O.C., 49.