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entitled to exclude both the periods during which the estate was under the management of the Court of Wards, but we do not think it necessary definitely to decide that point since in our view limitation for the suit was saved under section 19 of the Limitation Act by the acknowledgment of the plaintiff's claims by the Court of Wards.

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In the result we allow this appeal, set aside the decision of the learned Additional District Judge, and restore the decree that was passed in the plaintiff's favour by the learned Subordinate Judge. The plaintiff is awarded his costs throughout.

Appeal allowed.

APPELLATE CIVIL

*Before Mr. Justice Bisheshwar Nath Srivastava, Chief Judge
and Mr. Justice H. G. Smith*

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September 22

RANI KANIZ ABID, TALUQDARIA (PLAINTIFF-APPELLANT) v.
MURTAZA HUSAIN KHAN AND OTHERS (DEFENDANTS-
RESPONDENTS)*

Vendor and purchaser—Sale of property subject to mortgage—Mortgage subsequently declared invalid—Purchaser entitled to the benefit of property being exonerated from mortgage charge—Vendor, whether entitled to participate in the benefit accruing—Civil Procedure Code (Act V of 1908), order XLI, rule 22—Cross-objections—Suit wholly dismissed—Cross-objections, if necessary—Transfer of Property Act (IV of 1882), section 82—Lis pendens—Applicability of rule of lis pendens to auction sales—Res judicata, rule of.

Where property has been sold subject to a mortgage which after the completion of the sale is declared invalid, the purchaser is entitled to the benefit accruing to the property from its having been exonerated from the mortgage liability. The vendor has no claim, in such a case, to participate in any benefit which the purchaser may derive from his purchase. *Izzat-un-nissa Begam v. Kunwar Partab Singh (1)*, followed.

*First Civil Appeal No. 8 of 1934, against the decree of Dr. Chaudhari Abul Majd Mohammad Abdul Azim Siddiqi, Civil Judge of Bara Banki, dated the 23rd of December, 1932.

The object of cross-objections is to challenge certain findings of the lower court and the respondent is entitled to do so without filing any cross-objections where the appellant's suit has been wholly dismissed. Cross-objections are therefore superfluous in such a case.

It is well settled that the rule of *lis pendens* applies to auction sales.

Messrs. *Ali Zaheer* and *Ghulam Imam*, for the appellant.

Messrs. *M. Wasim*, *Nazir Uddin Siddiqi* and *Ali Hasan*, for the respondents.

SRIVASTAVA, C.J. and SMITH, J.:—This is a plaintiff's appeal against the judgment and decree, dated the 23rd of December, 1932, of the learned Subordinate Judge of Bara Banki dismissing her claim.

The learned Subordinate Judge has in his judgment stated the facts which have led up to the present litigation in full detail in their chronological order. We therefore propose to content ourselves with a brief statement only of the salient facts which have a material bearing on the case.

One Muzaffar Husain Khan was the owner of the entire village Karanjwara in the Bara Banki district and other properties. He died in 1865 leaving two widows, Musammat Mithun-un-nissa and Musammat Mahmud-un-nissa, who succeeded to the property of their husband in equal shares. Musammat Mithun-un-nissa died in 1872, and her heirs came in possession of her share of the property, and Musammat Mahmud-un-nissa, the junior widow, died on the 16th of May, 1911, leaving as her heirs three nephews Zahir-ud-din, Mazhar-ud-din and Abdul Karim who came in possession of her property. On the 17th of January, 1913, Zahir-ud-din executed a mortgage-deed (exhibit B-21) for Rs.8,500 in favour of Ratan Lal and Kundan Lal in respect of village Karanjwara and one other property with which we are not concerned. It appears that subsequently Mahmud-un-nissa's half share of village Karanjwara was formed into a mahal of 16 annas named after Mahmud-un-nissa, and

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10 annas 8 pies out of this mahal were allotted to Zahir-ud-din and the remaining 5 annas 4 pies to Abdul Karim. Zahir-ud-din on the 19th of January, 1918, executed a second mortgage (exhibit B-8) in respect of a 10 annas 8 pies share in mahal Mahmud-un-nissa of village Karanjwara together with some other property in favour of one Lachhman Prasad, who was a *benamidar* for Raja Abul Hasan Khan, taluqdar of Belahra, father of the present plaintiff. Raja Abul Hasan Khan died in 1891, and his estate was placed under the management of the Court of Wards. On the 28th of April, 1921, the Court of Wards obtained a deed of release from Lachhman Prasad in respect of this mortgage.

On the 21st of March, 1922, the Court of Wards, through the Deputy Commissioner of Bara Banki as manager, filed a suit on the basis of exhibit B-8, but the prior mortgagees Ratan Lal and Kundan Lal were not impleaded in it. A preliminary decree for sale (exhibit 26) was passed in the suit on the 4th of December, 1922, which was made final on the 13th of August, 1923 (exhibit 25). In the meantime in May, 1923, one Raushan Ali Khan instituted a suit for possession of the entire property of Muzaffar Husain Khan on the allegation that under a family custom his widows had only a life interest, and that after their death he was entitled to succeed as the next reversioner of Muzaffar Husain Khan. Zahir-ud-din, Ratan Lal and the representatives of Kundan Lal, the prior mortgagees, and the Deputy Commissioner as manager, Court of Wards, were all made parties to the suit. During the pendency of this suit, on the 7th of July, 1923, Ratan Lal and the representatives of Kundan Lal obtained a decree for mortgagee possession of a 10 annas 8 pies share of Karanjwara on the basis of their mortgage, exhibit B-21. The Deputy Commissioner having put his decree into execution, the 10 annas 8 pies share of Karanjwara was put to sale, and was purchased by the Deputy Commissioner on the 27th of October, 1925, for Rs.500 subject to the prior

incumbrance of the mortgage deed, exhibit B-21. This sale was confirmed on the 30th of November, 1925.

Turning back to the suit instituted by Raushan Ali Khan, it may be mentioned that the latter sold three-fourths of his right to one Shankar Sahai who was joined with him as a plaintiff. One of the pleas raised by the Deputy Commissioner in his defence was that the suit was bad for want of notice under section 54 of the Court of Wards Act. Presumably in view of this plea, Raushan Ali Khan and Shankar Sahai discharged the Deputy Commissioner, and his name was struck off from the array of defendants on the 14th of November, 1925. The Subordinate Judge on the 16th of January, 1926, decreed Raushan Ali Khan and Shankar Sahai's claim for possession of half the property which had been in possession of Mahmud-un-nissa "with the exception of the property in possession of the Court of Wards", but dismissed the claim as regards the other half of the property, which had been held by Mithun-un-nissa. Raushan Ali and Shankar Sahai in execution of this decree obtained possession of mahal Mahmud-un-nissa in village Karanjwara from Ratan Lal and others on the 6th of February, 1926. Both parties appealed to this Court against the decree passed in Raushan Ali Khan's suit, and on the 30th of April, 1927, this Court dismissed Raushan Ali Khan's suit *in toto*. Ratan Lal and others applied for restitution and recovered possession over the 10 annas 8 pies share of Karanjwara under section 144 of the Code of Civil Procedure on the 9th of August, 1927. Shortly before the decision of the appeals in Raushan Ali Khan's suit by this Court Rani Kaniz Abid, the present plaintiff, in whose favour the Belahra estate had been released by the Court Wards, instituted a suit for possession of the 10 annas 8 pies share in village Karanjwara on the basis of the auction purchase made by the Deputy Commissioner on the 27th of October, 1925, against Raushan Ali Khan, Shankar Sahai and Zahir-uddin. This suit was decreed *ex parte* on the 15th of December, 1927 (exhibit 10), and formal delivery of

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possession was made to her on the 8th of May, 1928 (exhibit 14). In pursuance of this mutation was also made in favour of Rani Kaniz Abid, and her name was substituted in place of Zahir-ud-din (exhibit 35). Raushan Ali Khan and Shankar Sahai appealed to His Majesty in Council, and on the 19th of November, 1929, their Lordships of the Privy Council reversed the decision of this Court and restored that of the Subordinate Judge (exhibit 3).

Thereupon the plaintiff, Rani Kaniz Abid, instituted the present suit on the 1st of April, 1932, for a declaration that she was the owner of the 10 annas 8 pies share of mahal Mahmud-un-nissa in village Karanjwara and for possession of the said share. Raushan Ali Khan having died his son, Murtaza Husain Khan, was impleaded as defendant No. 1. Shankar Sahai was made defendant No. 2, and the other defendants, Nos. 3 to 6, were transferees from Raushan Ali Khan and Shankar Sahai in respect of part of the property in suit. The suit was contested by defendants 1 to 4, proceedings against the other defendants being *ex parte*. They pleaded that the decree finally passed in Raushan Ali Khan's suit against Zahir-ud-din was binding on the plaintiff. They further alleged that the purchase made by the Deputy Commissioner on the 27th of October, 1925, was made during the pendency of Raushan Ali Khan's suit, and could not therefore affect the rights of Raushan Ali Khan under the decree passed in that suit. It was further pleaded that as the Deputy Commissioner had made the purchase subject to the prior charge of Ratan Lal and others, and the plaintiff could not recover possession from Ratan Lal and others without redeeming them, therefore the plaintiff could not be in a better position against Raushan Ali Khan who had obtained a decree against Ratan Lal and the representatives of his co-mortgagee. On these pleadings the learned Subordinate Judge framed the following issues:

- (1) What is the effect of the Privy Council decision on the rights of parties?

(2) What is the effect of the *ex parte* decree obtained by the plaintiff against Raushan Ali, Shankar Sahai and Zahir-ud-din? Is it binding upon the defendants?

(3) Are defendants 3 and 4 *bona fide* transferees for value? Its effect?

(4) Is the plaintiff entitled to no relief on account of his purchasing the property during the pendency of the suit against Zahir-ud-din?

(5) Is the plaintiff not entitled to recover possession as alleged?

(6) To what relief, if any, and against which of the defendants is the plaintiff entitled?

His finding on the first issue was that the Privy Council decision did not affect the plaintiff's mortgage. On the second issue he held that the defendants cannot be permitted to deny the title of the plaintiff to the property in suit by virtue of the *ex parte* decree, but they can put forward any pleas for retaining possession over the property. Issues 3 and 4 were decided against the defendants. With reference to issue No. 5 he held that the plaintiff must pay the proportionate money due on Ratan Lal's mortgage before she can get actual possession. On issue 6 the finding recorded by him was that the plaintiff was entitled to a declaration that she was the owner of the property in suit, but the present suit must be dismissed because she was not entitled to immediate actual possession. He accordingly dismissed the suit.

The plaintiff has come in appeal to this Court, and the defendants 2 and 3 have filed certain cross-objections. It has been admitted by the learned counsel for the defendants-respondents that no cross-objections were required, as the plaintiff's suit had been wholly dismissed by the Subordinate Judge. The object of the cross-objections is to challenge certain findings of the Subordinate Judge, which the respondents were entitled to do without filing any cross-objections. They are therefore superfluous.

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As already stated, Raushan Ali Khan impleaded the Deputy Commissioner in his suit. The object of impleading him was to get rid of the mortgage, exhibit B-8, dated the 19th of January, 1918. Subsequently the Deputy Commissioner was discharged from the suit. We have no doubt that the result of the order of discharge was that the Deputy Commissioner was not bound by the decision in the case. In other words, the mortgagee rights of the plaintiff in the aforesaid mortgage, exhibit B-8, cannot be affected by the decree obtained by Raushan Ali Khan. It is true that Zahir-ud-din, the mortgagor, was a party to the litigation, and the decree was passed against him, but the said decree cannot affect the rights of transferees under transfers made before the suit. It is therefore clear, and the proposition has not been disputed before us, that the plaintiff's rights as mortgagee are not affected in the least by the decree passed in Raushan Ali Khan's suit.

Next there is the question about the rights acquired under the purchase made by the Deputy Commissioner on the 27th of October, 1925. This purchase was subject to the previous incumbrance of Ratan Lal and others, under the mortgage-deed, exhibit B-21. In other words, it was a purchase of the equity of redemption in respect of the mortgage, exhibit B-21. The operative part of the judgment and decree, exhibits 2 and 27, of the Subordinate Judge passed in Raushan Ali Khan's suit about three months after the purchase had been made by the Deputy Commissioner is as follows:

"I decree the plaintiff's claim for possession of half the property described in list B attached to the plaint with the exception of the property in possession of the Court of Wards. The rest of the suit is dismissed."

Exhibit 23, which is the copy of the plaint in that suit, shows that village Karanjwara was one of the items of property entered in list B. Although the Deputy Commissioner was not in physical possession of the property, yet there can be no doubt that he owned the mortgagee rights under the mortgage, exhibit B-21, and the

equity of redemption in respect of the mortgage, exhibit B-8, and must be deemed to have been in legal possession of the said rights at the date of the Subordinate Judge's decree. Their Lordships of the Judicial Committee in their judgment, exhibit 3, in reciting the history of the case, distinctly stated that the Subordinate Judge "gave the plaintiff a decree for the properties which fell to the junior widow, with the exception of certain properties in the possession of the Court of Wards, as to which the suit failed for want of the statutory notice", and in the end restored the decree of the Subordinate Judge. It seems obvious that the defendants' rights are subject to the limitations contained in the decree in their favour, and they cannot claim anything more than what has been granted under the decree. Thus there can be no doubt that the plaintiff's title as mortgagee under exhibit B-21, and as owner of the equity of redemption in respect of the mortgage, exhibit B-8, under the purchase made by the Deputy Commissioner, not only remained unaffected, but was expressly protected by the terms of the decree passed in Raushan Ali Khan's suit.

This leads us to the question regarding the effect of the *ex parte* decree obtained by the plaintiff on the basis of the auction purchase by the Deputy Commissioner. In this suit the plaintiff claimed possession of a 10 annas 8 pies share of mahal Mahmud-un-nissa in village Karanjwara against Raushan Ali Khan, Shankar Sahai and Zahir-ud-din on the basis of the sale certificate, exhibit 28, obtained by the Deputy Commissioner in respect of the aforesaid purchase. It should be noted that Ratan Lal and others, subject to whose mortgage the purchase had been made, were not made parties to the suit. The claim was decreed *ex parte* on the 15th of December, 1927. An *ex parte* decree is as good, and has the same binding effect, as a decree passed in a contested suit. The result of this decree therefore is that the title of Rani Kaniz Abid based on the sale certificate, exhibit 28, in respect of the equity of redemption of the mortgage,

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exhibit B-8, is further affirmed and strengthened against Raushan Ali Khan and Shankar Sahai. However, it does not, in itself, give her any title for actual possession of the property free of the mortgage, exhibit B-8, firstly because the sale on which the decree is based was subject to that mortgage, and secondly because the mortgagees Ratan Lal and others who were in possession of the property at the date of the decree were no parties to it.

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It has been argued on behalf of the defendants-respondents that the sale, dated the 27th of October, 1925, in favour of the Deputy Commissioner was made during the pendency of Raushan Ali Khan's suit, and that it was therefore subject to the result of that suit. It is further argued that as the final result of that suit was that Zahir-ud-din was found to have no title to the property, therefore the plaintiff cannot derive any benefit from the said purchase. Section 52 of the Transfer of Property Act, which has codified the rule of *lis pendens*, provides that "the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the court and on such terms as it may impose". It is now well settled that the rule of *lis pendens* applies to auction sales. The sale therefore of the equity of redemption, treated as property owned by Zahir-ud-din, could not affect the rights of Raushan Ali Khan and his transferee as finally settled under the decree in that suit. We have already held that our reading of the decree of the Subordinate Judge, which has been finally affirmed by the Privy Council, is that the rights acquired by the Deputy Commissioner in respect of the equity of redemption in question were excepted from the decree passed in Raushan Ali Khan's favour. Our conclusion therefore is that the fact of the purchase having been made *pendente lite* does not affect the plaintiff's title to the aforesaid equity of redemption.

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In connection with the argument based on the rule of *lis pendens*, it was argued on behalf of the plaintiff-appellant that even if the purchase was affected by that rule, the effect of it was nullified by the *ex parte* decree which was obtained by the plaintiff against Raushan Ali Khan and Shankar Sahai on the 15th of December, 1927. The argument proceeded that Raushan Ali Khan and Shankar Sahai ought to have raised the plea of *lis pendens* in that suit and as they failed to do so, the plea was now barred by explanation IV of section 11 of the Code of Civil Procedure. This argument found favour with the Subordinate Judge, but does not impress us. Explanation IV of section 11 of the Code of Civil Procedure provides that any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit. That it might have been made a ground of defence does not admit of doubt, but the question whether they ought to have raised that defence or not has to be decided with due regard to all the circumstances. The suit was instituted by Rani Kaniz Abid on the 7th of March, 1927 (*vide* exhibit 9). There is no evidence to show the date fixed in the suit for first hearing, but we know that Raushan Ali Khan's suit was dismissed *in toto* by the Chief Court on the 30th of April, 1927, that is, within two months of the institution of the plaintiff's suit. Thus the probabilities are that the suit was dismissed by the Chief Court before the first hearing of the plaintiff's suit. This is the only reasonable explanation of Raushan Ali Khan and Shankar Sahai taking no interest in the suit, and allowing it to be decreed *ex parte*. Bearing these circumstances in mind we are not prepared to say that they ought to have raised this defence, even though their suit had been dismissed, so as to bar the plea by the rule of constructive *res judicata*.

It was also argued on behalf of the defendants-respondents that the *ex parte* decree, dated the 15th of

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December, 1927, was in any case set at naught by the later Privy Council decree to which Zahir-ud-din was a party. Reference was made to *Ram Prasad v. Mahabir and another* (1), *Amar Singh and another v. Gobind Ram and another and Sundar Lal* (2), *Moturi Seshayya and others v. Sree Rajah Venkatadri Appa Row Bahadur* (3) and *Appia K. B. Rukmani Ammal and Appia Ramachari v. L. Kattuvava Narasimha Iyer* (4) in support of the proposition that in the case of two conflicting decrees the later decree must prevail over the former. We do not think that this principle has any application to the present case. There was no question before the Privy Council about the validity of the sale of the equity of redemption in respect of the mortgage, exhibit B-8, or of the title of the Deputy Commissioner under the purchase dated the 27th of October, 1925, and therefore we do not think there was any such conflict between the two decrees as to attract the application of the principle relied on by the respondents. On the contrary, as we have already remarked, the Privy Council decree in our opinion has the effect of upholding the title of the Court of Wards in respect of the equity of redemption in question.

Lastly it remains for us to deal with the main argument advanced on behalf of the plaintiff-appellant. It has been contended that although the plaintiff as purchaser of the equity of redemption was bound to redeem the prior mortgage, exhibit B-21, yet as the said mortgage has now been held to be invalid, therefore the plaintiff is entitled to a decree for possession of the property free of the charge of the said incumbrance. In our opinion the contention must prevail. The appellant takes her stand on the decision of their Lordships of the Judicial Committee in *Musammam Izzat-un-nissa Begam v. Kunwar Pertab Singh and others* (5). It was held in that case that where property had been sold subject to

(1) (1923) I.L.R., 46 All., 220.

(2) (1927) I.L.R., 49 All., 606.

(3) (1916) 36 I.C., 289.

(4) (1921) 63 I.C., 730.

(5) (1909) L.R., 36 I.A., 203.

a mortgage which after the completion of the sale was declared invalid, the purchaser is entitled to the benefit accruing to the property from its having been exonerated from the mortgage liability. In the course of their judgment their Lordships observed as follows:

“On the sale of property subject to incumbrances 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 incumbrances affecting the land. The contract of indemnity may be express or implied. If the purchaser covenants with the vendor to pay the incumbrances, it is still nothing more than a contract of indemnity. The purchaser takes the property subject to the burthen attached to it. If the incumbrances turn out to be invalid, the vendor has nothing to complain of. He has got what he bargained for. His indemnity is complete. He cannot pick up the burthen of which the land is relieved and seize it as his own property. The notion that after the completion of the purchase the purchaser is in some way a trustee for the vendor of the amount by which the existence, or supposed existence, of incumbrances has led to a diminution of the price, and liable, therefore, to account to the vendor for anything that remains of that amount after the incumbrances are satisfied or disposed of, is without foundation. After the purchase is complete, the vendor has no claim to participate in any benefit which the purchaser may derive from his purchase.”

In the present case the prior incumbrances have failed by reason of the decree obtained by Raushan Ali Khan and Shankar Sahai, and although want of title in Zahir-ud-din, by reason of which those prior incumbrances have failed, would, in the absence of any other circumstances, put the present plaintiff also out of court, yet her position has become unassailable because of the *ex parte* decree, to which we have made reference above. for possession of a 10 annas 8 pies share of Mahal Mahmud-un-nissa. It has been suggested that it is not equitable that the plaintiff should profit by the labours and expenditure of Raushan Ali Khan and his co-plaintiff in connection with the protracted litigation in which they ultimately succeeded, and that she must, as found by the learned court below, pay the

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proportionate amount due on Ratan Lal's mortgage. This suggestion seems to us to have no force. Ratan Lal and the heirs of Kundan Lal have lost their rights by reason of the litigation of Raushan Ali Khan and Shankar Sahai, and the latter have had to pay nothing to the former. Raushan Ali Khan and his co-plaintiff can claim no right of subrogation in place of Ratan Lal and his co-mortgagee because they have not redeemed that mortgage. The decree which the former obtained against the latter cannot have the effect of subrogating Raushan Ali Khan and Shankar Sahai to the rights of Ratan Lal and his co-mortgagee so as to entitle them to claim the mortgage-money which was due to the latter. The aforesaid decree completely wipes out the mortgage on the ground of its being incompetent. It is not clear therefore how the plaintiff can be made to pay anything to the defendants in the present suit in respect of the vanished incumbrance of the 17th of January, 1913. As regards the expenses of Raushan Ali Khan and Shankar Sahai they were allowed their costs of the litigation, and we can discern no principle on which the plaintiff can be made to pay anything further in that respect. We are therefore of opinion that the plaintiff's claim for declaration of her title as owner and for possession of the 10 annas 8 pies share in suit must succeed. Nothing was urged on behalf of the appellant in support of her claim for mesne profits and compensation for some land acquired for the Sarda Canal. This part of the claim must therefore be disallowed.

The result therefore is that we allow the appeal, set aside the decree of the lower court, and grant the plaintiff a declaration that she is the owner of a 10 annas 8 pies share in mauza Karanjwara, and give her a decree for possession in respect of it against the defendants. In view of the special circumstances of the case we direct that the parties shall bear their own costs throughout. We make no order in respect of the cross-objections which, as already remarked by us, were superfluous.

Appeal allowed.