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SINGH  
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Srivastava,  
C.J. and  
Smith, J.

Act, on the occurrence of default in the payment of instalments, a decree-holder "may, notwithstanding the provisions or any law for the time being in force, immediately enforce payment of the whole amount then remaining due under the decree". The result is that we think the learned Munsif was quite justified in allowing instalments to the judgment-debtor, and that his action will in no way debar the decree-holders from obtaining relief if default is made in the payment of the instalments.

The result is that this revisional application is dismissed with costs.

*Application dismissed.*

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## APPELLATE CIVIL

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*Before Mr. Justice G. H. Thomas and  
Mr. Justice Ziaul Hasan*

1937

August 16,

LALA PARSOTAM DAS (PLAINTIFF-APPELLANT) v. SYED ALI  
HAIDAR AND OTHERS (DEFENDANTS-RESPONDENTS)\*

*Registration—Property not intended to be mortgaged included in the mortgage deed to give jurisdiction for registration—Registration, if valid—Transfer of Property Act (IV of 1882), sections 54, 91 and 92—Sale-deed, registration of—Registration of sham deed of sale, whether passes ownership—Civil Procedure Code (Act V of 1908), order XXI, rule 63—Encumbrances noted in sale-proclamation—No order that property sold subject to encumbrances—Auction-purchaser, if can question validity of encumbrances—Order under rule 63 of Order XXI, Civil Procedure Code, when conclusive—Subrogation—Auction-purchaser discharging prior mortgage, whether subrogated to rights of previous mortgage.*

Where a portion of the mortgaged property is entered in the mortgage-deed merely with the object of getting the deed registered in the office of a certain sub-registrar and it is never intended to make that property form part of the security, the

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\*First Civil Appeal no. 114 of 1935, against the decree of Saiyid Qadir Hasan, Civil Judge of Bara Banki, dated the 23rd of May, 1935.

registration of the deed is invalid. *Inuganti Venkatarama Rao v. Sobhanadri Appa Rao Bahadur Garu* (1), *Collector of Gorakhpur v. Ram Sundar Mal* (2), and *Parshotam Das v. Yar Ali* (3), referred to.

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Section 54 of the Transfer of Property Act no about lays down that immovable property worth less than Rs.100 can be sold by means of a registered instrument but it does not lay down that if the parties to a so-called sale get a sham deed of sale registered without intending that the transaction should take effect even then the ownership of the property will pass from one to the other, by registration.

Where all that is done is that a mortgage is notified in the proclamation of sale and there is no evidence to show that there was any adjudication or even that any order was passed by the court for the property being sold subject to that mortgage, the auction-purchaser is not estopped from questioning the validity of such a mortgage. *Wazir Husain v. Beni Madho* (4), and *Gailu alias Dalal v. Lakha Singh* (5), relied on.

An order under rule 63 of order XXI, Civil Procedure Code, is conclusive when it is passed on adjudication between two parties.

An auction-purchaser having an interest in the property mortgaged within the meaning of section 91 of the Transfer of Property Act, if he redeems a prior mortgage, can be subrogated to the rights of the prior mortgagee under section 92 of the Transfer of Property Act. *Gokuldoss Gopaldoss v. Ram-bux Seochand* (6), and *Toulmin v. Steere* (7), referred to.

Messrs. *Piarcy Lal Banerji, Ali Zahir and Ghulam Imam*, for the appellant.

Messrs. *M. Wasim, S. N. Dass, Aziz Uddin, Ali Hasan and S. H. Hafiz*, for the respondents.

THOMAS and ZIAUL HASAN, JJ.:—This is a plaintiff's first appeal against a judgment and decree of the learned Civil Judge of Bara Banki, dated the 23rd of May, 1935, dismissing the plaintiff's suit for recovery of money on the basis of a simple mortgage. In order to understand the defence and appreciate the points involved in the case, it is necessary to state certain facts.

(1) (1936) L.R., 63 I.A., 169.

(2) (1934) L.R. 61 I.A., 286.

(3) (1928) I.L.R., 4 Luck., 13.

(4) (1930) 7. O.W.N., 676.

(5) (1934) 11 O.W.N., 1475.

(6) (1884) L.R. 11 I.A., 126.

(7) 3, Mer. 210.

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The mortgage-deed in suit was executed by Saiyid Ali Haidar, defendant No. 1, in favour of Lala Parsotam Das, plaintiff, on the 9th of January, 1920, for a sum of Rs.10,000. The mortgage property consisted of a 16 annas share of village Kotwa, *alias* Wera Kazi, district Bahraich and an area of 4 biswas out of 9 biswas of plot No. 166 in village Ibrahimpur, district Bara Banki. These 4 biswas of land are said to have been purchased by the mortgagor for a sum of Rs.50, on the very date of the mortgage from Mustafa Ali Khan P. W. 1, who is also a *mukhtar-i-am* of the plaintiff, by a sale-deed which is exhibit 2 on the record. About a month earlier, that is, on the 29th of November, 1919, Ali Haidar had mortgaged the village in question to one Bhagwati Mahton for a sum of Rs.5,000.

On the 30th of July, 1931, the village of Wera Kazi was sold by auction in execution of a simple money decree (suit no. 42 of 1926) obtained by Moti Lal, defendant No. 9, against Ali Haidar and was purchased by Zaigham Ali, predecessor-in-interest of defendants 2 to 7, Rai Sahib Pandit Gaya Prasad, defendant No. 8, and Lala Moti Lal, decree-holder, defendant No. 9 in proportion of 8 annas, 4 annas and 4 annas respectively. On the 9th of October, 1933, the mortgagee rights of Bhagwati Mahton under the mortgage-deed of the 29th of November, 1919, were purchased from Lal Bahadur and others, sons of Bhagwati Mahton who had by this time died, by Zargham Haider, defendant No. 3 (son of Zaigham Ali), Govind Ram Pande, defendant No. 15 (nephew of Gaya Prasad Pande, defendant No. 8) and Lala Kundan Lal, defendant No. 16, (son of Lala Moti Lal, defendant No. 9). The consideration for this deed of sale was Rs.12,000. Subsequently Saiyid Ali Haider the mortgagor, the purchasers of the auction sale of 30th July, 1931 and the assignees of Bhagwati Mahton's mortgagee rights appointed one Budh Sagar Pathok, a vakil, as arbitrator to settle the amount that should be paid by the purchasers to the assignees of the mortgagee

rights and the arbitrator by his award (exhibit B-25 dated 27th November, 1933) decided that sums amounting to about Rs.22,800 should be paid by the purchasers to the assignees of the mortgagee rights.

It may also be mentioned that on the 29th of September, 1928, the plaintiff obtained an usufructuary mortgage (exhibit B-9) of the village of Wera Kazi from Muhammad Haidar, son of defendant No. 1, and one Muhammad Raza, to whom the equity of redemption had been transferred by defendant No. 1 for Rs. 36,800 and a sum of Rs.27,800 was set off against the amount due under the mortgage in suit.

The suit was contested by defendants 2 to 9 and 11 and various pleas were raised in defence with most of which we are not concerned in this appeal. The questions that fall to be decided in this appeal gave rise to the following issues framed by the lower court—

3(a) Did the plot No. 166 situate in Ibrahimpur belong to Syed Ali Haidar at the date of the mortgage?

(b) Was this plot fraudulently entered in the mortgage-deed for the purpose of registration at Rudauli?

(c) Are the defendants 2 to 9 and 11 estopped from taking these pleas or from asserting facts giving rise to it?

6(a) Have the defendants 2 to 9 and 11 redeemed the mortgage of Bhagwati Mahton dated the 29th of November, 1919, by getting the exhibit B-23 executed and have they been subrogated to his rights?

(b) If the exhibit B-23 does not amount to redemption but assignment, are the defendants 2 to 9 and 11 entitled to subrogation by reason of their having satisfied the decree as alleged, and because the exhibit B-23 itself amounts to redemption?

(c) To what amount are the defendants 2 to 9 and 11 entitled on the basis of the exhibit B-23?

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(d) Were the proceedings mentioned in paras. 16 and 17 of the written statement fictitious, colourable and fraudulent and did they confer any right of subrogation on the defendants?

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The learned Judge of the court below decided issue 3 in favour of the defendants and held that the mortgage-deed in question was invalid for want of proper registration. On issue 6 he held that the contesting defendants were subrogated to the rights of the mortgagee under the mortgage of the 29th of November, 1919, and that they were entitled to the amount actually due on that mortgage. The suit was however dismissed on the finding on issue 3.

The first point argued before us was whether the sale of plot No. 166 of village Ibrahimpur of the district of Bara Banki by Mustafa Ali to Haidar Ali and the mortgage of it by the latter to the plaintiff were real or fictitious. The plaintiff's case in the court below was that this plot of land was required by Ali Haidar for the purpose of planting a grove and building a house but this story was disbelieved by the learned Judge of the court below. In this Court, however, the learned counsel for the plaintiff on the strength of the recent decisions of their Lordships of the Privy Council on the subject (to be referred to presently), argued that even if plot No. 166 was included in the mortgage merely for the purpose that the mortgage-deed be registered at Rudauli it did not show that the sale and the mortgage of it were not genuine. We have given full consideration to the points raised by the learned counsel for the plaintiff but find ourselves unable to hold that plot No. 166 was actually intended to be sold by Mustafa Ali or to be purchased, or hypothecated to the plaintiff, by Ali Haidar. It is proved by certified copies of patwari's papers exhibit 11 (page 106), exhibit B-44 (page 15), exhibit B-43 (page 53), exhibit B-5 (page 163) and exhibit B-38 (page 63) that the entire plot No. 166 is part of the pathway running between two villages Bhauli and

Rudauli and the same fact appears from the report of the commissioner who was appointed at the plaintiff's own instance to inspect and measure the plot. It is therefore impossible to believe that Ali Haidar should have wanted to purchase a portion of it for the purpose of building a house and planting a grove. There is also no reliable evidence to show that any consideration actually passed for the sale of this plot. Nothing was paid to the vendor in the registration office and the vendor only acknowledged receipt of the consideration before the sub-registrar. Mustafa Ali, vendor, and Bindeshwari Prasad P. W. 2, a marginal witness of the sale-deed, no doubt state that a sum of Rs.50 was paid by Ali Haidar to Mustafa Ali as the consideration but we agree with the court below that neither of these witnesses can be said to be independent or reliable. Then, there is absolutely no evidence to show that Ali Haidar ever exercised or tried to exercise any right of ownership over this land after the alleged purchase and it is an admitted fact that neither he nor Mustafa Ali ever applied to the revenue court for mutation of names. In fact, Ali Haidar swears that he never saw the plot in question except on the day when the commissioner appointed by the court visited it and we have no reason to disbelieve him on this point. It was argued that mutation of names in the revenue papers could not be effected in respect of isolated plots but this argument cannot be accepted in view of the provisions of section 32 of the Land Revenue Act which show that proprietors of isolated plots also can get their names entered in the revenue registers.

Lastly it may be noted that the plaintiff who was himself taking a mortgage of this plot never made inquiries and knows little about it and according to one of his own witnesses, Yawar Husain, P. W. 3, he took the later usufructuary mortgage of village Wera Kazi simply because he apprehended that the registration of the mortgage-deed in suit was invalid. All these facts go to

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prove that the sale and mortgage of plot No. 166 of Ibrahimpur were merely paper transactions and that it was never intended by Ali Haidar or the plaintiff that the plot should be purchased by the former and mortgaged to the latter. In the cases of *Collector of Gorakhpur v. Ram Sundar Mal* (1) and *Raja Inuganti Venkatarama Rao v. Raja Sobhanadri Appa Rao Bahadur Garu* (2) their Lordships of the Judicial Committee have laid down in very clear terms that in judging whether the registration of a document is valid it should be seen whether or not it was really intended that a property which purports to have been dealt with by the instrument should actually be so dealt with. In other words whether the instrument actually "relates" to that property within the meaning of section 28 of the Indian Registration Act. In *Raja Inuganti Venkatarama Rao v. Raja Sobhanadri Appa Rao Bahadur Garu* (2), their Lordships remarked—

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"Having regard to these pronouncements their Lordships can have no doubt that the criterion by which the question now before them must be decided is whether, upon the facts established by the evidence, the parties intended this one yard of land to pass under the deed. The motive may be immaterial as the respondent contends, if the requirements of the law have been complied with; but of this the intention is critical."

It is interesting to remark that before their Lordships of the Judicial Committee decided the case of *Collector of Gorakhpur v. Ram Sundar Mal* (1), a Bench of this Court in circumstances similar to those of the present case held that where a portion of the mortgaged property was entered in the mortgage-deed merely with the object of getting the deed registered in the office of a certain sub-registrar and it was never intended to take that property form part of the security, the registration of the deed was invalid—vide *Lala Parshotam Das v. Saiyed Yar Ali* (3). Having found above that it was never intended that the ownership of plot No. 166 in village

(1) (1934) L.R., 61 I.A., 286. (2) (1936) L.R., 63 I.A., 169.

(3) (1928) I.L.R., 4 Luck., 13.

Ibrahimpur should pass from Mustafa Ali to Ali Haidar or that it should form part of the security under the mortgage-deed in suit, we must hold that the registration of the deed in suit was invalid.

It was argued that under section 54 of the Transfer of Property Act the sale of immovable property of the value of less than Rs.100 can be effected either by delivery of possession or by registered instrument and that in this case a registered instrument having been executed by Mustafa Ali in favour of Ali Haidar, the sale must be deemed to have been completed. Section 54 no doubt lays down that immovable property worth less than Rs.100 can be sold by means of a registered instrument but it does not lay down that if the parties to a so-called sale get a sham deed of sale registered without intending that the transaction should take effect even then the ownership of the property will pass from one to the other, by registration.

We have already referred to the plaintiff's case in the lower court about the sale of the plot to Ali Haidar and to the theory put forward in this Court. The learned counsel was indeed very anxious to show that the sale in question was brought about by the plaintiff and from this it was argued that the plaintiff intended that the sale should be a real transaction; but we are unable to accept this argument. The plaintiff not only set up a specific case about the alleged sale of the plot to Ali Haidar but insisted on it by getting a commission issued for the purpose of a report that plot No. 166 was fit for the purposes for which Ali Haidar was said to have purchased it. Moreover the plaintiff very clearly stated in the Court below:

"There was no consultation on my part and no scheme of mine in having that plot sold by Mustafa Ali to the mortgagor",

and this statement goes clearly against the contention now put forward on behalf of the plaintiff.

We have in short no hesitation in upholding the finding of the learned Civil Judge that there was no intention that the sale and the mortgage should relate to plot

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No. 166 of Ibrahimpur and that consequently the registration of the mortgage-deed in suit was invalid.

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The next point urged was that the contesting defendants were estopped from raising the question of the validity of the mortgage. This contention is based on the fact that at the time of the sale of village Wera Kazi in execution of defendant No. 9's decree the mortgage in suit was notified along with Bhagwati Mahton's mortgage. It is argued by the learned counsel for the appellant that the property having been sold subject to the plaintiff's mortgage, the auction purchasers cannot question the validity of the mortgage. We do not however think that it can be said in the present case that the property was sold subject to the mortgages mentioned in the proclamation of sale. All that was done was that the mortgages were notified at the time of the sale. In *Wazir Husain v. Beni Mudho* (1) the mere fact that encumbrances are noted in a sale proclamation for the information of the auction purchaser does not establish that the property is sold subject to those encumbrances and the same view was taken in *Gailu alias Dalal v. Lakha Singh* (2). In view of these decisions it cannot be said that the village of Wera Kazi was sold in Lala Moti Lal's decree subject to the mortgage in suit.

The learned counsel also relied on order XXI, rule 63 of the Code of Civil Procedure and argued that from the fact that the plaintiff's mortgage was notified in the proclamation of sale it must be presumed that an order was made for the property being sold subject to the plaintiff's mortgage and that therefore the order is conclusive under rule 63, order XXI, of the Code of Civil Procedure. An order under that rule is conclusive when it is passed on adjudication between two parties. In the case before us, however, there is no evidence whatever to show that there was any adjudication or even that any order was passed by the court for the property being sold subject to the plaintiff's mortgage.

(1) (1930) 7 O.W.N., 676.

(2) (1934) 11 O.W.N., 1475.

We, therefore, agree with the court below that the auction purchasers are not estopped from questioning the validity of the mortgage in suit.

The last point urged was that the proceedings relating to the execution of the deed of assignment by the sons of Bhagwati Mahton and the appointment of an arbitrator to settle the amount payable by the purchasers to the transferees of Bhagwati Mahton's sons were all collusive and that Bhagwati Mahton's mortgage should be deemed to have been redeemed by Zaigham Ali, Gaya Prasad and Moti Lal. In view of our findings on the third issue on which the suit of the plaintiff must fail, it is not necessary to determine the amount payable to the contesting defendants but we may say that we have no grounds on which to hold all these proceedings to be collusive and fictitious as all that is pointed out is that the transferees of Bhagwati Mahton's sons are sons and nephews of the auction purchasers but this fact is not sufficient. But even supposing that Bhagwati Mahton's mortgage was redeemed by the auction purchasers by payment of Rs.12,000 we do not think it makes any difference so far as the legal rights of the auction purchasers are concerned. The auction purchasers were persons having an interest in the property mortgaged within the meaning of section 91 of the Transfer of Property Act and could be subrogated to the rights of Bhagwati Mahton under section 92 of the Transfer of Property Act. In *Gokuldoss Gupaldoss v Rambux Seochand* (1) their Lordships of the Judicial Committee held that the doctrine laid down in *Toulmin v. Steere* (2) that the purchaser of an equity of redemption cannot set up a mortgage which he has got in against subsequent encumbrances of which he had notice, is not to be regarded as a rule of justice, equity and good conscience and therefore cannot be applied to such Indian transactions as are governed by that rule. It is therefore clear that the auction purchasers being subrogated to

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(1) (1884) L.R., 11 I.A., 126.

(2) 3 Mer., 210.

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clear that the auction purchasers being subrogated to the rights of Bhagwati Mahton can claim the amount due on Bhagwati Mahton's mortgage and we uphold the finding of the learned Judge of the lower court on this point also.

The result is that the appeal fails and is dismissed with costs.

*Appeal dismissed.*

### PRIVY COUNCIL

1938  
 April 7

NAWAB MIRZA MOHAMMAD KAZIM ALI KHAN AND  
 ANOTHER (APPELLANTS) v. NAWAB MIRZA MOHAMMAD  
 SADIQ ALI KHAN AND OTHERS (RESPONDENTS)

AND

NAWAB FAKHR JAHAN BEGUM AND OTHERS (APPELLANTS)  
 v. NAWAB MIRZA MOHAMMAD SADIQ ALI  
 KHAN (RESPONDENT)\*

[On Appeal from the Chief Court of Oudh]

*Taluqdari estate—Mohammadan Taluqdar—Death of taluqdar in 1921—Debts—Non-taluqdari property—Liability of taluqdari property for debts.*

A Shia Mohammadan died in 1921 possessed of a taluqdari estate entered under section 8 of the Oudh Estates Act (I of 1869) in List II which would devolve on a single heir and also non-taluqdari property which would descend according to the ordinary principles of Mohammadan Law of the Shia School.

*Held*, that the taluqdari and non-taluqdari were both liable for his debts and that there should be a rateable allocation of the debts as between the taluqdari and non-taluqdari property.

(2) The value of the taluqdari property should be ascertained as at the date of the death of the taluqdar, that is in 1921, and is not affected by a declaration made by the heir in 1923 under the Oudh Settled Estates Act, 1917, for section 15 of that Act does not operate retrospectively on rights accrued.

*Musammât Mulleeka v. Musammât Jumeela* (1), *Jafri Begum v. Amir Muhammad* (2), *Aldrich v. Cooper* (3), *Deering v. Earl of Winchelsea* (4), *Ramskill v. Edwards* (5), *Rambux Chittangeo*

\*Present: LORD WRIGHT, SIR SHADI LAL and SIR GEORGE RANKIN.

(1) (1872) L.R., Sup. I.A. 135 S.C. (2) (1885) I.L.R., 7 All. 822 (844).  
 5 W. R., 25.

(3) (1803) 8 Vesey Jun., 381. (4) ( ) 2 Bos. and Pul., 270 S.C.  
 1 Cox., 318.

(5) (1885) L.R., 31 C.D., 100 (109).