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order of the Munsif the less a refusal of the restitution under section 144 and as such it is appealable. Otherwise an appeal against an order refusing to grant restitution against obstruction would always be barred whereas a refusal but without obstruction would be appealable and I do not think this was the intention of the legislature. In my opinion notwithstanding that Sukhari Khalifa cannot bring a suit to enforce his right to restitution he may appeal against a refusal to give him that remedy under section 144 against an obstruction just as he could if the proceedings had been begun by suit and the order of the District Judge was on appeal, therefore, made with jurisdiction. From this order no appeal lies on the facts and it must stand. The learned Judge in agreement with the District Judge on the facts expressed his regret at the conclusion at which he had arrived on the law. I would allow this appeal and direct that the respondents do pay the appellant costs throughout.

KULWANT SAHAY, J.—I agree.

Appeal allowed.

APPELLATE CIVIL.

Before Wort and Fazl Ali, JJ.

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October, 31, *November*, 1, 3, 7.

JAGDEO SAHU

v.

MAHABIR PRASAD.*

Transfer of Property Act, 1882 (*Act IV of* 1882), *sections* 83 *and* 92—*right of subrogation, whether belongs to a person who under an agreement has paid off the mortgage—sale by Hindu widow—prior mortgage—vendee depositing mortgage money under the terms of the sale-deed—sale set aside—vendee, whether entitled to equitable relief of getting credit for*

* Appeal from Original Decree no. 191 of 1930, from a decision of Babu Radha Krishna Prasad, Subordinate Judge of Gaya, dated the 23rd December, 1929.

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the amount deposited—inclusion of certain property in sale-deed for purpose of registration—vendor found to have no title to such property —registration, whether invalid—sale-deed inadmissible in evidence for want of proper registration, whether can be used for collateral purposes—Registration Act, 1908 (*Act XVI of* 1908), *sections* 17 *and* 49.

In 1898 *M* gave certain shares in immovable property in mortgage by conditional sale with possession with the stipulation that the mortgagee would be entitled to foreclose on failure of the mortgagor to repay the advance of Rs. 14,000 by a certain date. After the death of the mortgagor his widow sold away the bulk of the mortgaged property to the defendant for a sum of Rs. 14,451. Out of the consideration a sum of Rs. 451 only was paid in cash and the balance was left with the purchaser under the express condition that he should pay off the mortgage of 1898. The sum so retained by the defendant was deposited under section 83 of the Transfer of Property Act, 1882, and the defendant thereafter got possession of the property. After the death of the widow the plaintiffs, one of them being the reversionary heir of the husband and the other being his transferee, brought the present suit for the recovery of possession of the property sold to the defendant on the ground that the sale was without justifying legal necessity. The suit was decreed and sale set aside but the defendant contended that plaintiffs should be put on terms of paying the amount deposited under section 83.

Held, (*i*) that section 92, Transfer of Property Act, 1882, which came into force in 1930, did not govern the case as all the rights the defendant had vested in him before that date;

(*ii*) that the right of subrogation belonged to the defendant who under an agreement had paid off the mortgagee;

(*iii*) that, therefore, the defendant having deposited the money under section 83, being under an obligation under the sale-deed to pay off the mortgage, he was entitled to the equitable relief of getting credit for the amount so deposited.

Gurdeo Singh v. *Chandrika Singh*(1), followed.

(1) (1907) I. L. R. 36 Cal. 193.

Moulvi Mahomed Shamsool Hooda v. *Shewakram*(1), *Gokuldas Gopaldas* v. *Rambaksh Seochand*(2), *Toulmin* v. *Steere*(3) and *Nasiruddin* v. *Ahmad Husain*(4), referred to.

Where in a sale-deed the vendor included certain property situated within the jurisdiction of a particular Sub-Registrar in order to entitle him to register the document, and it was found that although the property did exist the vendor had no title to it.

Held, that the inclusion of the property for the purpose of registration was a fraud and, therefore, invalidated the registration of the deed.

Biswanath Prashad v. *Chandra Narayan Chowdhuri*(5) and *Harendra Lal Roy Chowdhuri* v. *Hari Dasi Debi*(6), followed.

Mussammat Jasoda Koer v. *Janak Missir*(7), distinguished.

A sale-deed which is inadmissible in evidence for want of proper registration can however be used for collateral purposes, for instance, to prove that the vendee had undertaken, by the terms of the deed, to pay off a prior mortgage.

Varada Pillai v. *Jeevarathnammal*(8) and *Jagannath Marwari* v. *Sm. Chandni Bibi*(9), followed.

Appeal by the defendant.

The facts of the case material to this report are stated in the judgment of Wort, J.

S. M. Mullick (with him *B. C. De* and *K. K. Bannerji*), for the appellant.

L. K. Jha (with him *A. N. Lal*, *Dhyan Chandra*, *K. N. Varma* and *Anand Prasad*), for the respondents.

(1) (1874) L. R. 2 I. A. 7.
(2) (1884) I. L. R. 10 Cal. 1035, P. C.
(3) (1817) 3 Mer. 210.
(4) (1926) 31 Cal. W. N. 538, P. C.
(5) ((1921) L. R. 48 I. A. 127.
(6) (1914) L. R. 41 I. A. 110.
(7) (1924) I. L. R. 4 Pat. 395.
(8) (1919) I. L. R. 43 Mad. 244, P. C.
(9) (1921) 26 Cal. W. N. 65.

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WORT, J.—The only question in this appeal is whether the plaintiff as a condition of his obtaining possession should pay to the principal defendant a sum of Rs. 14,000 which sum was deposited by the defendant in Court under section 83 of the Transfer of Property Act, paying off a mortgage, dated the 18th April, 1898, entered into by one Mahtha Gauri Charan, the husband of the lady who sold the property to the defendant, which sale was challenged in this suit.

The action was by the next reversioners after the death of one Musammat Sona Kuar, the vendor, who died on the 6th June, 1916. Mahtha Gauri Charan, her husband, gave a 12-annas interest of the village Basora together with 1-anna ijaradar interest in the same village in thika on the 21st April, 1893, for a term ending 1902 to Rameshi Singh. Then on the 18th April, 1898, he gave a mortgage by conditional sale with possession of the same interest to the same person with the stipulation that Rameshi Singh, the mortgagee would be entitled to foreclose on failure of the mortgagor to repay the advance of Rs. 14,000 by the 9th June, 1922. In the next year, that is 1898, Gauri Charan died leaving his widow Musammat Sona Kuar. On the 14th December, 1906, the widow sold the 12-annas interest in that mauza to the defendant for a sum of Rs. 14,451 which sale has been set aside by the learned Subordinate Judge in the court below as not being for justifying legal necessity. Of the consideration of Rs. 14,451, Rs. 451 only was paid in cash, the Rs. 14,000 being retained by the purchaser under the express condition that he should pay off the mortgage of the 18th April, 1898. On the 6th June, 1916, as I have said, the widow died. Plaintiff no. 2 brought this action as the next reversionary heir, plaintiff no. 1 being the purchaser of a 7½-annas interest. The sum of Rs. 14,000 retained by the principal defendant for the payment of the mortgage was deposited under section 83 of the Transfer of Property Act. On the 5th

June, 1922, notice was given to the mortgagee and the defendant obtained possession of the property. On the 5th April, 1928, this suit was commenced within the period of limitation.

No question is raised in this Court as regards the validity of the sale. That has been decided in favour of the plaintiffs and the only question the defendant raises in this appeal is whether the plaintiff should be put on terms of paying the Rs. 14,000 deposited, as I have stated, by the defendant. It would appear that the Subordinate Judge decided this question in favour of the defendant on this point in these terms:

"Therefore I am of opinion that defendants have successfully shown that full consideration had passed under the baibilwafa deed, Exhibit E, and therefore they were obliged to deposit this sum under section 83 of the Transfer of Property Act, to the credit of the baibilwafadar, in order to discharge the encumbrance upon 12-annas of mauza Basoura which was purchased by virtue of the sale-deed in question."

In an earlier issue which he decided in favour of the plaintiff, he has stated that the relief which the defendants claim would be an equitable relief which could be granted to them as being a charge upon the property, which the plaintiffs would be held liable to redeem in getting the reliefs for possession. This issue was whether the action was maintainable in the absence of an offer by the plaintiff contained in the plaint to pay the sum into court as a condition of his obtaining a decree. However, he appears to have decided the matter which is before us against the defendant basing his decision on the validity of the registration of the deed of the 14th December, 1906.

In this Court it is contended by the respondent, first, that the registration of the Kabala of 1906 is invalid; that the deed must be treated as unregistered; that the defendant is precluded from putting the document in evidence. Having no interest which he can prove he was a mere volunteer and as such is not entitled to the relief claimed.

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In the deed of 1906, the second property mentioned was 10 dhurs of jagir paddy land lying in mauza Turheta in the Sub-Registry office and district of Hazaribagh. The deed was registered in the Hazaribagh Sub-Registry. The learned Subordinate Judge has found that neither was there such a village as Turheta or Choreta, nor had the widow any interest in such village even if it existed: that the inclusion of this fictitious property in the deed for the purpose of giving jurisdiction to the Sub-Registrar was a fraud on the Registry: that the effect, therefore, was that there was no proper registration.

The case was first argued in this Court on the assumption that the defendant's claim depended on the principle of subrogation contained in section 92 of the Transfer of Property Act. Section 92 of the Transfer of Property Act came into force in April, 1930, and therefore did not govern this case.

On the part of the defendant-appellant reliance is placed on the case of *Moulvie Mahomed Shamsool Hooda* v. *Shewukram*(1) and *Gokaldas Gopaldas* v. *Rambaksh Seochand*(2). The latter case was rather one of a prior mortgagee who having purchased the ultimate interest used his mortgage as a shield against all subsequent mortgagees. The broader principle is expressed in the earlier case in these terms:

"In the case of a mortgage subsisting upon the estate at the time of the sale and having been paid by the purchaser, it is equitable that, when the plaintiff reclaims the estate, credit should be given to the purchaser for the payment of the mortgage, which otherwise the plaintiff himself would have to meet."

On principle it is difficult to understand why that form of equitable relief should not be given to the defendant in this case. But we are met with

(1) (1874) L. R. 2 I. A. 7.
(2) (1884) I. L. R. 10 Cal. 1035, P.C.

the contention of the plaintiff-respondent that the defendant was not a person who was entitled to institute a suit for redemption, being unable to establish his title.

The matter of the validity of the registration raises two questions, one a question of fact and the other a question of law. If in fact there was a village Choreta and the widow had an interest therein the question of law does not arise as the defendant being in a position to prove his interest in the property he would be entitled to bring a suit for redemption within the meaning of section 83 of the Transfer of Property Act. So far as the question of the existence of the village is concerned, it seems to me that the decision of the learned Subordinate Judge was clearly wrong. There are a number of witnesses whose evidence can hardly be rejected. Buxi Pryag Das, who was the Assistant Record-keeper of the Ramgarh Court of Wards went into the witness-box and tendered a kabulivat in respect of the village Turheta. At this stage it might be mentioned that it seems clear from the evidence that since the publication of the record-of-rights the village has been known as Choreta instead of Turheta as before. Another witness Bishun Ram Pande speaks of an interest in that village having been given by the Raja of Ramgarh to his ancestors. This witness also incidentally speaks of the widow having an interest in this village, but with that I will deal in a moment. If the definite statement of the witness Buxi Pryag Das, the Assistant Record-keeper is accepted that the name of the village has changed, it outweighs the somewhat speculative reasons which the learned Subordinate Judge advances to support his finding that there was no such village as Choreta or Turheta.

There are a number of other documents which make mention of the village. The learned Subordinate Judge seems to have placed reliance upon Ex. 1, Ex. 1A, and Exts. 2 and 3 relating to an application

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to the Collector as to the existence of this village in Pargana Babhan Bai. The answer given by the Collector appears to be against its existence. In my judgment, this was not evidence in the circumstances, unless the writer of the answers was called as a witness and certainly could not be used in evidence against the defendant. No valid reason was put forward either in the court below or in this Court why the statement of Baxi Prvag Das should not be accepted on the question of the existence of the village. The question whether the widow had an interest in the village or not is an entirely different matter. It seems to me that it is here that the defendant fails. Apart from the vague statement of the last witness for the defendant, who, as the learned Judge in the court below points out, gave particulars of the boundaries which did not agree with the boundaries stated in the sale-deed, there was no evidence other than the kabulivat dated the 28th November, 1866, to Rang Lal the father of Mahtha Gauri Charan as to the existence of the interest. It is to be noticed that in the sale-deed of 1906 the property included was the 10-annas jagir interest. In the deed of the 28th November, 1866, the interest dealt with was the

" istemarari mokarrari of mauza Choreta 1 khunt at an annual jama of Rs. 19/4 etc. etc. after excluding the jagir and brit lands, coal mines etc., and treasure trove."

It is stated in argument by Mr. Mullick on behalf of the defendant-appellant that between 1866 and the time of the sale-deed of 1906 it must be assumed that in the ordinary course of events that jagir interests fell in and were resumed by Rang Lal or his son Mahtha Gauri Charan. This is a speculative argument with no foundation whatever.

The last witness for the defendant stated that he was the owner of the 10-annas milkiat interest in the village Turheta: four annas of this was in seer possession and six annas in thica; and out of the remaining six-annas share four annas belonged to

Sona Kuer. This is the only statement which in any way could be said to support the argument of the learned Advocate. The particulars of what the four annas were were not forthcoming. Again if we suppose that jagir interests fell in as they might have in the ordinary course of events, as they were expressly reserved in the kabulivat of 1866, the right of resumption would be in the Raja and not in Rang Lal or his son. From no point of view, it seems to me can it be suggested that the interest of Sona Kuer in this property was established.

In *Biswanath Prashad* v. *Chandra Narayan Chowdhuri*(1) a property was included in the bond which the parties did not intend should vest or pass under the mortgage, and it was held by the Judicial Committee of the Privy Council that the inclusion of this property for the purposes of registration was a fraud and, therefore, the alleged registration was invalid. Lord Finlay, delivering the opinion of the Judicial Committee, stated that that case fell within the decision of the Board in *Harendra Lal Roy Chowdhuri* v. *Hari Dasi Debi*(2) and that the bond could not be used in evidence. That case, in my judgment, governs this case. There appears to be no material difference on principle between the inclusion of the property not intended to pass by a deed and a property to which the vendor has no title.

The decision of this Court in *Jasoda Koer* v. *Janak Missir*(3) does not assist the defendant. There it was held that the subsequent discovery that the grantor had no title did not invalidate the registration.

It cannot be said in this case that there was a subsequent discovery that either the property was non-existent or that the grantor's title was not subsisting at the time of the execution of the deed. No case of that kind was either made out or even suggested.

(1) (1921) L. R. 48 I. A. 127.
(2) (1914) L. R. 41 I. A. 110.
(3) (1924) I. L. R. 4 Pat. 395.

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If it were necessary in order to succeed in this case to adduce in evidence the kabala of 1906 for the purpose of proving his title the appellant would, in my opinion, fail.

The argument of the respondent is that the equity which the appellant contends he is entitled to is an equity only in favour of persons other than volunteers. Unable as he is to prove his title to the property, it is contended that the appellant is a mere volunteer.

The appellant relies on the case of *Moulvie Mahomed Shamsool Hooda* v. *Shewukram*(1) That case depended in the first instance upon the true construction of a testamentary paper under which it was held that the widow had not an absolute estate, and therefore could not execute a conveyance for an estate beyond her life, it having been found that the conveyance was not for legal necessity. Her grandson was held to be entitled, as against the purchaser from the lady, to possession. The purchaser had paid off the mortgage of Rs. 14,000 and the question arose whether the plaintiff was entitled to the decree on the condition only of paying the Rs. 14,000. The opinion expressed by the Judicial Committee was that the mortgage subsisting upon the estate at the time of the sale having been paid by the purchaser it was equitable that when the plaintiff reclaims the estate credit should be given to the purchaser for the payment of the mortgage.

The case of *Gokaldas Gopaldas* v. *Puranmal Premsukhdas*(2) was also relied upon. In that case the Judicial Committee entered into a discussion of the case of *Toulmin* v. *Steere*(3) as to its applicability in India. The passage in the case which was quoted was to this effect:

(1) (1874) L. R. 2 I. A. 7.
(2) (1884) I. L. R. 10 Cal. 1035, P. C.
(3) (1817) 3 Mer. 210.

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"The case of *Greswold* v. *Marsham*(1) and *Mocatta* v. *Murgatroyd*(2) 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".

Sir Richard Couch, delivering the opinion of the Judicial Committee, made this statement:

"The doctrine of *Toulmin* v. *Steere*(3) is not applicable to Indian transactions, except as the law of justice, equity and good conscience. And if it rested on any broad intelligible principle of justice it might properly be so applied. But it rests on no such principle. If it did it could not be excluded or defeated by declarations of intention or formal devices of conveyancers, whereas it is so defeated every day. When an estate is burdened by a succession of mortgages, and the owner of an ulterior interest pays off an earlier mortgage, it is a matter of course to have it assigned to a trustee for his benefit as against intermediate mortgagees to whom he is not personally liable. In India the art of conveyancing has been and is of a very simple character. Their Lordships cannot find that a formal transfer of a mortgage is ever made, or an intention to keep it alive ever formally expressed. To apply such a practice the doctrine of *Toulmin* v. *Steere*(3) seems to them likely, not to promote justice and equity, but to lead to confusion, etc."

Then Sir Richard Couch says—

"The obvious question to ask in the interests of justice, equity and good conscience, is, what was the intention of the party paying off the charge? He had a right to extinguish it and a right to keep it alive. What was his intention?" Then he states—

"The ordinary rule is that a man having a right to act in either of two ways, shall be assumed to have acted according to his interest".

(1) (1685) 2 Ch. Cas. 170.
(2) (1717) 1 P. Wms. 393.
(3) (1817) 3 Mer. 210.

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The Judicial Committee held that the appellant had an intention and was entitled to keep alive the mortgage which he had paid off. That case, however, was rather a matter of using the mortgage as a shield against the puisne mortgagees rather than a question of subrogation.

The case of *Nasir-uddin* v. *Ahmad Husain*(1) was an action for specific performance and the subsequent purchaser against whom together with the vendor specific performance was sought had discharged the mortgages upon the property, and Lord Phillimore stated—

"In respect of any money paid by way of such discharge they are entitled to stand in the shoes of the mortgagees whom they have paid off".

It is said, as I have already stated, that the mere fact of payment by the defendant is insufficient as on the admissible evidence he was a volunteer and that, therefore, the cases to which I have just made reference do not apply for the reason that in those cases the person seeking the equity had no difficulty in establishing his title as a person who would have had a right to redeem. In this case the payment was made under section 83 of the Transfer of Property Act which section gives a right to a person who would be entitled to institute a suit for redemption to deposit the money to the credit of the mortgagee in Court. The deposit in fact was made in this case but it is said that the defendant not being able to prove his title he was not a person who was entitled to institute a suit for redemption under section 83: therefore, necessarily not entitled to make the deposit under section 83. Section 83 of the Transfer of Property Act, however, deals with the right to deposit the mortgage money in Court and not with the right to redeem by payment direct to the mortgagee or the right to bring an action

(1) (1926) 31 Cal. W. N. 538, P. C.

for redemption. It is admitted that so far as the right to bring an action for redemption there might be the same difficulty in the way of the defendant as there is in his proving his title to the property. But here he was under an obligation under the kabala to pay off the mortgage. Section 92 of the Transfer of Property Act is referred to. This section gives the same right to a person referred to in section 91 as regards redemption, foreclosure or sale as a mortgagee whose mortgage he redeems. Such right is described by the section as that of subrogation. The section also gives the right to a person who has advanced money to the mortgagor for the purposes of redemption. This last provision is subject to there being a registered instrument of agreement that such person shall be so subrogated. In this case, however, we are not bound by section 92 as this section came into force in April, 1930. All such rights as the defendant had were already vested before that date. The matter, therefore, depended upon the law as it stood before section 92 was enacted.

It seems to be clear that the right of subrogation belongs to a person who under an agreement has paid off the mortgagee—*see Gurdeo Singh* v. *Chandrikah Singh*(1). The fact is that the defendant in this case has paid up the mortgagee under an agreement to do so, but the question arises whether he is entitled to establish the agreement by putting in in evidence the document of 1906, his sale-deed. As I have already held, it is clearly inadmissible to prove his title to the property and for " any purpose affecting the property the document would be equally inadmissible ". There is ample authority for the proposition, however, that the document may be used for collateral purposes—*see Varada Pillai* v. *Jeevarathnammal*(2) and *Jagannath Marwari* v. *Sm. Chandni Bibi*(3). Indeed it seems to me on the wording of the section itself, that

(1) (1907) I. L. R. 36 Cal. 193.
(2) (1919) I. L. R. 43 Mad. 244, P. C.
(3) (1921) 26 Cal. W. N. 65.

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is, section 49 of the Registration Act, that the exclusion of a document as evidence is limited. The section provides that

> "A document required by section 17 to be registered shall not be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered".

WORT, J. The defendant here uses the document to show that there was an agreement by him that he should retain the Rs. 14,000, part of the consideration for the sale, and pay that sum in discharge of the mortgage of the 18th April, 1898. Had the matter been governed by section 92 of the Transfer of Property Act, he would have been precluded from using such document as that section provides that such an agreement must be evidenced by a registered instrument. In the circumstances, therefore, although he is precluded from proving his purchase he may establish his undertaking by the deed to pay off the subsisting mortgage. Also on the point that the defendant was a mere volunteer it seems to me that the respondent must fail. That being so, the defendant is entitled to the equitable relief claimed by him.

The decree of the Subordinate Judge for possession to the plaintiff shall be subject to the condition that the plaintiff should pay as a condition of his decree the sum of Rs. 14,000.

The respondent is in possession, therefore the respondent will pay to the appellant defendant the sum of Rs. 14,000 on or before the 7th May, 1934, with interest at 6 per centum per annum from the date of the delivery of possession to the respondent plaintiff until payment. On failure of such payment the respondent will redeliver the property to the appellant defendant.

The appeal will be allowed with costs in this Court and one half the costs of the Court below.

FAZL ALI, J.—I agree.

Appeal allowed.