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dismissed with costs throughout. The cross-objection is also dismissed.

RUPAN  
SINGH  
v.

CHATTERJEE, J.—I agree.

AKHAJ  
SINGH.

*Appeal decreed.*

Ross, J.

*Cross-objection dismissed.*

## APPELLATE CIVIL.

*Before Ross and Sroope, JJ.*

FOODENI SAH

v.

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July, 8, 9.

AZHAR HUSSAIN KHAN.\*

*Mortgage—suit for redemption of usufructuary mortgage—plea of absolute title on the basis of purchase—alternative plea for being re-imbursed for payments of rent payable by plaintiff—suit decreed—mortgagee, whether forfeits his statutory right—Transfer of Property Act, 1882 (Act IV of 1882), section 72.*

In a suit for redemption of a usufructuary mortgage, the defendant contended first, that although he had originally been a usufructuary mortgagee, he had become absolute owner of the mortgaged property and secondly, that even if the plaintiff be deemed entitled to redeem the mortgage, he could only redeem on the terms of repaying not only the original loan but the amount that the defendant had paid as rent which, under the terms of the bond, the plaintiff was to pay. The first plea failed and a decree was passed for redemption on repayment of the original loan and the amount of rent paid by the defendant with interest.

*Held*, that the mere fact that the defendant set up an absolute title in himself in repudiation of the title as mortgagee, could not take away his statutory right under section 72, Transfer of Property Act, 1882, to be re-imbursed for

\* Appeal from Appellate Decree no. 881 of 1928, from a decision of Babu Phanindra Lal Sen, Additional District Judge of Muzaffarpur, dated the 2nd of March, 1928, modifying a decision of Babu Sachindra Nath Ganguly, Munsiff of Hajipur, dated the 11th of March, 1927.

the amounts paid as rent, although the defendant did not profess to make these payments as mortgagee, but as absolute owner of the property.

*National Bank of Australasia v. The United Hand-in-Hand and Band of Hope Company*(1) and *Lord St. Leonards in Incorporated Society v. Richards*(2), distinguished.

Appeal by the plaintiff.

This was an appeal by the plaintiff in a suit for redemption. The plaintiff's case was that the defendant 1st party was a usufructuary mortgagee and that after taking the mortgage he had taken a fraudulent conveyance from the plaintiff's uncle and from a person who falsely personated his mother, but had acquired no title thereby. The plaintiff had deposited in Court the amount due under the usufructuary mortgage. The defence was that the conveyance was a good conveyance for value. Although the defendant had originally been a usufructuary mortgagee, he had become absolute owner and had paid the landlord's rent which under the terms of the bond the plaintiff was to pay. It was further pleaded that if the plaintiff was entitled to redeem, he could only redeem on the terms of repaying not only the original loan but the amount that the defendant had paid as rent.

The Courts below found that the defendant's conveyance was not a good conveyance and that he was a usufructuary mortgagee only, but that he had paid the rent as he alleged. A decree was, therefore, passed for redemption on repayment of the original loan and the amount of the rent paid by the defendant with interest. The plaintiff appealed.

*Sant Prasad*, for the appellant.

*Nirsu Narain Sinha*, for the respondent.

Ross, J. (after stating the facts set out above proceeded to say as follows:) The plaintiff now

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(1) (1870) 4 App. Cas. 391.

(2) (1841) 1 Dr. and War. 334.

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appeals against the terms of redemption, contending that as the defendant set up a fraudulent conveyance in repudiation of his title as mortgagee, he was not entitled to the mortgagee's privilege of adding to his principal his disbursements on behalf of the estate. Reference was made to the decision in *National Bank of Australasia v. The United Hand-in-Hand and Band of Hope Company*(<sup>1</sup>). The facts of that case were rather complicated, but were briefly that the respondent company had given two mortgages to the Bank and thereafter there had been various collusive transactions by the Bank, viz., a purchase through the Bank's solicitors and an improper exercise of the power of sale under the mortgages as a result of which the Bank had acquired the company's mine and had taken possession and worked the mine. The company sued the Bank, alleging in the first place that the mortgages were ultra vires of the directors but also impugning the Bank's purchase and all the subsequent acts, and claiming an account and offering to pay all just dues. It was decided that the mortgages were valid and that the company was entitled to redeem; and that the Bank had no title as owner and was liable as mortgagee in possession to account. The argument in appeal before the Judicial Committee on behalf of the appellant Bank was that redemption could not be decreed when the mortgages had been impugned and redemption had not been claimed. The decision was that although the authorities supported the technical rule, yet in the circumstances of that case the mortgagee was not entitled to the benefit of that technicality. That decision does not support the plaintiff's argument. In that case the defendant's argument failed and the plaintiff was held to be entitled to redeem. Here the position is different: it is the plaintiff suing as mortgagor, who is claiming to limit the rights of the mortgagee. The learned Advocate for the appellant, however, relied upon certain observation quoted from the judgment of

(1) (1879) 4 App. Cas. 391.

*Lord St. Leonards in Incorporated Society v. Richards*<sup>(1)</sup> to the effect that a mortgagee who set up an adverse title could not claim all the benefits attached to the character of a fair creditor. But the effect given to this observation was only with regard to the terms as to interest and costs. That is a very different thing from going the length of depriving the mortgagee of a statutory right. The decision certainly does not support any such conclusion as that. And it is clear that the mortgagee has a statutory right under section 72, Transfer of Property Act, 1882, to be reimbursed for these payments of rent. It is said that he did not profess to make these payments as mortgagee, but made them as owner after his invalid purchase. But when the purchase goes, then the parties are remitted to their original position and he must be credited with these payments as made by him in his capacity as mortgagee, the only capacity that he had when the conveyance failed.

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This was the only point that was argued in this appeal and in my opinion the argument fails and the appeal must be dismissed with costs.

SCROOPE, J.—I agree.

*Appeal dismissed.*

## APPELLATE CIVIL.

*Before Fazl Ali and Chatterji, JJ.*

TUGAN MULL

v.

LADHU LAL.\*

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*Limitation Act, 1908 (Act IX of 1908), sections 19, 20 and Schedule I, Article 183—"payment" referred to in the*

\*Appeal from Original Order no. 205 of 1928, from a decision of Maulvi Md. S. Uddin Khan, Deputy Magistrate Subordinate Judge, at Pakaur, dated the 17th August, 1928.

(1) (1841) 1 Dr. and War, 334.