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It remains to consider the question of sentence. In deciding what sentence to impose I think that we ought to bear in mind the fact that so far as it appears the accused correctly entered in his account all items of receipt and has not made any false entries in his books. We should also bear in mind that the accused was put in fear of a possible charge of fraudulent accounting in addition to that of retention of the trust money and suffered in consequence additional anxiety and mental distress. Therefore, in my opinion, it is not necessary to impose a long term of imprisonment though the section requires us to pass a sentence of imprisonment. I would impose the sentence of rigorous imprisonment for three months and a fine of Rs. 7,500 in default to be rigorously imprisoned for a further period of one year and three months. Of the fine, if realized, Rs. 6,000 should be paid to the complainant on behalf of the Maharajadhiraj of Darbhanga as compensation and expenses under section 545 of the Criminal Procedure Code.

VARMA, J.—I agree.

Appeal allowed.

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September,
26, 30.

APPELLATE CIVIL.

Before Courtney Terrell, C.J. and Dhave, J.

KEDAR NATH GOENKA

v.

BHAGWAT PRASAD KUMAR.*

Mortgage—sale of mortgaged property in favour of mortgagee in consideration of total mortgage debt—mortgage debt left intact by deed—failure on the part of mortgagor to deliver up portion of vended property—mortgagee, whether entitled to keep alive the mortgage against mortgagor—partial failure of consideration, effect of, on the old contract

* Appeal from Original Decree no. 175 of 1931, from a decision of Maulavi Abdul Aziz, Subordinate Judge of Monghyr, dated the 10th September, 1931.

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of mortgage—mortgage debt, whether extinguished by sale—
Transfer of Property Act, 1882 (Act IV of 1882), section 101.

Where the mortgagees and the mortgagors entered into an agreement whereby the latter conveyed to the former a portion of the mortgaged property in consideration of the total mortgage debt due on two mortgage bonds, but failed to deliver up possession of a portion of the vended property, and the deed of sale recited—

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Keeping intact the effects of the mortgage created under the mortgage (simple) and suddharna (usufructuary) mortgage bonds aforesaid; (and we) put the said purchaser in possession of the vended property in our place, admitted him to be absolute owner, and set off the whole and entire consideration in respect of the dues of the aforesaid purchaser under both (his) said bonds.....* * *"

Held, (i) that the words as to keeping alive the mortgage bonds were merely an assertion of the same rights as are conferred by reason of section 101 of the Transfer of Property Act, 1882, and they were intended merely to preserve to the mortgagees a shield against the claims of persons setting up a subsequent charge upon the same property; they had no reference in their proper construction either in the deed or in the Act to the maintenance of any mortgage rights by the mortgagees against the mortgagors;

(ii) that the contract of sale was not wholly void inasmuch as there had been only a partial failure of consideration for which there was an appropriate remedy for breach of contract; that being so, the execution of the sale-deed had put an end to the mortgage debt and there was no question of the rights under the old contract surviving.

Lachman Prasad v. Lachmeshwar Prasad(1), followed.

Upendra Nath Samenta v. Saroda Prasad Ghosh(2), distinguished.

Appeal by the plaintiffs.

The facts of the case material to this report are set out in the judgment of Courtney Terrell, C.J.

S. M. Mullick (with him *S. M. Naimatullah, Nitai Chandra Ghosh* and *J. C. Sinha*), for the appellants.

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(2) (1932) 36 Cal. W, N. 696.

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S. N. Bose, for the respondents.

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COURTNEY TERRELL, C.J.—This is an appeal from the decision of the Subordinate Judge of Monghyr in a suit to enforce a mortgage. The essential facts may be very shortly stated. The mortgagees' suit is on a mortgage executed on the 5th of October, 1917, for a sum of Rs. 6,291. It has been dismissed on the ground that the mortgage debt has been satisfied by the sale by the mortgagors to the mortgagee-plaintiffs of the equity of redemption of the mortgage deed. The mortgage in question came about in the following way. On the 4th of October, 1909, the defendants 1, 2 and 3 executed a mortgage bond to the plaintiffs for Rs. 19,000 odd. On the 5th of October, 1917, calculation was made as to the amount which remained due on this bond in respect of principal and interest and the sum so found was Rs. 38,000 odd. A new transaction was entered into. The mortgagors borrowed from the mortgagees another Rs. 5,300 odd and then executed in favour of the mortgagees two documents—one of them a simple mortgage bond (the mortgage bond now sued upon) for Rs. 6,291 and seven properties were mortgaged by that deed. As to two of these properties the mortgagees were given an anomalous usufructuary mortgage for Rs. 37,000 odd. The debt on these mortgages continued swelling up, and on 24th October, 1928, the total dues by the defendants to the plaintiffs amounted to Rs. 49,500 odd. Therefore, the mortgagees and the defendants entered into a deed of sale and the defendants conveyed properties 1 and 2 out of the seven properties, the subject of the original mortgage, to the mortgagees for and in respect of the said sum of Rs. 49,500 odd and the mortgage debt was put an end to. In the sale deed the following expression occurs; after reciting that the consideration price for the conveyance of the properties 1 and 2 was to be Rs. 49,500, the deed continued thus:

"keeping intact the effects of the mortgage created under the mortgage (simple) and sudbharna (usufructuary) mortgage bonds aforesaid; (and we) put the said purchaser in possession of the vended

property in our place, admitted him to be the absolute owner, and set off the whole and entire consideration in respect of the dues of the said purchaser under both (his) said bonds."

The reference to the keeping intact of the effects of the mortgage has been relied upon by the plaintiffs in this case and it is argued on their behalf that it was intended that, notwithstanding the deed of sale and the apparent extinction of the mortgage debt, the mortgagees should remain in possession of the full rights under their mortgage bond. In other words, the argument amounts to the contention that by virtue of the sale-deed the mortgagees became not only mortgagees again, but further, proprietors by virtue of the conveyance. This would be an entirely anomalous situation for which I am sure there is no precedent. The words as to keeping alive the mortgage bond are merely an assertion of the same rights that are conferred by reason of section 101 of the Transfer of Property Act and they are intended merely to preserve to the mortgagee a shield against the claims of persons setting up a subsequent charge upon the same property. They have no reference in their proper construction either in the deed or in the Act to the maintenance of any mortgage rights by the mortgagee against the mortgagor. Properties 1 and 2, which were the subject of the sale deed, consisted of a three annas odd share in mauza Sikandarpur which was the property mortgaged. After the execution of the sale deed the plaintiffs registered themselves as proprietors of the property conveyed. They subsequently found out the position of the defendants second party. These are persons who had obtained a money decree against defendant no. 3. Defendant no. 3, who is one of the mortgagors, had a one anna odd share in the said properties and the plaintiffs found that they were in a position of doubt as to whether these defendants second party (who in execution of their money decree had attached that one anna odd share of defendant no. 3) had any right to do so and they took up the position in their plaint that they had not received that which they had bargained to receive

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under the sale deed and therefore the sale deed had no effect upon the rights under the mortgage deed sued upon and they, therefore, purported to sue defendants 1, 2 and 3 impleading the defendants second party and claiming a mortgage decree for sale of the said properties. The defendants second party, as I have said, having attached this one anna odd share of defendant no. 3, put it up for sale on the 6th of August, 1928, before the date of the sale deed in question and bought it in and got delivery of possession. The case on behalf of the plaintiffs is put, I think, in two alternative ways. First of all, it is contended that under the sale deed the rights of the plaintiffs were preserved as mortgagees notwithstanding that they also became proprietors under the sale deed. This contention I have already dealt with. Secondly, it is said that owing to the failure of the defendants first party to deliver the property contracted to be delivered, that is to say, the three annas share and being only in a position to deliver a two annas share in Sikandarpur, there has been a total failure of consideration. For a short time during the argument I was, speaking for myself, attracted by this proposition, but an examination of the fact shows that it is not a case of total failure of consideration, but a failure of consideration with regard to a quantum only. Unless it could be satisfactorily argued that the sale deed was of no effect on a total failure of consideration the decision cannot be otherwise than that the mortgage debt was extinguished by the execution of the sale deed. This proposition has been clearly exemplified by the decision in the case of *Lachman Prasad v. Lachmeshwar Prasad*⁽¹⁾ and the learned Judges in that case pointed out that there had been a partial failure of consideration; but where a person contracts to sell something and fails to carry out the contract partially there is an appropriate remedy for breach of contract and the contract is not wholly void, and they pointed out that in such circumstances the execution of the sale deed put an end to

(1) (1922) 68 Ind. Cas. 203.

the mortgage debt. In short, a new contract is entered into by which the former relationship of a mortgagor and mortgagee is terminated and the new relationship of a vendor and vendee is substituted. For a breach of that new contract a remedy is open to the person who is damaged by its breach, but there can be no question of the rights under the old contract surviving. The case principally relied upon by Mr. Mullick on behalf of the plaintiffs—*Upendra Nath Samenta v. Saroda Prasad Ghosh*(1)—is clearly distinguishable. There was no question of merger there of the rights of the mortgagee by reason of the transfer, because the property which was purported to be transferred was not the property which had been mortgaged. There having been no merger, therefore, the rights of the mortgagee survived the contract of sale. Here the property actually transferred, though not actually delivered, was the property which was the subject of the equity of redemption and was the property which had been the subject of the mortgage.

For these reasons, in my opinion, the appeal fails, the learned Subordinate Judge having rightly dismissed the suit on the ground that it was not maintainable the mortgage bond having been discharged by the execution of the sale deed. I would, therefore, dismiss the appeal with costs.

DHAVLE, J.—I agree. The appellants took the sale deed in satisfaction of the monies due under the mortgage and the suddharna. It is not their case definitely that the sale deed has failed in part, but they brought the suit on the footing that the defendants second party claimed a prior title in respect of the share of defendant no. 3 who was one of the mortgagors. Whether those defendants have a good title or not as against the appellants has not yet been determined; they asserted it against the appellants in the land registration proceedings, and there it was the appellants that succeeded. That title involves

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questions of fact on which no issue was framed in the lower court nor any evidence given. Assuming, however, that the sale deed taken by the appellants does fail in respect of the part claimed by the defendants second party, it is impossible to let the plaintiffs sue on the mortgage, while keeping the bulk of the property conveyed to them by the sale deed. As a matter of fact they stand registered at present in the Collectorate registers as owners of the entire mortgaged property. The provision in the sale deed regarding

“ keeping intact the effects of the mortgage created under the mortgage (simple) and sudbharna (usufructuary) bonds ”,

does not seem to me to have the effect of keeping up the mortgage as against the mortgagors; indeed it is conceded that it was not open to the appellants by any arrangement with the mortgagors to constitute themselves mortgagees and owners at one and the same time. Plainly, that provision was made in the sale deed merely in view of section 101 of the Transfer of Property Act which entitles the “ owner ” of a mortgage, by express words or necessary implication, to provide that the mortgage shall continue to subsist. The section makes the mortgage available not as against the mortgagor but as against puisne incumbancers and others occupying the same position; while as against the mortgagor, the mortgagee’s rights are replaced by his rights under the sale deed taken in discharge of the mortgage debt. Mr. Mullick for the appellants has contended that no distinction was made in *Gopal Sahoo v. Gunga Pershad Sahoo*(1) between total failure of consideration and partial failure of consideration for a sale deed taken by the mortgagee. In the particular case there was a total failure of consideration, and their Lordships held that the mortgagee was accordingly entitled to fall back upon the mortgage. When, however, as in the present case, there is only a partial failure of consideration, the position is entirely different. So far as the mortgagors as such are concerned, they are discharged by

(1) (1892) I. L. R. 8 Cal. 530.

the sale deed, though it may be that the mortgagees as purchasers will be entitled to damages for the failure of the vendors to make out a good title to some part of the property conveyed. The sale not failing as a whole, the relation of mortgagor and mortgagee, which was replaced by that of vendor and purchaser, cannot be recalled as against the mortgagors-vendors. [*c.f. Lachman Prasad v. Lachmeshwar Prasad*(1)], even irrespective of the consideration that the purchaser cannot both approbate and reprobate the sale. The appellants cannot, therefore, in view of their acceptance of the sale deed sue on the mortgage, making the mortgagors the defendants first party, nor could they have sued on that document leaving out the mortgagors. The suit brought by them was, therefore, defective not merely in a technical sense but on a matter of substance, and was rightly dismissed by the lower Court.

Appeal dismissed.

PRIVY COUNCIL.

DEVENDRA PRASAD SUKUL.

v.

SURENDRA PRASAD SUKUL.

On appeal from the High Court at Patna.

*Transfer of Property Act, 1882 (IV of 1882), section 31—
Sale of Land—condition subsequent—equitable relief.*

Immoveable property was sold subject to the condition that the vendee should, out of the consideration money, discharge a mortgage debt of the vendor, and that on the failure of the vendee to discharge the debt by December 30, 1925, the sale should be void. The vendee paid a sum of money in part discharge of the debt on October 15, 1925, but failed to discharge the debt by December 30, 1925. On August 16, 1926, the vendor instituted a suit for a declaration that the sale was void. On September 14, 1926, before judgment in the suit, the vendee paid the mortgagee a further sum in complete discharge of the debt.

(1) (1922) 66 Ind. Cas. 203.

*Present: Lord Thankerton, Sir Lancelot Sanderson and Sir George Rankin.

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