

## APPELLATE CIVIL.

Before Mr. Justice Das and Mr. Justice Doyle.

N. V. N. NATCHIAPPA CHETTYAR

v.

KO THA ZAN AND ONE.\*

1928

April 24.

*Mortgaged property, purchase of—Purchase price used for paying prior mortgage—Priority of purchaser over puisne mortgagee—Continuance of incumbrance when beneficial to purchaser, intention immaterial—Transfer of Property Act (IV of 1882), s. 101.*

Held, that where a purchaser buys immoveable property which is encumbered, and the circumstances are such that it is for the benefit of the purchaser that the mortgages involved in the purchase should not be extinguished, they enure for the benefit of the purchaser. Where in a case to which the concluding words of s. 101 of the Transfer of Property Act apply, *et c.*, where the continuance of an incumbrance is for the benefit of the purchaser, the question of intention of parties need not be examined.

*Gokaldas v. Purnamal*, 10 Cal. 1035 (P.C.)—*distinguished*.

*Soobramonian Chetty v. Aga Rajat Ally*, 5 L.B.R. 138—*referred to*.

*A. B. Banerji* for the appellant.

*Burjorjee* for the respondents.

Plaintiff was first mortgagee of paddy land, and puisne mortgagee of godowns and a building. Subsequently to the plaintiff's mortgage, respondents bought from the mortgagor-owners the godowns for Rs. 20,500. They as defendants in the plaintiff's suit for redemption or sale, proved that, out of the purchase price, Rs. 19,500 were paid to clear some mortgages prior to that of the plaintiff, and so they claimed priority over the plaintiff to that extent. The learned District Judge held that if sale proceeds were devoted to pay off prior incumbrances, the purchaser was entitled to priority over puisne mortgagees and referred to the case in 5 Lower Burma Rulings, page 138. He

\* Civil First Appeal No. 262 of 1927 against the judgment of the District Court of Bassein in Civil Regular No. 30 of 1926.

gave a mortgage decree to the plaintiff and decreed that, if the amount due to plaintiff was not paid in six months, the paddy land was to be sold first, and, if the sale proceeds were insufficient, then only the other properties were to be sold. If the godowns were to be sold eventually, respondents were to have priority over the plaintiff to the extent of Rs. 19,500. Plaintiff appealed.

1928

N. V. N.  
NATCHIAPPA  
CHETTYAR  
v.  
KO THA ZAN  
AND ONE.

DAS and DOYLE, JJ.—The sole point for decision in the present appeal is whether the learned District Judge was correct in holding that, where sale proceeds are devoted to paying off prior encumbrances, purchasers are entitled to priority over puisne mortgagees.

It is argued that there is no evidence that there was any intention to keep alive the mortgages, and that, therefore, under section 101 of the Transfer of Property Act, the mortgages must be held to be extinguished at the time of purchase.

In our opinion no question of intention arises. It is true that in *Soobramonian Chetty and others v. Aga Rajat Ally Khorasani and others* (1), where a problem similar to the present was discussed, the question of intention was examined. The learned Judges who decided that case based their conclusions on the Privy Council ruling in *Gokaldas Gopaldas and Rambaksh Seochand v. Puranmal Preamsukh Das* (2). They appear, however, to have overlooked the fact that the Privy Council ruling dealt with a state of affairs prior to the passing of the Transfer of Property Act of 1882, and that the principle to be applied in cases such as the present is contained in the concluding words of section 101 of the Transfer of Property Act.

(1) (1909) 5 L.B.R. 138.

(2) (1884) 10 Cal. 1035.

1928

N. V. N.  
NATCHIAPPA  
CHETTYAR  
v.  
KO THA ZAN  
AND ONE.

DAS AND  
DOYLE, JJ.

Where, therefore, at the time of purchase circumstances are such that it is for the benefit of the purchaser that the mortgages involved in the purchase should not be extinguished, it must be held that they enure for the benefit of the purchaser.

The appeal stands dismissed with costs.

## APPELLATE CIVIL.

*Before Mr. Justice Cunliffe and Mr. Justice Baguley.*

MOHAMED CASSIM

v.

A. J. DAVID.\*

1928

April 30.

*Civil Procedure Code (Act V of 1908), O. 21, rr. 89, 92—Limitation Act (IX of 1908), Sch. I, Art. 166—Requisite deposit less by a very small amount, effect of—Delay of one day in making deposit, effect of—Strictness of the provisions of the Code.*

*Held*, that where an application is made under the provisions of O. 21, r. 89, of the Civil Procedure Code to set aside sale on deposit, a very small shortage of the amount required to be deposited may be disregarded and will not vitiate the deposit, but even a day's delay in making the application or the deposit beyond the period of 30 days from the date of sale cannot be disregarded. The provisions of O. 21, rr. 89 and 92 are strict.

*K. C. Bose* for the appellant.

*Leach* for the respondent.

CUNLIFFE and BAGULEY, JJ.—This is an appeal under Order 43, rule 1 (*j*) against a refusal of the District Court of Insein to set aside a sale in Civil Execution No. 20 of 1926 of that Court. The questions to be considered arise out of the construction in the circumstances of Order 21, rule 89 and Order 21, rule 92. Order 21, rule 89, lays down part of the conditions under which a deposit must be made by

\* Civil Miscellaneous Appeal No. 197 of 1927 from the order of the District Court of Insein in Civil Execution No. 20 of 1926.