Before Mr. Justice Bayley and Mr. Justice Mitter.

PORAN MISRA (DEFENDANT) *v.* HARSARAN MISRA (PLAINTIFF.)* 1871 *June* 27.

Purchase from Hindu Widow—Payment of Debt on the Estate by Purchaser —Purchase set aside by Heir—Refund by Heir.

The plaintiff purchased an estate from a Hindu widow in possession, and after his purchase he paid a debt, for which the property sold had been mortgaged by the late husband of his vendor. Subsequently the daughter of the vendor claimed the property as heir of her father, and recovered possession of it from the purchaser by suit. The purchaser now sued the heir for a refund of the amount of the mortgage-debt paid by him. *Held*, that the purchaser was entitled to recover.

THE plaintiff purchased certain immoveable property from one Maracha Koer, widow of Harrak Misra, deceased. The property had belonged to the deceased Harrak Misra, who, during his life, had mortgaged it. After purchase from the widow, the plaintiff paid the mortgaged-debt. Subsequently, one of the present defendants, Rukhi Koer, daughter of Harrak Misra, brought a suit against the plaintiff to recover possession of the property on the ground that her mother Maracha Koer had no power to sell, and that the purchase was collusive. The Court which decided this suit for possession in the first instance, gave a decree in favor of Rukhi Koer, partly on the ground that the deed of sale was not proved by any legal evidence, and partly upon the grounds that there was no valid necessity to justify the sale by Maracha Koer, as a Hindu widow in possession of her husband's estate. This decree was subsequently upheld in appeal.

The present suit was instituted by the plaintiff to recover from Rukhi Koer the amount of the mortgage-debt, contracted by her deceased father Harrak Misra, which he the plaintiff had paid while in possession of the property after his purchase of the same from her mother.

The defence of Rukhi Koer was that the suit was barred by section 2 of Act VIII of 1859, and by the law of limitation; and that, as the kabala of the plaintiff had been set aside, he was not entitle to recover the amount of the mortgage-debt.

The first Court found upon the evidence that the plaintiff had acted in good faith in paying the money to the mortgagee, that he had good reasons to believe himself to be the owner of the property, and that he was in possession of it at the time when the payment was made. It further found that the mortgage-debt was a real debt for which the defendant was liable, and that the plaintiff having satisfied that debt was entitled to a decree for refund of the money paid. The lower Appellate Court confirmed this decision.

* Special Appeal, No. 236 of 1871, from a decree of the Subordinate Judge of Sarun, dated the 10th December 1870, affirming a decree of the Moonsiff of that district, dated the 30th June 1870.

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The defendant Rukhi Koer preferred a special appeal to the High Court.

Baboo *Debendra Narrayan Bose*, for the appellant, contended (*inetr alia*) that the payment by the plaintiff was a voluntary one, not made under any contract either express or implied with the defendant, who was not bound to pay the plaintiff, though she would have been bound to pay the mortgagee.

Mr. *Sandel* (with him Baboo *Rughubans Sahoy*) for the respondent.—The debt was contracted by the defendant's ancestor. The defendant had got the property in dispute which was mortgaged for that debt, as heir of the mortgagor. She was no doubt bound to pay the mortgagee. The payment by the plaintiff was not voluntary. Upon the facts found by the Courts below, it is clear that the plaintiff in paying the mortgage-debt had done what every reasonable proprietor would do. All that the defendant was entitle to as heir was the property burdened with the mortgage. She had now got it free from that encumbrance, and was therefore bound to make good that money to the plaintiff.

MITTER, J. (after stating the facts, continued). In special appeal it is argued that, as it was found in the former suit that the plaintiff had failed to prove the conveyance set up by him by any legal evidence, so the plaintiff must be treated as an utter stranger, and as such the payment made by him to the mortgagee should be looked upon as a voluntary and officious payment.

We are of opinion that the lower Courts were not bound by the finding of the Subordinate Judge in the previous case, with reference to the plaintiff's failure to prove the alleged conveyance. That finding was no doubt binding and conclusive for the purpose of that suit, but in this case in which a different question is involved, *viz.*, whether the plaintiff is entitled to recover a sum of money which he had paid in satisfaction of a debt due by the defendant, the lower Courts had every right to look to all the facts and evidence of this case, in order to determine whether the plaintiff had acted in good faith in making that payment. It is argued that this finding has been arrived at without any evidence, but we are by no means prepared to accede to the correctness of this argument. The facts, as disclosed by the parties, clearly go to show that the finding of the Court of first instance is not unsupported by proof. But be this as it may, as the objection was not raised by the special appellant before the lower Appellate Court, we do not think that this is a case in which we ought to allow him to take it up at this last stage of the proceedings. It is perfectly clear that the plaintiff has satisfied a debt which ought to have been paid by the special appellant. The zuripeshgi lease is in his hands; it was returned to him by the zuripeshgidar after the payment of the zuripeshgi money. A faint attempt was made in the first Court to dispute the correctness of the zuripeshgi lease, but this point also does not appear to have been pressed before the lower Appel late Court, and under these circumstances we think that the special appellant ought to

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be held strictly to the grounds taken by him in his petition of appeal to this Court, and in that to the lower Appellate Court. The finding of the first Court that the plaintiff had acted in good faith was never seriously contested by the special appellant before the lower Appellate Court. He rested his case entirely on the ground that the former decision was binding and conclusive, not only for the purposes of the suit in which that decision was passed, but also for those of the present suit which involved a question quite different from that involved in the previous litigation. We wish further to add that, looking to the judgment of the Court of first instance in the former suit, we are disposed to think that it went more on the ground that the conveyance set up by the plaintiff was not supported by any valid legal necessity, than on the ground that it was a spurious document. It is not however on this ground that we dispose of this case.

We dismiss the special appeal with costs.

Before Mr. Justice Phear.

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March 18.

IN THE INSOLVENT COURT.

IN RE MANUEL GRANT COSTELLO, AN INSOLVENT.

Insolvent Act (11 & 12 *Vict., c.* 21), *s.* 86.

THE petition of the insolvent came on for hearing on 2nd September 1871; and the insolvent not appearing an order was made on the application of the Official Assignee that the hearing should be adjourned until the 9th September, and that the insolvent should attend on that day for the purpose of being examined; the order to be served on him in the meantime. On 9th September the insolvent did not appear, and an application was made on behalf of the Official Assignee that judgment should be entered up against the insolvent under section 86 of the Insolvent Act.

The Court wished to be satisfied that that section was still in force.

Mr. *Ingram* for the Official Assignee.—Section 65—67, relating to cognovits and warrants of attorney, were repealed by Act XIV of 1870, but section 86 is not thereby repealed. Act XXIV of 1865 abolished warrants of attorney and cognovits and judgments thereon, but that Act does not apply to the Court in its insolvent jurisdiction.

PHEAR, J. (after taking time to consider)—An order will be made to enter up judgment in the High Court against the insolvent for the scheduled debts, under section 86 of the Insolvent Act.

Attorneys for the Official Assignee: Messrs. *Carruthers* and *Dignam*.