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 SHIB NARA-
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v.
 KISHOR
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directly the reasoning by which the conclusion was come to by the Chief Justice in that case. Under this view of the case, I would reject the application for review, with costs.

GLOVER, J.—I also think that the application should be rejected. No new argument has been advanced nor any thing shewn to us, which induces me to think the original order wrong. That order turned on a point of law solely, which was fully argued and considered at the first hearing.

1868
 July 13.

Before Mr. Justice Kemp and Mr. Justice E. Jackson.

BRAJARAJ KIFORI DASI *v.* MOHAMMED SALEM.*

Mortgagor and Mortgagee—Covenant not to Alienate—Purchaser at Auction-Sale.

See also
 14 B. L. R.
 447.

A. gave a mortgage to B. of certain property as a security for money lent, and covenanted not to alienate the property by gift, ijara, putni, or otherwise, by which loss might be caused to the existing actual assets of the property. A. subsequently granted a putni to C. B. obtained a decree against A. for the amount of the loan, and the property was sold in default of payment. D. was the purchaser at the Auction-sale. *Held*, that D. could maintain his suit against C. to set aside the putni and for possession.

By a Bengali instrument dated 14th Aswin 1271 (29th September 1865), Bhairab Chandra mortgaged the property in dispute to Giridharilal, and thereby stipulated that he "shall have no power in any way to alienate the property by sale, gift, ijara, putni, or otherwise, by which loss may be caused to the existing actual assets of the property."

Subsequent to the execution of the mortgage, Bhairab Chandra granted a putni (perpetual lease) of the property to the defendant.

Giridharilal sued Bhairab Chandra, and obtained a decree for the amount due and for sale of mortgaged premises, in case of default. The property was sold accordingly. The fact of the existence of the putni lease was made known at the sale.

*Special Appeal, No. 327 of 1868, from a decree of the Judge of Rungpore, affirming a decree of the Principal Sudder Ameen of that district.

The plaintiff purchased the property at the auction-sale, and instituted this suit for setting aside the putni and obtaining khas possession of the property.

The defence was that the plaintiff had purchased only the proprietary right to the land ; that he had notice of the existence of the putni lease ; that the stipulations of the mortgage-deed had not been infringed, as the putni rent was equal to the assets of the estate ; and that the debt of the mortgagee had been satisfied out of the sale proceeds.

The Principal Sudder Ameen held, that there was nothing to preclude the purchaser from suing to cancel the putni ; that the putni lease was an invalid transaction, as the judgment-debtor (mortgagor) had no power to create such a lease ; that the granting of the lease did cause loss in the actual assets of the lands. He gave a decree for the plaintiff.

On appeal, the judge, in the first instance, dismissed the suit, but upon an application for review of his judgment, the Judge reversed his former judgment, and confirmed the decree of the Principal Sudder Ameen.

The defendant appealed to the High Court.

Baboo *Iswar Chandra Chuckerbutty* for appellant.—The plaintiff is the purchaser of the rights of the judgment-debtor and had full notice of the putni ; he has no right to sue to set it aside. The covenant was with the mortgagee ; plaintiff was no party thereto ; he cannot be benefited by a contract not entered into by him. The lien which the mortgagee had did not pass to the plaintiff. The maxim *caveat emptor* applies. The plaintiff is only in the position of the mortgagor. This principle is laid down in *Erskine v. Dhankrishna Sen* (1).

Baboo *Ramesh Chandra Mitter* (Baboo *Krishna Dayal Roy* with him) for respondent.—The notice of the existence of the putni does not alter the right of the mortgagee or the purchaser. The property as it stood at the time of the mortgage was sold. *Beckwith v. Umesh Chandra Roy* (2) ; *Rajnarayan Singh v. Shera Meah* (3) ; *Shivprasanna Sing v. Braja Sahu* (4).

(1) 8 W. R., 292.

(2) 3 W. R., 110.

(3) 7 W. R., 67.

(4) 7 W. R., 232.

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Baboo Iswar Chandra Chuckerbutty in reply.

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E. JACKSON, J.—This was a suit brought by a purchaser of the rights and interests of a mortgagor at a sale in execution of a decree, which declared the mortgaged property liable for the mortgage debt, to oust the defendant, a putnidar, who had obtained a putni potta from the mortgagor, subsequent to the mortgage, and in violation of the conditions contained in the mortgage deed, forbidding alienation of any sort.

The lower appellate Court has decreed the claim. I am of opinion that that Court was right in law. The purchaser did not, under these circumstances, purchase only the rights and interests of the mortgagor subject to all alienations made by him subsequent to the mortgage. The case is exactly in point with the case, *Rajnarayan Sing v. Shera Meah* (1), and is not, I think, opposed, as it has been argued it is, to that of *Erskine v. Dhankrishna Sein* (2), inasmuch as there is nothing in that decision to show that the decree, in execution of which the sale took place, was more than a money-decree. It is said that, at the time of the sale, notice of the putni was given, and that the decree-holder did not object. There is nothing to show that he assented to the sale being subject to the putni, and the mere notice, which was given, was simply to put purchasers on their guard, and to intimate to them that the putni title was set up in the property. It can have, I think, no effect on our decision determining whether the putnidar has any right or title to hold possession of his putni against the purchaser.

I would dismiss the appeal with costs.

KEMP, J.—I concur. It appears to me that the plaintiff, special respondent, the purchaser, bought the rights and interests of the judgment-debtor as they stood at the time of the hypothecation, and not as they stood at the time of the sale. The special appeal is dismissed with costs.

(1) 7 W. R., 57.

(2) 8 W. R., 292.