

Before Mr. Justice Prinsep and Mr. Justice Hill.

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July 16.

CHOWDHRY JOGESSUR MULLICK AND OTHERS, SONS AND HEIRS OF
CHOWDHRY JANMEJOY MULLICK, DECEASED (LATE DEFENDANT No. 4) v.
KINTTER MOHUN PAL (PLAINTIFF) AND OTHERS (DEFENDANTS).^{*}

*Sale for arrears of Revenue—Act XI of 1859, ss. 10, 11, 28, 53, 54, and
Sched. A—Rights of purchaser of share of estate admitted to special
registration under ss. 10 and 11 of Act—Rights of mortgagee of share
against purchaser.*

There is a clear distinction between the rights acquired under s. 53 and under s. 54 of Act XI of 1859. Under the former section the terms of the certificate given under Sched. A are limited, and a purchaser under that section acquires the estate subject to all encumbrances existing at the time of sale, whether created before or after the default, and even up to the date of the sale; but there is no such limitation to the terms of a certificate given to a purchaser under s. 54, and all encumbrances created after the date on which a purchase under that section takes effect, that is, after the date on which the default was committed, are void.

A share of a taluk admitted to special registration, under ss. 10 and 11 of Act XI of 1859, was advertised for sale under that Act in default of payment of the June *kist* of Government revenue. On the 25th July the recorded sharer mortgaged his interests in that share to the plaintiff. The sale took place on the 26th September, and the share was purchased by the defendant who obtained a sale-certificate in due form under the Act declaring, in accordance with s. 28, that his title accrued from the 29th June the day after the latest date allowed for payment of the June *kist*: *Held*, that the mortgage was of no effect as an encumbrance under s. 54 of the Act.

THIS was a suit on a mortgage bond executed in favour of the plaintiff on 25th July 1884 by defendants Nos. 1 and 3, Russick Chand Masanta, one of the sons of Koer Narain Masanta, and Thakurmoni the widow of Uman Chand Masanta, another of his sons. Koer Narain died, leaving five sons, Prem Chand, Arun Chand, Uman Chand, the defendant Russick Chand, and the defendant No. 2, Jibun Chand, who were all co-sharers in the ancestral property left by their father, and of whom Jibun Chand was a minor at the date of the mortgage. Of the mortgaged property, a 5 annas 6 gundas 2 cowries 2 krants' share, bearing

^{*} Appeal from Appellate Decree No. 1707 of 1888, against the decree of R. Towers, Esq., Judge of Midnapore, dated the 25th of June 1888, affirming the decree of Baboo Dwarka Nath Bhuttacharjee, Subordinate Judge of Midnapore, dated the 16th of August 1887.

a revenue of Rs. 320-9-3, formed the taluk of the defendants Nos. 1, 2 and 3. The mortgage was made in order to raise money to defray the instalments of Government revenue due in March and June 1884, in consequence of non-payment of which the estate of the mortgagors and their co-sharers was advertised for sale. The March instalment of revenue was paid, but that estate was sold for the June instalment, and was purchased on 26th September 1884 by Jaumejoy Mullick, the father of the other defendants. The sale certificate was in the form given in Appendix A to Act XI of 1859, and, in accordance with s. 28 of that Act, the certificate declared that the title of the purchaser accrued from 29th June, the day after the latest date allowed for payment of the June instalment of revenue.

Various defences were raised, the only one of which material to this report was, that the purchase at the sale for arrears of revenue by the father of the Mullick defendants was not subject to the plaintiff's alleged mortgage lien. This question was argued for the first time before the Judge, whose decision upon it was as follows:—

“There remains the last and most important question taken, *viz.*, was Jaumejoy Mullick's purchase free of the encumbrance created by this mortgage? His purchase took effect before the date of the mortgage. Section 28 says that on the sale becoming final and conclusive, the Collector is to give the purchaser a certificate of title in the form prescribed in Sched. A of the Act, and this is to be sufficient evidence of the estate or share sold being vested in the purchaser from the date specified. That date is in the present case the 29th June. Plaintiff did not lend his money or get his mortgage from defaulting proprietors until the 25th July. There had been already default in the March *kist*, and the 25th July was fixed for the sale in consequence. There had also been default in the June *kist*, the latest day for payment of that *kist* being the 28th June. By the money borrowed from plaintiff the March *kist* was saved, but not so the June *kist*. The auction purchase was one regulated by s. 54 of the Act. The question is, was plaintiff's mortgage an encumbrance within the meaning of that section? Section 53, I think, throws some light on this. The purchasers therein mentioned are subject to certain disadvantages; they acquire the estate subject to all encumbrances “existing at the time of sale.” Then s. 54, which applies to Jaumejoy Mullick's purchase, lays down that he acquires his share subject to all encumbrances; it does not repeat the words “existing at the time of sale,” but they are probably to be understood. The sale certificate given to both kinds of purchasers (those under s. 53 and

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s. 54) would be in the same form. There is, in fact, only one form, *viz.*, that in Appendix A to the Act, so that in the case of a purchaser under s. 53, although his purchase would take effect on the day after the latest day for payment, he would acquire subject to subsequent encumbrances created between the last day of the payment and the time of sale. Why should not the case be the same with a purchaser under s. 54? It is only the form of the sale certificate which is relied on by him; yet a purchaser under s. 53, getting exactly the same kind of certificate, is still subject to encumbrances created before the time of sale. It is true, of course, that the words "existing at the time of sale" do not occur in s. 54, and hence I am by no means certain that my construction is the right one. No precedents, however, having been quoted on the point, I am left to my own resources, and, for the reasons given above, I think I ought to decide the question in the plaintiff's favour. The appeal is therefore dismissed with costs."

From this decision the Mullick defendants appealed.

Baboo *Rash Behari Ghose* and Baboo *Ashutosh Mookerjee* for the appellants.

Baboo *Umakali Mookerjee* for the respondent.

The judgment of the Court (PRINSEP and HILL, J.J.) was as follows:—

The question raised in this appeal relates to the construction of s. 54 of the Revenue Sale Law (Act XI of 1859). A share admitted to special registry under ss. 10 and 11 was advertised for sale for arrears of Government revenue for the June *list*. Subsequent to the default and before the sale, the recorded sharer mortgaged his interests in that share. The question before us, therefore, is: what are the rights under this mortgage as against the purchaser at the subsequent sale for arrears of revenue?

Section 54 declares that in a sale of this description "the purchaser shall acquire the share or shares subject to all encumbrances, and shall not acquire any rights which were not possessed by the previous owner or owners." The certificate granted to such a purchaser is by s. 28 declared to be a certificate in the form prescribed in Sched. A, and this form declares that the purchase under which the title accrues takes effect on a date which is the day after that fixed for the last day of payment, that is to say, the day on which the estate fell into default by failure of the sharer to pay his share of the Government revenue. It would seem clear,

therefore, that any encumbrance, such as the mortgage now before us, created after what is declared to be the date on which the title under a purchase for arrears of revenue takes effect, would be null and void. But much argument, both here and in the Courts below, has been directed to the terms of s. 53, and it is contended that those terms apply equally to s. 54, although that section is expressed differently and in language not necessarily conveying the same meaning. A purchaser within the terms of s. 53, not being the purchaser of a share admitted to special registration, is declared entitled to acquire the estate subject to all the encumbrances "existing at the time of sale." The words "existing at the time of sale" do not appear in s. 54. To hold that the two sections confer the same rights on different kinds of purchasers would be to assume that the Legislature unintentionally omitted those words in s. 54, or that they are redundant in s. 53. This we cannot do. It is clear that, in order to give effect to the law, a distinction must be drawn from the omission of these words in s. 54. The Legislature appears to have directed that, ordinarily by reason of a certificate in terms of Sched. A, all encumbrances created after the date on which a purchase takes effect, that is to say, created after the date on which the default was committed, are void; but that, under the circumstances described in s. 53, the terms of that certificate shall be limited, and a purchaser under s. 53 will acquire the estate subject to all encumbrances existing at the time of sale whether created before or after the default, and even up to the date of the sale. It is unnecessary for us to do more than point to the injury which might be done to the property of other sharers if the owner of a share admitted to special registration were allowed, subsequent to default in payment of revenue, to create encumbrances which would bind his share after it passed into the hands of the purchaser. The encumbrance, if a valid encumbrance, would necessarily diminish the price bid for the share, so as in all probability to make it less than the amount of revenue in arrear. The entire estate, including the shares of other recorded sharers, would then be liable to sale, and thus to save an encumbrance created by a defaulting share after the default, the property of other sharers who had paid their portion

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of Government revenue would become liable. The result would be that the encumbrance on the share would become a burden on the entire estate. It was probably to avoid such an injustice that the terms of s. 54, as distinct from s. 53, were enacted. One of the principal objects of Act XI of 1859, which was to give relief to co-sharers who had protected their rights by special registration, would be frustrated if such an opportunity were given to a defaulting co-sharer. We are, therefore, of opinion that there is a clear distinction between rights acquired under s. 53 and under s. 54, and that in the present case the mortgage which was created after the last day of payment, that is to say, the date of default in payment of Government revenue, was of no effect as against the purchaser at a revenue sale which subsequently took place. The orders of the lower Courts will, therefore, be set aside, and the plaintiff's suit dismissed. The defendants will be entitled to costs both in this Court and in the lower Courts.

J. V. W.

Appeal allowed.

Before Mr. Justice Tottenham and Mr. Justice Ghose.

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LAL MOHUN CHOWDHURI (JUDGMENT-DEBTOR) v. NUNU MOHAMED TALUKDAR (AUCTION-PURCHASER) AND OTHERS (DECREE-HOLDERS).²

Sale in execution of decree—Disparaging remarks by bystanders or purchasers other than the decree-holder—Irregularity—Practice regarding sales in execution of decrees—Adjournment of sale—Civil Procedure Code (Act XIV of 1882), ss. 331 and 291.

Disparaging remarks made by bystanders or by purchasers at an execution-sale other than the decree-holder do not constitute such an irregularity as is contemplated by s. 311 of the Code of Civil Procedure.

Gunga Narain Gupta v. Annunda Moyee Burroanee (1) followed; *Woopendro Nath Sircar v. Brojendroonath Mundle* (2) and *Rukhines Bullubh v. Brojonath Sircar* (3) distinguished.

It is the practice of the Courts under the Rules of the High Court, which have the force of law, to place all properties intended for sale in execution of decrees on a list, and to proceed with the sales from day to day, con-

² Appeal from Order No. 125 of 1889, against the order of Baboo Nil Madhub Mookerjee, Munsiff of Thakurgaon, dated the 29th of January 1889.

(1) 12 C. L. R., 404.

(2) I. L. R. 7 Calo., 346; 9 C. L. R., 263.

(3) I. L. R., 5 Calo., 308.