Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of Nilakant Banerji v. *Suresh Chunder Mullick and others (ex parte) from the High Court of Judicature at Fort William in Bengal; delivered July 9th*, 1885.

Present:

LORD MONKSWELL.
LORD HOBHOUSE.
SIR BARNES PEACOCK.
SIR RICHARD COUCH.

IN this case the Appellant was the Plaintiff and the Respondents were the Defendants in the first Court. The case raised between them was of this nature. In the month of October 1866 the Plaintiff advanced money to the representatives of one Asutosh Deb on mortgage of his estate. There was a further charge afterwards, and the total amount advanced was Rs. 30,000. In the month of December 1866 a writ of *fieri facias* was issued by some creditors of Asutosh Deb upon a decree obtained by them prior to the mortgage. It does not appear at what date the seizure was effected under that *fieri facias*, but the sheriff sold the property mortgaged, amongst other property, in the month of July 1867, and the portion now in dispute was purchased by one Khogendra Nath Mullick. The present Respondents claim under Khogendra, but the issues in the suit have not been varied by the transmission of title, and the matter may be treated in precisely the same way as if Khogendra was himself before the Court. In the meantime, before the sale in July 1867, and in the month of June

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1867, the Plaintiff had instituted a suit in the ordinary form for the realisation of his mortgage by foreclosure or sale. When he learnt of the purchase by Khogendra he applied to the Court to make Khogendra a party to the suit as a person having an interest in the mortgaged property. Supposing the doctrine of *lis pendens* did not apply to this case, which may be arguable, that was, *primâ facie* at all events, a right thing to do. An order was made by Mr. Justice Macpherson in the High Court, adding Khogendra as a party to the suit, and directing an amendment in the prayer of the plaint accordingly. When Khogendra was brought before the Court he put in a plea or written statement by which he claimed a title paramount to the mortgage. We have not got that written statement before us. We have only got statements of it by the Courts below. The subordinate Judge says of it, "Khogendra Nath "having entered appearance, raised divers other "questions adverse to the Plaintiff's title. He, "however, did not set up a defence as claiming "through the mortgagors." The High Court makes a similar statement of Khogendra's position. So that the result was this, that Khogendra, being brought there as having purchased subsequent to the mortgage, sets up a paramount title, and does not accept his position as a person who is either to redeem or be foreclosed. Upon that defence being raised the case came on for settlement of issues before Mr. Justice Markby, and he, finding a defence raised which was quite foreign to a mortgage suit, considered that he had no option but to dismiss Khogendra, which he did with costs. It may be mentioned that there were several other purchasers of other portions of the mortgaged property who were made parties and who also alleged paramount titles in themselves, so that the suit would

have been multifarious and confused in the highest degree if it had gone on in that shape. They were all dismissed with costs. The High Court then went on to make the ordinary decree for mortgage accounts and for sale in default of redemption. It appeared to one of the dismissed Defendants, the subordinate Judge states that it was Khogendra himself, that the ordinary decree was calculated to prejudice the paramount title which he claimed. While it was being drawn up, he appeared to contest it, and persuaded the Court to vary its terms in a way which he thought to be more favourable to himself. In the month of September 1880 the property now in suit was put up to sale, and the mortgagee himself, the Plaintiff, purchased the equity of redemption for Rs. 1,600. At that time Khogendra was in possession. It is to be presumed that he got it under the sheriff's sale, but it is not exactly known how he got it; and why the Plaintiff did not then sue him for possession does not appear. There was considerable delay in bringing this suit for possession, but it has been held in both Courts that the delay is not such as attracts the law of limitation. Therefore the suit may be brought and the legal questions are just the same as if it were brought the day after the Plaintiff purchased.

This suit being brought against Khogendra's representatives, a written statement is put in by the only adult representative to this effect. He pleads that the mortgage was fraudulent, that it does not comprise the lands in suit, that he has a preferential title. Then he puts in the extraordinary plea that the matter was decided in his favour in the suit of 1867. Finally he complains that, being entitled to the equity of redemption, no opportunity has been afforded him to redeem the mortgage.

All the issues raised by the Defendants, excepting the right to redeem if it can be said they have raised that issue, have been found against them; or in other words, it has been found that the preferential title which they alleged but did not disclose in the suit of 1867 is an entirely false and fictitious title, and that Khogendra, so far from being improperly made a party to that suit, was a person who had a right of redemption and no other right at all. If the truth had been known when the matter was before Mr. Justice Markby in the suit of 1867, it is clear he would have held either that Khogendra was rightly a party to that suit, or was not so simply because he had purchased *pendente lite*, and that in either case the decree must go against him, that when the mortgage accounts had been taken he must redeem or be bound by the sale.

Upon these circumstances the subordinate Judge held that Khogendra was bound by the decree he himself had asked to have; that he had virtually asserted in the suit of 1867 that he could not be put to redeem but had a paramount title which could not be tried in that suit; that he was dismissed and got his costs on that ground; that he could not now be heard to say that he wished to redeem; and therefore he gave the Plaintiff a decree for possession.

It may here be mentioned that the case is a little confused by the introduction of section 13 of the Code of 1877. That section has nothing to do with this case. This is not a question whether a person is bound by a decree made in some other suit. The question is whether he is bound by the decree made in this very suit of 1867 in which the Plaintiff bought the land, and whether after that decree was passed his rights were not entirely gone.

The High Court have reversed the decree made by the subordinate Judge, and it must be asked on what grounds they do so. The grounds are these. First they say that the suit of 1867 did not override the interest acquired by Khogendra at the execution sale, and then they draw this inference:—"We think therefore that the "Plaintiff is not entitled in virtue of having filed "his suit previous to the Defendants' *fieri facias* "purchase, to ignore that purchase and to hold "the mortgaged property free from any right "which the Defendants acquired by the *fieri* "*facias* sale. We think that we are bound to "give effect to the well-recognised rule that the "interest of a person who has purchased the "mortgagor's equity of redemption, is not "affected by any decree in a suit to which he is "not a party, and to hold accordingly that the "Defendants having purchased the mortgagor's "interest in the estate, viz., the right of re-"deeming the existing mortgage, did not lose "that right of redemption in consequence of the "decree obtained in a suit against the repre-"sentatives of Asutosh." Whether the High Court are right in their limitation of the doctrine of *lis pendens* may, as above intimated, be doubted; but it is not worth while to pursue that question, because, assuming that they are right, the fact is that the Plaintiff did not ignore the purchase by Khogendra. So far from ignoring it, he assigned to Khogendra the precise position which the High Court now assign to him in their Judgement, and, doing so, made him a party to the suit of 1867 in order that he might redeem if he were so minded, and if he were not so minded he might be for ever shut out. It is not the case that the equity of redemption is affected by a decree in a suit to which the owner of it is not a party. He was a party to the suit, and he declined to accept the position of a party

to the suit, and he insisted upon it that the Court should dismiss him and treat him as if he were not a person who could be put to redeem at all. He even did more. He insisted on being present when the order for sale was settled, and on having a voice in its terms, and he actually got them varied to his satisfaction. That is the first ground taken by the Court.

Then they go on:—"The next question is, "whether the Defendants having been joined in "the mortgage suit on the Plaintiff's motion, "and having got the suit dismissed as against "them, are now precluded from setting up their "claim to the mortgaged premises. We are of "opinion that the orders passed in that suit, so "far as regards the present Defendants, had no "effect beyond deciding that whatever their "claims might be, they could not conveniently "be tried in that suit."

It was the paramount claims that could not be conveniently tried in that suit. If Khogendra had accepted the position of a person who was entitled to redeem, then, so far from his claims not being conveniently tried in that suit, he was (apart from the doctrine of *lis pendens*) a necessary party to that suit, and his claims could not be conveniently or properly tried in any other suit; but, not accepting that position, his claims were tried in that suit so far as concerned the question whether or no he was entitled to redeem, and it was held on his own showing that he was not entitled to redeem, and on that ground he was dismissed.

The next ground is this:—"An objection has "also been grounded on the form of the present "suit, and it has been urged that the Plaintiff "having sued for direct possession, the suit ought, "if he be found not entitled to direct possession, "to be simply dismissed. We think however "that we are at liberty to follow the course taken

" in a very analogous case regarding the same " property by Pontifex, J., in Khasimun-nissa " Begum *v.* Nilruttun Bose (9 Cal. 181), and to " give the Plaintiff a decree for possession con- " ditional on the Defendants' failure to redeem, " and that we are at liberty to decide what are " the equitable terms on which the Defendants " may be permitted to redeem. The Plaintiff " has himself purchased several of the mortgaged " properties, and he cannot therefore throw more " than a proportionate share of the mortgage " charge on another portion of the mortgaged " premises." That doctrine of apportionment is stated somewhat broadly, and is not applied correctly. The true application of it is this, that the Court may direct accounts, to which the purchasers of fragments of the equity of redemption must be parties, with a view of settling between them all what is the proportion to be charged on each fragment. This is shown by the case which the High Court cite from Moore as an authority for their decision. In that case an equity of redemption had been sold in parcels, and the mortgagee had purchased some. The purchaser of a parcel then sued the mortgagee alone for redemption of that parcel alone on payment of its proportion of the debt; and his suit was dismissed because he was bound to add the other purchasers as parties, and to offer to redeem their parcels.

It is quite a new thing to hold that the purchaser of a single fragment of the equity of redemption may come, without bringing the other purchasers before the Court, and have an account as between himself and the mortgagee alone, so that the mortgagee may be paid off piecemeal. Such a law would result in great injustice to the mortgagee. It would put him to a separate suit against each purchaser of a fragment of the equity of redemption though

purchasing without his consent, and he would have separate suits against each of them, and suits in which no one of the parties would be bound by anything which took place in a suit against another. Different proportions of value might be struck in the different suits, and the utmost confusion and embarrassment would be created.

But so far from contemplating accounts between all the parties concerned, the High Court do not direct any account at all; not even the ordinary account on which a redemption decree must be founded. They go at once to say of their own discretion what shall be the price paid for this mortgaged property. They say, "In the present "instance the Plaintiff paid Rs. 1,600 as the "price of the mortgaged property. And we "think that the equities of the case will be "met by giving the Defendants six months "within which to redeem by payment of this "sum, together with interest at 6 per cent. "from the date of the Plaintiff's purchase, 27th "April 1870; the Plaintiff in default of such "redemption within six months to be entitled "to khas possession." So a sale having taken place with the knowledge of Khogendra under the decree which gave him his costs and dismissed him as one having no interest subordinate to the mortgage, and the Plaintiff having paid Rs. 1,600 for the equity of redemption at that sale, he is to have the whole property taken away from him by Khogendra on receipt of what he has paid for the equity of redemption alone, and not to have a single farthing for that proportion of his mortgage debt which the Court themselves say ought to be charged upon the property. Nor is he to have anything for Khogendra's costs which he paid, or for his own costs of that suit which failed by Khogendra setting up a fictitious title. The hardship of such a decree upon the

Plaintiff is apparent in stating the facts. Their Lordships think that it is founded upon entirely wrong grounds. It is not consistent with itself, because it does not give to the mortgagee what the Court says he is entitled to have, but besides the inconsistency it is founded upon wrong grounds. Their Lordships hold that Khogendra is bound by the decree in the suit of 1867, and that he could not, after that decree was passed, ever come in to redeem this property.

The result is, that in their Lordships' judgment the High Court ought to have dismissed the appeal with costs, and they will now humbly advise Her Majesty to make that decree, reversing the decree of the High Court, and so restoring the decree of the Subordinate Judge. The costs of this appeal must be paid by Chunder Nath Mullick, who appears on his own behalf and also as next friend of the minor Respondents.

With reference to the costs their Lordships have to observe that the bulk of the record has been unduly swelled by the insertion of a schedule upwards of 80 pages in length, containing particulars of either the property in suit or the whole of the property mortgaged, it does not matter which; in either case they are particulars which could not by any possibility have come into controversy or have aided the controversy in this present appeal. They will therefore intimate their opinion to the Registrar that in taxing the costs of this appeal he shall disallow all costs occasioned by that bulky schedule.