Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Mussummat Sham Kumari v. *Raja Rameswar Singh Bahadoor and others, from the High Court of Judicature at Fort William in Bengal; delivered the* 12*th July* 1904.

Present at the Hearing:
LORD DAVEY.
LORD ROBERTSON.
SIR ARTHUR WILSON.

[*Delivered by Sir Arthur Wilson.*]

The suit out of which this Appeal arises was brought by the Plaintiff (now represented by the Appellant) on the 18th July 1895, in the Court of the Second Subordinate Judge of Tirhoot, to enforce two mortgage bonds, dated the 23rd June and the 30th December 1894. He joined as Defendants (1) his mortgagors, Defendants of the first part, and (2) the first Respondent (hereinafter spoken of as "the Respondent"), who claimed to be a prior mortgagee of the properties charged. The plaint alleged that the mortgage to the Respondent was without consideration and invalid. It referred to a debt assigned to the Plaintiff by the mortgagors, raising a question which will be dealt with hereafter. It also raised a point with respect to certain mouzahs, included among the mortgaged properties, which the Respondent has purchased at revenue sales. It was contended in the plaint that by such purchases the Respondent, for the reasons assigned, had acquired no fresh right prejudicial to the Plaintiff's right. And relief was prayed for accordingly.

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The mortgagor Defendants did not appear to the suit, nor have they appeared on this Appeal. The Respondent appeared and filed his written statement, in which he in his turn attacked the validity of the Plaintiff's mortgage bonds, while maintaining the validity of his own. He said specifically that the Plaintiff's account filed with his plaint was wrong in not giving credit as against the Plaintiff for the amount of the assigned debt mentioned in the plaint. And he denied generally the allegations of the plaint.

Issues were settled and the case came on for hearing before the Subordinate Judge. At the trial the evidence was mainly directed to the questions raised as to the validity of the mortgages of the Plaintiff on the one side and of the Respondent on the other.

The Subordinate Judge found that the Plaintiff's and the Respondent's mortgages were both valid. As to the assigned debt, he debited the Plaintiff with the amount. With regard to the properties purchased by the Respondent at auction sales, he held that that Defendant, by his purchases, had acquired them, under the Revenue Sales Act (XI. of 1859), free of incumbrances, including the Plaintiff's charge, and that, therefore, the Plaintiff's claim could not be enforced against them. The Subordinate Judge accordingly made a Decree the effect of which, so far as is material for the present purpose, was to ascertain the amount of the Plaintiff's claim as second mortgagee, in ascertaining which he was debited with the assigned debt, and to entitle him to redeem the Respondent's prior mortgage interest in respect of the mortgaged properties other than those purchased at revenue sales (which were exempted) with the necessary consequential directions.

On appeal to the High Court the whole case was re-opened, but with the result that that Court affirmed the Decree of the Subordinate

Judge with a formal modification. And against that decision the present Appeal has been brought.

The Appellant's petition for leave to appeal to His Majesty in Council again sought to re-open a large part of the controversy between the parties, but in the argument before their Lordships the Appellant's contentions were limited to two.

One question related to the assigned debt already referred to, and it arises in this way. At the time of the second mortgage in favour of the Plaintiff the mortgagors also executed another deed, spoken of as a *bechinama*, by which they assigned to him a debt due to them from a third person. In taking the account of what was due to the Plaintiff the Courts in India have debited the Appellant with the amount of that debt. The Appellant urged that it ought to be debited only if and when actually received. The Respondent, through his learned Counsel, disclaimed all interest in the question. In their Lordships' opinion it lay upon the Plaintiff to use reasonable diligence to recover the assigned debt from the debtor. But the High Court has found (and the finding is not impugned in fact) that no serious attempt seems to have been made to recover any portion of it. This being so, their Lordships see no reason to dissent from the conclusion which has been arrived at in India with regard to this matter.

The remaining question raised on behalf of the Appellant is a question of law and one of some general importance. One of the mehals purchased by or on behalf of the Respondent at revenue sales, and which it was considered in India that he had acquired free from incumbrances and therefore free from the Plaintiff's claim, is the mehal Bisfi Kaithahi. It appears however that, as to that property, the Respon-

dent's position is peculiar because, prior to the revenue sale, he had already purchased the same property at an execution sale under the Civil Procedure Code.

The material facts are these: The Respondent sued his mortgagors, who were also the mortgagors of the Plaintiff, and on the 22nd January 1895 obtained an *ex parte* decree against them. The Appellant was not made a party to this suit. That decree the Respondent proceeded to execute by attachment and sale of Bisfi Kaithahi under the provisions of the Civil Procedure Code. The sale took place on the 17th February 1896 when the Respondent himself became the purchaser. On the 21st March 1896 he obtained his sale certificate, and on the 29th April he was put into possession. In the meantime, on the 12th January 1896, default occurred in payment of Government revenue payable in respect of Bisfi Kaithahi. On the 25th March 1896, that property and other properties were brought to sale under the Revenue Sales Act, and the Respondent in the name of a benamidar became the purchaser of Bisfi Kaithahi. And, on the 7th September following, the sale certificate in the name of the benamidar was granted which, in accordance with the law, declared that the sale took effect from the 13th January 1896, the day after the last day fixed for payment of the kist in respect of which the default had been made.

The contention for the Appellant is that, under these circumstances, the purchase of Bisfi Kaithahi by the Respondent at the Revenue sale was a purchase of an estate of which he was proprietor within the meaning of Section 53 of the Revenue Sales Act, and that by the terms of the Section he purchased subject to incumbrances, including the Plaintiff's. For the Respondent it was contended that the case was governed, not by Section 53, but by Section 37, and that under it

he took free from incumbrances such as that of the Plaintiff.

In the Courts in India the question was plainly raised whether the Respondent by his purchase of Bisfi Kaithahi at the revenue sale, under the circumstances in which he did purchase, acquired it free from incumbrances or subject to the Appellant's right to redeem, but so far as their Lordships could learn, when this Appeal was first argued before them in February last, the bearing of Section 53 upon this question was a point then raised for the first time. For this reason their Lordships deferred giving judgment upon the Appeal in order that the parties might have an opportunity of further considering and arguing the question. Their Lordships have now had the advantage of hearing the point fully argued. In the course of that argument it was made clear that, in the discussions before the Courts in India, the bearing of Section 53 upon the question in issue was not argued. It was further made clear that the research of Counsel cannot bring to light any Bengal decision amounting to an express authority upon the exact point in controversy. This affords, perhaps, no great ground of surprise, for the circumstances of the case are peculiar and such as probably do not often occur. The peculiarity of the case lies in the order of the events, which is this: First, default in payment of Government revenue in respect of an estate; secondly, sale of that estate in execution by a Civil Court; thirdly, sale of the estate at a revenue sale for the default in payment, and purchase by the same person who had bought at the execution sale. The question that arises upon these facts is whether by reason of Section 53 the latter purchase was subject to incumbrances.

The Sections of the Act which are principally important are Sections 37 and 53, but it will be

necessary incidentally to notice some other of its provisions. Section 37 says that "the pur-" chaser of an entire estate in the permanently " settled districts . . . . sold . . for the re-" covery of arrears due on account of the same" purchases free of incumbrances generally, and may annul under-tenures with certain exceptions.

To bring a case, therefore, within the words of this Section three things must concur: there must be a sale, first, of an entire estate; secondly, in the permanently settled districts; thirdly, for its own arrears. The cases excluded by the language of the Section are dealt with elsewhere. Sales of shares of estates in Sections 10, 11, 13, 14, and 54; sales of estates not in permanently settled districts, in Section 52; sales of estates not for their own arrears in the latter part of Section 53.

The earlier part of Section 53 introduces another distinction depending upon the character of the purchaser at a revenue sale. It says (omitting certain words which had become obsolete and have been repealed): "Excepting " sharers with whom the Collector, under Sec-" tions 10 and 11 of this Act, has opened " separate accounts, any recorded or unrecorded " proprietor or co-partner, who may purchase " the estate of which he is proprietor or co-" partner . . . . shall by such purchase " acquire the estate subject to all its incum-" brances existing at the time of sale."

It seems to their Lordships obvious that this enactment cannot be construed in any such way that it shall not operate as a proviso to, or qualification of, Section 37. This was fully conceded upon the second argument. And the Respondent when he purchased at the revenue sale the same property which he had previously purchased at the execution sale was apparently

a proprietor purchasing an estate of which he was proprietor.

It was argued, however, in the first place, that the Respondent, when he bought at the revenue sale, was not a proprietor of the estate although he had previously bought at the execution sale, because when he made the last-mentioned purchase, default had already been made in payment of revenue, for which in the ordinary course it would be sold, so that what was really bought at the execution sale was not the estate but the right to receive any surplus sale proceeds of the estate when it should be sold for revenue. But liability to sale is not the same thing as sale, and until a revenue sale takes place the ownership of the estate remains as it has been, except so far as the provisions of the Act interfere with it. It is always open to the Collector under Section 18 to exempt the estate from sale if the arrears are paid up before sale; and it is matter of common knowledge that this is a power which collectors exercise freely. To regard an estate in respect of which default has occurred, and which is therefore liable to sale, as a lost estate would be quite contrary to the facts as they exist.

It was next contended that the proprietors mentioned in Section 53, and upon whom the disability is imposed, should be restricted to defaulting proprietors. It was said, and probably correctly said, that the principal object of the Legislature was to prevent defaulters from taking an unjust advantage of their own wrong; but the language of the Section must be construed as it stands, and it does not contain the suggested limitation. If, too, we are to look outside the Section itself for help in construing the words of Section 53, the other analogous provisions of the Act suggest a construction different from that contended for. The latter part of Section 53 dealing with sales of estates otherwise

than for their own arrears, and Section 54 dealing with sales of shares of estates, impose limitations upon the rights of purchasers, in the one case identical with, in the other case similar to, those imposed in the case now in question, and in those cases the disability is certainly not confined to defaulters. On this point the case of *Abdool Bari* v. *Ramdass Coondoo* (I.L.R. 4 Calc. 607) seems to show that the view which their Lordships adopt was that which in 1878 was accepted by the High Court.

It was further contended that the purchase at the revenue sale having by the terms of the sale certificate related back to the 13th January 1896, the day after that on which the default occurred, that is the date to be looked at for the present purpose, and that at that date the Respondent was not the proprietor because it was before the execution sale. It is true that under Section 28 and Schedule A the sale certificate is to specify, as the date from which title is to be deemed to have vested in the purchaser, the day after that fixed as the last date of payment, and that that is the date from which the purchaser becomes entitled to the rents and profits on the one hand, and liable to pay the revenue on the other. But it would be a strained construction in any case to say that that is the date to be looked to in saying whether a purchaser was a proprietor when he purchased. And when the Act is considered as a whole it seems clear that when sale or purchase is spoken of in connection with time, the time meant is that at which the sale takes place in fact, not that to which its operation is carried back by relation. This is apparent from Sections 18, 20, 21, 23, and 27.

For these reasons their Lordships are of opinion that the Respondent when he purchased Bisfi Kaithahi purchased it subject to

its incumbrances, including the Appellant's claim as second mortgagee, and that that property ought to have been included among those which the Decrees of the Courts in India allowed the Appellant to redeem.

They will accordingly humbly advise His Majesty that it ought to be declared that the Respondent purchased Bisfi Kaithahi subject to the Appellant's claim as second mortgagee, and that the Decree of the High Court ought to be varied accordingly, and the case remitted to the High Court with directions to modify its Decree in accordance with such declaration in regard to the property which the Appellant is allowed to redeem, the adjustment of costs consequent on the declaration, the taking of further accounts, and the fixing of a further period of redemption, and otherwise as the circumstances of the case may require.

There will be no Order as to the costs of the Appeal.