*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Musammat Izzat-un-nisa Begam and another* v. *Kunwar Pertab Singh and others, from the High Court of Judicature for the North-Western Provinces, Allahabad; delivered the 30th July*, 1909.

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Present at the Hearing .

LORD MACNAGHTEN.
LORD DUNEDIN.
LORD COLLINS.
SIR ANDREW SCOBLE.
SIR ARTHUR WILSON.

[*Delivered by Lord Macnaghten.*]

In a suit commenced in 1887 in the Court of the Subordinate Judge of Bareilly, Intizam Begam obtained the usual mortgage Decree for the sale of nine villages hypothecated to her as security for an advance of Rs.30,000. This Decree was affirmed by the High Court on the 25th of February, 1889.

In June, 1889, an order was made for the sale of these nine villages. The usual Proclamation was issued. It stated that the property was subject to two prior mortgages for Rs.10,000 and Rs.20,000 respectively.

At the auction sale Intizam Begam, having got permission to bid, bought all the villages but one

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for Rs.64,000. The remaining village was also sold, but not to her.

At the time of the sale the position of the prior mortgages, which had been duly registered, was this :—Both mortgages had been granted to, and were then held by, the same persons. No steps had been taken to enforce the first mortgage, which purported to comprise 13 villages, including all those in mortgage to Intizam Begam. In respect of the second mortgage, which included one of the villages mortgaged to Intizam Begam, the usual mortgage decree had been obtained in the Court of the Subordinate Judge of Bareilly on the 9th of June, 1892.

So matters stood at the date of the auction sale, which was held on the 20th of April, 1894. But on the 15th of January, 1895, the Decree of the 9th of June, 1892, was reversed by the High Court. And the Order of the High Court was ultimately affirmed by this Board on the 27th of July, 1898.

In the meantime a suit was brought to enforce the first mortgage. That suit was dismissed by the Subordinate Judge, following the decision of the High Court in the case of the second mortgage. And the Decree of the Subordinate Judge was affirmed by the High Court on the 3rd of May, 1899.

The Appellants as successors in title of Intizam Begam, who had died in 1897, thus became the unencumbered owners of the property which she had bought at the auction sale in April, 1894, as subject to the two prior mortgages.

In this state of things the representative of the judgment debtors, whose property had been sold in execution of the Decree affirmed in February, 1889, instituted the present suit. In his plaint, dated the 8th of July, 1901, the Plaintiff alleged that the real purchase money of the property

sold at the auction-sale of April, 1894, was the amount paid by the purchaser on completion of the sale, together with the amount due on the prior mortgages, and that, inasmuch as the property had been exonerated from all liability in respect of those prior mortgages, the sums due on the footing thereof, amounting in the aggregate to Rs.1,61,776.11.0, were now due to him as unpaid vendor. The claim was for payment on that footing, a lien on the nine villages for the amount due, and a sale in the event of non-payment.

This singular claim seems to have perplexed both the Judge of first instance and the High Court on appeal.

The Judge of first instance, having heard, as he said, a long and learned argument and a number of English and Indian authorities, came to the conclusion that the case was "unique of its kind," and that there was no authority, English or Indian, on the question. "Not a single authority," he said, "has been cited to shew that the rule of equity relating to unpaid vendor's lien applies to the case of an involuntary sale," and, on principles which he had already explained, he thought it would not be equitable to apply that rule to the case before him. So the suit was dismissed, but no costs were allowed to the Defendants.

On appeal the decision of the Subordinate Judge was reversed. The appeal was heard, in the first instance, before the Chief Justice and Burkitt, J. The learned Judges differed. Then Blair, J., was called in. He concurred with the Chief Justice. All the Judges treated the question as one of novelty and considerable difficulty. The learned Chief Justice thought that the case might be looked at from two points of view. It might be contended that the Appellants' predecessor

in title having represented to the Court that the property was subject to two mortgages, and having got liberty to bid upon that representation, was "estopped from denying the truth of the representation and must make it good to the best of her ability, that is, must pay to the judgment debtor the amount of the encumbrances represented by her to be subsisting." The other view, he said, was that the purchaser only acquired the interest which the Court purported to sell, "and so having purchased from the Court property expressly stated to be subject to specified encumbrances cannot hold the property without making good the amount of those encumbrances." The amount of encumbrances which the Court was led to believe were existing encumbrances, and subject to which the sale was expressly made, must, he thought, be paid by the Defendants to the Plaintiff, and he was also of opinion that the Plaintiff was entitled to a lien on the property in respect of that amount. Judgment was given in favour of the Plaintiff, but the case was remitted to the Subordinate Judge to inquire and ascertain the due proportion of the mortgage money intended to be secured by the mortgages declared invalid which was properly attributable to the villages bought by Intizam Begam.

Burkitt, J., dissented. On a review of the relevant sections in the Civil Procedure Code, he thought it plain that the amount of the invalid encumbrances formed no part of the purchase money. He thought too that the preparation of the list of encumbrances mentioned in the proclamation of sale was not the act of the parties, but the act of the Court. And he failed to see why, "in a suit like the present," the representatives of the purchaser should be compelled to discharge them. The auction purchaser made a lucky purchase. But she and

her representatives were "not liable to be deprived of the fruits of her bargain at least in a suit framed like the present suit."

With the utmost respect to the learned Judges of the High Court, their Lordships are unable to discover any difficulty in the case. It seems to depend on a very simple rule. On the sale of property subject to encumbrances the vendor gets the price of his interest, whatever it may be, whether the price be settled by private bargain or determined by public competition, together with an indemnity against the encumbrances affecting the land. The contract of indemnity may be express or implied. If the purchaser covenants with the vendor to pay the encumbrances, it is still nothing more than a contract of indemnity. The purchaser takes the property subject to the burthen attached to it. If the encumbrances turn out to be invalid, the vendor has nothing to complain of. He has got what he bargained for. His indemnity is complete. He cannot pick up the burthen of which the land is relieved and seize it as his own property. The notion that after the completion of the purchase the purchaser is in some way a trustee for the vendor of the amount by which the existence, or supposed existence, of encumbrances has led to a diminution of the price, and liable, therefore, to account to the vendor for anything that remains of that amount after the encumbrances are satisfied or disposed of, is without foundation. After the purchase is completed, the vendor has no claim to participate in any benefit which the purchaser may derive from his purchase. It would be pedantry to refer at length to authorities. But their Lordships, under the circumstances, may perhaps be excused for mentioning *Tweddel* v. *Tweddel* (1787), 2 Br. C. C. 151, *Butler* v. *Butler* (1800), 5 Vesey 534, and *Waring* v. *Ward* (1802), 7 Vesey 332, 336.

There is nothing in the circumstances of the case to raise an estoppel against the Appellants.

Their Lordships will humbly advise His Majesty that the Order of the High Court ought to be reversed with costs, and the Judgment of the Subordinate Judge of Bareilly restored, but with costs against the Respondents.

The Respondents will pay the costs of the Appeal.

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