Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Musammat Bhawani Kumar v. *Mathura Prasad Singh, from the High Court of Judicature at Fort William in Bengal; delivered the 22nd July* 1912.

PRESENT AT THE HEARING:

LORD SHAW.
SIR JOHN EDGE.
MR. AMEER ALI.

[DELIVERED BY LORD SHAW.]

This is an Appeal from a judgment and decree of the High Court of Calcutta, dated the 10th January 1908, which set aside a decree of the Subordinate Judge of Gaya in Bengal, dated the 27th January 1905.

The suit was brought by the Appellant as Plaintiff to obtain possession of a certain share, amounting to 5 annas 1½ pies, in four villages in the Gaya district which are named in the plaint. The Appellant's rights are those of a purchaser who bought these properties at a revenue sale,—that is to say, a sale for arrears of revenue. The Appellant pleads that he has received, in his character of purchaser and as from the date of sale, a right which cannot be defeated by the Respondent. The Respondent was a mortgagee holding a security over the property for money lent thereon, and in respect of this loan the property was sold in execution to him. It is out of this conflict between the rights of the former, who may be called the revenue vendee, and the

latter, who was mortgagee and purchaser at the execution sale, that the suit has arisen.

As their Lordships are unable to agree with the views which have been taken with regard to this case, either by the Subordinate Judge or by the High Court, it is necessary to mention certain dates which are material, and to test crucially what were the rights of parties at those dates.

On the 9th August 1886 a mortgage for Rs. 5,000 was granted in favour of the Respondent over the shares aforesaid of four out of seventy-one villages. On the 31st May 1899 the Respondent obtained a decree on his mortgage bond, which was made absolute on the following 19th December. He executed his decree, a sale in the ordinary course took place, and on the 19th March, which is the first important date in the case, the mortgaged property was sold, and it was purchased by himself, the mortgagee.

Nine days thereafter, namely, on the 28th March 1900, the March instalment of Government revenue on the 71 villages, amounting to Rs. 1,554, fell into arrear, and the whole, including the four which had just been purchased by the mortgagee were notified for sale by the Collector. The situation of matters accordingly then was that, so far as the ownership of the property was concerned, a transaction of sale thereof in favour of the mortgagee as purchaser had in point of fact taken place, and this at a time when, by the use of the ordinary information available as public facts, or upon enquiry with regard to the property purchased it would have been found that the period of the falling due of revenue was almost at hand, and that proceedings preliminary to a sale in respect of arrears then left unpaid would inevitably be commenced.

The mortgagee, however, did not pay the revenue which fell due at the end of March.

Without doing so, he went forward with proceedings to get the sale to himself in execution of the mortgage confirmed. On the 23rd April he obtained a certificate confirming the sale, the certificate bearing that he "has been declared " the purchaser at sale by public auction on the " 19th March, 1900 . . . . and that the said sale " has been duly confirmed by this Court on the " 23rd April 1900."

It was maintained in argument for the mortgagee that the true meaning of this was that the sale to him did not become a legal fact until the 23rd April. In their Lordships' opinion, this is an under-statement and a mis-statement of the mortgagee's rights. It is true that upon that date the sale was confirmed, but what was, as the certificate bears, confirmed, was a sale " by " public auction on the 19th March 1900." There seems little reason to doubt that upon the 19th March all the lands sold had been transferred to the mortgagee, and that if there had been any accretions to the property between that date and the date of confirmation, those accretions would have become the property of the purchaser. On the other hand, there seems no legal principle which would leave un-transferred to the mortgagee, any obligations which arose during the same period. Furthermore, if the properties which were the subject of sale were liable to attachment for sums due from the lands as revenue, and falling into arrear subsequent to the actual date of sale, namely, the 19th March 1900, it was not within the legal right of the mortgagee on the one hand to claim as against the mortgagor that the ownership of the property had been transferred, and at the same time to claim against the Government, or in respect of third parties unconnected with either mortgagor or mortgagee, that the mortgagor had not transferred the rights of ownership to the mortgagee,

but himself remained in the position of owner. For the mortgagee to be permitted to say to the mortgagor that the ownership had been transferred, and to say to an outsider, like the Collector of Revenue, that the ownership had not been transferred, is a conclusion not supported by good sense and, in the opinion of their Lordships, they are not forced to it by any canon or rule of law.

If the date of sale be taken as the true and actual date in fact, which, in their Lordships' opinion, was, as explained, the 19th March 1900, it appears to their Lordships equally clear that what was in fact then sold was the estate itself and nothing other or less than this which might be denominated by the terms "right, title, or interest" of the mortgagor only, or the like. And it would seem to follow as a necessary consequence that when the mortgagee thus became the purchaser and owner of the subjects mortgaged, he was not in a position to maintain as against himself, or as against third parties unconnected with mortgage transactions upon the property, the position that his mortgage still remained an encumbrance thereon.

In their Lordships' opinion it is clearly unsafe to apply considerations as to the rights of prior and succeeding mortgagees to questions like the present. For in the present case no question arises as between a first and succeeding mortgagee, and no right or duty emerges with regard to the avoidance of an inequitable priority alleged to arise inferentially by acquisition of the estate. On the 19th March 1900, the crucial date in question, there were no interests of any kind to enter into account or consideration so as to impede the full and complete transfer of ownership of the estate as such.

In these circumstances, when the 29th March 1900 was reached, the property which fell then

into arrear of revenue and became liable to subsequent sale was the property in fact and in law of no one but the purchaser, namely, the mortgagee. It is admitted,—the concession was logically unavoidable,—that if at the sale on the 19th March the mortgagee himself had not purchased, but a stranger or outsider had, then such purchaser would have stood liable for the obligations accruing on the property and been responsible to Government for the payment of revenue and for the consequences which would ensue if the revenue fell into arrear. It seems somewhat difficult to discern why these consequences, which would be inevitable in the case of a stranger purchaser, should be avoided because the mortgagee was purchaser himself.

The above considerations seem substantially to dispose of the whole case and lead their Lordships to a conclusion the opposite of that reached by the High Court, who think that it was possible for a mortgagee to maintain the ownership of the property in himself with an encumbrance which he should use to defeat, or, to use the term which the learned Judges employ, as a "shield against" the rights of third parties.

Upon this subject it is true that the language of Section 54 of the Act No. 11 of 1859—the Bengal Statute as to Sales of Land for arrears of Revenue—provides that when a share or shares of an estate may be sold "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." This provision, however, appears to their Lordships—(1) to confirm the view that what is taken by a revenue vendee is nothing less nor more than what belonged to the former owner, and (2) to negative the idea that it is open to an owner to protect himself as

by "a shield" against the consequences of that full transfer by keeping incumbrances alive against the revenue vendee. These incumbrances had become extinct and lost in the mortgagee's overriding right when he became the complete owner of the lands. To keep them alive as sought would introduce confusion into the mechanism of transfer and an insecurity into the rights in real estate which are not warranted by the Act.

Their Lordships will humbly advise His Majesty that the Judgments of the Courts below be reversed, and that the Plaintiff be declared entitled to the lands in suit in terms of the plaint, that possession be delivered to the Appellant of the properties in dispute the possession of the Respondent being removed, that the name of the Plaintiff be caused to be entered in the Land Registration Office accordingly, the name of the Defendant being expunged and his illegal possession removed, and that the cause be remitted to the High Court for the ascertainment of mesne profits for the period of dispossession up to the date of delivery of possession and for a decree therefor against the Respondent. The Respondent will pay the costs both here and in the Courts below.

In the Privy Council.

MUSAMMAT BHAWANI KUMAR

v.

MATHURA PRASAD SINGH.

DELIVERED BY LORD SHAW.

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