Appellate Civil.

Before Falshaw and Kapur, JJ.

NARAIN SINGH AND ANOTHER,—*Defendants-Appellants,*

versus

BACHAN SINGH AND THREE OTHERS (PLAINTIFFS) KAMLA AND OTHERS (DEFENDANTS),—*Respondents.*

Regular Second Appeal No. 1202 of 1947.

1951

Dec 5th

Vendor and Purchaser—Property subject to encumbrances sold and part of sale consideration left with purchaser for discharge of encumbrances—Encumbrances discharged by the purchaser but wiped out by operation of statute—Right of the vendor to recover from the purchaser the unused part of the sale consideration left with him for discharging the encumbrances.

Held, that the vendor was not entitled to recover from the purchaser the part of the sale consideration left with him for discharging the encumbrances. 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.

(The case was referred to the above Division Bench by Mr. Justice Teja Singh,—*vide* his order, dated 4th October, 1948.)

Second appeal from the decree of Shri S. L. Madhok, Additional District Judge, Ferozepore, dated the 17th March, 1947, reversing that of Shri Chaman Lal Puri, Sub-Judge, 1st Class, Moga, District Ferozepore, dated the 15th April,

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1946 and awarding the plaintiffs-appellants a decree for Rs. 1,700 with costs throughout against Narain Singh and Hargopal Singh, respondents.

Appellants : By Mr. DALJIT SINGH, Advocate.

Respondents : By Mr. H. R. SODHI, Advocate.

JUDGMENT OF THE DIVISION BENCH.

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FALSHAW, J. The facts giving rise to this second appeal are as follows :—

On the 1st June 1895 one Saida mortgaged the land in suit to Bhana, predecessor-in-interest of the plaintiffs, for Rs. 1,700 by a registered deed. About ten years later, on the 31st May 1905, Allah Ditta and Kalu, sons of Saida, who had died by that time, sold the land to Lehna Singh, father of Narain Singh, and Hargopal Singh, defendants Nos. 1 and 2, for Rs. 3,000 also by a registered deed, according to the terms of which a sum of Rs. 1,300 was paid in cash and Rs. 1,700 remained with the vendee for payment to the previous mortgagee. Whether Lehna Singh was unable or unwilling to pay this amount, it is at any rate certain that he did not do so, and he allowed the land to remain in possession of the mortgagees, and so matters remained until after the passing of the Punjab Restitution of Mortgaged Lands Act, IV of 1938, when, taking advantage of this Act the sons of Lehna Singh applied to the Special Collector who on the 21st August 1945, passed an order under the Act extinguishing the mortgage and granting possession to the sons of Lehna Singh without payment. The suit was instituted in October 1945 by the successors-in-interest of Bhana, the original mortgagee, for a declaration that the mortgage of 1895 could not be extinguished without the payment of Rs. 1,700 together with an injunction restraining defendants Nos. 1 and 2 from obtaining possession of the land from the plaintiffs, or in the alternative for the recovery of Rs. 1,700. Defendants Nos. 3 to 6 were impleaded as the successors-in-interest of the original mortgagor who were alleged to have transferred their right to recover Rs. 1,700 to the plaintiffs by a document executed on

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the 1st September 1945. The suit was contested by the sons of Lehna Singh who raised the preliminary legal objection that the suit could not be entertained by the Civil Court under section 12 of Act IV of 1938 so far as it related to the relief of declaration and injunction. This objection was upheld by the trial Court which, however, held that it could try the suit by the plaintiffs for the recovery of Rs. 1,700, on the basis of the transfer of their rights to the plaintiffs by defendants Nos. 3 to 6. Regarding this claim the issues framed were :—

(1) Did defendants Nos. 3 to 6 sell their rights to recover Rs. 1,700 from defendants Nos. 1 and 2 in favour of the plaintiffs ?

(2) Could defendants Nos. 3 to 6 validly sell the said rights to the plaintiffs ?

(3) Did defendants Nos. 3 to 6 acquire any right to recover Rs. 1,700 from defendants Nos. 1 and 2 by the extinguishment of the mortgage under Punjab Act IV of 1938 ?

The trial Court held that defendants Nos. 3 to 6 had in fact assigned their rights to the plaintiffs in respect of the sum of Rs. 1,700, but on the strength of a decision of their Lordships of the Privy Council in *Izzat-un-Nisa Begam* v. *Partab Singh* (1), held that neither defendants Nos. 3 to 6 nor the plaintiffs were entitled to recover Rs. 1,700 and the plaintiffs' suit was accordingly dismissed. The plaintiffs' appeal was heard by the Additional District Judge, Ferozepore, who affirmed the decision of the trial Court regarding the non-maintainability of the plaintiffs' suit for declaration and injunction, which point was not pressed before him, but held, on the strength of certain decisions of Courts in this country which had purported to distinguish the decision of the Privy Council, that in the circumstances of the case the original vendors

(1) I. L. R. (1909) 31 All. 583.

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were entitled to recover the sum of Rs. 1,700 from defendants 1 and 2, and that the plaintiffs, having acquired the rights of these defendants, were therefore entitled to recover this amount from the defendants. The plaintiffs' appeal was accordingly accepted and they were granted a decree for Rs. 1,700 with costs in both Courts against Narain Singh and Hargopal Singh, who in their turn have come to this Court in second appeal.

Their appeal originally came up in October 1948, before Mr. Justice Teja Singh who seems to have been somewhat doubtful whether the decisions relied on by the learned Additional District Judge did not run counter to the decision of their Lordships of the Privy Council, and therefore was of the opinion that the matter should be referred to a Division Bench.

The doubts expressed by the learned Single Judge as to whether the decisions of Courts in this country were not opposed to the decision of the Privy Council certainly appear to have been well founded. Briefly the facts in *Izzat-un-Nisa Begam* v. *Partab Singh* (1), were as follows : In a suit instituted in 1887 the plaintiff, Mst. Intizam Begam obtained a decree for the sale of nine villages mortgaged with her as security for a loan of Rs. 30,000, this decree being affirmed by the Allahabad High Court on the 25th February 1889. Thereafter the sale of the villages was ordered, it being stated in the proclamation that the property was to be sold subject to two prior mortgages for Rs. 10,000 and Rs. 20,000, respectively. At the auction sale the decree-holder herself bought eight of the villages for Rs. 64,000, the other villages being sold to another purchaser, on the 20th April 1894. The position as regards the two mortgages subject to which the sale took place was that the first mortgage, which was of 13 villages including the villages then in suit, had not yet been enforced but in respect of the second mortgage, which included one of the villages mortgaged with Mst. Intizam Begam, a decree had been obtained by the mortgagees on the 9th of June 1892, the mortgagees being the same persons in both

(1) I. L. R. (1909) 31 All. 583.

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cases. However, the mortgage decree of 1892 was set aside by the High Court on the 15th January 1895, and the order of the High Court was affirmed by the Privy Council in 1898. A suit was also brought to enforce the first mortgage, but this was dismissed by the trial Court on the strength of the decision of the High Court regarding the second mortgage, and the decree of the trial Court was affirmed by the High Court in May 1899. Mst. Intizam Begam died in 1897 and her successors-in-interest were Izzat-un-Nisa Begum and another, and as a result of the failure of the suits based on the two mortgages subject to which the sale in favour of Mst. Intizam Begam had taken place they became unencumbered owners of the property which she had bought. However, in 1901, Partab Singh and others instituted a suit against the representatives of Mst. Intizam Begum alleging that the real purchase money of the property sold at the auction was the amount paid by the purchaser plus the amount due on the prior mortgages, and that since the property had been exonerated in respect of the prior mortgages, the sums due on the footing thereof, amounting to more than Rs. 1,60,000, were now due to the plaintiffs as unpaid vendors. They accordingly claimed this sum and also claimed a lien on the villages for the amount due and their sale in the event of non-payment. The suit was dismissed by the trial Court and the appeal to the High Court appears, in the words of Lord Macnaghten, who delivered the judgment of their Lordships of the Privy Council, to have perplexed the two learned Judges before whom it came and there was a disagreement between them, the third Judge to whom the appeal was then referred agreeing with the learned Chief Justice that the plaintiffs' suit should be decreed. The nature of the plaintiffs' claim, however, appears to have presented no difficulty whatsoever to their Lordships, whose views have been expressed with the utmost clarity by Lord Macnaghten in the following passage :—

> "With the utmost respect to the learned Judges of the High Court, their Lordships are unable to discover any difficulty in the case.

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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 pendantry to refer at length to authorities. But their Lordships, under the circumstances, may perhaps be excused for mentioning *Tweddel* v. *Tweddel, Butler* v. *Butler,* and *Waring* v. *Ward.*"

It now remains to be considered whether the apparently simple, lucid and comprehensive statement of the

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law thus laid down has adequately or properly been distinguished in the cases relied on by the learned counsel for the respondents. The first of these is *Raghunatha Chariar v. Sadagopa Chariar* (1). This was a case in which the plaintiff instituted a suit for the recovery from the defendant of a sum of money which the latter had agreed to pay to two other persons in consideration for the transfer to him by the plaintiff of two decrees standing in his favour. The plaintiff alleged that the defendant had failed to pay the amount due to the said two persons, and that he himself had been obliged to pay it to them. The plaintiff had failed in the trial Court and in the Court of first appeal, but his appeal was accepted by Abdur Rahim and Sundara Ayyar, JJ., who held that the plaintiff was entitled to sue the defendant for the recovery of the money as it was due to him in case of the defendant's failure to pay the third persons within a reasonable time, and the plaintiff was not in such a case bound to show that he was in any way damnified by the defendant's failure. The *ratio decidendi* of the case appears to be contained in the words at page 350 :—

> "It is no doubt conceivable and possible that an assignment of property may be made in consideration merely of the assignee agreeing to indemnify the assignor against some claim by a third party. But this is not the natural interpretation to be placed where the value of the property assigned is ascertained between the parties and the assignee is directed to pay that value to a third party."

In fact the suit appears to be of quite a different type from the present suit, and it is not surprising that when the decision of the Privy Council was cited on behalf of the defendant it was held to be inapplicable, and it is perhaps unfortunate that the words used in discussing this judgment have been adopted in later decisions in cases more akin to the present suit. The relevant passage at page 352 reads :—

> "It is perfectly clear that the Judicial Committee was dealing with a case where a

(1) I. L. R. (1913) 36 Mad. 348.

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vendee pays a certain price for the equity of redemption and agrees to indemnify the vendor against the claims of the encumbrancers, and not one where he agrees to pay a certain sum of money for the land sold to him and undertakes to pay a portion thereof to encumbrancers. Their Lordships observe that in such a case an express promise to discharge encumbrances against which the purchaser covenants to indemnify the vendor, does not change the nature of the vendor's right which is only to be indemnified against certain claims, and not to have certain sums of money belonging to him paid to another."

The first of the other cases relied on by the respondents is *Bahadur Chand* v. *Bahadur Singh and another* (1), a decision of a learned Single Judge, Bhide, J. The facts in that case were that one Palhu mortgaged a house to Bahadur Chand for Rs. 300 and later sold the same house to Bahadur Singh for Rs. 1,500, out of which it was stipulated that Rs. 400 were kept by the vendee for the discharge of the debt due on the mortgage. Bahadur Singh, however, did not pay this amount to the mortgagee who instituted a suit to enforce his mortgage which resulted in the sale of the house for only Rs. 180. The mortgagee then sought to attach the sum of Rs. 400 lying with Bahadur Singh as the debt due from Bahadur Singh to Palhu. His application was rejected, but his appeal was accepted by the High Court, Bhide J., holding that the sum of Rs. 400 had been kept with the vendee on the definite understanding that he should pay it to the prior mortgagee and the vendee had failed to carry out the terms of the contract although the mortgage subsisted, and in these circumstances the vendor was entitled to have this amount refunded to him and it could therefore be looked upon as a debt due to the vendor and was liable to attachment. The judgment is very brief and in reaching this conclusion the learned Judge simply observed that he followed the

(1) A. I. R. 1935 Lah. 50 (2).

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decision in I. L. R. 36 Mad. 348, in which the decision of the Privy Council in I. L. R. 31 All. 583 had been distinguished. The decisions in question were merely mentioned but not discussed at all.

The next case is *Rameshwar Dayal and others* v. *Hari Kishen* (1). This was a case in which the vendee from a mortgagor retained the amount due on the mortgage which was included in the purchase price for payment to the mortgagee and paid the balance of the purchase money to the mortgagor, and in the meantime the U. P. Agriculturists' Relief Act was passed, by which the vendee was able to clear off the mortgage debt for less than the amount which was due, and it was held by Bennet and Verma, JJ., that in these circumstances the mortgagor was entitled to recover the balance as unpaid purchase money. The decision of the Privy Council in Izzat-un-Nisa Begam's case was mentioned but was held not to be applicable to the facts of that case and the learned Judges based their decision on the decision in *Naima Khatun* v. *Sardar Basant Singh* (2). That, however, was a case of a very different nature, in which the plaintiff had executed two mortgages of three items of property in 1923, and in 1925 he sold to the defendant one of the mortgaged properties leaving with him the sum of Rs. 19,800 out of the sale consideration for payment to the two mortgagees, and at the same time the defendant had executed a security bond in favour of the plaintiff undertaking to pay Rs. 19,800 to the mortgagees by a certain date and in case of failure to do so to be liable to pay to the plaintiff Rs. 15,000 as damages in addition to Rs. 19,800. The defendant failed to make any payment to the mortgagees who instituted suits against the plaintiff on the basis of their mortgages and obtained decrees, whereupon the plaintiff brought a suit against the defendant to enforce the security bond for the payment of Rs. 19,800 plus Rs. 15,000. At the time of the suit the plaintiff had not paid anything to the mortgagees, but the properties had not been sold in execution of the mortgage decrees, and in these circumstances it was held

(1) A. I. R. 1940 All. 351.
(2) I.L. R. (1934) 56 All 766 (F.B.)

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that the plaintiff was entitled to a decree for the refund of the whole of the amount left in the hands of the defendant vendor with interest, but he was not entitled to any damages without proving the extent of damages incurred. It was also held that no decree for the specific performance of the original contract as it stood could be made in the case, but the plaintiff could compel the defendant to pay the amount in order to release her other properties from liability even though she might not have suffered any loss. Here again the Privy Council decision was mentioned, but naturally it was found not to be applicable.

Finally, there is the case of a Pachigolla *Satyanarayana murthi and others* v. *Karatam Sathiraju and others* (1), in which it was held by Wadsworth and Patanjali Sastri, JJ., that where part of the purchase money is retained by the purchaser for payment to the mortgagee and if the purchaser does not have to pay the full amount thus reserved with him owing to the mortgage debt being scaled down at the instance of the mortgagors, he would be liable to return to the latter the portion of the purchase money remaining unpaid. In this case I. L. R. 36 Mad. 348 was relied on but it does not appear that Izzat -un-Nisa Begam's case (2) was cited at all.

With due respect to the views of the learned Judges expressed in the cases mentioned above I cannot see any firm basis for any distinction of the rule of their Lordships of the Privy Council except in those cases where the nature of the suit was manifestly different from that of the present suit. If there is any basis at all for any distinction it would seem to lie in the fact that the property was purchased in Izzat-un-Nisa Begam's case (2) at a public auction in execution of a decree and that the property was sold simply subject to the charges created by the two mortgages, one of which was already the subject of a decree at the time of the sale, whereas in the present case and some of the other cases cited a specified portion of the sale price was retained by the vendee for the discharge of

(1) A. I. R. 1942 Mad. 525.
(2) I.R. (1909). 31 All. 58 3.

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the mortgage debt. In some of the cases cited the mortgage debt was still in existence, and in others it had been scaled down, while in the present case it had been extinguished altogether by the operation of a statute—The Punjab Restitution of Mortgaged Lands Act. Those cases in which the mortgage debt was still in existence at the time of the suit are clearly distinguishable, but with regard to the other cases I cannot see that the facts that the sale was by private arrangement or that the portion of the sale price which was apportioned to the discharge of the mortgage debt was specified, are sufficient to take the case out of the scope of the rule laid down in *Izzat-un-Nisa Begam's* case, (1), some portions of which it seems necessary to cite once more. The first point is dealt with in these words :—

> "On the sale of the 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 second point appears to me to be covered by the words—

> "The contract of idemnity 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

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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 complete, the vendor has no claim to participate in any benefit which the purchaser may derive from his purchase."

In my opinion this decision would apply in a case like the present in which the purchaser undertook to discharge the mortgage debt, but later became the unencumbered owner of the land by the extinction of the mortgage debt through the operation of a statute, and therefore the vendors, and consequently the plaintiffs, who had acquired the vendors' rights, had no claim to the sum of Rs. 1,700.

I would accordingly accept the appeal and, setting aside the decree of the lower appellate Court, restore the decree of the trial Court dismissing the plaintiffs' suit. In view, however, of the difficulty of the point involved I would order the parties to bear their own costs throughout.

Kapur J.

KAPUR J. I am of the same opinion and have nothing to add except this that the observations of Lord Macnaghten make it quite clear that whether there is an express covenant by the alienee to pay the previous encumbrance or not, the vendor has no right to participate in the benefits which the purchaser may be able to get either because the encumbrance no longer exists or is unenforceable or the amount of the encumbrance is scaled down by agreement or by operation of law.