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against his copartners, he cannot claim higher rights than Jiwaji could have, according to law, claimed. In either view the plaintiff ought to have carried his claim against the defendants to the Court which had passed the decree for dissolution and accounts and obtained an order from the Court to the Receiver to treat his present claim as an incident in the taking of the accounts. Whether the accounts are still open we are not in a position to say, as the evidence is meagre, and the Subordinate Judge has not dealt with this important question. But we do not think we should prolong the present litigation by fresh inquiry in the present suit. The plaintiff's right to recover the amount he claims from the defendants depends, firstly, upon the result of the accounts as between him and the defendants as partners, directed to be taken in the decree which declared the partnership dissolved and appointed a Receiver; and, secondly, upon whether Jiwaji could under that decree and upon the accounts consequent upon it claim more than a rateable share of his money advanced to the partnership, as against the other creditors, if any, of the partnership. We must, therefore, amend the decree of the Subordinate Judge by declaring that the plaintiff is entitled to recover from the defendants only so much of his claim in the present suit as may be directed by the Court executing the decree in suit No. 486 of 1894.

Parties to bear their own costs throughout.

*Decree amended.*

## APPELLATE CIVIL.

*Before Mr. Justice Chandavarkar and Mr. Justice Aston.*

1903. *September* 17.

DATTARAM GOVINDBHAI GUZAR (ORIGINAL DEFENDANT No. 3), APPELLANT, *v.* VINAYAK BALKRISHNA AGASHE AND OTHERS (ORIGINAL PLAINTIFF AND DEFENDANTS 1, 2, 4 AND 5), RESPONDENTS.*

RAMCHANDRA ANANT PARCHURE AND ANOTHER (ORIGINAL DEFENDANTS 1 AND 2), APPELLANTS, *v.* VINAYAK BALKRISHNA AGASHE AND OTHERS (ORIGINAL PLAINTIFF AND DEFENDANTS 3, 4 AND 5), RESPONDENTS.*

*Bombay Minors' Act (XX of 1864), section 18—Minor—Administrator—Sanction of the Court—Transfer of minor's interest as mortgagee in possession—*

* Joint Appeals 103 and 110 of 1900.

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*"Any immoveable property"—Transfer of Property Act (IV of 1882), section 72—Mortgagee in possession expending money to defend his title against mortgagor—Suit for account—Minor—Contract with minor void—Refund of money—Specific Relief Act (I of 1877), section 41.*

The expression "any immoveable property" in section 18 of the Bombay Minors' Act (XX of 1864) means immoveable property of any character or kind whether held by the minor as owner, or mortgagee, or in any other right. Hence, the administrator of a minor, appointed under Act XX of 1864, could not sell immoveable property held by the minor as a mortgagee in possession without the previous sanction of the Court.

A mortgagee in possession is, under section 72 of the Transfer of Property Act (IV of 1882), entitled to add to his mortgage-debt, in the absence of a contract to the contrary, sums spent by him for making his own title thereto good against the mortgagor. The mere fact that in a redemption suit the mortgagee in possession did not give details of the sums either in the course of the trial or in his written statement is not sufficient to deprive him of his right, seeing that those details can be gone into after the redemption decree providing for an account has been passed.

The decision in *Mohori Bibee* v. *Dharmodas Ghose* (1) is to the effect that a contract by a minor, such as a mortgage, is void and that a money-lender who has advanced money to a minor on the security of the mortgage is not entitled to repayment of the money on a decree being made declaring the mortgage invalid. That decision, however, is also an authority for the proposition that the circumstances of a particular case may be such that having regard to section 41 of the Specific Relief Act (I of 1877), the Court may, on adjudging the cancellation of an instrument, require the party to whom such relief is granted to make any compensation to the other which justice may require.

JOINT appeals from the decision of V. V. Paranjpe, First Class Subordinate Judge at Satára.

Suit for redemption.

One Hanmantrao owned 4 annas and 6 pies share in the inám village of Keral, and two-thirds share in the inám village of Potle. He mortgaged with possession his share in these two villages, on the 22nd July, 1870, with Govindbhai (father of defendant 3) and defendant 1 for Rs. 12,000. Out of mortgage-money Rs. 8,000 were advanced by Govindbhai, and Rs. 4,000 by defendant 1.

Before this mortgage, a money-decree was passed against Hanmantrao in 1868; and in execution of it, his right, title and interest in the Keral village were sold subject to that mortgage at a

(1) (1903) 30 Cal. 539.

Court auction, and were purchased, on the 16th November, 1871, for Rs. 8 by one Naro, a clerk in the employ of Govindbhai. The sale certificate was issued to Naro on the 11th January, 1872; and shortly after this his name was substituted for the Keral village in the place of that of Hanmantrao, in the Government records. Govindbhai (father of defendant 3) died some time after the sale of the Keral village. Defendant 3 was then only eight days old; and Naro and three others were appointed the guardians and administrators of his estate, under Act XX of 1864. While this appointment was in force, the administrators, including Naro, executed, on the 3rd April, 1881, a deed in favour of defendant 1, and thereby assigned to him whatever interest Govindbhai had in the mortgage, for Rs. 5,401. On the 17th April, 1881, the administrators presented a petition to the Mámlatdár, reciting the fact of assignment and praying that the village officers be directed to make payment of land revenue to defendant 1. On the same day Naro addressed a yádi to the Assistant Collector in the form of a *rájináma*, stating that he had sold his right derived from the auction purchase in the Keral village to defendant 1 and Balkrishna (father of plaintiff) and praying that it be transferred from his name to theirs. The transfer of the names was duly effected.

Hanmantrao's interest in the village of Potle also passed through many hands. In 1871, Balkrishna (father of plaintiff) obtained a money-decree for Rs. 2,044 against Hanmantrao, and in satisfaction of it caused his interest in the village of Potle to be sold. It was purchased on the 18th and 19th November, 1872, for Rs. 1,138 by one Govind Narhar, a clerk of Balkrishna. Sale certificates were issued in the name of Govind; and on the strength thereof his name was registered for the Potle village in place of Hanmantrao's. In 1878, Govind's name was, on his own application, removed and those of Balkrishna and defendant 1 were substituted in its place. Thus half the ownership of the equity of redemption in the village of Potle remained with Balkrishna and on his death passed to his sons (plaintiff and defendant 4) and his nephew (defendant 5).

In 1884, during Balkrishna's life-time, a further mutation of names in respect of the Potle village took place: the names of Balkrishna and defendant 1 were removed and that of Ramchandra (defendant 2), son of defendant 1, was substituted. It was

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found that these mutation proceedings were all sham and they did not in any way affect Balkrishna's ownership to the half of the equity of redemption in the village of Potle.

In 1896, plaintiff brought this suit praying that "account of profits should be taken and he either singly or jointly with his co-sharers (defendants 4 and 5) be permitted to redeem and recover possession of the shares in both the villages or such portions of them as he and they may be entitled to, on payment of such sum, if any, as may be found due on the mortgage."

Defendants 1 and 2 denied the plaintiff's right to redeem.

Defendant 3 contended in addition that the alienation of his estate made by the administrators during his minority, without the sanction of the Court, was void and not binding on him; that he attained majority on the 19th December 1895; that the properties were in possession of defendant 1 at the date of the suit; that the money due to him on his share of mortgage was Rs. 19,326-0-3; that the share in the Keral village was purchased by his guardian and administrator, Naro Amrit, for the benefit of, and with the money belonging to, him (*i. e.*, defendant 3), and that Naro did not assign, nor was he competent to assign, the right acquired by that purchase, without the leave of the Court.

The Subordinate Judge held that the assignment of the mortgage rights of defendant 3 to defendant 1 was proved, and that the plaintiff was entitled to ask for account and redemption. He also held that "Court's sanction (to the alienation by Naro) was not necessary, firstly, because the surrender of the mortgage to Antaji (defendant 1), so far as defendant No. 3's interest was concerned, was virtually one in the course of redemption, Antaji having acquired the right to redeem the mortgage, and, secondly, because that interest was not of the nature of 'immoveable property' within the meaning of section 18 of Act XX of 1864."

Defendant 3, and also defendants 1 and 2, appealed to the High Court.

APPEAL No. 103 OF 1900.

*Donald*, with *M. W. Bhat*, for the appellant.

*Branson*, with *M. B. Chaubal* and *G. N. Nadkarni*, for respondents 2 and 3.

*M. R. Bodas* for respondent 4.

*Setlur*, with *V. V. Ranade*, for respondent 5.

APPEAL No. 110 OF 1900.

*Branson*, with *M. B. Chanbal* and *G. N. Nadkarni*, for the appellants.

*S. R. Bakhle* for respondent 1.

*Donald*, with *M. V. Bhat*, for respondent 2.

*M. R. Bodas* for respondent 3.

*V. V. Ranade* for respondent 4.

CHANDAVARKAR, J.: The first question in these appeals, which have been heard together as arising out of one suit, relates to the assignment of defendant No. 3's share and interest as a co-mortgagee in the property in dispute in favour of defendant No. 1, by the guardians of defendant No. 3, acting as the administrators of his property under Act XX of 1864. The property was held by defendant No. 1 and defendant No. 3 under a usufructuary mortgage from Hanmantrao, under whom the plaintiff claims, and the assignment to defendant No. 3 is impugned before us, as it was impugned in the lower Court, as void, on the ground that it was a sale of immoveable property which, according to section 18 of Bombay Act XX of 1864, the administrators of the property of defendant No. 3 had no power to effect "without the sanction of the Civil Court previously obtained." The Subordinate Judge, First Class, has held the assignment to be good, because, in his opinion, it was not an assignment of "immoveable property" within the meaning of section 18 of the Act and the assignment was "virtually one in the course of redemption, Antaji, *i. e.*, defendant No. 1, having acquired the right to redeem the mortgage."

As to the first of these reasons assigned by the Subordinate Judge, it is to be remarked that whatever may be the nature of the interest of a mortgagee in immoveable property mortgaged to him, whether such interest ranks as real or personal estate, the terms of the last part of section 18 of Act XX of 1864 which bears on the question now under discussion apply to "any immoveable property," which, properly construed, means immove-

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able property of any character or kind, whether held by the minor as owner, or mortgagee, or in any other right. It is unquestioned in the present case that the property in dispute, consisting of certain shares in two Inám villages, is immoveable property; what is contended for defendant No. 1 is that the interest of defendant 3 in it as a mortgagee in possession was transferred to defendant No. 1. But section 18 of Bombay Act XX of 1864 does not refer to a minor's interest in immoveable property. Assuming such interest is moveable property, the prohibition in section 18 is to a sale, alienation, mortgage or otherwise of "any immoveable property" apart from the question of the nature or extent of the minor's right or interest. The meaning is clear that the moment it is ascertained that a minor has some right to or interest in immoveable property, his administrator cannot sell it so far as that right or interest goes without the previous sanction of the Court. This construction is supported by section 11 which provides that the Court may direct the Collector to take charge of a minor's estate when that estate consists "in whole or in part of land or any interest in land." This shows that the Legislature intended to treat "any interest in land" as of the same class as the land itself. Under section 16 a minor's administrator is bound to deliver in Court within six months from the date of his certificate "an inventory of all the immoveable property belonging to the minor, and of all such sums of money, goods, effects, and things as he shall have received on account of the estate, together with a statement of all debts due by or to the same." Where a minor is in possession of property mortgaged to him as a usufructuary mortgagee, it cannot be disputed that the property itself *belongs* to him as such mortgagee and that under section 16 of the Act the minor's administrator is bound to deliver in Court an inventory of it. Upon a proper construction of the Act itself, then, we come to the conclusion that the administrator of a minor, appointed under it, could not sell immoveable property held by the minor as a mortgagee in possession without the previous sanction of the Court, and that the transfer to defendant No. 3, evidenced by Exhibit No. 231, must be treated as void. The Subordinate Judge has, however, treated the transaction as one of redemption by defendant No. 1 of the mortgage so far as defendant No. 3's interest as his co-mortgagee was concerned, and he bases that conclusion of his on the

ground that since at the date of the transaction defendant No. 1 had become a part owner of the equity of redemption he was entitled to redeem the whole of the property. But the question whether the transaction was an asignment to defendant No. 1 of defendant No. 3's rights as a mortgagee, or a redemption of the latter by the former, cannot be determined simply with regard to the rights which defendant No. 1 had at the time. The question is not whether he had the right to redeem defendant No. 3, but whether he intended to exercise and did exercise that right. The answer to that must depend upon the construction of Exhibit 231 and the surrounding circumstances. By Exhibit 231 the administrators purported to *sell* to defendant No. 1 the right and interest of defendant No. 3 in the deed of mortgage and in the property. Defendant No. 1 is described in the deed as a joint mortgagee who by the sale to him was to stand in the place of the vendors "as regards ownership of the document, &c." There is no reference whatever in the deed to the share acquired by defendant 1 in the equity of redemption. We must, therefore, hold that the transaction evidenced by Exhibit 231 was a sale and not one of redemption.

This conclusion renders it unnecessary for us to consider the other point urged before us in defendant No. 3's appeal, *viz.*, that the sale under Exhibit 231 was vitiated by the fact that defendant 1 held at its date a fiduciary relation towards defendant No. 3.

The next point is that arising on the appeal of defendant No. 1, deceased, by his heirs. That point is that the Subordinate Judge has wrongly rejected their claim to bring into the mortgage account sums which they allege were spent by defendant No. 1 for the protection and preservation of the property. The ground on which the Subordinate Judge has declined to allow the sums is that defendants Nos. 1 and 2 made no such claim in their written statements and did not file a detailed statement of the items on this head "to enable the plaintiff and his co-sharers to give a proper reply to the same," though more than once they had been directed to file such statement. Section 92 of the Transfer of Property Act provides that where an account of what is due on a mortgage has to be taken in a redemption suit

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"the Court shall pass a decree ordering that an account be taken of what will be due to the defendant for the mortgage money and for his costs of the suit (if any) awarded to him." The Court had the power to order an account to be taken in the present case if the circumstances showed that an account was necessary. The Subordinate Judge ought to have allowed defendants 1 and 2 to prove facts entitling them to credit in the mortgage account for sums alleged to have been spent for the protection or preservation of their property and defending their title as mortgagees. Their substantial allegation was that obstructions had been caused by the original mortgagor, Hanmantrao, and by others at his instigation to the peaceable enjoyment of the mortgaged properties and that Antaji, defendant No. 1, had to spend large sums for the removal of those obstructions. The Subordinate Judge has in another connection allowed defendants 1 and 2 to give evidence on the question of these obstructions and their removal and he has found them proved. That finding has not been contested before us on the merits by any of the respondents in this appeal, and on the evidence we think it is correct. The only question that was argued as against that finding was that defendants 1 and 2 as mortgagees had no right to hold the mortgaged property chargeable with expenses incurred by defendant 1 in defending his title as a mortgagee as against Hanmantrao, the original mortgagor, who had lost his right to the property at the date of the obstructions raised by him. Under section 72 of the Transfer of Property Act a mortgagee in possession is entitled to add, in the absence of a contract to the contrary, sums spent by him for making his own title thereto good against the mortgagor. Upon the finding of the Subordinate Judge it follows that defendant No. 1 spent certain sums in defending his title against the original mortgagor, Hanmantrao. The mere fact that defendant No. 1 did not give details of the sums either in the course of the trial or in his written statement is not sufficient to deprive him of his right, seeing that those details can be gone into after the redemption decree providing for an account has been passed. In *Ex parte Carr, In re Hofmann*[1] it was said :—"A mortgagee

[1] (1879) 11 Ch. D. 62 at p. 66.

is entitled to deduct from the value of his security that which is in the nature of salvage money, his reasonable expenses of defending his title." In that case Cotton, L. J., said:—"A mortgagee has a right to assume his mortgagor's representation of his title to be true and to take any reasonable proceedings for defending his title and asserting the validity of his security."[1] We think that defendants 1 and 2 are therefore entitled to bring into the mortgage account the sums which they may prove were reasonably spent in defending their title and asserting the validity of the mortgage. An account must be taken of those sums in the execution proceedings.

There is a further claim which is urged before us by the learned counsel for defendants 1 and 2 and it arises out of our finding that the assignment under Exhibit 231 of defendant No. 3's rights as a co-mortgagee to defendant No. 1 by the administrators of the property of defendant No. 3, appointed under Act XX of 1864, is void. It is contended that under those circumstances the amount of Rs. 5,475 paid by defendant No. 1 to defendant No. 3 as consideration for the assignment should be brought into the account which will have to be taken in adjusting the mutual rights and liabilities of the parties arising out of the mortgage now in dispute. On the other hand, Mr. Donald, counsel for defendant No. 3, argues that defendant No. 1 is not entitled to recover back the sum of Rs. 5,475, and he relies on the recent ruling of the Privy Council in *Mohori Bibee* v. *Dharmodas Ghose*[2] where it has been held that a contract by a minor, such as a mortgage, is void and that a money-lender who has advanced money to a minor on the security of the mortgage is not entitled to repayment of the money on a decree being made declaring the mortgage invalid.

If the facts of the case with which we have to deal were simply these, that defendant No. 3's administrators had, during his minority, sold his rights as mortgagee in the properties in dispute, to defendant No. 1 for Rs. 5,475, without the sanction of the Court as required by Act XX of 1864 and that the administrators had received the money from defendant No. 1 for defendant No. 3,

(1) (1879) 11 Ch. D. 62 at p. 67.
(2) (1903) 30 Cal., 539; 5 Bom. L. R., 421.

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the principle of the ruling just cited would have applied, that principle being that "A Court of Equity cannot say that it is equitable to compel a person to pay any moneys in respect of a transaction which as against that person the Legislature has declared to be void." But the decision in question of the Privy Council is also an authority for the proposition that the circumstances of a particular case may be such that, having regard to section 41 of the Specific Relief Act, the Court may, on adjudging the cancellation of an instrument, require the party to whom such relief is granted to make any compensation to the other which justice may require. Upon the facts of the case in *Mohoree Bibee* v. *Dharmodas Ghose*[1] the Calcutta High Court had held that there were no circumstances which required the Court to order the return by the infant to the mortgagee of money advanced to the former and the Privy Council saw no reason for interfering with the discretion so exercised. We must, therefore, in the present case, ascertain the facts and then determine the principle of law applicable to them.

Defendants 1 and 3 were at first co-mortgagees who held possession of the mortgaged properties with a liability to account to the mortgagor and further with a liability *inter se* to account to each other for the rents and profits received respectively by them, this latter liability arising out of the fact that defendant 1 held possession of some and defendant 3 held possession of the other properties. In 1878 defendant 1 obtained a half share in the equity of redemption of one of the properties, *viz.*, the Inám village of Potle, and subsequently defendant No. 3 became the sole owner of the equity of redemption in the other property, *viz.*, the Inám village of Keral. In this state of things, while the parties were accountable to each other for the profits received by each, the administrators of the property of defendant No. 3, who was then a minor, sold without the sanction of the Court in 1881 his right, title and interest as a mortgagee in the mortgaged estates to defendant No. 1. They sold it without the sanction under the mistaken view of law that defendant No. 3's right was moveable property—a mistake which, the facts of the case warrant our holding, was shared in by defendant No. 1 also.

(1) (1903) 30 Cal. 539; 5 Bom. L. R. 421.

Under this mistake the transaction was completed and accordingly the purchase-money—Rs. 5,475—paid by defendant No. 1 was entered in the books of defendant No. 3 in two sums—one of Rs. 5,000 and the other of Rs. 475—and credited to the account of the mortgagor on the 12th April 1881 and 6th April 1881, respectively. Now that an account has to be taken between the plaintiff on the one hand and defendants 1 and 3 on the other, and between defendant 1 on the one hand and defendant 3 on the other, this sum of Rs. 5,475, which defendant 3 had received, as appears from his books, on the mortgage account, would have to be brought into the mortgage account because it forms a part of it, and taken by itself, as the entry stands in the accounts of defendant No. 3, it *primâ facie* must be referred to the mortgage account. The only ground on which we are asked to exclude it from the account in which it stands is that these two sums were paid in respect of a transaction which is now adjudged void. But though the transaction is declared void and the money cannot be recovered on that ground, the fact stands—a fact which was absent in the case before the Privy Council—that the sums have formed part of the accounts between the parties to the mortgage. If the assignment had been valid, the account would have closed and, as a matter of fact, it was taken as closed on that footing. But now that the account has to be re-opened as a result of our finding that the assignment to defendant No. 3 is void, we cannot shut our eyes to the fact that defendant No. 3 has received Rs. 5,475 from defendant 1 on the mortgage account. No doubt it was paid to defendant No. 3 for the void assignment under the mistake of law common to both parties that the interest of a mortgagee in possession is moveable property. But, as observed in *Ex parte James, In re Condon*[1] "the principle that money paid under a mistake of law cannot be recovered must not be pressed too far, and there are several cases in which the Court of Chancery has held itself not bound strictly by it." In *Rogers* v. *Ingham*,[2] James, L. J., pointed out that there are cases in which the Court of Chancery in England has not adhered strictly to the rule that a mistake in law is not always incapable of being reme-

(1) (1874) L. R. 9 Ch. 609 at p. 614. (2) (1876) 3 Ch. D. 351 at p. 355.

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died in that Court, and then he goes on to say: "Relief has never been given in the case of a simple money demand by one person against another, there being between those two persons no fiduciary relation whatever, and no equity to supervene by reason of the conduct of either of the parties." The facts in the case of *Mohori Bibee* v. *Dharmodas Ghose*(1) show that the restitution there claimed but disallowed had no other basis than that of a simple money demand—the person who had lent money to the minor on a mortgage knew the debtor was a minor, there was no fiduciary or other relation between the two to give rise to an equity in favour of the creditor, and the minor had dissipated the money in extravagance. In the present case the restitution claimed is not a mere money demand; the parties (defendants 1 and 3) stand in a state of accountability to each other; and the amount claimed by defendant 1 stands as part of the mortgage account which defendant 3 wishes to re-open. These facts raise an equity in favour of defendant No. 1 and call for the exercise of the discretion vested in the Court under section 41 of the Specific Relief Act. The leading case on the point is that of *Daniell* v. *Sinclair*,(2) and the facts of the present case are sufficient to bring it within the principle laid down there. In *Daniell* v. *Sinclair*(2) it was said:

"Undoubtedly there are cases in the Courts of Common law in which it has been held that money paid under a mistake of law cannot be recovered, and it has been further held that, under certain circumstances, the giving credit in account may be treated as so far equivalent to payment as to prevent sums wrongly credited being made the subject of set-off: *Skyring* v. *Greenwood*.(3) But in equity the line between mistakes in law and mistakes in fact has not been so clearly and sharply drawn." In *Earl Beauchamp* v. *Winn*(4) Lord Chelmsford observes: "With regard to the objection that the mistake (if any) was one of law, and that the rule '*ignorantia juris neminem excusat*' applies, I would observe on the peculiarity of this case that the ignorance imputable to the party was of a matter of law arising upon the doubtful construction of a grant. That is very different from the ignorance of a well-known rule of law; and there are many cases to

(1) (1903) 30 Cal. 539; 5 Bom. L. R. 421.
(2) (1881) 6 App. Cas. 181.
(3) (1825) 4 B. & C. 281.
(4) (1873) L. R. 6 H. L. 225 at p. 234.

be found in which Equity, upon a mere mistake of the law, without the admixture of other circumstances, has given relief to a party who has dealt with his property under the influence of such a mistake."

"In *Cooper* v. *Phibbs*[1] Lord Westbury says: "Private right of ownership is a matter of fact: it may be also the result of matter of law; but if parties contract under a mutual mistake as to their relative and respective rights, the result is that that agreement is liable to be set aside, as having proceeded upon a common mistake."

"In *M'Carthy* v. *Decaix*,[2] where a person sought to be relieved against a renunciation of a claim to property, made under a mistake respecting the validity of a marriage, the Lord Chancellor observes: "What he has done was in ignorance of law, possibly, of fact; but, in a case of this kind, this would be one and the same thing."

"In *Livesey* v. *Livesey*[3] an executrix who, under a mistake in the construction of a will, had overpaid an annuitant, was permitted to deduct the amount overpaid from subsequent payments.

"Undoubtedly the signature by the plaintiff of the account in question, if it stood alone, unexplained, would afford a strong presumption that an agreement to substitute compound for simple interest under the mortgage had been come to, and it was for the purpose of proving the agreement which the defendant had pleaded that the account was relied upon. Their Lordships accept the finding of the jury that no such agreement was, in fact, made; indeed, there would seem to have been no consideration for it, because, although the defendant did not exercise his power of sale as soon as he might, there is no evidence that he ever bound himself or promised to show any forbearance or indulgence to the plaintiff. Their Lordships further agree with the Courts below, that both parties may be taken to have misunderstood the effect of the mortgage-deed. This being so, there was no intention to make a change in the rate of interest—no such question was discussed or considered. The accounts were drawn

(1) (1867) L. R. 2 H. L. 149 at p. 170. (2) (1831) 2 Russ. & My. 614.
(3) (1827) 3 Russ. 287.

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up and assented to by the parties under a common mistake as to their respective rights and obligations. Their Lordships are therefore of opinion that the signature of a particular account occurring in a series of accounts all alike drawn up in error, does not prevent it being re-opened upon the accounts under the mortgage being taken."[1] We think, therefore, that the contention of the learned counsel for defendants 2 and 3 as to Rs. 5,475 must be allowed.

The questions raised by the cross-objections filed by defendants 1 and 2 have not been pressed; Mr. Branson who appeared for these defendants having intimated to the Court that he did not intend to argue them. The cross-objections, therefore, of defendants 1 and 2 filed in appeal No. 103 of 1900 fail.

We now come to the point raised by the cross-objections of defendant No. 4. It relates to the equity of redemption in the village of Keral. The Subordinate Judge has found that the equity of redemption in question was purchased at a court-sale by one Naro on the 16th of November, 1871. Naro was at the date of the purchase a kárkún of defendant No. 3's father; and when defendant No. 3's father died, he was appointed one of the administrators of defendant No. 3's estate. In August, 1881, Naro gave in a *rajinama* under section 74 of the Bombay Land Revenue Code, relinquishing his rights in favour of defendant No. 1 and the father of the plaintiff and defendant No. 4. The case of defendant No. 4 is that by this relinquishment he and the plaintiff became co-owners of the equity of redemption with defendant No. 1. The Subordinate Judge has, however, overruled the claim, holding that Naro was merely a *benami* purchaser for defendant No. 3. We agree with the Subordinate Judge's view and think that the evidence justified his finding that Naro was a *benamidar*. It was urged before us that in any case this question should be left open and made the subject of a separate suit, but the parties having gone into the question and led evidence, we do not think we should accede to the suggestion and prolong the litigation. But it was urged by Mr. Bodas for defendant No. 4 that even supposing Naro had purchased the property as *benamidar* for defendant No. 3's father, yet defendant No. 1 and the father of

(1) (1881) 6 App. Cas. 181 at p. 190.

the plaintiff and defendant No. 4 had no notice of the *benami* title and must be taken to have purchased it *bonâ fide* for valuable consideration. We do not find that the plea of *bonâ fide* purchaser was specially pleaded in the Court below, but, apart from that, it is not available to defendant No. 4. He is the purchaser of an equitable title and defendant No. 3 had the legal right, since he and defendant No. 1 were in possession of the property as mortgagees. Even supposing that defendant No. 3 was not in possession, because the actual possession was with defendant No. 1, still by his purchase of the equity of redemption belonging to defendant 3 from Naro, who was defendant No. 3's trustee, the father of plaintiff and defendant No. 4 could not get any priority over defendant No. 3's equitable title, according to the well-known principle of law that, where equities are equal, priority prevails and the doctrine of purchaser for value without notice does not apply as between equitable estates. See per Lindley, L. J., in *Bailey* v. *Barnes*(1) and *Shropshire Union Railways and Canal Co.* v. *The Queen*.(2)

As to the Kothle village, we see no reason to dissent from the inference of fact drawn by the Subordinate Judge on the evidence regarding the right acquired by defendant No. 1 jointly with Balkrishna Agashe from Govind Narhar, the auction-purchaser. Nor do we see any reason to differ from the Subordinate Judge's finding as to *mahalmajkur*.

The last point urged for the plaintiff and defendants 4 and 1 is that the Subordinate Judge should have allowed them to redeem the whole of the property and left defendants 1 and 3 to sue separately for their shares as owners of part of the equity of redemption. The Subordinate Judge has given cogent reasons for his finding on this point in which we agree.

For these reasons we vary the decree of the First Class Subordinate Judge and direct—

1. Let an account be taken of what is due on the mortgage dated 22nd July, 1870 (Exhibit 280), to the mortgagees, defendants 1 and 3, at the date of this decree. The mortgagees shall be credited with the principal amount Rs. 12,000, together with interest at 9 per cent., the expenses properly incurred by defendant for the

(1) (1894) 1 Ch. 25. (2) (1875) L. R. 7 H. L. 496.

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protection and preservation of the mortgaged property with interest at 9 per cent. and they shall be debited with the net income of the mortgaged property which they may have received after deducting the *mahalmajkur* expenses. The account is to be made with 'annual rests' as directed by the mortgage-deed, and the balance due at the date of this decree is to be thus ascertained. The amount thus found due should be apportioned on the two mortgaged villages, Potale and Keral, according to their market values The plaintiff and defendants 4 and 5 or their heirs, jointly or any one or more of them, shall pay into Court a moiety of the sum falling due on the village of Potale within six months from the ascertainment of the amount and take possession of a moiety of that village from defendant 1's representative defendant 2, and defendant 3, or from either of them. Should the plaintiff or defendants 4 and 5 fail to pay into Court the sum which they are thus ordered to pay within the specified six months, liberty to apply.

2. Let an account be taken of what is due under or by virtue of the mortgage aforesaid to defendant 1 or his representative defendant 2 at the date of this decree. He is to be credited with Rs. 4,000, his portion of the principal mortgage amount, together with the expenses which he may have properly incurred for the protection and preservation of the mortgaged property, and Rs. 5,475, which he has paid to defendant 3. He is to be debited with the net income of the mortgaged property which he may have received for his share when the property was in the joint possession of defendants 1 and 3, or which he may have received while the property was in his exclusive possession. Interest to be charged on each item at 9 per cent. and annual rests should be taken. The balance represents the amount due to him on the mortgaged property.

3. Let a similar account be taken of what is due to defendant 3 on the mortgage aforesaid at the date of this decree. He is to be credited with Rs. 8,000 for his portion of the principal mortgage amount and debited with the net income of the mortgaged property which he may have received and also with Rs. 5,475, which he got from defendant 1. The account should be taken with annual rests. Interest at 9 per cent. to be charged on each

item. The balance represents the amount due to him on the mortgaged property.

4. If the balance mentioned in para. 2 of this decree exceeds the proportionate debt due on a moiety of Potle village as referred to in para. 1 of this decree, defendant 1 shall be entitled to retain his moiety of Potle village as freed from the mortgage claim, and he will be entitled, subject to the direction of the Court, to realise the excess amount due to him from defendant 3, first proceeding against the remaining moiety of Potle or the sum which the plaintiff and defendants 4 and 5 may pay into Court as directed in para 1 of this decree and, secondly, against Keral if defendant 3's liability in respect of the proportionate debt due on Keral to defendant 1 exceeds the amount due to him, *i. e.*, defendant 3, as referred to in para. 3 of this decree, but not otherwise. If the proportionate debt due on a moiety of Potle village as referred to in para. 1 of this decree exceeds the balance mentioned in para. 2 as due to defendant 1, then the defendant 1 or his representative defendant 2 shall redeem his moiety of Potle on payment of that excess amount to defendant 3 within six months from the expiration of the six months allowed to plaintiff and defendants 4 and 5. Liberty to apply.

5. If the balance mentioned in para. 3 of this decree exceeds the proportionate debt due on Keral village as referred to in para. 1 of this decree, defendant 3 shall be entitled to get possession of that village free of any payment and he will be entitled to realise the excess amount due to him from defendant 1 by proceeding, subject to the direction of the Court, first against the moiety of Potle owned by plaintiff and, defendants 4 and 5, or the amount to be paid by them, and secondly, against the moiety of Potle owned by defendant 1 if defendant 1's liability in respect of the proportionate debt due on that moiety exceeds the amount due to him as referred to in para. 2 of this decree, but not otherwise. If the proportionate debt due on Keral exceeds the balance mentioned in para. 3 as due to defendant 3, then defendant 3 shall redeem Keral on payment of that excess amount to defendant 1 or his representative defendant 1 within six months from the expiration of the six months allowed to plaintiff and defendants 4 and 5, with liberty to apply.

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6. The amount due on a moiety of Potle if paid by plaintiff and defendants 4 and 5, as directed in para. 1 of this decree, should be kept in Court and appropriated as aforesaid in the accounts hereby ordered to be taken between defendant 1 or his representative defendant 2 and defendant 3. Parties to be at liberty to apply.

7. Each party to bear his own costs of these appeals and the costs of the suit.

*Decree varied.*

## APPELLATE CIVIL.

*Before Mr. Justice Chandavarkar and Mr. Justice Aston.*

1903. *September* 17.

SAYADKHAN PYARKHAN (PLAINTIFF) *v.* B. S. DAVIES (DEFENDANT).*

*Civil Procedure Code (Act XIV of 1882), section 268—Decree—Execution—Salary of Railway servant—Disbursing officer outside the jurisdiction of the Court—Prohibitory order—Jurisdiction.*

The judgment-debtor, a railway servant, resided within the local limits of the jurisdiction of the Small Cause Court at Bhusával, which passed the decree. The disbursing officer of the Railway Company resided at Bombay, outside its jurisdiction; but the salary was every month paid to the judgment-debtor at Bhusával by the disbursing officer, through his subordinate. The Court at Bhusával issued to the disbursing officer a prohibitory order, under section 268 of the Civil Procedure Code (Act XIV of 1882), against the salary of the judgment-debtor.

*Held*, that the Court at Bhusával had no jurisdiction to attach the salary of the judgment-debtor by a prohibitory order issued to the disbursing officer under section 268 of the Civil Procedure Code (Act XIV of 1882).

*Abdul Gafur* v. *W. J. Albyn* (1) followed.

THIS was a reference made by V. N. Rahurkar, Subordinate Judge of Bhusával, exercising the powers of a Small Cause Court Judge, under section 617 of the Code of Civil Procedure (Act XIV of 1882).

The facts giving rise to the reference, and the opinion of the Subordinate Judge on the question referred, appear from his statement which was as follows:—

* Civil Reference No. 10 of 1903.

(1) (1903) 30 Cal. 719.