

MANU/BH/0038/1959

Equivalent Citation: AIR1959Pat153

**IN THE HIGH COURT OF PATNA
FULL BENCH**

Letters Patent Appeal No. 30 of 1954

Decided On: 04.12.1958

Appellants:**Suraj Prasad
Vs.**

Respondent:**Aguta Devi and Ors.**

Hon'ble Judges/Coram:

Vaidynathier Ramaswami , C.J., R.K. Choudhary and Kamla Sahai , JJ.

Counsels:

For Appellant/Petitioner/Plaintiff: Jaleshwar Prasad and Balram Kumar Sinha, Advs.

JUDGMENT

Kamla Sahai, J.

1. The plaintiff, who has lost in all the Courts, has preferred this appeal under Clause 10 of the Letters Patent against the decision of a learned single Judge of this Court in Second Appeal No. 553 of 1950. It has been referred to this Bench on account of conflict of judicial opinion on the points which have been raised.

2. Briefly, the facts of the case are as follows. One Sarju Lal executed a registered zerpashgi bond (Exhibit B) dated the 12th October, 1925, in favour of Bharduli Singh, a predecessor-in-interest of defendants Nos. 1 to 3 in respect of the disputed property, namely, an area of 6 Kathas 4 dhurs in plot No. 211 of village Patti Pachamba, for a consideration of Rs. 49/-. On the 16th January, 1930, Sarju Lal orally sold the mortgaged property to defendants Nos. 4 and 7 (Baban Dubey and Kapildeo Dubey)' brothers of defendants Nos. 5 and 6, for a consideration of Rs. 89/-

On the same date, Sarju Lal executed the receipt (Exhibit D), acknowledging the oral sale and receipt of Rs. 40/- in cash and directing the vendees to redeem the mortgage on payment of Rs. 49/- to Bharduli Singh. Thereafter, the vendees paid Rs. 49/- to Bharduli Singh and redeemed the mortgage. Exhibit C is the endorsement made by Bharduli Singh on the back of exhibit B, acknowledging receipt of the entire mortgage money, i.e. Rs. 49/-.

The Courts below have held that Sarju Lal executed the receipt (Exhibit D), and that Bharduli made the endorsement (exhibit C) and delivered possession of the disputed property to the vendees on one and the same day. They have also found that the zerpashgi bond was redeemed by the vendees "at the instance and in the presence of the vendor".

3. The plaintiff claims to have purchased the disputed property from Sarju Lal under a registered sale deed dated the 16th May, 1945. He instituted the suit for redemption on the allegation that the defendants refused to receive payment of the mortgage

money and to allow the mortgaged property to be redeemed. The Courts below have dismissed his suit on the ground that defendants Nos. 4 and 7 became the owners of the disputed property on the basis of the oral sale to them, hence it is not capable of being redeemed.

4. Appearing on behalf of the appellant, Mr. Jaleshwar Prasad has advanced the argument that the oral sale by Sarju Lal to defendants Nos. 4 and 7 was invalid and unenforceable. In support of his argument, he has first contended that all that Sarju Lal held on the 16th January, 1930, was the equity of redemption in the disputed property, and that it could not be legally sold by an oral sale because it was an intangible thing and not a tangible Immovable property within the meaning of Section 54 of the Transfer of Property Act. He has next contended that, in any case, the sale had to be accompanied by delivery of possession in order to be effective, and that, the disputed property having been in the possession of a usufructuary mortgagee, it was not possible for the vendor to deliver possession to the vendees. According to him, the fact that the mortgagee delivered possession to the vendees is not a sufficient compliance with the requirements of the law as contained in Section 54.

5. I propose to consider the two points raised by Mr. Jaleshwar Prasad in the order in which I have mentioned them. Under the English common law, a mortgagee became the owner of a property mortgaged to him subject to a covenant for re-conveyance if his mortgage dues were paid to him within a fixed time. The mortgagor's right to redeem the mortgage until he was debarred from it by foreclosure or the mortgaged property was sold under the orders of the Court was recognised by the Courts of Equity which held that a mortgage was merely a security for money.

This right is called the equity of redemption, Even when the mortgagor was given this right, the mortgagee continued to be the legal owner of the mortgaged property. This lasted until the Law of Property Act, 1925, was passed whereunder the legal ownership was vested in the mortgagor. Two important points of difference between the English law and the Indian law on this subject may be noted. Firstly, no such expression as "the equity of redemption" has been used in the Indian law.

The right which a mortgagor has been given under Section 60 of the Transfer of Property Act is the right to redeem. It will be quite incorrect to consider this expression to be a substitute for "the equity of redemption" because the latter expression imports that the ownership at law is vested in some one other than the holder of the equity of redemption. Secondly, a mortgage is, according to Section 58 of the Transfer of Property Act, the transfer of an interest in specific Immovable property and not that of the Immovable property itself.

Ownership does not pass by way of mortgage but by way of sale as defined in Section 54, It seems to me that the conflict of authority on the question of whether the mortgagor holds a tangible Immovable property or only an intangible right has arisen generally because, in some cases, the distinction between the Indian law and the old English law has not been kept in view with the result that, taking the mortgagor's interest to be a bare equity of redemption and not that of an owner, it has been held that he has only an intangible right.

6. The point appears to me to be quite simple. The word 'tangible' means something that can be touched, i.e., a material object. The question which has to be asked is whether the subject-matter of the sale belongs to the vendor or, to put it in different words, is he the owner? Strictly speaking, all abstract rights are intangible things. In

the sense in which the distinction between an intangible thing and a tangible Immovable property has been made in Section 54, however, it is obvious that, when an owner transfers his ownership in a tangible immovable property, he conveys that property, and the sale is that of a tangible Immovable property.

Distinction has been made in some cases between the sale of a property which is in the possession of the owner and a property which is in the possession of a usufructuary mortgagee or lessee. In my judgment, there is no principle at all in support of this distinction. Ownership is a bundle of rights, and merely because the owner parts with the right of possession, it cannot be said that he is incapable of transferring the property itself. When he sells such a property, all that can be said is that he transfers the property subject to the right of the possession of the usufructuary mortgagee or lessee.

On the other hand, a usufructuary mortgagee or lessee cannot transfer the property itself : he can only transfer the "interest" which he has acquired in the property. Possession cannot form the basis of any distinction. A little consideration will make this clear. The difference between a simple mortgagee and a usufructuary mortgagee is that, in the former, possession is retained by the mortgagor whereas, in the latter, he delivers possession of the property to the mortgagee.

In either case, the mortgagee holds a similar interest because, though Section 58 enumerates and gives some special incidents of different kinds of mortgages, it gives one definition for a mortgage of every kind. Can it then be reasonably said that a mortgagor transfers a tangible property when it is subject to a simple mortgage but he transfers an intangible thing when his property is subject to a usufructuary mortgage? The only answer must be 'no.' It is, therefore, manifest that, when an owner sells his immovable property which is subject to a simple or usufructuary mortgage, it is the sale of a tangible Immovable property and not that of a mere intangible right.

7. Mr. Jaleshwar Prasad has relied upon an observation of Bhashyam Ayyangar, J., in *Ramasami Pattar v. Chinnan Asari* ILR 24 Mad 449 which is as follows :

"The equity of redemption in a usufructuary mortgage is only an intangible thing like "a reversion" which immediately precedes the expression 'or other intangible thing (vide Williams on "Real Property", 18th Edition, pp. 30, 31), and it can be transferred by sale only by a registered instrument and not by delivery of the property. Equity of redemption in a simple mortgage may be tangible Immovable property, and its sale can be effected if its value be below Rs. 100/- without registered instrument by mere delivery of the property. The right of a simple mortgagee in the property mortgaged is in my opinion only an intangible thing like a charge on Immovable property within the meaning of Section 54. . . ."

With great respect, I am unable to agree with this opinion. The learned Judge has clearly proceeded upon the nature of a mortgagor's interest under the old English law and has not considered that the mortgagor is the owner of the mortgaged property under the Indian Law. Further, he has not explained how the mere fact that the mortgage is with or without possession will make a difference in the mortgagor's ownership of the property.

8. Learned Counsel has also placed reliance on the view expressed by Chitty, J., in *S. Hushmat v. S. Jamir* 23 Cal WN 513 : AIR 1919 Cal 325 (2) to the effect that the sale

by a mortgagor of a property which is in the possession of a usufructuary mortgagee is the sale of only the equity of redemption, and, as it was the sale of "merely a right in Immovable property, the property being in the actual possession of the mortgagee," it was a sale of an intangible thing. For the reasons which I have given, I cannot accept this view.

9. The question came to be considered by a Full Bench of the Allahabad High Court in *Sohan Lal v. Mohan Lal* MANU/UP/0186/1928 : ILR 50 All 986:AIR 1928 All 726) Mukerji and Kendall, JJ., held that a mortgagor's estate was a tangible Immovable property, even though that property was in the possession of a mortgagee. Mukerji, J. has quoted a passage from Salmond's Jurisprudence (7th edition, 1924 at p. 280) which reads :

"The right of the owner of a thing may be all but eaten up by the dominant rights of lessees, mortgagees and other encumbrancers. His ownership may be reduced to a mere name rather than a reality. Yet, he nonetheless remains the owner of the thing, while all others own nothing more than 'rights' over it. He, then, is the owner of a material object, who owns a right to the general or residuary uses of it, after the deduction of all special and limited rights of use vested by way of encumbrance in other persons."

The learned Judge has observed at p. 993 (of ILR All); (at p. 729 of AIR) of the report:

". if the cases which deal with the mortgagor's interest have been correctly decided, it would follow that the interest of a simple mortgagee would be an intangible property, while the interest of the usufructuary mortgagee would be a tangible Immovable property. As I have already stated, there is no room for this distinction. In such case the mortgagee possesses nothing but an interest in the immovable property and the mortgagor is the owner of the property."

Kendall, J. has also come to the conclusion that, in the case of a sale of what is popularly called the 'equity of redemption,' there is in reality a sale of the property itself and consequently a sale of a tangible property. Sulaima, A. C. J. has differed from Mukerji and Kendall, JJ., on this point, and has stated :

"According to its literal meaning, 'tangible' property would be one which is capable of being touched, and therefore, capable of being possessed. It must accordingly be property which is capable of delivery of possession from one person to another. A mortgaged property itself is undoubtedly 'tangible' but the interest of the mortgagor in the property, when the mortgage is usufructuary, is not identical with the property itself, as some interest has already passed to the mortgagee, including the right to remain in possession and appropriate the profits. The interest which the mortgagor possesses is not itself capable of being touched, nor is it such that an actual delivery of its possession can be effected by the mortgagee. It seems difficult to conceive of a thing as being tangible when it is not capable of actual delivery of possession. Although, therefore, the mortgagor is the legal owner of the usufructuarily mortgaged property, whatever rights he possesses, so long as the mortgage subsists, cannot be treated as 'tangible' The subject-matter of ownership is 'tangible,' but the interest which the mortgagor can transfer is 'intangible.'" With the greatest respect, I cannot subscribe to this view. An

Immovable property is capable of being touched and must, therefore, be always, tangible. On the other hand, all abstract rights including the right of ownership or possession are incapable of being touched and are hence intangible. When a person has possession over a property, he can only transfer his right of possession and not the property. An owner, however, can transfer the property itself subject to the rights which he or his predecessor has transferred to others out of the totality of rights which ownership connotes.

The mere fact that the possessor has the right to touch the property while the owner has no immediate right to do so will not, in my judgment, be of any consequence because it is the property and not the right which is tangible. A property is tangible because it can be touched by any one and not because it is capable of being touched by a person who is in possession and has an immediate right to touch it. Incapacity to deliver possession immediately will not, therefore, make any difference to the transfer of the property by the owner.

10. The same question arose for consideration in this Court in *Pheku Mian v. Syed Ali* ILR 15 Pat 772: ATR 1937 Pat 178. *Khwaja Mohammad Moor, J.*, who delivered the judgment, *Madan, J.* agreeing, followed the view expressed by the majority of the Judges in MANU/UP/0186/1928 : TLR 50 All 986: AIR 1928 All 726) (FB), and did not follow the opinion of *Sulaiman, A. C. J.* This is a direct authority of this Court to the effect that the sale of a mortgaged Immovable property by the mortgagor is the sale of a tangible Immovable property within the meaning of Section 54, though it is in the possession of a usufructuary mortgagee.

I entirely agree with the opinion expressed in this decision on this point. It is supported by some decisions of other High Courts also. Reference may be made to *Tukaram Ganpatrao v. Atmaram Vinayak* MANU/MH/0074/1938 : ILR 1939 Bom 71 : AIR 1939 Bom 31, *Girdhar Parashram v. Firm Motilal Champalal* MANU/NA/0149/1939 : AIR 1941 Nag 5 and *Ghanaram v. Paltoo* MANU/NA/0153/1949 : AIR 1954 Nag 109

11. In *Dharameshwar Sarma v. Lakhyadhar Borgohain* AIR 1950 Ass 107 *Thadani, C. J.* has followed the decisions in ILR 50 All 986: AIR 1928 All 726 and ILR 15 Pat 772: MANU/BH/0236/1936 : AIR 1937 Pat 178, and has held that the mortgagor's estate in an Immovable property given by him in usufructuary mortgage is a tangible Immovable property. *Ram Labhaya, J.* has expressed a contrary opinion; but with great respect, I do not think that it is correct.

12. In a Full Bench decision in *Bhikhabhai Nanabhai v. Chimanlal Maganlal* AIR 1953 Bom 437 *Chagla, C. J.*, who has delivered the judgment of the Bench, appears to have been inclined to hold the view that a sale by a mortgagor of an Immovable property in the possession of a usufructuary mortgagee is the sale of a tangible Immovable property; but he has left the question open, and has decided the case on another point.

13. On a consideration of the principles and authorities, I am clearly of the opinion that the sale by *Sarju Lal* in this case to defendants Nos. 4 and 7 was the sale of a tangible Immovable property.

14. The second question which has now to be considered is whether there was delivery of possession of the property in this case as required by Section 54 of the Transfer of Property Act. That section provides that the sale of tangible Immovable

property of the value of one hundred rupees and upwards, or of a reversion or other intangible thing, can only be made by a registered instrument, but the sale of a tangible Immovable property of the value of less than one hundred rupees can be effected either by a registered instrument or by delivery of the property. The fourth clause reads :

"Delivery of tangible Immovable property takes place when the seller places the buyer, or such person as he directs in possession of the property."

The sale of the disputed property by Sariu Lal to defendants Nos. 4 and 7 was admittedly not made by a registered instrument, Unless therefore, there was a delivery of the property within the meaning of Section 54, the sale cannot be held to have effectively passed title.

15. There is a great and long-standing conflict of judicial opinion on the point whether a vendor can be held to be capable of making delivery of the property to the vendee by any method if the vendee has been in possession of the property as usufructuary mortgagee, lessee or otherwise from before the date of sale. Mr. Jaleshwar Prasad has referred to the observation of Viscount Findlay while delivering the judgment of the Judicial Committee in Mathura Prasad v. Chandra Narayan MANU/PR/0107/1921 : AIR 1921 PC 8 which is as follows:--

"Their Lordships cannot accept the suggestion made on behalf of the appellants that, for the purposes of Section 54, some sort of constructive possession resulting from the delivery of the alleged instrument of transfer might be sufficient. For this purpose, there must be a real delivery of the property."

16. Divorced from the context, this observation may be taken to lord support to the view that their Lordships were of opinion that nothing but actual delivery of possession was sufficient compliance with the requirement of delivery of the property under Section 54. The facts in that case were, however, quite different. A mortgage bond in respect of some properties in Darbhanga District had to be registered. A certain property lying in Muzaffarpur District was included for the purpose of getting the bond registered in that district.

It was alleged that that property was sold by a person named Osman under an unregistered deed to the mortgagor for Rs. 50/- before the mortgage bond was registered. The sale deed was not produced, nor was any secondary evidence given. It was said that the deed was delivered by Osman to the mortgagor; but their Lordships observed that, even if the instrument of sale was delivered, that was not sufficient to constitute delivery of the property.

The conclusion which their Lordships reached was that none of the parties ever intended that title to the property of Muzaffarpur District included in the mortgage bond should vest in the mortgagor or should pass to the mortgagee under the bond. It is manifest, therefore, that they have not given their concluded opinion on the interpretation of the words "delivery of the property" in Section 54.

17. In *Sibendrapada Banerjee v. Secretary of State* , ILR 34 Cal 207, a strict view of the interpretation of the relevant words in Section 54 has been taken. Their Lordships have said that Section 54 speaks of delivery of the property, and hence "delivery is the essence of the transaction". They have further said:

"The essence of a transfer by delivery of the property is that possession is changed. What was an the occupation of the vendor, by reason of that transfer ceases to continue in his occupation, the possession being transferred to the vendee. The correctness of the view expressed in this case has been doubted in the same High Court by a Division Bench in *Fakira Mahton v. Leakut Hossain* AIR 1914 Cal 754 and a single Judge in *Kulachandra v. Jogendra Chandra* MANU/WB/0242/1932 : AIR 1933 Cal. 411. In *Sonai v. Sonaram* 34 Ind Cas 692: AIR 1916 Cal 934 a Bench of the Calcutta High Court bas, while professing to follow *Sibandrapada Banerjee's* case ILR 34 Cal 207 (Supra), laid down a different principle. Their Lordships have held that, though the vendee was in possession at the time of the sale, the fact that the mortgagor pointed out the boundaries for the purpose of making a formal delivery of possession and the fact that the mortgage document was endorsed and handed over to the vendee were sufficient to constitute delivery of possession in order to support an oral sale.

18. In several cases, the Madras High Court has taken a view contrary to that taken in *Sibandrapada Banerjee's* case ILR 34 Cal 207. Reference may be made to *Muthukampan Samban v. Muthu Samban* : MANU/TN/0146/1914 : AIR 1915 Mad 573 : ILR 38 Mad 1158) and *Dawood Saheb v. Moideen Batcha Saheb* : MANU/TN/0238/1924 : AIR 1925 Mad 566 in which their Lordships have expressly refused to follow the interpretation of the words 'delivery of the property' as given in *Sibandrapada Banerjee's* case ILR 34 Cal 207. In the former case, their Lordships have said:

".....if there was an oral sale of the properties, the fact that the vendee was already in possession would not render the sale invalid if the vendor had by appropriate declarations or acts converted the possession of the vendee as mortgagee into one as purchaser."

In the latter case, their Lordships have stated:

"There is no reason to think that the word 'delivery' in Section 54 is used in a peculiar sense or that the words 'places the buyer in possession of the property' in the 4th clause are intended to alter the legal conception of 'possession' or of 'delivery.' 'Delivery' usually means 'such delivery as the thing to be delivered is capable of.' Possession cannot be taken to be synonymous with 'occupation' as has been done in ILR 34 Cal 207 with which decision we cannot agree."

19. The view which has almost consistently been expressed by this Court is that, even if the vendee is in possession on the date of an oral sale, there will be sufficient compliance with the requirement of 'delivery of the property' under Section 54 if the vendor, by appropriate declarations or acts, alters the nature and character of the vendee's possession so that he holds it as owner from the date of the sale. James, J. has followed this view in *Santokhi Misser v. Siro Jha* MANU/BH/0011/1934 : AIR 1934 Pat 301, and has held that the fact that the vendor got the name of the vendee who was already in possession mutated in the landlord's records was sufficient to constitute 'delivery of the property' within the meaning of Section 54.

In ILR 15 Pat 772: MANU/BH/0236/1936 : AIR 1937 Pat 178, a Bench of this Cour has expressed the same view. Their Lordships have held in that case that the fact that the vendor renounced his rights and got the name of the vendee recorded in the

record-of rights amounted to "delivery of the property" as required by Section 54. The facts in Jagarnath v. Chhathu : (MANU/BH/0181/1948 : AIR 1949 Pat 504 : ILR 27 Pat 202) also appear to have been similar, and their Lordships, who decided that case, followed the decision in ILR 15 Pat 772: (MANU/BH/0236/1936 : AIR 1937 Pat 178). A contrary opinion has been expressed in this Court only by a single Judge in Puran Mahton v. Bhoogo Mahton, MANU/BH/0137/1945 : AIR 1946 Pat 81. It appears that the Bench decisions of this Court were not brought to his Lordship's notice, and he followed the decisions in Sibendrapada Banerjee's case ILR 34 Cal 207: (Supra) and MANU/UP/0186/1928 : ILR 50 All 986: AIR 1928 All 726).

20. In the Full Bench decision in ILR 50 All 986:MANU/UP/0186/1928 : AIR 1928 All 726) (Supra), which I have already referred to while dealing with the first point, all the three learned Judges have expressed the opinion that there can be no "delivery of the property" as required by Section 54 if the vendee is already in possession on the date of the sale. Mukerji, J. has founded this opinion upon the ground that actual delivery of possession is necessary for the sake of publicity of the fact that title has passed, and Kendall, J. has also accepted this ground.

A Full Bench of the Bombay High Court has taken the same view in AIR 1953 Bom 437 which I have referred to while discussing the first point. In my opinion, there can be sufficient publicity even if the vendor gives a clear and unambiguous indication by words or deeds of his intention to extinguish his right in the vended property and to change the nature of the possession of the vendee into possession as an owner.

21. In MANU/GH/0023/1959 Ram Labhaya, J. has not expressed any opinion on this point; but Thadani, CJ. has followed the decision in (MANU/BH/0236/1936 : ILR 15 Pat 772: AIR 1937 Pat 178) (Supra). In MANU/NA/0153/1949 : AIR 1954 Nag 109 Sen, J. has considered a large number of decisions, and, expressing dissent with the decision in Sibendrapada Banerjee's case ILR 34 Cal 207 he has held that a change in the character of the vendee's possession from the date of the oral sale is sufficient compliance with the requirement of Section 54 for 'delivery of the property,'

22. On a consideration of the authorities which I have referred to above, I am of opinion that the view expressed in the different decisions of this Court with the exception of MANU/BH/0137/1945 : AIR 1946 Pat 81 is correct. Oral sale accompanied by delivery of possession is one of the modes in which the sale of a tangible Immovable property of the value of less than Rs. 100/- can be effected. I do not see any good reason why this mode of transfer should not be available to a person who sells a property of such low value, simply because the vendee is in possession of the property under some legal right on the date of the sale.

The law cannot contemplate that such a sale can only be effected by the circuitous method of getting the vendee to give up possession temporarily so that he may be put back in possession by the vendor. In my judgment, all that is necessary is that the vendor should do whatever he can do in the circumstances so as to indicate definitely and without any ambiguity an intention to pass the title and also possession as owner to the vendee. He can do so by making appropriate declarations or by doing such acts as are necessary.

23. The present case stands on a stronger footing because the vendees were not in possession from before the date of sale. What happened was that, at the instance and in the presence of the vendor the vendees repaid the mortgage money to Bharaduli Singh, redeemed the mortgage and took possession of the vended property. There

was, therefore, clearly a delivery of possession to the vendees. There is no reason why this should not be held to be sufficient simply because it was directly from the mortgagee in possession and not from the vendor himself that the vendees took delivery when it is clear that the delivery was given and taken at the instance of the vendor. Even in *Sibendrapada Banerjee's case* ILR 34 Cal 207 their Lordships have observed:

"If on the date of the sale the vendee gets into possession with the assent, express or implied, of the vendor, it may be held that there has been delivery of the property; but this principle has no application to a case like the present, in which the intended transferee had been in occupation from before the date of the transfer." In : MANU/MH/0074/1938 : ILR 1939 Bom 71: AIR 1939 Bom 31), it was agreed between the parties that the vendee would pay off the mortgagee in possession of the vended property, and would enjoy it. The vendee, accordingly, paid off the mortgagee on the date on which the sale took place, and took possession of the property. It was held that this was enough to constitute 'delivery of the property.'

In AIR 1953 Bom 437 (Supra), Chagla, C.J. who delivered the judgment of the Full Bench, distinguished *Tukaram Ganpatrao's case* MANU/MH/0074/1938 : ILR (1939) Bom 71 : AIR 1939 Bom 31) by saying that possession was actually delivered in that case by the mortgagee to the vendee on the direction of the vendor. Mr. Jaleshwar Prasad has relied upon the decision of *Agarwala, J.* in MANU/BH/0137/1945 : AIR 1946 Pat 81.

In that case, the mortgagor orally sold a property, which was in the possession of a mortgagee, to a third person. The purchaser redeemed the mortgage after some days and took possession. His Lordship held that the fact that the vendor subsequently sold the property by a registered sale deed to another person showed that he was not a consenting party to the delivery of possession by the mortgagee to the oral vendee, and hence title did not pass by that oral sale.

In my judgment, this case can be distinguished on two grounds. Firstly, the mortgage was redeemed in that case some days after the sale; whereas the mortgage has been redeemed in the present case on the date of the sale. Secondly, his Lordship held in that case that the vendor was not a consenting party to the delivery of possession by the mortgagee; but the finding of fact in this case is that the delivery was made to the vendee at the instance and in the presence of Sarju Lal. I may add, however, that, in my judgment, that case has been wrongly decided.

24. For the reasons given above, I hold that the sale by Sarju Lal to defendants Nos. 4 and 7 was not invalid or unenforceable, and that it did pass title to those two defendants. The plaintiff is not, therefore, entitled to redeem the mortgage, and his suit has been rightly dismissed.

25. In the result, the appeal fails, and it is dismissed. There will be no order for costs as the respondents have not appeared.

Vaidynathier Ramaswami, C.J.

26. I agree.

R.K. Choudhary, J.

27. I agree.

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