

been converted for use as "soda fountain lorry". The trial Court under issue No. 8 discussed the evidence and held that the vehicle at the time of the accident was being used as a private vehicle and that the company had failed to prove that at that time it was being used as a goods or transport vehicle. The correctness of this conclusion of the trial Court was not challenged before us and was in fact conceded to be correct at the time when Malik Chand's application to be transposed as an appellant was being argued. Therefore, it must be held that the defendants have failed to prove that at the time of the accident the vehicle was not being used as a private passenger vehicle. In any case the misuser of the vehicle at the time of the accident will not take the policy of insurance out of the purview of section 95(2)(c), of the Motor Vehicles Act. I am, therefore, of the opinion that the liability of the Company is co-extensive with that of Malik Chand, defendant. This contention, therefore, also fails.

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No other point was argued before us and the correctness of the decision on issues Nos. 7 and 8 was conceded before us.

For these reasons, I would dismiss this appeal. The plaintiffs are entitled to get the costs of the appeal from the appellant Company.

CAPOOR, J.— I agree.

B.R.T.

APPELLATE CIVIL

Before D. Falshaw and I. D. Dua, JJ.

PREM NATH THROUGH RAM KISHAN MUKHTAR-I-AM,—
Appellant.

versus

MUSSAMMAT SUNDRA WATI AND OTHERS,—*Respondents*

Regular First Appeal No. 11 of 1951.

*Transfer of Property Act (IV of 1882)—Sections 2(d)
and 54—Sale of minor's property effected under the orders*

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of the Guardian Court—Whether hit by Section 54—Section 92—Purchaser paying off the previous mortgage without possession and obtaining possession—Whether entitled to a declaration that he is in possession as a chargeholder or a mortgagee.

Held, that the sale of the minor's property effected under the orders of the Guardian Court is covered by the provisions of Section 2(d) of the Transfer of Property Act and is not hit by the provisions of Section 54 of the Transfer of Property Act and does not require registration as it is a transfer in execution of an order of a Court of competent jurisdiction. The fact that the Court passed the order for sale on an application by the guardian of the minor does not detract from the order being an order of the Court in compliance with which or in obedience to which the sale was in fact effected. Again the fact that under the provisions of the Guardians and Wards Act only permission of the Court need be obtained for selling the minor's property does not debar the Court from actually ordering the sale and supervising the whole process in order to safeguard the interests of the minor ward for the protection of whose estate the ultimate responsibility is always that of the Guardian Court. Indeed in proceedings in which interests of minors are involved the courts being in the position of quasi-tutelage have a duty to protect their interests and in the discharge of this function have full power to control such proceedings.

Held, that where a purchaser of property pays off a previous mortgagee without possession and obtains possession of the property, he is entitled to be subrogated to the position of the said previous mortgagee but cannot claim to take possession of the property as the mortgagee's representative. He is entitled to claim a charge on the property in question, as against the seller, for the amount of the purchase money properly paid by him as sale price. This right is conferred on him as purchaser by Section 55(6)(b) of the Transfer of Property Act.

Regular first appeal from the decree of Shri H. D. Loomba, Sub-Judge, 1st Class, Ludhiana, dated the 1st November, 1950, granting the substantive relief for declaration that plaintiff No. 1 is the owner of the suit property

by virtue of the public auction held on 13th June, 1943, as detailed in the plaint and further awarding full costs to plaintiff No. 1 (Shrimati Sundra Wati) against the defendants.

N. L. WADHERA and H. R. MAHAJAN, for Appellants:

M. R. AGGARWAL with RAJ KUMAR, for Respondents.

JUDGMENT

DUA, J.—Amar Nath defendant No. 1, father of Prem Nath defendant No. 2, was appointed Court guardian of his son defendant No. 2, during his minority by the guardianship Court. On 27th of January, 1943, Amar Nath applied to the guardianship Court for permission to sell one-fourth of the minor's property so as to be able to pay off a previous mortgagee from whom Rs. 9,500 had been borrowed for the construction of Prem Talkies. On the same day the Guardian Judge passed an order allowing the guardian to dispose of one-fourth of the minor's property with a direction that the money should be deposited in Court and that the Court should also be satisfied about the market value of the property sought to be sold. On 24th of May, 1943, nearly four months after the permission of the Court had been obtained, Amar Nath guardian again applied to the Court stating that since the previous application one or two more intending purchasers had felt interested in the property and they were likely to pay higher price. It was also suggested that if the property were sold by public auction, and bids taken it may fetch higher price and that this would be for the minor's benefit. Permission was, in the circumstances, sought to effect the sale, through one Mr. Amrit Lal Ahluwalia, Advocate, by public auction "of two quarters and a site as mentioned in the application" subject to the Court's confirmation. It

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was also prayed that the Court may fix proper fee or commission for the sale to be paid to Mr. Amrit Lal Ahluwalia. The property sought to be sold was stated to form one-sixth part of the minor's entire property. On 25th of May, 1943, the guardian Court accepted the application and allowed public auction to be effected through Mr. Amrit Lal Advocate. The Court also expressly ordered that in view of the circumstances narrated in the application Mr. Amrit Lal Ahluwalia would perform the job. It appears that on the 31st of May, 1943, Mr. Amrit Lal Ahluwalia, Advocate noted having received this order in the following words:—

‘*Hukamnama wasul paya.*’

On 21st of June, 1943, Mr. Amrit Lal Ahluwalia submitted a report to the Guardian Court in which he stated that in obedience to the orders of the Court dated 25th of May, 1943, and in compliance with the Court's *robkar* dated 31st of May, 1943, he had made proper advertisement of the sale, and that after causing proclamation, etc., the property was actually sold by public auction on the 13th of June, 1943. According to this report the hammer fell at 8 p.m. in the evening and the highest bid was for a sum of Rs. 7,600 given by Des Raj Mehta. A cheque for a sum of Rs. 2,000 in favour of the learned Senior Subordinate Judge, Ludhiana, drawn on the Imperial Bank of India, Khanna, representing the earnest money, was attached with the report. It was also stated in the report that at the time of auction Mr. Mehta had told Mr. Amrit Lal Ahluwalia that he was acting as a *benamidar* for one Mst. Sundra Vati. A demand for the balance of the sale price and the commission fee had, according to the report, also been issued, and carbon copy thereof was actually

attached with this report; the auctioneer approved the bargain observing that the sale price was just and proper; it was also expressly mentioned in the report that only one-eighth share of the minor's property had been sold. On 26th of July, 1943, Des Raj Mehta filed an application in the Guardian Court stating that he had purchased two houses together with a site for Rs. 7,600 at the public auction held on 13th of June, 1943, and that he had already deposited the amount in respect thereof "in accordance with the Court's order". It was explained in the petition that he had deposited Rs. 7,600 on account of the bid plus Rs. 380 on account of commission. He also expressly stated that he had purchased these two houses together with a site for Mst. Sundra Vati wife of B. Kishori Lal Ahluwalia of Khanna Town. It was prayed that a sale deed in respect thereof may be got duly executed and registered in favour of Mst. Sundra Vati; it was also prayed that a writing may be secured from the mortgagee, to whom money may be paid in respect of the property sold, to the effect that there had been left no charge in his favour on the said property, i.e., the two houses and the vacant site. By way of postscript it was added in this petition that Lala Amar Nath guardian may be summoned for execution and registration of the sale deed. On the same day Mr. Amrit Lal Ahluwalia auctioneer and the counsel for the previous mortgagee attended the Court and in their presence it was ordered by the Court that the mortgagee Lala Mathra Dass be paid the entire sale price which had been deposited in Court by the vendee. Rs. 315 were also ordered to be paid to the auctioneer as his commission and the balance deposited on account of commission, was ordered to be refunded to the vendee. On 28th of July, 1943, a receipt was executed by Mathra Dass, the previous mortgagee, in which a sum of

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Rs. 2,000 by means of a cheque dated 13th of June, 1943, and a cheque for Rs. 5,600 were acknowledged to have been received by him from the Court; it was mentioned in the receipt that this amount would be credited towards the mortgage money relating to the property of the minor with an express recital that the mortgagee would have no charge on the property sold by auction the sale money in respect of which had been received by him.

On 2nd of November, 1943, Mehta Des Raj, again applied to the Court stating that he had purchased two roofed quarters together with a site in the *abadi* of Khanna town for Mst. Sundra Vati for a sum of Rs. 7,600 and had deposited the sale money in accordance with the Court's order, and prayed that Amar Nath, the minor's guardian, may be summoned and a registered sale deed may be got duly executed by him. It appears that Amar Nath was ordered to appear in Court on the 8th of January, 1944, for executing and getting registered the required sale deed but as he failed to come to Court on that day, another notice was sent to him directing him to send to the Court by the 12th of February, 1944, a special power of attorney executed in favour of some person for execution and registration of the required sale deed. This notice was sent to the Jharia address of Amar Nath who was reported to have gone there for doing coal business. On the 9th of February, 1944, Amar Nath Ahluwalia filed an application in the Guardian Court praying for exemption from appearance in Court on the 12th of February, 1944, and offering to appear on the next date of hearing. It is important to note that Amar Nath did not care even to allude in his application to the direction given to him by the Court, in the notice dated 8th of January, 1944, to send a special

power of attorney in favour of some person for execution and registration of the required sale deed. This, in my opinion, clearly shows the dishonest dilatory and evasive tactics on the part of Amar Nath guardian of his minor son for avoiding execution and registration of the sale deed. On 4th of May, 1949, Mehta Des Raj vendee filed another application in the Guardian Court giving the history of the purchase of the property in suit by him and this time praying for a sale certificate to be granted to Mst. Sundra Vati wife of B. Kishori Lal Ahluwalia through him as *benamidar* vendee. In this application it was expressly stated that the property purchased was in the possession of Mst. Sundra Vati and tenants were in actual occupation under her. It was also mentioned that two petitions previously filed by him requesting the Court to have a proper sale deed executed and completed by Amar Nath guardian of the minor had been consigned to the record room on 12th of February, 1944, in default of prosecution. In reply to this petition it seems that Prem Nath son of Amar Nath, who had since become major, filed a written statement on the 22nd of June, 1949, in which knowledge of permission of the Guardian Court to effect auction sale of the property in suit was denied and in reply to the assertion of the purchase of the property by Mehta Des Raj on behalf of Sundra Vati at the auction sale it was stated that the para in question need not be replied. Default by the vendee in depositing the three-fourth share of the sale price within the period fixed was also pleaded by way of objection and it was finally averred that he (Prem Nath) having become major, the property in question had been made over to him. It was, of course, prayed that the application be dismissed with costs. On 27th of July, 1949, Mr. M. R. Bhatia, District Judge, Ludhiana, rejected the petition of the purchaser

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on grounds, the soundness of which appears to me to be doubtful.

It is in these circumstances that the present suit has been instituted by Mst. Sundra Vati and Metha Des Raj for a declaration to the effect that plaintiff No. 1 is, by virtue of the public auction sale held on 13th of June, 1943, the real owner and possessor of two houses and the vacant site in dispute; in the alternative it is prayed that a decree for specific performance of the contract of sale by formal execution and registration of the sale deed in respect of the said property in favour of plaintiff No. 1 or plaintiff No. 2 may be passed. Amar Nath and Prem Nath both have been impleaded as defendants in this suit. Prem Nath defendant No. 2 claiming to be the owner of the property has challenged the auction sale on the ground that it had been effected in an irregular manner and for inadequate value with the object of causing loss to him. Amar Nath has also pleaded that the sale was irregular and invalid. He expressed his ignorance about the payments, having been made to Mathra Das, the previous mortgagee. Both defendants prayed that the suit be dismissed. The plaintiffs in their replications controverted the allegations of the defendants and on the pleadings of the parties, the following issues were framed:—

- (1) Whether the plaintiff No. 1 is the real owner of the suit property as claimed by the plaintiffs?
- (2) Whether the suit for specific performance is within limitation?
- (3) Whether the sale held by the guardian Court is invalid for the reason that there was collusion between plaintiff No. 2 and Jagat Parkash as claimed and

for the reason that three-fourths of the purchase money was not deposited in time?

(4) Relief.

The learned Subordinate Judge has in a fairly well-considered judgment decreed the plaintiffs' suit granting plaintiff No. 1 the declaration sought by her. The trial Court has also gone into the question of the alternative relief claimed and though in view of the declaration having been granted to plaintiff No. 1 it was not necessary to go into this question, nevertheless it has been found that in case it was considered necessary the plaintiffs would also be entitled to the relief by way of specific performance; it was of course held that the suit for specific performance was within limitation.

On appeal Mr. Nathu Lal Wadehra has contended that the sale in question could only be effected by means of a registered document. He has placed reliance on section 54 of the Transfer of Property Act, which section has admittedly been made applicable to the areas within the municipal limits throughout the Punjab by means of a notification dated the 27th of April, 1935. The Court below, it may be mentioned, has while repelling this contention relied on section 2(d) of the Transfer of Property Act which is to the following effect:—

“2. In the territories to which this Act extends for the time being the enactments specified in the schedule hereto annexed shall be repealed to the extent therein mentioned. But nothing herein contained shall be deemed to affect—

(a) * * * * *

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(b) * * * * *

(c) * * * * *

(d) save as provided by section 57 and Chapter IV of this Act, any transfer by operation of law or by, or in execution of, a decree or order of a Court of competent jurisdiction:

* * * * *

Mr. Wadehra has drawn our attention to *Salig Ram and others v. Barkat Ali and others* (1), in which it has been held that a sale by a guardian of the property of his ward which requires and has received the sanction of the Court under the provisions of section 29 of the Guardians and Wards Act, is not a "sale in execution of an order of a Civil Court" within the meaning of section 3(5) (a) of the Punjab Pre-emption Act, and is consequently not exempt from the law of pre-emption. It may be stated that in the reported case the guardian of the minor had applied to the Court for leave to execute a sale deed which had already been drawn up and approved by the parties. Leave was granted by the Court and the conveyance was duly executed and registered by the parties. On these facts it was observed that the sale in that case was an ordinary private transaction which only required the sanction of the Court because one of the parties to it was under disability. On this finding the transaction in the reported case was held to fall within the exceptions under section 3(5) (a) of the Punjab Pre-emption Act of 1913. As against this decision the learned counsel for the respondents has drawn our attention to *Mithan Lal v. Chuni Lal* (2), decided

(1) I.L.R. 4 Lah. 164.

(2) A.I.R. 1949 East Punjab 22.

by Teja Singh and Khosla, JJ. In this case also section 3(5) (a) of the Punjab Pre-emption Act came up for construction and the expression "in execution" was held not to have been used in that narrow technical sense in which execution of a decree takes place under the provisions of the Civil Procedure Code; this expression was construed in a very wide sense and was held to mean "in obedience to", "in compliance with", or "in accordance with". The learned Judges took into consideration the fact that the operation of sub-section (5) extended not only to an order of a civil Court but also to orders of criminal or revenue Courts and therefore, observed that the term "in execution" could not but have been used in a very wide sense. In the reported case an argument was advanced by way of analogy that a sale of insolvent's property by an Official Receiver had been construed in *Gurbakhsh Singh v. Sardar Singh* (1), (a decision by a Full Bench) to be subject to the right of pre-emption and not hit by section 3(5) (a) of the Punjab Pre-emption Act. This argument was met among other reasons by a reference to an unreported decision by a larger Bench of the Lahore High Court in *Rup Devi v. Matwal Cand* (2), which, according to Khosla, J., who was also a member of that larger Full Bench, had expressly dissented from the principle enunciated in *Gurbakhsh Singh's case* (1).

I have bestowed my most anxious thought to the reasoning employed in the two reported cases and after considering both the views I am inclined, though not without some hesitation, to agree with the reasoning adopted in the case *Mithan Lal v. Chuni Lal* (3). Besides, this being the decision of this Court it is entitled to greater respect than the

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(1) I.L.R. 16 Lah. 173 (F.B.).

(2) L.P.A. No. 34 of 1945.

(3) A.I.R. 1949 East Punjab 22.

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decision of the Lahore High Court. The facts of this case also bear comparatively speaking a closer resemblance to the facts of the instant case. As already stated above it was the Guardian Court which actually ordered the sale of the property by Amrit Lal Ahluwalia auctioneer and sent to him a *robkar* directing him to sell the property and deposit the proceeds in Court. The fact that the Court passed this order on an application by the guardian of the minor would not, in my opinion, detract from the order dated 25th of May, 1943, being an order of the Court in compliance with which or in obedience to which the sale was in fact effected. Indeed it was understood by all concerned at that time that the sale was being effected in accordance with and in obedience to the orders of the Court. Mr. Amrit Lal Ahluwalia in his report dated 21st of June, 1943, expressly says that he had effected the sale "in obedience to the orders of the Court and in compliance with the Court's *Robkar*". In this view of the matter I am of the opinion that the sale in question was not hit by the provisions of section 54 of the Transfer of Property Act as it was a transfer in execution of an order of a Court of competent jurisdiction. It is noteworthy that there was no suggestion at the Bar that the Guardian Court was not empowered in the circumstances of this case to order sale of the minor's property; the only contention raised being that under the provisions of the Guardians and Wards Act only permission of the Court need have been obtained for selling the minor's property. This, in my opinion, does not debar the Court from actually ordering the sale and supervising the whole process in order to safeguard the interests of the minor ward for the protection of whose estate the ultimate responsibility is always that of the Guardian Court. Indeed in

proceedings in which interests of minors are involved the courts being in the position of quasi-tutelage have a duty to protect their interests and in the discharge of this function have full power to control such proceedings.

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The learned counsel for the appellant has also contended that the suit for specific performance is barred by time and that the Court below is wrong in holding that the case is governed by the second part of Article 113 of the Indian Limitation Act. According to the learned counsel conditions 1 and 5 of the conditions of the auction sale read together clearly show that registration was to be effected within a week after confirmation by the Court with the result that the suit should have been filed within three years from the date so fixed, namely, one week after the confirmation. It is, however, urged in reply, that Mr. Amrit Lal Ahluwalia has, as a witness, stated that he did not take any sanction of the Court for the conditions of the sale which he himself included in the auction notice and, therefore, it could not be said that the parties had by agreement fixed a date for the performance of the contract. It is further contended that according to the conditions of the auction the purchaser was saddled with the obligation of getting the registration effected within the period fixed, failing which the amount paid was to be forfeited, but the Court or the Guardian of the minor having not taken any action under the the aforesaid two conditions, the time fixed for the registration should be deemed to have been extended which, according to the counsel for the respondents, was permissible under the law. In my opinion, it is not necessary to decide this somewhat difficult question in view of our decision on the first point that the sale in question is covered by the provisions

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of section 2(d) of the Transfer of Property Act and, therefore, no registration as required by section 54 of the Transfer of Property Act was necessary.

The learned counsel for the respondents has also contended that his case is covered by the doctrine of part performance on which section 53A of the Transfer of Property Act is based. He contends, as laid down in *Mst. Shankri and others v. Milkha Singh* (1), a decision by a Full Bench of three Judges, that if he is in possession as a purchaser then although there is no registered document in his favour, he is entitled to seek a declaration, even as a plaintiff, by invoking the rule of equity embodied in section 53A of the Transfer of Property Act. He has also referred us to *Assistant Custodian Evacuee Property, Ludhiana v. Jiwa Singh and others*, (2), in which a Division Bench of this Court had relied on *Mst. Shankri's case* (1). It was held in the unreported case that where a plaintiff's possession was threatened, he was entitled to a declaration that he was lawfully in possession of the property in dispute which had been delivered to him by the defendants and over which he had a lien for the value of the property which the plaintiff had handed over to the defendants in exchange and for the money paid by the plaintiff to the defendants. The decision in the unreported case does support the respondent. I would, however, like to abstain from basing my decision on this contention, because I find that in a later decision of the Lahore High Court by a still Larger Bench, reported as *Milkha Singh v. Mst. Shankari and others* (3) two of the propositions of law enunciated in the Full Bench decision reported

(1) A.I.R. 1941 Lah. 407.

(2) L.P.A. 59 of 1953.

(3) A.I.R. 1947 Lah. 1 (F.B.),

in *Mst. Shankari and others v. Milkha Singh* (2), were dissented from, and the matter has not been fully and properly argued by the counsel for the parties before us.

In the present case, however, there is no question of there being a contract to transfer, for consideration, any immovable property by means of a writing signed by the seller which on account of non-registration is inadmissible in evidence so as to invoke the doctrine of part performance underlying section 53A of the Transfer of Property Act. In view of our decision on the first point I think it is hardly necessary even to decide the correctness of this contention raised by the learned counsel for the respondents.

In the next place, the learned counsel for the respondents has contended that in any case he is entitled to a declaration that he is in possession as a charge-holder or a mortgagee by virtue of having paid the amount for redeeming the earlier mortgage. In this connection he has drawn our attention to the provisions of section 92 of the Transfer of Property Act which embodies the rule of subrogation. I, however, do not think the learned counsel can take any advantage from the rule embodied in section 92 because in the present case the mortgagee who has been paid off was not a mortgagee with possession and, therefore, even if the respondents be held to be entitled to be subrogated to the position of the said previous mortgagee, they cannot claim to take possession of the property as the mortgagee's representatives. What, in my opinion, the respondents can legitimately ask to be entitled to is to claim a charge on the property in question, as against the seller, for the amount of the purchase money properly paid by them as sale

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price. This right is conferred on them as purchasers by section 55(6) (b) of the Transfer of Property Act. But as stated above the respondents having been held by us to be entitled to a declaration that they are in possession of the property in suit as purchasers the question of declaring their charge on the property as vendees does not arise.

The learned counsel for the appellant has as a last resort contended that in any case no declaration with respect to the taur or vacant site could or should have been granted, because the documentary evidence conclusively shows that it was only the two houses which had been sold without any vacant site attached to them. In support of his contention he has drawn our attention to the report of Mr. Amrit Lal Ahluwalia, dated 21st of June, 1943, and has also referred us to the plan attached with the plaint. It may in this connection be remembered that in the very first application filed by the minor's guardian on the 27th of January, 1941, it was expressly mentioned that "if two quarters together with adjoining land measuring about one bigha is sold . . . "which clearly shows that the guardian actually intended to sell the said two houses together with the adjoining land. Again in the application dated 24th of May 1943, the guardian of the minor expressly referred to the sale of "the two quarters and a site" as mentioned in his previous application. After the sale of the property, in the application filed by Des Raj Mehta on the 26th of July, 1943, there was an unambiguous assertion that he had purchased the "houses together with a site" and it was precisely this property that the mortgagee released from his charge by virtue of the receipt, dated 28th of July, 1943. Then again, on the 2nd of November, 1945, Des Raj Mehta in his application to the Court expressly asserted the purchase of two

roofed quarters together with a site. In reply to this application the guardian of the minor filed a petition on 9th of February, 1944, but did not care to controvert the assertion that the site was also the subject-matter of the auction sale. In the present suit also the defendant-appellant never claimed any issue on the question of vacant site not being a part of the property sold and did not even argue this part of the case in the Court below. As a matter of fact he did not even care to appear as his own witness with the result that this part of the case was never seriously urged before the Court below on his behalf at any stage of the suit. The learned counsel suggested that the case might be remanded for trial on this question as according to him the report of the auctioneer showed that it was only the two houses without any vacant site that were sold. I regret I find it exceedingly difficult to agree to this suggestion. The appellants had never cared to controvert the claim put forward at the earliest stage by the respondents that the houses along with the vacant site had been purchased by them; indeed the vacant site was actually intended by the minor's guardian to be sold for the purpose of relieving the property from the charge of mortgage and the Court's permission was sought for its sale. It is in fact not even shown that the vacant site has any independent approach from public road; on the other hand the plan on the record appears to suggest that the vacant site forms almost a part of the two houses and may be that the only approach to this site is through the two houses. But be that as it may, it is too late now on appeal to entertain this plea, which is essentially a plea of fact; and to remand the case for retrial. I need hardly observe that there is absolutely no equity in favour of the appellant and as the history of the dispute narrated

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above shows, he has all along been trying to deprive the honest purchasers of the property of its possession though full price has been paid by them. This money has actually been utilised in discharging the debt which was a charge on this very property. There is neither law nor equity in favour of the appellant's claim and the interests of justice will not be advanced by conceding to his belated and wholly unjustified request for remand.

For the reason stated above, the appeal fails and is hereby dismissed with costs.

FALSHAW, J.—I agree.

B.R.T.