

**(1937) 04 AHC CK 0003**

**Allahabad High Court**

**Case No:** None

Nanhe Lal and Another

APPELLANT

Vs

Ram Bharose and Others

RESPONDENT

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**Date of Decision:** April 1, 1937

**Acts Referred:**

- Transfer of Property Act, 1882 - Section 3

**Citation:** AIR 1938 All 115

**Hon'ble Judges:** Sulaiman, C.J

**Bench:** Division Bench

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### **Judgement**

Sulaiman, C.J.

This is a plaintiffs' appeal, arising out of a suit for sale on the basis of a mortgage deed dated 20th January 1922, executed by one Mulla in favour of the plaintiffs hypothecating a house and a property called "Nibhera" which was a collection of two shisham and 13 nim trees standing on land not belonging to the mortgagor. After this mortgage deed, the mortgagor executed a second mortgage deed of the trees only in favour of Nanki. Nanki brought a suit for sale on the basis of his mortgage deed, without impleading the present plaintiffs, and obtained a decree and purchased the trees. After his death, the property was sold by his widow viz. d of and ant 2 in this case, to the vendee defendant 3, and the latter appears to have out away the trees and appropriated them. The plaintiffs then brought a suit in 1930 on the basis of their mortgage deed and obtained a decree and executed it and got the house sold and purchased it themselves. In the meantime, Nanki had died before the suit and his heirs were not brought on the record. The plaintiffs were therefore unable to proceed any further. The present suit was brought in 1932 for sale on the same mortgage deed by enforcing the charge against the trees which had in the meantime been appropriated by defendant 3. The lower appellate Court held that the trees which stood on the land constituted an immovable property, but that defendant 3 was not personally liable to make good the loss to the mortgagee.

It also held that the second suit was not maintainable. One of us before whom this appeal first came up referred it to a Division Bench. It seems to us that the view taken by the lower Appellate Court that the suit is not maintainable is not correct. The previous suit had been brought at a time when the defendant Nanki was dead and the decree obtained against the deceased person was altogether void. As Nanki was not interested in the house sold and was a mortgagee of the grove only, the decree was not binding on his heirs so far as the grove was concerned. The result therefore was that in the previous suit the subsequent mortgagees of a part of the mortgaged property had by mistake been left out. There is nothing to bar the subsequent suit against the persons so left out.

2. We however think that the lower Appellate Court is wrong in thinking that this so-called grove constituted immovable property. The trees were timber trees which were shisham and nim and not ordinary fruit trees. u/s 3, T.P. Act, the definition of immovable property does not include standing timber. The mortgage deed therefore did not come under Ch. 4, T.P. Act, at all, as it was a hypothecation of moveable property only. In these circumstances, the claim so far as the trees are concerned, was not governed by the 12 years rule but by the six years rule. The suit brought in 1932 was therefore barred by time. The plaintiffs had no right to enforce the claim against defendant 2 or her transferee. The appeal is therefore dismissed with costs.