

**(1920) 10 AHC CK 0007****Allahabad High Court****Case No:** None

Karan Singh

APPELLANT

Vs

Ishtiaq Husain and Another

RESPONDENT

**Date of Decision:** Oct. 26, 1920**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 2 Rule 2

**Citation:** AIR 1921 All 312 : (1921) ILR (All) 268 : 61 Ind. Cas. 376**Hon'ble Judges:** Pramada Charan Banerji, J; Gokul Prasad, J**Bench:** Division Bench**Final Decision:** Dismissed**Judgement**

Pramada Charan Banerji and Gokul Prasad, JJ.

The suit which has given rise to this appeal was brought under the following circumstances.

2. One Ashfaq Husain who is now represented by the defendants respondents mortgaged his zamindari property under three mortgages. The first of these was executed in favour of Khurshed-un-nissa and others in 1884. The other two which also related to the same property were executed in 1887 in favour of Sheo Prasad, who was represented by Mohabbat Bahadur and others, Both sets of mortgagees brought suits upon their mortgages in 1910 and obtained decrees for sale; neither mortgagee was made a party to the suit of the other. Khurshed-un-nissa put her decree into execution and on the 20th of June, 1912, she caused the mortgaged property to be sold by auction and the present plaintiff purchased it for Rs. 14,250. The amount of the mortgage held by Khurshed-un-nissa was discharged in full out of the sale proceeds and there was a surplus of Rs. 9,000 and odd which remained in court.

3. Mohabbat Bahadur and others applied for payment out of this sum of the amount of their decrees but, unfortunately, the court on the objection of the defendants,

refused to grant their application. We think that in so doing the court acted erroneously. In our opinion upon the sale of the property the security held by Mohabbat Bahadur and others was transferred to the surplus sale proceeds which represented the mortgaged property. To this matter we will refer later on; but we may repeat that had it not been for the order of the court refusing to pay over to Mohabbat Bahadur and others the amount of their decrees and had not their mortgagor objected to such payment, the present litigation would never have come into existence. Upon the court's refusing to pay to Mohabbat Bahadur and others the amount due upon their decrees, the mortgagors themselves withdrew from court the aforesaid sum of Rs. 9,000 and odd. Mohabbat Bahadur and others then applied for execution of their decrees and for sale of the mortgaged property. Thereupon the plaintiff brought a suit for a declaration that Mohabbat Bahadur and others were not entitled to do so. This suit was dismissed, but the court deciding it added to its decree a condition to the effect that if the property was sold in execution of the decrees held by the subsequent mortgagees, that is, Mohabbat Bahadur and others, the purchaser would not be entitled to obtain possession and to oust the plaintiff unless he redeemed the prior mortgage, in satisfaction of which the property had been sold and purchased by the plaintiff Mohabbat Bahadur and others, the subsequent mortgagees, pursued their application for sale of the mortgaged property and their decrees were transferred to the Collector for execution. In order to prevent a sale of the property the plaintiff paid the amount of their decrees and thus protected the property from the sale and then instituted the present suit for recovery of the amount paid together with interest. The suit was resisted by the defendants on various grounds. The court below has dismissed it mainly on the grounds that the purchase by the plaintiff was a purchase subject to the mortgage of Mohabbat Bahadur and others, and that therefore the amount which the plaintiff paid as consideration only represented the value of the interest of the mortgagors, and that the plaintiff was bound to discharge the mortgages of Mohabbat Bahadur and others if he wished to protect the property from a second auction sale. This, as we have said above, is the main ground upon which the learned Subordinate Judge has dismissed the suit. He has also held that Order II, Rule 2, of the CPC is a bar to the maintenance of the present suit. We may at once observe that this last ground of the learned Judge's decision is wholly untenable. The cause of action for the suit which the plaintiff previously brought was not the same as that for the present suit. At the time when that suit was brought he had not discharged the mortgages held by Mohabbat Bahadur and others, and therefore he was not in a position to claim in that suit the relief which he now seeks in the present suit.

4. As regards the other ground of the learned Judge's decision we are unable to agree with his view. It cannot be said that the plaintiff purchased the property subject to the subsequent mortgages held by Mohabbat Bahadur and others. The sale was in execution of a decree obtained upon the prior mortgage held by

Khurshed-un-nissa and others. The only defied in the plaintiff's title was that it was still open to the second mortgagees, who had not been made parties to the first morlgagee's suit, to redeem the prior mortgage, but it cannot be said that the plaintiff did not acquire the property itself but only such rights as remained in the mortgagors and subject to the subsequent more gages. In our opinion the only right which the subsequent mortgagees had was the right to redeem the prior mortgage and, if they did so, to sell the mortgaged property for the consolidated amounts of the prior mortgage and their own subsequent mortgages. Subject only to this right, the whole property must be deemed to have been purchased by the plaintiff. Furthermore, the proceeds of the sale at which the plaintiff purchased were sufficient to discharge the prior mortgage, and a large surplus remained which was more than sufficient for the payment of the subsequent mortgages. After the sale of the property the security which was held by the subsequent mortgagees was transferred to the surplus sale proceeds, which represented the value of the property, and the subsequent mortgagees were entitled to be paid the amount of their mortgages from these surplus sale proceeds. In the case of Barharndeo Brasad v. Tara Chand ILR (1913) Cal. 654 their Lordships of the Privy Council held that when property is sold under a prior mortgage, the security of a subsequent mortgagee is transferred to the surplus sale proceeds, and it did not cease to be such security because the mortgagor had improperly withdrawn the money from court. In the present case, upon there being a surplus after the sale in satisfaction of the decree on the prior mortgage, the security of the subsequent mortgagees was transferred to the surplus sale proceeds, and they were entitled to be paid out of the amount of the surplus. The mortgagors in resisting their prayer for such payment and in withdrawing the money from court acted improperly and contrary to their rights. The plaintiff having paid full value for the property which was the subject of the first mortgage was not liable to redeem the subsequent mortgages. There were sufficient funds in court to discharge those mortgages and it was only in consequence of the mortgagors appropriating those funds by withdrawing them from court that the plaintiff was obliged to pay the amount of the subsequent mortgages in order to save the property from sale in satisfaction of those mortgages. We think that injustice and equity the plaintiff is entitled to be reimbursed the money which he paid in discharge of the subsequent mortgages and for which the defendants were primarily liable. In this view we think the decision of the court below is erroneous. We accordingly allow the appeal, set aside the decree of the court below and decree the plaintiff's claim with costs in both courts. The plaintiff will get future interest at 6 per cent, per annum from the date of the suit to the date of payment.