

**(1916) 05 AHC CK 0007**

**Allahabad High Court**

**Case No:** None

Ram Narain

APPELLANT

Vs

Bhoj Raj

RESPONDENT

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**Date of Decision:** May 30, 1916

**Acts Referred:**

- Transfer of Property Act, 1882 - Section 72

**Citation:** (1916) ILR (All) 530

**Hon'ble Judges:** Henry Richards, C.J; Muhammad Rafiq, J

**Bench:** Division Bench

**Final Decision:** Dismissed

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### **Judgement**

Henry Richards, C.J. and Muhammad Rafiq, J.

This appeal arises out of a suit for pre-emption. The first court decreed the claim, the lower appellate court modified the decree. The defendant vendee has appealed. It appears that as far back as the year 1873, the property was mortgaged with possession to the vendee. On the 19th of October, 1911, the mortgagor sold his equity of redemption to the vendee defendant for the sum of Rs. 8,000. This sum of Rs. 8,000 was made up of Rs. 3,000, the original money advanced on the mortgage and Rs. 5,000, Government revenue which the vendee said he had paid in respect of the property. The mortgage-deed contained a clause that the mortgagor would pay the Government revenue, and that if he failed to do so, then the mortgagee should be entitled to recover the sum from the mortgagor and his other property together with interest at the rate of one per cent, per mensem. Both courts have found that as a matter of fact the mortgagee had to pay and did pay the Government revenue. The question which we have to consider in the present appeal is what sum the plaintiff should pay as a condition precedent to obtaining possession of the property. It may be taken as a fact that the property is not really worth Rs. 8,000. It is contended on behalf of the plaintiff that, having regard to the terms of the mortgage and also having regard to the fact that the mortgage was executed before

the Transfer of Property Act came into operation, the mortgagee was not entitled to the benefit of Section 72, which entitles a mortgagee in possession to pay money in order to save the mortgage property and to add it to its principal. On the other hand, it is contended that the principle underlying the provisions of Section 72 of the Transfer of Property Act, is not new, that the same principle of equity existed before. There seems to us considerable force in this latter contention. In any event the mortgagor may well have considered that his property was really liable for the Government revenue which had been paid by the mortgagee and that therefore he could not redeem the property without paying that amount together with Rs. 3,000 the original advance. If therefore we assume the genuineness of the earlier mortgage and the bona fides of the parties, it seems to us that the plaintiff, in order to entitle him to be substituted for the vendee, must do what the vendor had agreed to do viz., to discharge the claims that were made by the vendee and in consideration of which he transferred the equity of redemption. It is argued, however, that the mortgage in 1873 was really a sale and that the agreement by the mortgagor to pay Government revenue was fictitious. This argument is based upon the alleged fact that the property was never worth even the 3,000 rupees. The answer to this contention is that if the transaction of 1873 was really a sale, the suit ought to have been to preempt that, not the sale which took place in 1911. Such a suit is long barred by time. If the transaction was a fraud it can hardly be said that the pre-emptor did not know of it, because the presumption that it is a fraud, is based upon the fact that the property was not worth anything like the three thousand advanced. In our opinion the consideration must be Rs. 3,000 together with the Government revenue which have been found to have been paid by the mortgagee, but in calculating this amount interest will only be allowed at annas ten per cent, per mensem on the Government revenue so paid. We modify the decree of the court below accordingly. The interest will be calculated by the office on the amount paid for the Government revenue, that is to say, each time the mortgagee paid the Government revenue, he will be entitled to get annas ten per cent, per mensem upon each payment simple interest. We extend the time to six months from this date. If the plaintiff does not pay the amount ascertained within the time aforesaid, the suit will stand dismissed in all courts. The appellant must have his costs of this appeal.