(1956) 01 AHC CK 0026

Allahabad High Court (Lucknow Bench)

Case No: First Appeal No''s. 99, 106 and 115 of 1945

Mohd. Mohsin and Another		APPELLANT
	Vs	
Kausar Raza and Others		RESPONDENT

Date of Decision: Jan. 5, 1956

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 34 Rule 1
- Transfer of Property Act, 1882 - Section 101, 76

Citation: AIR 1956 All 422

Hon'ble Judges: Kidwai, J; H.S. Chaturvedi, J

Bench: Division Bench

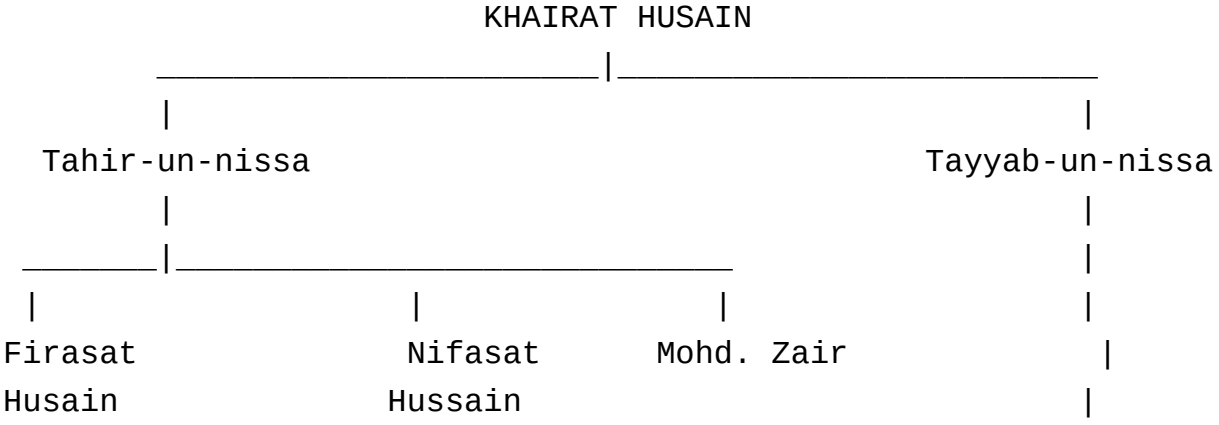
Advocate: Niamatullah, Hakimuddin and Inayatullah, for the Appellant; B.K. Dhaon and M.L. Trivedi, (for Nos. 1/6 to 1/9), Mohd. Husain, (for Nos. 2/1 to 7, 12 and 14) and B.K. Dhaon, (for Nos. 8, 9 and 11), for the Respondent

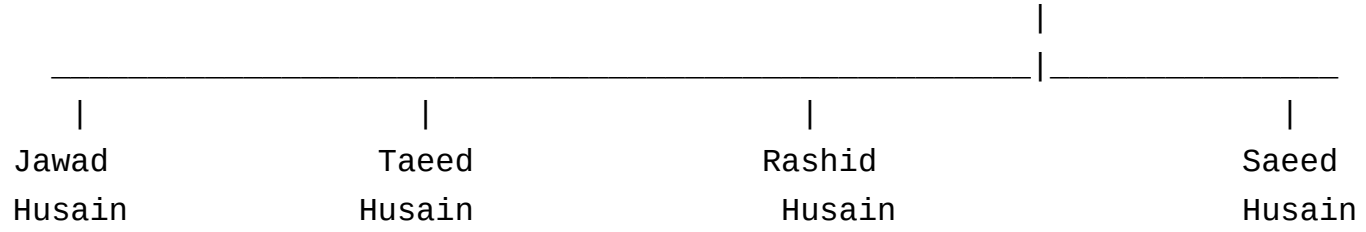
Final Decision: Dismissed

Judgement

Kidwai, J.

The following pedigree will elucidate the facts of the case:





2. Khairat Husain, a Shia Muslim, died leaving two daughters as his heirs. His immovable property consisted of 3 villages, Garhi Rakhmau, Murligang and Rasoolabad. After the death of Tayyab-un-nissa, her eldest son, Jawad Husain, laid claim to the whole property and got mutation effected in his favour alone. It is no longer in dispute that as a matter of fact Tahir-un-nissa, and after her, her sons, were entitled to and the latter got, an eight annas share and each of the four sons of Tayyab-un-nissa was entitled to and eventually got a two annas share.

3. On 7-12-1883, Tahirunnissa executed a deed under which Jawad Husain was allowed possession of her eight annas share in the property and Jawad Husain undertook to pay her an allowance of Rs. 500/- per annum. On 16-2-1886 Speed executed a deed agreeing to take Rs. 125/- per annum in lieu of his share which would have been 2 annas. The other two brothers of Jawad executed no deed but he continued in possession of their shares also.

4. On 21-12-1895, Jawad mortgaged the whole property to Raja Tasadduq Rasul Khan of Jahan girabad to secure a loan of Rs. 25,000/- and agreed to pay interest at 7,1/2 per cent. Taeed Husain and Rashid Husain signed the deed as witnesses. The deed was without possession but there were certain stipulations which would enable the mortgagee to take possession and to enhance the rate of interest. The mortgagee never did in fact take possession.

5. On 1-11-190S, Taeed mortgaged his 2 annas share to Ajodhia Prasad in lieu of Rs. 10,000/-. This mortgage was also without possession.

6. On 13-8-1908, Raja Tasadduq Rasul Khan instituted a suit for sale on the basis of his mortgage. He sought the sale of only the 6 annas share belonging to Jawad, Taeed and Rashid and the did not implead Ajodhia Prasad. He obtained a compromise decree on 20-10-1908, by which the execution of the decree was postponed for four years and if it was not satisfied then the 2 annas share of Jawad was to be sold first, then the 2 annas of Taeed and then the 2 annas of Rashid.

7. The decree was not fully satisfied by the Bale of Jawad''s share and consequently the shares of Taeed in each of the villages had also to be sold. They were purchased

in May and July, 1914, by Ainul Husain and Maqsud-un-nisa, wife of Taeed Husain. (The sale certificates were issued on 23-7-1915). Delivery of possession was duly made in pursuance of the sales on 6-8-1915.

8. Ajodhia Prasad having died, Gurdayal, his son, instituted on 16-9-1917, a suit for the recovery of money on the basis of the mortgage in favour of Ajodhia Prasad. Taeed Husain and the two auction purchasers were impleaded as parties to this suit and it was specifically mentioned that Ainul Husain and Maqsud-un-nissa were impleaded as subsequent transferees. There was no prayer for a decree for redemption of the earlier mortgage in favour of the Raja who was not impleaded.

9. During the pendency of the suit Gurdayal also died and Ramnath Kuar, Tulsha Kuar, Sia Kishori and Subhedra Kuar were brought on the record. The trial court ordered that the plaintiff should be allowed to redeem on payment of the proportionate share of the mortgage money due to the Raja or, if they so choose, they could sell the property subject to the incumbrance in favour of the defendants (vide Ex. 91 dated 9-9-1918).

On appeal the Judicial Commissioner''s Court modified the decree of the trial court by deleting the provision relating to redemption and directing that "the plaintiff will be entitled to bring the mortgaged properties held by the contesting defendants" (Ainul Husain and Maqsud-un-nissa) "to sale in case of non-payment of the decretal money which may be found due to him subject to a proportionate liability for the money due on the mortgage effected by Jawad Husain in favour of Raja Tasadduq Rasul Khan" (-- vide Ex. 5).

The decree was made final on 25-7-1922, for Rs. 45,295/11/6 and the shares in Rakhumau and Rasoolabad were sold on 20-5-1926, while the share in Murliganj was sold on 20-4-1929.

10. The decree-holders themselves purchased the properties and obtained sale certificates on 14-9-1929 (Exs. 8, 10 and 9). Sometime in September-October, 1929; they obtained -actual delivery of possession over the property sold but Ainul Husaia and Maqsud-un-Nissa objected stating that the, decree-holders

""were entitled to put to sale the property in suit, subject to the charge in the name of Maqsud-un-nissa and Ainul Husain, the persons in possession of the property and as the prior mortgagees were in possession of the property in suit, their actual possession over the property in suit was to be maintained upto the time when the prior charge was paid and against this purpose of the decision of the Judicial Commissioners no action could be taken."

11. It was also objected that as prior auction purchasers and "also on the basis of the prior mortgage" the objectors, who were in possession were entitled to remain in possession and if it was considered that the fresh auction purchasers could obtain actual possession, then they, should first pay off the prior charge.

12. At the hearing of this objection the agent of the decree-holders auction Purchasers stated that he only desired formal delivery of possession and did not wish to dispossess the objectors. The objectors agreed to this position and the Court ordered, on 12-8-1930, that only formal proprietary possession of the decree-holders was to be maintained.

13. On 3-9-1935, the auction purchasers under the second decree transferred a 15/16th share of the property purchased by them (the remaining 1/16 vested in another person) to Syed Mohammad and Mohsin and Syed Mohammad Husain and on 28-7-1938, the said transferees instituted the suit out of which this appeal arises for redemption without, payment of anything since the money due had already been liquidated out of the income of the property. A decree of Rs. 1,500/- as mesne profits was also claimed.

14. The various defendants took a large number of pleas in their written statements including the plea that no suit lay for the redemption of the mortgage on the ground that the mortgagors were agriculturists. The following three preliminary issues were framed:

(1) Were Jawad Husain and Taeed Husain agriculturists at the time of the execution of the mortgage?

(2) Is the suit barred by Section 25 of the Agriculturists'' Relief Act us alleged?

(3) If the second issue is answered in the affirmative can this plaint be treated as an application u/s 12 of the Agriculturists'' Relief Act?

15. The learned Civil Judge held that Jawad Husain and Taeed Husain were agriculturists and that, therefore, the suit was barred u/s 25 of the Agriculturists'' Relief Act. He further held that the plaint could not be converted into an application u/s 12 of the Agriculturists'' Relief Act. He accordingly dismissed the suit.

16. The plaintiffs appealed and a Division Bench of the Chief Court of Avadh held:

(1) That Jawad and Taeed were agriculturists and that no suit for redemption lay in respect of the mortgage executed by them:

(2) That the suit could, however, be treated as an application; and

(3) That this was not a suit for redemption but a suit for possession on the terms already fixed by the Judicial Commissioner''s decree in the suit on the basis of the second mortgage.

17. The appeal was accordingly allowed and the Court held that, in view of its last finding, an application u/s 12 of the Agriculturists'' Relief Act did not lie taut that the suit should be tried on the regular side. The case was accordingly tried and the following issues which were framed by the learned Civil Judge will sufficiently indicate the various pleas raised in defence.

1. Is the sale deed Exhibit 13 genuine?

2. (a) If so, are the plaintiffs (vendees mentioned in it) benamiders? If so, its e,7ect?

2. (b) Does Exhibit 13 amount to a transfer Of a right to sue?

3. Is this suit barred by limitation?

4. What is or was the proportionate liability of the plaintiffs or their predecessors in interest?

5. Does the judgment Exhibit 5 operate as res judicata on the question of the proportionate liability?

6. (a) Can no accounting be gone into in this case?

(b) If on accounting anything is found due to the plaintiffs, are they not entitled to a decree for the same in this case?

(c) On payment of what amount, if any, are the plaintiffs entitled to recover possession of the property in suit?

7. Are defendants estopped from denying the rights of Jawad Husain to mortgage the entire 10 annas share?

8. (a) Did Rashid Husain consent to the mortgage deed executed by Jawad Husain in favour of Raja Sahib of Jahingirabad?

(b) Are defendants estopped by reason of Exhibits 2 and 5 from contesting issue 8 (a) ?

9. Can the liabilities of other persons except Taeed Husain not be determined even to find out the share of Taeed Husain?

10. Did defendants 1 and 2 cut off trees during the pendency of this suit? If so their value?

11. Are the plaintiffs bound by the compromise Exhibit 2?

12. To what relief are the plaintiffs entitled? (18)

18. The trial Court found:

(1) That the sale deed in favour of the plaintiffs (Ex. 13) was genuine:

(2) That the plaintiffs were not benamidars but real purchasers:

(3) That by Ex. 13 the property itself was transferred and not a mere right to sue:

(4) That the suit is not barred by limitation:

(5) That the plaintiffs are liable to pay the defendants 1 to 7 (the successors-in-interest of the purchasers under the sale held in execution of Raja

Tasadduq Rasul''s mortgage) 15/16 of 1/3 or 5/16 of the money due under the mortgage before they can get possession (1/3 being the share of Taeed which was ordered by the Judicial Commissioner''s decree to be sold subject to a proportionate liability for the mortgage debt):

(6) That the judgment of the Judicial Commissioner''s Court (Exhibit 5) operates as res judicata on the question of proportionate liability?

(7) That Ainul-Husain and Maqsud-un-nissa did not enter into possession as mortgagees but as auction purchasers of the mortgagor''s interest and they cannot be called upon to account:

(8) That the plaintiffs are entitled to get the property on payment of Rs. 11,759/2/6 (the proportionate share of the money due in respect Of 15/16 of the 2 annas share of Taeed Husain at the date of the sale to Ainul Husain and Maqsud-un-nissa):

(9) That the defendants are not estopped from denying the right of Jawad Husain to mortgage the entire property left by Khairat Husain:

(10) That Rashid Husain consented to the mortgage deed executed by Jawad Husain in favour of Raja Tasadduq Rasul:

(11) That the liabilities of various persons can be determined in order to ascertain the share of Taeed Husain:

(12) That defendants 1 and 2 did not cut any trees: and

(13) That the plaintiffs are not bound by the compromise between Raja Tasadduq Rasul Khan, Jawad Husain, Taeed Husain and Rashid Husain. As a result of these findings the plaintiffs were granted a decree for possession conditional upon their depositing Rs. 11,759/2/6 in Court within three months. It was provided that should they fail to do so the suit would be dismissed with costs. *

19. Three appeals have been filed against this decree. In First Civil Appeal No. 99 of 1945, which was filed by the plaintiffs, as many as ten grounds are taken for dissatisfaction with the decree but Mr. Niamatullah confined his arguments to the following point only, namely," that Ainul Husain and Maqsud-un-nissa on obtaining the property as auction purchasers entered into possession as mortgagees and were liable to account for the profits received by them and that, in any case, since they relied upon the prior mortgage in favour of the Raja as a shield they could not have the benefit of the profits of the property without accounting for them.

It was also urged that in accounting the enhanced rate of interest provided in the deed in favour of Raja Tasadduq Rasul Khan was pena), and could not be considered while after 1-1-1930, only interest according to the Agriculturists'' Relief Act could be allowed.

20. The other two appeals, First Civil Appeal Nos. 106 and 115 of 1945, were not pressed by the learned counsel who appeared for the appellants.

21. It is not disputed that the title which Ainul Husain and Maqsud-un-nissa acquired at the sale in execution of the Raja''s decree was the title of the mortgagor and, to a certain extent, of the mortgagee in execution of whose decree they purchased the property. This was, of course, sub- ject to the rights of the puisne mortgagee who was no party to the Raja''s suit,

22. There is also no dispute that Ajodhia Prasad and his successors were not affected in any manner by the decree in the Raja''s suit, or by ''the proceedings, including the sale, held in execution thereof. They were entitled to treat the mortgage as a subsisting one and either to redeem it or to sell the property subject to it. As has already been stated Gurdial, Ajodhia Prasad''s son, sued, not to redeem the Raja''s mortgage but to realise his money by the sale of the mortgaged property and he was allowed to do so subject to a proportionate liability for the money due on the Raja''s mortgage.

23. On the sale taking place in execution of Gurdial''s decree, the title of Ainul Husain and Maqsud-un-nissa, in so far as it was derived from the mortgagors, i.e. as owners, ceased. They were however, allowed to continue in possession on the conditions already stated.

Clearly this arrangement was arrived at because the money which they had paid for the purchase was utilised to pay off the Raja''s mortgage and they were entitled to set up that mortgage as a shield and to insist upon continuing in possession till the proportionate share of that mortgage had been paid off.

24. The question that has now to be decided Is how is the money due to the successors of Ainul Husain and Maqsud-un-nissa to be ascertained and are they liable to account for the profits of the whole period during which they were "in possession or, at least, for the period after which they ceased to be owners.

25. The mortgages with which we are concerned are simple mortgages which did not confer upon the mortgagee any right to possession. Had Gurdial, therefore, brought his suit for sale of the mortgaged property before any decree had! been passed on the Raja''s mortgage, he or a purchaser in execution of the decree could not have claimed accounting: the Raja was a prior mortgagee and was not in possession and the mortgagor had not agreed to hand over the rents and profits and so could not be called upon to account.

Can then the transferees of the mortgagors'' rights -- for it is in that right that the auction purchasers obtained possession of the property --at a sale held in pursuance of a decree which had no effect on Gurdial''s right be called upon by Gurdial to account for the rents and profits received by them.

Prima facie, it would appear that they cannot be made so accountable. The appellants'' learned advocate, however, placed before us certain decisions in support of his contention that they may be made accountable. We will proceed to examine these decisions but, before doing so reference may be made to two passages in Ghosh''s Law of Mortgages upon which Mr. Dhaon, for the respondents, relied. The following passage occurs at page 554 (5th edition):

"It may here be useful to point out that the liability to account as mortgagee in possession attaches only to a mortgagee who knowingly enters into possession in that character and not to one who receives the rents and profits in the honest belief that he has become the owner; as the analogy between a mortgagee and a bailiff, to which, according to Lord Westbury, the practice of charging the mortgagee with wilful default, on which I will say a few words presently, owned its origin, cannot obviously be extended to a case Where the mortgagee assumes possession in good faith, under an adverse right to the mortgagor".

26. Again at page 556 it is stated :--

"A mortgagee, however, who enters into pos session under a defective decree for foreclosure will be accountable for the rents and profits an mortgagee in possession. A purchaser under an imperfect decree for sale must also account for the rents and profits, if owing to the absence of any necessary party the sale operated merely as an assignment or the mortgage. ''But if the sale effected a transfer of the mortgagor''s estate though subject to incumbrances the purchaser would not be liable to account as mortgagee in possession because he would then stand in the place of the owner".

27. It must also be noted that Section 76(g) and (h) of the Transfer of Property Act do not apply since they are only applicable when receipt of money is in the capacity of a mortgagee, and in the present case, the possession of Ainul Husain and the heirs of Maqsud-un-nissa was not that of a mortgagee although, to protect their possession they could use the mortgage in favour of Raja Tasadduq Rasul Khan as a shield.

28. The first case which Mr. Niamatullah placed before us, not so much with the purpose of relying upon it as of distinguishing it, was the Privy Council decision in ''Umesh Chaunder v. Mt. Zahoor Fatima'' 17 Ind App 201 (PC) (A). In that case, on 29-7-1873 Farzand Ali and others mortgaged some property to Arshad Ali, predecessor of Zahoor Fatima, to secure a loan of Rs. 2,000/-. Thereafter mortgages of the same property were executed in favour of other persons also.

On 23-6-1875, the mortgagee having instituted a suit, to which the puisne mortgagees were not impleaded obtained! a decree for sale. On 15-12-1879, Zahoor Fatima, who had by this time succeeded to the interest of the mortgagee, herself purchased the property for Rs. 4,700/-, although the amount then due in respect of the mortgage decree was only Rs. 3,582-5-1. She obtained possession by virtue of her purchase.

Later on a puisne mortgagee brought a suit for sale of the whole mortgaged property. This suit was decreed leaving the rights of the various mortgagees -- and Zahoor Fatima was treated as one of the mortgagees -- to be worked out against the sale price. Although the suit was not one for redemption, and could not be dealt with as such, it was held that

"the rights of the plaintiff and Zahoor Fatima in the purchase money must be adjusted on the footing that the plaintiff has the right to redeem Zahoor Fatima''s two annas".

The question then arose as to the manner in which the money due to Zahoor Fatima was to be ascertained. Their Lordships discussed the rules laid down by the District Judge for this purpose and say

"One of them (No. 3) is that the possession of a mortgagee ''Shall be taken as equivalent to interest. This rule which appears to be just anal convenient, and is not objected to by either party, will relieve Zahoor from giving an account of her receipts and will deprive her of interest, from some time in the year 1880, when it appears that sha took possession".

29. Mr. Niamatullah contended that the principle here laid down is only applicable if neither party objects. He further contended that, but for the agreement of the parties, the mortgagee would be liable to account for the profits although she took possession as purchaser. These are certainly inferences which might be drawn from the decision but their Lordships do not say so.

Further in that case the mortgagee was herself the purchaser and it would have been inequitable -- after all it was a rule of equity that was being considered -- to allow her to keep the profits she had derived and also to claim interest.

30. The only other decision of the Judicial Committee which we have been able to consider is AIR 1922 11 (Privy Council) . In that case Nand Ram and others executed two simple mortgages in 1874 and 1875 hypothecating the property in suit to Kirpa Ram, husand of Mt. Sukhi.

On 15-1-1883 the mortgagors executed a mortgage by conditional sale of the property in suit in favour of Ghulam Safdar Khan and another. In 1886 Kirpa Ram brought a suit on the basis of his mortgages but he did not implead the subsequent mortgagees. He obtained a decree, put the property to sale purchased it himself and obtained possession over it.

Kirpa Ram died in 1895 and, under his will, Mt. Sukhi succeeded to all his property, including the property in suit. She made a gift of it to her nephew, Jag Ram and Net Ram, who, at the same time, covenanted to pay her Rs. 1,200/- a year as maintenance. In security they mortgaged all the property gifted by a deed dated) 14-10-1902.

In 1910 Ghulam Safdar and the successors of his co-mortgagees brought a suit for foreclosure on their mortgage against Jag Ram and Net Ram but did not implead Mt. Sukhi. Jag Ram and Net Ram put forward the mortgages of 1874 and 1875 as a shield. Ghulam Safdar had to pay Rs. 2,954/-in respect of those mortgages and thereupon got ft decree for foreclosure in respect of Rs. 864971377 which the defendants did not pay. This happened in 1913.

In 1914 Mt. Sukhi brought a suit for arrears of maintenance. The first Court decreed the suit on condition that Mt. Sukhi repaid RS". 2,954/-. On appeal the High Court ordered the payment of a further sum of Rs. 8649-13-7.

Their Lordships ordered Ghulam Safdar and his co-mortgagees to pay Rs. 2,954/- with interest at 6 per cent, from the date of the trial court''s decree to the plaintiff because it was by their mistake that Jag Ram and Net Ram had been enabled to take away the money. If they failed to pay this sum a sufficient portion of the property was to be sold to realise it.

This was made subject to the right of Ghulam/ Safdar to recover it from Jag Ram and N''et Ram by a separate suit. It was ordered that thereafter Mt. Sukhi could only put the rest of the property to sale if she paid Rs. 8649-13-7 the amount of the foreclosure decree.

Their Lordships did not allow any interest to ''Ghulam Safdar nor did they order accounting although Ghulam Safdar and his co-mortgagees had been in possession for about 8 years before this decree. In this case there was, however, no discussion of the matter nor can it be ascertained upon what principles their Lordships acted.

It is, however, to be noticed that one of the ''decisions which they had before them in another connection was that in 17 Ind App 201 (PC) (A) and that the decree in this case was in accordance with rule approved by their Lordships as "just and convenient", in that case.

31. The only two decisions of the Privy Council brought before us have been decided upon the principle that, during the period during which the mortgagee'' has obtained possession as a purchaser under a defective decree, he is not entitled to claim interest and he is not liable to accounting for the profits.

32. The next case upon which reliance was placed was ''Wahid-un-nissa v. Gobardhan Das 25 All 338 . (C) which is a Full Bench decision of the erstwhile Allahabad High Court. The point now under consideration was not considered in that case; so that case need not detain us.

33. In ''Girish Chunder v. Kedar Nath'' 33 Cal. 590 (D), some property was mortgaged on 11-9-1882 to Umesh. The same property was mortgaged on 25-8-1889 to Kedarnath. On 1-12-1890 Umesh having obtained a decree on his mortgage without impleading Kedarnath & purchased the property for Rs. 25/-although Rs. 350/-was then due on the mortgage. Thereafter Kedarnath instituted a suit on his mortgage

to which he did not make Umesh a Party.

He obtained a decree in 1900 and purchased the property himself in execution of the decree. On 14-8-1901 Umesh sold the property to a third person, who, on 29-11-1902, instituted a suit for possession. It was held that Kedarnath was entitled to redeem and an account of the money due on the first mortgage was directed to be prepared.

It was ruled that a calculation should be made of the money due for principal, interest and costs and redemption should! be allowed on payment of this sum. It was further directed "if the plaintiffs have been in actual possession they must either as against the interest bring into account any properties they have received or be disallowed interest during that period".

No mention is made in this decision of the consent of the parties being necessary to set off the Profits against interest.

34. In Jnanendra Nath Singh Roy Vs. Shorashi Charan and others the mortgagees sued without impleading one of the persons interested in the equity of redemption, obtained a decree and themselves purchased the property mortgaged. It was held that the latter was not bound by the decree and was in the same position as if no suit had been brought at all.

He was accordingly entitled to redeem and in preparing the account of the money due on the mortgage it was directed

"as regards the actual profits realised since 4-8-1915, when the mortgagees obtained possession of the mortgaged property, the learned Judge has, without taking any account, simply directed that such realisations be set off against the interest payable. This is a rough and ready method which may be adopted with the consent of the parties".

Their Lordships, however, made it clear that in the absence of such consent interest at the stipulated rate and profits derived from the property should both be taken with the consent. The lengthy judgment does not, however, discuss any principle upon which this conclusion was arrived at nor does it consider the case of a purchaser other than the mortgagee being in possession.

35. Further a different view has been taken by another division bench of the same Court in '' Sailendra Nath Bhattacherjee Vs. Amarendra Nath Mukherjee and Others, in which the learned Judges considered the decision in ''Jnanendra Nath''s case (E)'' which they followed in other respects, but held:

"In the case before us, defendants 10 and 11 in their character as the purchasers of the Sens'' mortgagee rights had no legal right to collect rents and profits, because the Sens'' mortgage was a simple mortgage, but as the purchasers of the right of the mortgagor they had the lawful right to do so. The collection of rent and profits

by them must, therefore, be attributed to them in that character in which they could have lawfully "collected them, on the principle that law presumes against misconduct "omnia praesumuntur rite esse acta".

"As a mortgagor who gives a simple mortgage is entitled to retain possession and to enjoy the rents and profits of the mortgaged properties and is not accountable for those profits, to the mortgagee, defendants 10 and 11 are not accountable" to the plaintiff, the puisne mortgagee for the profits they had received from 11-2-1927, when they were put in possession by the Court on the basis of their sale certificate".

The only distinction -- which was la vital one --between this case and the earlier Calcutta case is that, in the former case the mortgagee was himself the purchaser and in this case a third person was the purchaser.

36. Next reliance was placed upon Ram Sanehi Lal and Another Vs. Janki Prasad and Others and it was held that a purchaser at auction in execution of a decree obtained'' by a prior mortgagee without impleading the subsequent mortgagee can set up the prior mortgagee as a shield even though a suit on its basis would be time barred but no question as to the principle to be followed in accounting was discussed in that case.

Another case of the erstwhile Allahabad Hign Court, which was not referred to in the arguments does, however, have a considerable bearing on the case: it is '' Ramji Lal and Others Vs. Roshan Singh and Others, and is a decision of a division Bench composed of Niamatullah and Rachhipal Singh JJ. In that case the learned Judges held, following '' Nannu Mal Vs. Ram Chander and Others that the sale in execution of the prior mortgagees decree effectively transfers the mortgagors'' rights to the auction purchaser though the sale is not binding on the subsequent mortgagee who can exercise his right to redeem the first mortgage.

They further held that in order to ascertain what must be paid to redeem, the first mortgagee is entitled to have the account made up in accordance with the stipulations contained in the mortgage deed up to the date of redemption. They then proceed:

"At the same time, the prior mortgagee''s who have been in possession of the mortgaged property by virtue of the auction-sale held in execution of their own mortgage decree, should account for the usufruct received by them. They have to do this, not because their possession can be traced to anything in the mortgages in their favour, which were simple, but to the fact that the usufruct received by them should be considered to be tantamount to payments made by the mortgagors.

In this connection it should not be overlooked that as between the prior mortgagees and the mortgagors the latter''s rights were assigned to the prior mortgagees under the auction-sale in lieu of the mortgage money. The prior mortgagees have been in receipt of the usufruct as against the mortgagor in consideration of the whole or

part of the mortgage money which as against the mortgagors should be considered to have been wiped out.

Any payments which the mortgagor makes to the prior mortgagee enure for the benefit of the puisne mortgagee also. ''If the prior mortgagees be considered to be in possession of the mortgaged property under an arrangement madle by the Court in the auction sale on behalf of the mortgagor to the effect that the prior mortgagees may take possession of the mortgaged property and retain it as the owners thereof in full or part satisfaction of the mortgage money'' subject to the right of the puisne mortgagee''s right to redeem, ''there can be no doubt that the usufruct received by the prior mortgagees under such arrangement should, in relation to the puisne mortgagee, be considered to be payments made by the mortgagor''. Other- wise the prior mortgagees would! have it both ways.

On the one hand they insist on payment of the mortgage money consisting of the principal and interest calculated up to date, and on the other hand they are allowed to appropriate the usufruct which, but for the auction-sale in their own suit, would have been taken by the mortgagor".

The reasoning is perfectly clear and it depends upon the fact that the auction purchaser was himself the first mortgagee and the learned Judges treated the sale as

"an arrangement made by the Court in the auction sale on behalf of the mortgager to the effect that the mortgagee may take possession of the mortgaged property and retain it as owners thereof in full or part satisfaction of the mortgage money".

Thus the possession of the mortgagee, although it came into existence as that of an auction purchaser was deemed, by a fiction of law, to be still that of a mortgagee and it was considered that ha had been given possession as such. Such a reasoning cannot apply to the case of a stranger purchaser.

Further it may be noted that in that very case, owing to the difficulty of preparing an account the learned Judges were compelled to accept the position that the puisne mortgagee should be allowed to redeem on payment of the amount due on the date on which the prior mortgagee obtained possession, without being allowed any interest after that date although this was not the case which the puisne mortgagee desired to adopt.

37. The Bombay case upon which reliance was placed, Nagu Tukaram Ghatule Vs. Gopal Ganesh Gadgil, is not applicable to this case. In that case on 1-5-1920 one of the two joint co-owners mortgaged 3 fields to one Rupchand to secure a debt of Rs. 1,300/-. On 8-/-1922 both the co-owners mortgaged the same three fields and two more to Umabai.

Both mortgages were simple. Umabai instituted a suit on her mortgage without impleading Rupchand and on 8-4-1927 she obtained a compromise decree. On

26-8-1931 the property was sold in execution of this decree and was purchased by Umabai herself. The purchaser obtained possession on 25-12-1932.

In the meanwhile, on 29-11-1929 Rupchand had obtained a decree on his mortgage without impleading Umabai. In execution proceedings Umabai intervened and prayed to be allowed to redeem. She was referred to a separate suit but she never filed one. On 19-3-1934, the property was sold in execution of Rupchand''s decree and possession was delivered to him. Umabai''s transferee su''ed to redeem after accounting.

Various questions were raised which do not arise in the present appeal. With regard to the matter of accounting for profits it was held that Rupchand had not purchased the interest of the owner since that interest had already vested, by reason of her prior purchase, in Umabai and she, being no party to Rupchand''s suit, was not affected by the subsequent sale.

It was thus held that the only interest which was transferred was that of the mortgagee & that the auction purchaser as the holder of this interest only was liable to account for the profits during the period of his possession. The present case standis on quite a different footing inasmuch as the auction purchaser took possession in the right of an owner.

38. It is no doubt true that the two Madras cases upon which Mr. Niamatullah relied, '' Muthammal Vs. Razu Pillai alias Subbaraya Pillai and Others, and '' M.R.M.A.R. Natesa Chettiar Vs. T.A. Ramalingam Chettiar and Others, , support his contention and make even a stranger purchaser liable to account. In the later case it was contended that the purchaser of the rights of the mortgagor could not be called upon to account. This argument was repelled in the following words:

"It is first argued that as purchaser of the mortgagor''s right in the land, he steps into the shoes of the mortgagor and the latter, of course, is not accountable to any one for the profits of the land. This argument is fallacious. It ignores the fact that the purchase was made behind the back of the puisne mortgagee, in pursuance of a decree to which the puisne mortgagee was no party though he ought to have been made a party, in which case the lands would have been sold for their full value and the puisne mortgagee would have been-satisfied wholly or in part.

In this connection we observe that though the appellant declared in his plaint in O.S. No. 20 that when he bought the land at Court auction he knew nothing of the respondent''s mortgage, as a matter of fact the existence of that mortgage was proclaimed at the time of the auction.

The law as settled is that in relation to the puisne mortgagee, the decree on the first mortgage is to be treated as a nullity. The sale which took place in pursuance of that decree is thus a nullity and the purchaser at that sale could not acquire the rights of a mortgagor owner as against the puisne mortgagee.

The only right he did acquire against the puisne mortgagee arose from the fact that the purchase money either wholly or in part went to discharge the prior mortgage; so that he is able to revive the prior mortgage and hold it as a shield against the puisne mortgagee when the latter sues to bring the property to sale".

With great respect we are unable to accept this reasoning. It is because the puisne mortgagee was not made a party that he is enabled to redeem: he must be placed in the same position as he would have been had no decree been passed. As we have pointed) out, he would not have been able to call upon the mortgagor to account and consequently he cannot call upon the mortgagor''s successor to account.

Further this view is opposed to the view taken by the Full Bench of the erstwhile Allahabad High Court to Ram Sanehi Lal and Another Vs. Janki Prasad and Others and by Niamatullah & Rachhpal Singh JJ. in Ramji Lal and Others Vs. Roshan Singh and Others, to the effect that the sale in execution of the decree of the prior mortgagee is not a nullity but it effectively passes the interest of. the mortgagor to the auction purchaser subject to the right of the puisne mortgagee to redeem.

39. We regret that, with all deference to the learned Judges who decided the Madras cases, we are unable to accept the correctness of the view propounded by them.

40. We have, therefore, arrived at the conclusion that the puisne mortgagee, placed as Gurdial''s successors were, is not entitled to call for an account of the profits of the property in the hands of a stranger auction purchaser -- we are not called upon to decide what the position would be if the mortgagee was himself the purchaser --and that consequently as a matter of equity the said purchaser, although he may set up the earlier mortgage as a shield is not entitled to claim Interest for the period during which he was in possession.

This is what the trial court has done. It may be that the decree of the trial court is not in proper form, though it is difficult to see what other course was open to the learned Civil Judge in view of the decision of tine learned Judges of the Chief Court of Avadh in an earlier proceeding in this very matter. It is, however, not necessary at this stage to interfere with that decree in any manner since we are informed that the entire decretal amount has been deposited and) there is no question of the suit being dismissed.

41. We may note that Civil Miscellaneous Application Number 1169 of 1954 was not pressed and is dismissed.

42. We accordingly dismiss these appeals (P.C. Appeals Nos. 99, 106 and 115 of 1945) with costs. The stay order dated 14-1-1946 is vacated.