Gurdeo Singh and Chandrikah Singh Vs Chandrikah Singh and Rashbehary Singh

Court: Calcutta High Court

Date of Decision: April 10, 1907

Acts Referred: Civil Procedure Code, 1908 (CPC) â€" Section 25

Citation: (1909) ILR (Cal) 193

Hon'ble Judges: Mookerjee, J; Holmwood, J

Bench: Division Bench

Judgement

Mookerjee, J.
The circumstances, which gave rise to the litigation out of which the present appeals arise are in some measure complicated,

but although they were in controversy between the parties in the Court below, the facts found by the Subordinate Judge have not been challenged

before us. These facts, in so far as it is necessary to state them for the disposal of the questions of law raised in the two appeals, may be briefly

stated. On the 23rd November 1886, the first four defendants in the present suit executed a mortgage in favour of the father of defendant No. 14.

The property comprised in the security consisted of a share in Mehal Raipur Chur, which included three villages, Raipur Khas, Kachnath and

Burkavi. The mortgagors undertook to repay the loan on the 13th June 1889. Subsequently, on the 1st February 1898, the plaintiffs purchased

from the mortgagee his rights under the security of 1886, and, on the 15th June 1900, commenced the present action to enforce them. The

defendants, against whom relief is claimed or who are sought to be bound by the decree in the present litigation, may be divided into three groups.

The first four defendants are the mortgagors; the next four are some encumbrancers, who have enforced their securities as against the mortgagors;

and the third set of four defendants are other encumbrancers similarly situated.

2. The transactions, by which these two sets of defendants claim to have acquired an interest in the properties included in the mortgage, which is

the foundation of the title of the plaintiffs, appear to be as follows. On the 15th December 1884, the first four defendants executed a mortgage in

favour of defendants 5 to 8 in respect of a share of Mehal Raipur Chur. On the 31st May, 1894, the mortgagees sued to enforce their security,

and joined as parties defendants, not only their mortgagors, but also the predecessor in interest of the present plaintiffs, namely, the mortgagee of

1886. On the 21st March 1895, the mortgagees obtained a decree as against their mortgagors, but their claim was dismissed as against the

mortgagee of 1886. Subsequently, they executed this decree and became purchasers of the property comprised in their security. On the 5th May

1887, the first four defendants executed a mortgage in favour of defendants 5 to 8 and the properties comprised in this security were shares in

Mehal Raipur Chur and another property by name Chandharwa. On the 31st May 1894, the mortgagees sued to enforce their security, and joined

as parties defendants their mortgagors, as also the mortgagee of 1886. On the 21st March 1895, the suit was decreed as against the mortgagors,

but was dismissed as against the predecessor in title of the present plaintiffs. Subsequently, they executed their decree and became purchasers of

the properties comprised in their security.

3. On the 29th March and 2nd June 1885, the first four defendants executed two mortgages in favour of defendants 9 to 12. The properties

comprised in these securities were shares of Mehal Raipur Chur, which included Kachnath and Burkavi. In 1899 the mortgagees brought a suit to

enforce their security and joined as parties defendants, not only their mortgagors, but also defendants 5 to 8, that is, the mortgagees of 1884 and

1887, defendant 14, that is, the mortgagee of 1886, and the present second plaintiff, who had taken a conveyance from the mortgagee of 1886 for

the benefit of himself and the other plaintiff. On the 5th April 1900, the mortgagees obtained a decree, which reserved in favour of defendants 5 to

8 a declaration of priority, not merely in respect of their bond of 1884, but also with regard to a sum of Rs. 1,172 out of the debt due to them

under their bond of 1887. The decree, however, directed that the mortgagees should proceed in the first instance against properties other than

Mehal Raipur Chur. On the 23rd November 1900, the mortgagees enforced their decree and purchased Kachnath and Burkavi in partial

satisfaction of their dues. This did not, however, affect their right to proceed against Raipur Chur for the realization of the remainder of their dues

under their mortgage decree.

4. In the, present case the claim of the plaintiffs under the mortgage of 1886 has been resisted substantially by the two sets of defendants, whom

we have described as defendants 5 to 8 and defendants 9 to 12, and the principal point in controversy between the parties is as to the manner in

which their respective rights under the different mortgages and execution sales are. to be regulated. The learned Subordinate Judge has made the

usual mortgage decree in favour of the plaintiffs for Rs. 9, 121, and has directed that, if the decretal money is not paid within three months, the

mortgaged property Mehal Raipur Chur is to be sold subject to the prior mortgage charge of defendants 5 to 8 and subject to the charge of the

remaining decretal money of defendants 9 to 12, so that the purchaser at the auction sale will have to pay up the mortgage lien of defendants 5 to 8

and the balance of the judgment debt due to defendants 9 to 12. Against this decree, objection has been taken by all the parties interested.

Defendants 5 to 7 have preferred Appeal No. 540 of 1904. The plaintiffs have preferred Appeal No. 566 of 1904 and a memorandum of cross-

objection has been presented on behalf of defendants 9 to 12.

5. On behalf of defendants 5 to 7 the judgment of the lower Court has been assailed substantially on four grounds, namely, first, that the

Subordinate Judge had no jurisdiction to hear the case; secondly, that the decrees obtained by these defendants on the basis of their mortgages of

1884 and 1887 operate as res judicata, so that the plaintiffs are not entitled to enforce their security as against the properties purchased by the

appellants in execution of the two decrees obtained by them; thirdly, that the appellants are entitled to priority over the mortgage of the plaintiffs,

not only in respect of their mortgage of 1884, but also in respect of the sum of Rs. 1,952, which formed part of the consideration of their mortgage

of 1887; and fourthly, that the plaintiffs are not entitled to interest upon their security at the rate claimed, as they had subsequently entered into a

valid compromise by which they undertook to reduce the rate of interest.

6. On behalf of the plaintiffs, the decision of the Subordinate Judge has been challenged substantially on two grounds, namely, first, that the

decisions in the suits commenced by the mortgagees of 1884 and 1887 to enforce their securities, which were ultimately dismissed as against the

predecessor in interest of the plaintiffs, operate as res judicata, and that consequently the plaintiffs are entitled to enforce their security precisely in

the same manner as if the mortgages of 1884 and 1887 had never been created; and secondly, that defendants 5 to 8 and 9 to 12 are bound to

render an account of the profits of the property, of which they have taken possession as purchasers at the sales held in execution of their decrees.

On behalf of defendants 9 to 12 the decision of the Subordinate Judge has been challenged on the ground that they are entitled to their costs of the

litigation from the plaintiffs, whose claim has substantially failed as against them. We shall first take up the points raised in the appeal of the

defendants 5 to 7; but as the question of res judicata is raised by these defendants as also by the plaintiffs, it will be convenient, if we discuss this

question from the points of view of both the parties.

7. The first ground taken on behalf of defendants 5 to 7 raises the question of the jurisdiction of the Subordinate Judge to entertain this suit. The

circumstances, so far as it is necessary to state them for the elucidation of this point, appear to be as follows: The present action was commenced

on the 15th June 1900, and it was originally instituted in the Court of the second Subordinate Judge of Shahabad. On the 22nd June 1901, the

District Judge transferred the case to his own Court, and it may be presumed that he acted in exercise of the powers conferred upon him by

Section 25 of the Code of Civil Procedure. On the 24th June following, the suit was dismissed by the District Judge for want of prosecution. The

plaintiffs appealed to this Court, and on the 25th February 1904, a Division Bench allowed the appeal and sent back the case to the District Judge

for rehearing. After the records had been remitted to the District Judge, the case remained pending in his Court from the 7th June to the 25th June

1904. On the latter date, the District Judge transferred the case to the first Subordinate Judge as he himself was about to proceed on leave. On the

28th June, the case was received by the Subordinate Judge, and the trial lasted from the 28th July to the 18th August 1904. No objection was

taken by either party to the effect that the Subordinate Judge had no jurisdiction to try the case. It is now contended, however, that the

Subordinate Judge had no jurisdiction, and, as the question is one of jurisdiction, we have allowed the appellants to take it, although it had not been

suggested at any earlier stage of the proceedings. The ground, upon which the objection is founded, is that although u/s 25 of the CPC a District

Court has power to withdraw any suit pending in a Court of first instance subordinate to it and to try the suit itself or transfer it for trial to any other

Subordinate Court competent to try it, the District Court has no power, after it has withdrawn a suit and placed it on the files, to transfer it to any

Subordinate Court. In support of this position, reliance has been placed upon the cases of Ram Charittar Roy v. Bidhata Roy (1906) 10. C.W.N.

902 and Sita Ram v. Nauni Dulaiya I.L.R (1899). All. 230.

8. It has been argued, on the other hand, by the learned vakil for the appellants respondents that there are at least three answers to the contention

of the appellants, namely, first, that the District Judge had inherent power, apart from the provisions of Section 25 of the Code of Civil Procedure,

to transfer a suit from his Court to that of the Subordinate Judge; secondly, that if he did not possess such power, the Subordinate Judge has not

acted without jurisdiction, but has at best assumed jurisdiction in an irregular manner, and that consequently the defendants, who had acquiesced in

the exercise of such jurisdiction, ought not to be permitted now to question the legality of the proceedings before the lower Court; and thirdly, that

the defect, if any, is cured by Section 578 of the Code of Civil Procedure, inasmuch as the order of transfer might undoubtedly have been made by

this Court, if not by the District Court, and that, if any objection had been taken in time before the Subordinate Judge, the plaintiffs might also have

avoided the defect by the presentation of a new plaint, as no question of limitation could possibly arise upon the admitted facts of the case. In our

opinion the contention of the learned vakil for the plaintiffs respondents furnishes, in each of its three branches, a complete and conclusive answer

to the plea of want of jurisdiction advanced by the appellants. The case of Ram Charittar Roy v. Bidhata Boy (1906) 10. C.W.N. 902 is, no

doubt, an authority for the proposition that, when once a District Judge withdraws a suit to his own file for trial, he is not competent, u/s 25 of the

Civil Procedure Code, to retransfer it to the Court from which the case had been withdrawn. The case of Sita Ram v. Nauni Dulaiya ILR (1899)

All. 230 appears to go still further, as the learned Judges held that Section 25 has no application to a case remanded u/s 562. The cases of

Sakharam v. Gangaram ILR (1899) Bom. 654, Amir Begum v. Prahlad Das I.L.R.(1902) All. 304 and Nundan Prasad v. W.C. Kenney ILR

(1902) All. 356 also support the view that, where a District Judge has once exercised the powers conferred by Section 25 of the CPC and

transferred a case to his own Court from that of the Subordinate Judge, he cannot afterwards retransfer such case.

9. In these cases, however, the Court was not invited to consider whether, apart from the provisions of Section 25 of the Civil Procedure Code,

the District Court may not have authority to make an order of the description now in question before us. In our opinion, there is considerable force

in the contention of the learned vakil for the plaintiffs respondents that as u/s 9 of Act XII of 1887, the District Judge has administrative control

over all the Civil Courts within the local limits of his jurisdiction, it ought to be held that the District Judge has inherent power to transfer a case

from his own Court to that of the Subordinate Judge, specially when, as in the present instance, the order was made for the obvious benefit of the

litigants and for the speedy determination of the matter. It has been ruled by this Court, in the cases of Panchanan Singha Roy v. Dwarka Nath

Roy (1905) CRI.L.J. 29 and Hukum Chand Boid v. Kamalanand Singh I.L.R.(1905) Calc. 927; 3 C.L.J. 67, that the CPC was not intended to

be, and is not, exhaustive. As was observed in the case of Rasik Lal Datta v. Bidhumukhi Dasi ILR (1906) Calc. 1094; 4 C.L.J. 403, the Code

does not affect the power and duty of the Court in cases where no specific rule exists, and the Court should act according to equity, justice and

good conscience, though in the exercise of such power it must be careful to see that its decision is based on sound general principles and is not in

conflict with them or the intention of the legislature.

10. We agree entirely with the view indicated in the cases mentioned that the Courts in this country have, in matters of procedure, powers beyond

those which are expressly given by the Code of Civil Procedure, which binds Courts only in so far as it goes; the powers of the Court are not

rigidly circumscribed by the provisions of the Code, and it is not possible to maintain the theory that the Court has no power to make a particular

order, though it may be absolutely essential in the interests of justice, unless some section of the Code can be pointed out as a direct authority for

it. We are not Unmindful that there are, perhaps, observations in the case of Bidya Moyee Debya Chowdhurani v. Surja Kanta Acharji ILR

(1905) Calc. 875, which may, at first sight, appear to militate against this view, and may lend some colour of support to the contention that a

District Judge has no inherent power to transfer a case either from his own Court or from that of an officer under his administrative control, and

that the power must be one conferred by Statute. The circumstances of that case, however, were of an entirely different description, and it was not

intended there to decide the question, which has been raised before us.

11. We are, therefore, disposed to hold that the District Judge had power, under the circumstances disclosed in the order-sheet, to make the order

of transfer, which he did; and we arrive at this conclusion without hesitation, as the result of our view undoubtedly accords with what has been for

many years past the well-established practice. We may further point out that, as was laid down by their Lordships of the Judicial Committee in the

case of Syud Tuffuzzool v. Rughoo Nath (1871) 14 Moo I.A. 40, 51, to proceed to recall and cancel an invalid order is not simply permitted to,

but is the duty of a Judge, who should always be vigilant not to allow the act of the Court ""itself to do wrong to the suitor; see also Hiralal Mukerji

v. Premamoyee Debi (1905) CRI.L.J. 306, 309, where the application of this principle is explained. We are unable to appreciate why this

principle should not be applied to the case before us. If the District Judge, who has transferred a case to his Court, discovers that the very object,

with which the case was transferred, is likely to fail by reason of unforeseen circumstances, it would be unreasonable to hold that it is not

competent to him to withdraw the order and restore the case to the Court of the Subordinate Judge.

12. But it is not necessary to rest our decision on this ground alone, because the second and third branches of the contention of the plaintiffs

respondents appear to us to be unanswerable. It was contended by the learned vakil for the respondents that, assuming that the District Judge had

no power under the law to transfer a case from his Court to that of the Subordinate Judge, this does not really affect the jurisdiction of the latter

officer. u/s 18 of Act XII of 1887, the Subordinate Judge unquestionably possessed jurisdiction over the subject matter of the litigation. The only

suggestion, which can be plausibly made, is that he assumed that jurisdiction in an irregular manner. The case, therefore, is not one of absolute want

of jurisdiction, but is at best of an irregular assumption of jurisdiction. It was argued on behalf of the respondents that, in such a case as this, the

appellants, who had never taken this objection at an earlier stage of the proceedings, were precluded from raising the question now.

13. In our opinion, this distinction is well founded on principle and is amply supported by authority. In Ledgard v. Bull ILR (1886) All 191 ILR .A.

134, their Lordships of the Judicial Committee pointed out that, although jurisdiction cannot be conferred by consent where there is an entire

absence of jurisdiction, in a case where the Court is competent to entertain the suit, if it were competently brought, the defendant may be barred by

his own conduct from objecting to the irregularities in the institution of the suit; and, further, that when a Judge has no inherent jurisdiction over the

subject matter of a suit, the parties cannot, by their mutual consent, convert it into a proper judicial process, although they may constitute the Judge

their arbitrator and be bound by his decision on the merits, when these are submitted to him. There are numerous authorities, which establish that,

when in a cause which the Judge is competent to try, the parties without objection join issue and go to trial upon the merits, the defendant cannot

subsequently dispute his jurisdiction upon the ground that there were irregularities in the initial procedure, which, if objected to at the time, would

have led to the dismissal of the suit. To the same effect are the observations of their Lordships in the case of Meenakshi Naidoo v. Subramanya

Sastri ILR (1887) .A. 160; ILR Mad. 26, where their Lordships affirmed the view taken in Ledgard v. Bull I. L.R. (1886) .A. 134; I. L.R. All.

191 and pointed out that a waiver of a right to complain for want of jurisdiction is inapplicable only if there is an inherent incompetency in the Court

to deal with the question brought before it, and that no consent can confer upon a Court that jurisdiction, which it never possessed. This distinction

between an absolute want of jurisdiction and an irregular assumption of jurisdiction has, sometimes, been overlooked.

14. But the foundation of the distinction is fully explained in the Order of Reference to a Full Bench in the cases of Sukh Lal Sheikh v. Tara Chand

Ta I.L.R.(1905) Calc. 68; 2 C.L.J. 241 and Ghosh Mahomed Sirkar v. Nazir Mahomed ILR (1905) Calc. 352; 3 C.L.J. 259. In the first of these

cases, it was pointed out that jurisdiction may be defined to be the power of a Court to hear and determine a cause, to adjudicate or exercise any

judicial power in relation to it, Rhode Island v. Massachusetts (1838) 12 Peters U.S. 657. Such jurisdiction naturally divides itself into three broad

heads, namely, with reference to (1) the subject matter, (2) the parties, (3) the particular question which calls for decision, Black on Judgments,

Section 215.

15. A Court cannot adjudicate upon a subject matter, which does not fall within its province as defined or limited by law; this jurisdiction may be

regarded to be essential, for jurisdiction over the subject matter is a condition precedent to the acquisition of authority over the parties, and, if a

Court has no jurisdiction over the subject matter of the controversy, consent of the parties cannot confer such jurisdiction, and a judgment made

without jurisdiction in such a case is absolutely null and void; it may be set aside by review or appeal, or its nullity may be established, when it is

sought to be relied upon in some other proceeding: See Hawes on Jurisdiction, pages 12-16; Hermann on Estoppel, Section 110, and Frankel v.

Sutter field (1890) 19 AR 898.

16. An entirely different class of questions, however, arises, when it is suggested that a Court in the exercise of the jurisdiction which it possesses,

has not acted according to the mode prescribed by the Statute. If such a question is raised, it relates obviously, not to the existence of jurisdiction,

but to the exercise of it in an irregular or illegal manner. This distinction between elements, which are essential for the foundation of jurisdiction and

the mode in which such jurisdiction has to be assumed and exercised, is of fundamental importance, but has not always been sufficiently

recognised. That the distinction is well-founded is manifest from cases of high authority. Thus, in Pisani v. Attorney-General of Gibraltar (1874)

L.R. 5 P.C. 515 their Lordships of the Judicial Committee held that, where there is jurisdiction over the subject matter, but non-compliance with

the procedure prescribed as essential for the exercise of jurisdiction, the defect might be waived. The same principle was adopted in Exparte Pratt

(1884) 12 Q.B.D. 334 and Exparte May (1884) 12 Q.B.D. 497, which are authorities for the proposition that where jurisdiction over the subject

matter exists requiring only to be invoked in the right way, the party, who has invited or allowed the Court to exercise it in a wrong way, cannot

afterwards turn round and challenge the legality of the proceedings due to his own invitation or negligence; see Vishnu Sakharam Nagarkar v.

Krishna Rao Malhar ILR (1886) Bom. 153. Although the objection that a Court is not given jurisdiction over the subject matter by law, cannot be

waived, Golab Sao v. Chowdhury Madho Lal (1905) 2 0. L.J. 384; 9 C.W.N. 956, yet defects of jurisdiction arising from irregularities in the

commencement of the proceedings, may be waived by the failure to take objection at the proper stage of the proceedings; Harkness v. Hyde

(1878) 98 U.S. 476, Jollaud v. Sprague (1833) 12 Peters U.S. 300, Rhode Island v. Massachusetts (1838) 21 Peters U.S. 657, 718.

17. To put the matter from another point of view, it is only when a Judge or Court has no jurisdiction over the subject-matter of the proceeding or

action in which an order is made or a judgment rendered, that such order or judgment is wholly void, and that the maxim applies that consent

cannot give jurisdiction; in all other cases, this objection to the exercise of the jurisdiction may be waived, and is waived when not taken at the time

the exercise of the jurisdiction is first claimed, Hobart v. Frost (1856) 5 D N.Y. 672; Black on Judgments, Section 217.

18. On this ground, we must hold, as regards the second branch of the contention of the respondents, that the defendants have waived their right to

take exception to the power of the Subordinate Judge to try the cause under authority of an order of transfer made by the District Judge. As

regards the third branch of the contention of the respondents, namely, that the objection is entirely devoid of all substance, it is manifest from other

considerations. It cannot be disputed that the order of transfer might have been made by the High Court. If, therefore, objection had been taken by

the defendants either at the time, when the District Judge made his order or at the time when the Subordinate Judge dealt with the case on the

merits, it would have been open to the plaintiffs to obtain an order from this Court, which would have cured the defect. It may further be pointed

out that, if the objection had been taken at the time, it would have been open to the plaintiffs to present even a new plaint to the Subordinate Judge.

Indeed, if the suit be assumed to have been instituted on the day when the Subordinate Judge took cognizance of it, it would not be open to

objection on the ground of limitation, because, although the due date upon the bond expired on the 13th June 1889, the liability of the mortgagors

was kept alive by acknowledgment made within twelve years from the date of the present suit. From every point of view, therefore, it follows that

the appellants are precluded from questioning, at the present stage, the validity of the proceedings before the Subordinate Judge. The first ground

taken on behalf of the defendants 5 to 7 consequently fails and must be overruled.

19. The second ground taken on behalf of defendants 5 to 7 involves the question of res judicata, and the first ground taken on behalf of the

plaintiff raises precisely the same question. But, although the parties are agreed that the decisions in the litigations of 1894 upon the mortgages of

1884 and 1887 operate as res judicata, they are not agreed as to the precise effect of those decisions. Defendants 5 to 7 contend that the effect is

to preclude the plaintiffs from enforcing their mortgage against the properties purchased by the decree-holders mortgagees in the suits of 1894. The

plaintiffs assert, on the other hand, that the effect is to preclude defendants 5 to 7 from setting up their mortgages and thus to place the plaintiffs in

the position, which they would have occupied, if the mortgages of 1884 and 1887 had never been created. To determine which of these

contentions ought to prevail, we have to examine the circumstances of these two litigations; for as was pointed out by this Court, in the cases of

Surjiram Marwari v. Barhamdeo Persad (1905) 1 C.L.J. 337, 349'' and Magniram v. Mehdi Hossein Khan ILR (1903) Calc.95, to determine the

question of res judicata, it is essential to ascertain what were the rights in dispute between the parties and what were alleged between them, and

this must be done, not merely from the decree, but also from the pleadings and judgment.

20. Now, it appears that defendants 5 to 8 commenced suit No. 22 of 1884 to enforce their mortgage of the 15th December 1884, and they

instituted suit No. 21 of 1894 to enforce their security of the 5th May 1887. In each of these suits they joined as parties defendants, not merely

their mortgagors, who are now defendants 1 to 4, but also defendant No. 14, who is the mortgagee of 1886 and is the predecessor in title of the

present plaintiffs. It will; be observed that in the suit to enforce the security of 1884, the mortgagee of 1886 was a necessary party, and an

examination of the plaint in that case shows that he was brought on the record as a puisne encumbrancer interested in the mortgaged premises. He

filed a written statement in which he challenged the validity of the plaintiffs mortgage and alleged that it was fraudulent and without consideration.

He further pleaded that the plaintiffs had no valid cause of action as against him. Upon these pleadings, issues were raised, one of which was,

whether the bond was genuine and bona fide, and another was, whether the plaintiffs had any cause of action against that defendant. The

Subordinate Judge, who tried the case, found that neither party had proved that this particular defendant was in any way interested in the

mortgaged property. He also held that the evidence adduced to establish the payment of consideration for the mortgage was not satisfactory or

reliable, and that the admission of the mortgagors that they had received the sum alleged to have been advanced was no evidence against the other

defendants.

21. In this view of the matter, the Court dismissed the suit against the mortgagee of 1886, but made a decree against the mortgagors, as they had

confessed judgment. The decree directed the sale of the mortgaged property only in so far as the mortgagors were concerned. As we have already

stated, the mortgagees decree-holders subsequently executed this decree and purchased the property at the execution sale. As regards the

mortgage of 1887, the mortgagees, the present defendants 5 to 8, commenced their suit against the mortgagors and the mortgagee of 1886. An

examination of the plaint shows that it does not disclose any cause of action against the mortgagee of 1886. It will be observed that the mortgagee

of 1866 was not a necessary party to enforce the mortgage of 1887; for, as was explained by this Court in the case of Surjiram Marwari v.

Barhamdeo Persad (1905) 1 C.L.J. 337, 351 in a suit to enforce a second mortgage, the first mortgagee is not a necessary party. No doubt in one

of the paragraphs of the plaint it was alleged that a portion of the consideration money for the mortgage of 1887, namely, Rs. 1,952, had been

applied in satisfaction of interest due upon earlier bonds of the 15th December 1884, the 29th March 1885, and the 2nd June 1885; but there was

no express prayer that in respect of this sum, the mortgage, though of 1887, might be treated as entitled to priority over the mortgage of 1886. The

mortgagee of 1886 defended the suit on the ground that there was no valid cause of action as against him, and also asserted that the mortgage

bond, on which the claim was founded, was collusive and without consideration. Upon these pleadings, the Subordinate Judge framed issues, one

of which was, whether the bond in suit was genuine and bona fide, and another was, whether the plaintiffs had any cause of action against the

mortgagee of 1886. There was no issue raised as to whether the bond of 1887, if genuine, was, in respect of a portion of the consideration money,

entitled to priority over the bond of 1886. The Subordinate Judge found upon the evidence that there was nothing to show whether the alleged

mortgagee of 1886 was really interested in the property in suit. He also held that there was no reliable evidence to prove the claim against them. In

this view of the matter, he dismissed the suit against the mortgagee of 1886, but made a decree against the mortgagors on confession of judgment.

The decree directed the sale of the properties included in the mortgage so far as the mortgagors were concerned. The mortgagees subsequently

executed this decree and purchased the property at the execution sale. Upon these facts, the learned vakil for defendants 5 to 7, the mortgagees of

1884 and 1887, contends that the present plaintiffs, whose predecessor, the mortgagee of 1886, was a party defendant to the suits of 1894, are

precluded by the doctrine of res judicata, from setting up the mortgage of 1886. In support of this position reliance is placed upon the cases of

Srigopal v. Pirthi Singh ILR (1902) A. 118; ILR 24 All. 429 and Gopal Lal v. Benarasi Pershad Chowdhry ILR (1904)Calc. 428.

22. It is argued on the other hand by the learned vakil for the plaintiffs that as the suits of 1884 were dismissed as against the mortgagee of 1886,

defendants 5 to 8 are now precluded from relying upon their mortgages of 1884 and 1887, which they had unsuccessfully attempted to enforce as

against their predecessor in the two earlier litigations, to which we have referred. In support of this position, reliance is placed upon the decision of

their Lordships of the Judicial Committee in the case of Run Bahadur Singh v. Lucho Koer ILR (1884) Calc. 301, 306. After a careful

examination of the authorities upon which reliance is placed on both sides, we are clearly of opinion that the contention of the plaintiffs is well

founded and must prevail. It is not necessary to examine minutely the decisions in Srigopal v. Pirthi Singh I. L.R. (1902) .A. 118 ILR 24 All. 429

and Gopal Lal v. Benarasi Pershad Chowdhry I.L.R.(1904) Calc. 428, upon which reliance is placed on behalf of the defendants 5 to 8. The true

foundation of the doctrine laid down in those cases was fully explained by this Court in the case of Surjiram Marwari v. Barhamdeo Persad I. L.J.

(1905) 337 , 350. That principle to our mind has no application to the facts of the present case. It has been strenuously argued by the learned vakil

for the defendants 5 to 8 that the mortgagee of 1886 was bound to establish his title, when he was brought before the Court in the litigations of

1894, and that his omission or failure to do so precluded him from relying upon that title in the present litigation. In our opinion, there is no

foundation for this argument. So far as the security of 1887 was concerned, the mortgagee of 1886 was, as we have already explained, not a

necessary party to the suit to enforce it. No doubt he might be a necessary party, if the plaintiffs attempted to obtain priority in favour of their

mortgage of 1887 over the mortgage of 1886. But, although a suggestion to that effect was made in the plaint, there was no relief expressly

claimed on that basis. The question was not even raised in the issues, and the suit ultimately failed by reason of the failure of the mortgagees of

1887 to establish the genuineness of their security as against the mortgagee of 1886. In the same manner, so far as the security of 1884 was

concerned, although the mortgagee of 1886 was a proper and necessary party, the suit to enforce the claim was unsuccessful by reason of the

failure of the mortgagees of 1884 to establish the genuineness of the security as against the mortgagee of 1886. Under these circumstances, it is

impossible to hold that merely because the mortgagee of 1886 failed to establish his security in the suits of 1894, such failure in any way precludes

him or his representative from now relying on his title under the mortgage.

23. The decrees of dismissal, which were made in the suits of 1894, were decrees, which were based on the finding that the mortgages of 1884

and 1887 were not proved to be genuine and for consideration as against the mortgagee of 1886. That finding, therefore, clearly operates as res

judicata in favour of the mortgagee of 1886. The decrees, which were made, were in accordance with and based on this finding, see Peary Mohan

Mukerjee v. Ambica Churn Bandopadhya ILR (1897) Calc. 900.

24. On the other hand, the finding that there was no evidence to show that the alleged mortgagee of 1886 was in any way interested in the

mortgaged premises, could not be taken as the basis of the judgment of the Court. The decrees might be said to be decrees in spite of that finding,

and when the suits were dismissed as against the mortgagee of 1886, it was not open to him to challenge, by way of appeal, the finding of the

Subordinate Judge upon the question of the validity of his mortgage. In this view of the matter, that finding does not in any way operate as res

judicata. See Run Bahadur Singh v. Lucho Koer ILR (1884) Calc. 301, 306, Nundo Lall Bhuttacharjee v. Bidhoo Mookhy Debee ILR (1886)

Calc. 17, Thakur Magundeo v. Thakur Mahadeo Singh I.L.R.(1891) Calc. 647, Peary Mohun Mukerjee v. Ambica Churn Bandopadhya I L.R.

(1897) Calc. 900 and Concha v. Concha L.R. (1886) A C 541, 552.

25. We are not unmindful that in a litigation between the present defendants 9 to 12 on the one hand as plaintiffs, and defendants 1 to 4 (as

mortgagors), defendants 5 to 8 (as puisne encumbrancers) and defendant 14 (as subsequent mortgagee), as defendants on the other hand, the

present defendants 5 to 8 succeeded in obtaining a declaration that not only in respect of their bond of 1884, but also in respect of a sum of Us.

1,172 out of the consideration for their bond of 1887, they were entitled to priority over the bond of 1885. That question, however, appears to

have been then decided between the present defendants 5 to 8 and 9 to 12; it is clear that there was no controversy in that litigation between

defendants 5 to 6 and 14, the predecessor of the plaintiffs, in respect of this matter. It cannot, therefore, be suggested that the decision in that

litigation in any way operates as res judicata for, as is now well settled, when an adjudication between defendants is necessary to give the

appropriate relief to the plaintiff, there must be such an adjudication, and in such a case the adjudication will be res judicata between the

defendants as well as between the plaintiff and the defendants; but for this, there must be a conflict of interest amongst the defendants, and the

judgment must define the real rights and obligations of the defendants inter se; see Magniram v. Mehdi Hossein Khan I.L.R.(1903) Calc. 95,

Chajju v. Umrao Singh (1900) ILR 22 All. 386, Balam Bhat v. Narayan Bhat ILR (1900)Bom. 74, Muhammad Kuni Rowthan v. Visvanathaiyar

ILR (1902) Mad. 337 and Cottingham v. Earl of Shrewsbury (1843) 3 Hare 627.

26. No materials have been placed before us to show that the decisions in the suit, to which we have referred, was given under circumstances,

which could possibly make it operate as res judicata between co-defendants. We must, consequently, hold that the decisions in the suits of 1894,

brought by defendants 5 to 8 to enforce their mortgages of 1884 and 1887, operate as res judicata, and as those suits were dismissed, rightly or

wrongly, against the mortgagee of 1886, the defendants 5 to 8 are not entitled to rely upon those mortgages as against the plaintiffs, who now

represent the mortgagee of 1886. The true test to be applied to a case of this description is, are the defendants 5 to 8 entitled, after their defeat in

the litigations of 1894, to enforce their mortgages of 1884 and 1887 against the mortgagee of 1886 ? If they are not, and if their remedy was by

way of an appeal against the adverse decisions of 1894, they are obviously precluded from falling back upon their mortgages of 1884 and 1887.

The effect of their purchase in execution of their own decrees has been to give them a title against their mortgagors alone, and as the suits, in which

these decrees were made, were dismissed against the mortgagee of 1886, they have not obtained a valid title against him or his representative in

interest. The Subordinate Judge was, in our opinion, clearly in error in this matter. He proceeded on the assumption that the effect of the dismissal

of the suits of 1894 was to leave the parties in the position, which they would have occupied, if the mortgagee of 1886 had never been joined as a

party defendant in those suits. This view is obviously unsound. The mortgagee of 1886 was brought before the Court; he challenged the validity of

the mortgages of 1884 and 1887, as he was entitled to do, and his resistance was successful. Under these circumstances, the conclusion appears

to be irresistible that the present plaintiffs may rightly claim the full benefit of the dismissal of the suits of 1894 and are entitled to enforce their

security against the properties in the hands of defendants 5 to 8, precisely as if the mortgages of 1884 and 1887 had no real existence. The second

ground advanced on behalf of defendants 5 to 8 must be overruled, and the first ground taken on behalf of the plaintiffs must consequently prevail.

27. The third ground taken on behalf of defendants 5 to 7 raises the question, whether they are not entitled to priority over the mortgage of 1886,

which the plaintiffs seek to enforce, in respect of the sum of Rs. 1,952, which formed part of the consideration of their mortgage of 1887. It is

established by the evidence that out of the sum advanced by defendants 5 to 7 upon the mortgage of 1887, Rs. 100 was paid in satisfaction of the

interest due upon a prior mortgage of the 15th December 1884 executed in favour of persons now represented by defendants 5 to 8; another sum

of Rs. 1,072 was applied in discharge of interest due on a bond of the 29th March 1885, and a third sum of Rs. 780 was applied in satisfaction of

the interest due on a bond of the 2nd June 1885. Upon these facts, it is argued by the learned vakil for defendants 5 to 7 that to the extent of these

three sums of money, which were applied in satisfaction of interest due on three bonds earlier than that of the present plaintiffs, they are entitled to

a declaration of priority. In support of this position, reliance is placed upon the cases of Gokaldas Gopaldas v. Puranmal Premsukhdas ILR 11 .A.

126; ILR 10 Calc. 1035, Gopal Chunder Sreemany v. Herembo Chunder Holdar ILR (1889) Calc. 523 and Lomba Gomaji v. Vishvanath Amrit

Tilvankar ILR (1893) Bom. 86.

28. It is argued, on the other hand, by the learned vakil for the plaintiffs respondents that there are two objections to the right claimed by the

defendants, each of which is fatal to their contention. It is pointed out, in the first place, that the decision of this question is barred by the principle

of constructive res judicata, and it is contended, in the second place, that upon the admitted facts, the principle of subrogation has no possible

application. In our opinion, the argument advanced on behalf of the appellants is not well founded, and their contention must be overruled. It is

manifest that this claim for priority might and ought to have been set up in the litigation of 1894 in which the mortgage of 1887 was enforced.

(Jones on Mortgages, Sections 1439-41 and 1589A, 6th edition, Vol. II, pages 397 and 526.) Indeed, as we have already pointed out, the

mortgagees did set out in their plaint circumstances sufficient to form the foundation of the claim now advanced. It was not, however, pressed, and

the suit appears to have been dismissed so far as the mortgagee of 1886 was concerned. There is, therefore, considerable force in the contention

that it is no longer open to the mortgagees of 1887 to set up in the present litigation the claim for priority, which might and ought to have been

adjudicated upon in the litigation of 1894. See Srigopal v. Pirthi Singh ILR (1902) IndAp 118; ILR 24 AIL 429, Mahabir Pershad Singh v.

Macnaghten I. L.R. 161. A. 107; ILR 16 Calc. 682, Kameswar Pershad v. Rajkumari Ruttan Koer I. L.R. (1892).A. 234; ILR 20 Calc. 79. It is

not necessary, however, to rely upon this ground, as a question might arise as to whether the doctrine of constructive res judicata is applicable

where the subject-matters of the two suits are different: Surjiram Marwari v. Barhamdeo Persad (1905) 1 C.L.J. 337, 353 We are satisfied,

however, that the second branch of the contention of the learned vakil for the respondent must be sustained. That contention, in substance, is two-

fold, namely, first, that the doctrine of subrogation entitles a person to the benefit of a mortgage in favour of a stranger, either when he is compelled

to pay it off to protect an interest of his own in the property mortgaged or by an agreement; and secondly, that in any event, the entire amount of a

senior encumbrancer must be paid before subrogation can be claimed.

29. The first of these points raises the question of the nature of subrogation and the principle on which it is founded. That principle is thus explained

by Mr. Justice Sutherland in Ellis-worth v. Lockwood (1870) 42 N.Y. 89 ""Subrogation or substitution by operation of law to the rights and

interests of the mortgagee in the land is by redemption, and redemption is payment of the mortgage debt after forfeiture by the terms of the

mortgage contract, so that really the subrogation or substitution by operation of law arises or proceeds on the theory that the mortgage debt is

paid. If the holder of a bond assigned it to a party claiming a right to redeem, the latter is subrogated by the assignment to the mortgage debt and

mortgage security and to the instrument evidencing such debt and security, and there is no room or occasion for subrogation by operation of law.

Consequently, it may be said, in general, that to entitle one to invoke the equitable right of subrogation, he must either occupy the position of a

surety of the debt or must have made the payment under an agreement with the debtor or creditor that he should receive and hold an assignment of

the debt as security, or he must stand in such a relation to the mortgaged premises that his interest cannot otherwise be adequately protected. The

foundation of the rule was elaborately examined in a recent case, Wilkins v. Gibson (1901) 113 Georgia 31; 38 S.E. 374, in which Mr. Justice

Cobb stated the rule to be that a ""Subrogation will arise only in those cases, where the party claiming it advanced the money to pay a debt which,

in the event of default by the debtor, he would be bound to pay, or where he had some interest to protect, or where he advanced the money under

an agreement, express or implied, made either with the debtor or creditor that he would be subrogated to the rights and remedies of the creditor.

This distinction between the position of a person, who pays off a mortgage to protect an interest of his own and the position of another, who claims

subrogation by agreement, is well marked, and is said to have been borrowed from the Civil Law, which recognised two kinds of subrogation,

namely, ""legal subrogation"" which took place of right and without any agreement as such by the creditor and as a matter of equity, and

conventional subrogation"" which was applied, where an agreement was made with the person paying the debt that he would be subrogated to the

rights and remedies of the original creditor. See Howe"s Studies in the Civil Law, 1905, page 256; see also Bank v. Tillman (1901) 106 Georgia

55, 31 S.E. 794 , where the doctrine of conventional subrogation is examined. The case of (1884) L.R. 11 I.A. 126 (Privy Council) , where it was

held that the purchaser of an equity of redemption, who had paid off the first charge, might use the first mortgage as a shield against mesne

encumbrancers, the payment being made by a person who is under no personal obligation to pay, only to protect his own interest, furnishes an

illustration of the former class of cases. The case of Jagatdhar Narain Prasad v. A.M. Brown (1906) ILR 33 Calc. 1133 , furnishes an illustration

of the second class of cases; whereas the decision of their Lordships of the Judicial Committee in (1901) L.R. 29 I.A. 9 (Privy Council) shows, the

line dividing the class of cases, where no bargain is made when the money is advanced, and cases where the money is advanced on the

understanding that the creditor should be subrogated to the position of the mortgagee. It is only in the first class of cases that the question of

intention to keep the mortgage alive arises. The doctrine of subrogation is not applied for the mere stranger or volunteer, who has paid the debt of

another, without any assignment or agreement for subrogation, being under no legal obligation to make the payment, and not being compelled to do

so for the preservation of any rights or properties of his own. This doctrine is nowhere more clearly and concisely expounded than in the judgment

of the Supreme Court of the United States in Etna Life Insurance Company v. Middleport (1887) 124 U.S. 525, where the principle laid down by

Chancellor Johnson in Gadsden v. Brown (1843) Speers, Eq. (S. C.) 37 and by Chancellor Walworth in Sandford v. McLean (1832) 3 Page

N.Y. 122 was adopted as well founded on reason. That principle is, that subrogation as a matter of right is never applied in aid of a mere

volunteer. Legal substitution into the rights of a creditor for the benefit of a third person takes place only for his benefit, who, being himself a

creditor, satisfies the lien of a prior creditor, or for the benefit of a purchaser, who extinguishes the encumbrances upon his estate, or of a co-

obligor or surety, who discharges the debt, or of an heir, who pays the debts of the succession, Shin v. Budd (1862) 14 N.J. Eq. 234.. Any one,

who is under no legal obligation or liability to pay the debt, is a stranger, and, if he pays the debt, he is a mere volunteer, Arnold Green (1889) 116

N.Y. 566. To the same, effect are the decisions in Crippen v. Chappel (1886) 35 Kansas 495; 57 Am. Rep. 187, Hough v. Etna Life Insurance

Company (1870) 57 III. 318; 11 Am. Rep. 18 and Watson v. Wilcox (1876) 39 Win. 643; 20 Am. Rep. 63. The learned vakil for the

respondents placed reliance upon passages from Sheldon on Subrogation, Sections 240-243, which fully bear out his contention, and the position

is further strengthened by the expositions contained in Jones on Mortgages, Section 874(6th Edition, Vol. I, page 918), and Harris on

Subrogation, Sections 792-797. If these doctrines, which appear to us to be based on principles of justice, equity and good conscience, are

applied to the case before us, it becomes manifest that the claim put forward on behalf of defendants 5 to 7 is entirely unfounded. When a portion

of the money advanced by them was applied in part satisfaction of the interest due on earlier bonds, it could not be said that they were compelled

to make the payment to protect an interest of their own in the property mortgaged to them; much less could it be suggested that there was any

agreement, express or implied, Upon which a claim for subrogation could be founded. There is a second answer, however, as the learned vakil for

the respondents has pointed out, to this claim for subrogation. The sums were applied only in part satisfaction of the claim for interest due upon

earlier bonds, and it is difficult to appreciate how, under such circumstances, a claim for subrogation could arise. The person, who makes the

payment, cannot, by simply paying the interest as it accrues or paying or discharging a portion of the interest. which has already accrued, claim a

right of subrogation. He must pay the entire amount of an incumbrance, which is senior to his own. This doctrine is based upon a perfectly

intelligible principle; for as we have already explained, subrogation is by redemption, and, unless there is redemption, it is not easy to perceive how

subrogation can take place, Merritt v. Hosmer (1858) 11 Gray (Mass) 276; 71 Am. Dec. 713, Street v. Beal (1864) 16 Iowa 68; 85 Am. Dec.

504, O"Reilly v. Holt (1877) 4 Woods C.C. 645; 18 Fed Cases 792, Carter v. Neal (1858) 24 Georgia 346""; 71 Am. Dec. 136. It is obvious

that the contrary view would lead to endless difficulties. It would enable a person, who has made a part payment of the interest due on a mortgage

security, to claim subrogation; would b.6 then occupy the position of a joint mortgagee with the person whose claim is partially satisfied? What

would be his position with regard to interest subsequently accruing upon the prior mortgage, and how are the rights to be worked out if, as in the

case before us, the prior mortgagees have already sued and enforced their security ? The rule, therefore, that before one creditor can be

subrogated to the rights of another, the demand of the latter must be entirely satisfied, so that he shall be relieved from all further trouble, risk and

expense, is based upon good-sense and ought to be adopted as applicable to the case before us, Sheldon on Subrogation, Sections 14, 19, 25,

70 and 83; Harris on Subrogation, Section 29. To use the language in Hollingworth, v. Floyd (1807) 2 Harris & Gill (Maryland) 91 ""it would not

subserve the ends of justice to consider the assignment of an entire debt to a surety as affected by operation of law, when he had paid but a part of

it and still owed a balance to the creditor, and the Court would not countenance such an anomaly as a pro tanto assignment, the effect of which

would only be to give distinct interests in the same debt to both creditor and surety."" This view is in no way inconsistent with that taken by the

learned Judges of the High Court in Lomba Gomaji v. Vishvanath Amrit Tilvanlcar ILR (1893) Bom. 86. On the grounds, therefore, that the

position of defendants 5 to 7 did not entitle them to claim the benefit of the principle of subrogation, and that partial payment was not sufficient to

entitle them to succeed to the rights of the prior encumbrancer by subrogation, we must overrule the third ground upon which the decision of the

Subordinate Judge is sought to be assailed.

30. The fourth ground, upon which the decision of the Subordinate Judge is challenged on behalf of defendants 5 to 7 is that the plaintiffs are not

entitled to claim interest at the rate specified in the mortgage of 1886, inasmuch as on the 18th June 1889, they entered into a compromise with

their mortgagors, by which they undertook to reduce their claim for future interest to 6 per cent, per annum. In answer to this contention, it is

argued on behalf of the plaintiffs respondents that the compromise in question is inoperative in law, as it was not registered u/s 17 of the

Registration Act. The facts, so far as a statement of them is necessary for the decision of this point, are not disputed before this Court. It appears

that in 1899 the present defendant 14, the mortgagee under the bond of 1886, sued the mortgagors for recovery of interest due at the time of

institution of that suit. On the 18th June 1889, a petition of compromise was filed on behalf of the parties. It recited that the plaintiffs had been paid

Rs. 100 in cash, that the balance of Rs. 593 was to be paid within the 4th February 1890, and that upon failure to do so, interest would run upon

the decretal amount at the rate of 60 per cent, per annum. The compromise further contained a term by which the mortgagee agreed to accept

future interest on the entire amount of debt covered by the bond, at the rate of 6 per cent, per annum. This compromise was recited in the

preamble to the decree, which was made in that litigation. The decree, however, was based on that portion only of the compromise, which related

to the subject-matter of that suit, as is required by Section 375 of the Code of Civil Procedure. No decree was made in respect of the covenant by

the mortgagee to reduce the claim for future interest to 6 per cent, per annum. Upon these facts, it is contended on behalf of defendants 5 to 7 that

the compromise is operative, though not registered, because it was recited in the decree. In support of this position reliance is placed upon the

cases of Bindesri Naik v. Ganga Saran Sahu I. L.R. (1897) All. 171; L.R. 25 IndAp 9 and Raghubans Mani Singh v. Mahabir Singh ILR (1905)

All. 78. It is argued, on the other hand, by the plaintiffs respondents that the petition of compromise, in so far as it related to matters beyond the

scope of the suit, in which it was filed, required to be registered, and this view is sought to be supported by a reference to the cases of Pranal Anni

v. Lakshmi Anni I. L.R. (1899).A. 101; ILR Mad. 508, Muthayya v. Venkataratnam I L.R. (1901) Mad. 551, Birbhadra Rath v. Kalpataru

Panda (1905) 1 0. L.J. 388 and Patha Muthammal v. Esup Rowther ILR (1906) Mad. 365. In our opinion, the contention advanced on behalf of

the plaintiffs respondents is well founded and must prevail. The point is really concluded by the decision of their Lordships of the Judicial

Committee in Pranal Anni v. Lakshmi Anni .IL.R. (1899) IndAp 101; ILR 22 Mad. 508, the true effect of which was explained in Birbhadra Rath

v. Kalpataru Panda (1905) 1 0. L.J. 388. After a careful examination of all the authorities on the subject, we adopt the view put forward in that

case. A petition of compromise, in so far as it relates to properties in suit, does not require registration u/s 17 of the Registration Act, and the

decree, in so far as it gives effect to the settlement touching such properties, operates as res judicata. If it gives effect, however, to the settlement

touching properties extraneous to the litigation, the decree is, to that extent, clearly without jurisdiction and is inoperative. In relation to these

extraneous properties, the parties must fall back upon the petition itself, which cannot, without registration, effectively declare or create title to

Immovable property exceeding Rs. 100 in value. The same view was adopted by this Court in the case of Kali Charan Ghosal v. Ram Chandra

Mandal ILR (1903) Calc. 783. The case of Raghubans Mani Singh v. Mahabir Singh ILR (1905) All. 78, upon which much stress was laid on

behalf of the appellants, appears to be based upon a misapprehension of the judgment of their Lordships of the Judicial Committee in Pranal Anni

v. Lakshmi Anni ILR (1899) .A. 101; ILR 22 Mad. 508, With all respect for the learned Judges, who decided that case, we find ourselves entirely

unable to adopt their view, and we are supported in our conclusion by the decision of the Madras High Court in Patha Muthammal v. Esup

Rowther ILR (1906) Mad. 365, Muthayya v. Venkataratnam I L.R. (1901) Mad. 551 and Achuta Ram Raja v. Subbaraju ILR (1901) Mad.7. If

the view adopted by the learned Judges of the Allahabad High Court in Raghubans Mani Singh v. Mahabir Singh ILR (1905) All. 78 is well

founded, litigants may, as was pointed out in Birbhadra Rath v. Kalpataru Panda (1905) 1 C.L.J. 388, evade with impunity the provisions of the

Registration Act, the Stamp Act, the Court-fees Act and the Civil Courts Act, which last defines the jurisdictions of different classes of Courts. We

are unable to persuade ourselves to hold that this is what was intended by their Lordships of the Judicial Committee. It has not been disputed, and

it cannot be disputed, that the petition of compromise in question purported to extinguish title to or interest in Immovable property of a value

exceeding Rs. 100. We must consequently hold that it is inoperative, because it was not registered. The fourth ground taken on behalf of

defendants 5 to 7 cannot consequently be supported.

31. The first ground taken on behalf of the plaintiffs respondents, who have preferred a separate appeal, relates to the question of res judicata, and

has already been disposed of in connection with the second ground taken on behalf of defendants 5 to 7.

32. The second ground taken on behalf of the plaintiffs raises the question, whether defendants 5 to 7 would not be bound to account for the

profits received by them during their possession of the mortgaged properties after their purchase at the execution sale, and whether these

defendants are entitled to have interest at the contract rate specified in their securities, calculated after the dates of their respective decrees. Both

these contentions would seem to be well founded, and it is sufficient to refer to the case of Ganga Das Bhattar v. Jogendra Nath Mitra (1907) 5

C.L.J. 315 , which is entirely in accord with the decision of their Lordships of the Judicial Committee in 8 CWN 609 (Privy Council) . It is not

necessary, however, to deal with this point in detail because, as we have already held, defendants 5 to 7 are not entitled to rely upon their

mortgages of 1884 and 1887 as against the mortgage of 1886, which the plaintiffs seek to enforce. The plaintiffs are entitled to enforce their

security precisely in the same manner as if the mortgages of 1884 and 1887 had never been created.

33. The only point taken on behalf of defendants 9 to 12 raises the question, whether they are not entitled to their costs in the Court of first

instance as well as in this Court. It is manifest that the case of the plaintiffs as against them has entirely failed and the learned vakil for the plaintiffs

has not seriously resisted the claim for costs put forward on behalf of defendants 9 to 12.

34. The result, therefore, is that Appeal No. 540 of 1904 preferred by defendants 5 to 7 fails, and must be dismissed. Appeal No. 566 of 1904

preferred by the plaintiffs must be allowed, and the decree of the Subordinate Judge modified to this extent, namely, the words ""subject to the prior

mortgage charge of the defendants 5 to 8 and"" and ""the mortgage decree of the defendants Nos. 5 to 8 and"" shall be expunged. The cross

objection of defendants 9 to 12 must also be allowed, and they will be entitled to their costs in the Court below. So far as the. costs of this Court

are concerned, defendants 5 to 7 must pay the costs of the plaintiffs respondents in Appeal No. 540 of 1904, and the plaintiff appellants in Appeal

No. 566 of 1904 must pay the costs of defendants 9 to 12. Only one decree will be drawn up in the two appeals, and, to avoid future difficulties,

the decree must be self-contained without any reference to the decree of the Subordinate Judge.