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**(1916) 12 CAL CK 0001**

**Calcutta High Court**

**Case No:** None

Jamini Mohan Gupta

APPELLANT

Vs

Ram Narayan Parey and Others

RESPONDENT

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**Date of Decision:** Dec. 13, 1916

**Acts Referred:**

- Transfer of Property Act, 1882 - Section 81

**Citation:** 38 Ind. Cas. 542

**Hon'ble Judges:** Newbould, J; D. Chatterjee, J

**Bench:** Division Bench

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### **Judgement**

1. Durga Charan Sen the deceased father of defendants Nos. 1, 2 and 3, mortgaged properties Nos. 1 and 2 to the deceased father of the plaintiff under a kistbandi mortgage bond for Rs. 800, and dated the 11th of Jyeshth 1291: then on the 3rd of Bhadra 1300 he mortgaged property No. 2 to one Behari Lall. Then on the 4th of Magh 1306 he mortgaged properties Nos. 1, 2 and 3 to the father of the plaintiff for Rs. 500 made up of Rs. 200 due under the first mortgage of 1291 and Rs. 300 cash, and lastly on the 30th Chaitra 1306 he mortgaged property No. 2 to the father of defendant No. 4, who purchased the same in execution of a decree based upon that mortgage. Upon the plaintiff bringing this suit on his mortgage, dated the 4th Magh, 1306, defendant No. 4 alone opposed him on the ground amongst others that the bond was collusive. That plea has been overruled and the only question now before us is the form and nature of the decree that should be made in the case.

2. There is no dispute that the plaintiff is entitled to a decree as upon a first mortgage for the Rs. 200 due under the mortgage of 1291 with interest at the rate provided by that mortgage, and for this amount he will be entitled to sell properties Nos. 1 and 2. But as Behari Lall took a mortgage of property No. 2 only and there is no evidence that he had notice of the mortgage of 1291 to the plaintiff, defendant No. 4 who stands by subrogation in the shoes of Behari Lall will be entitled to call upon plaintiff to sell property No. 1 first, see Section 81, Transfer of Property Act.

The order of sale, therefore, will be in the order of the properties, that is to say, property No. 1 first, property No. 2 second and property No. 3 third, if necessary.

3. The result is that the defendants failing to redeem within six months from this date, the plaintiff will be entitled to sell first the property No. 1 and to satisfy himself as to the Rs. 200 due under the mortgage of 1291 with interest at the rate mentioned in the said bond. If the proceeds are not sufficient he will be entitled to sell property No. 2. If there is a surplus upon the sale of property No. 1 it will go ^towards the satisfaction of the rest of the plaintiff's decree. If property No. 2 is sold as above the balance, if any, will go towards satisfying the claim of defendant No. 4 for the amount paid to Behari Lall, namely, Rs. 250 with interest at the rate of Behari Lall's bond: if it is not sold as above for satisfying the first mortgage of the plaintiff, it will still be sold and satisfy defendant No. 4 as above. If there is a further surplus it will go towards the satisfaction of the balance of the plaintiff's decree and the surplus, if any, will go to defendant No. 4. If the plaintiff's decree is still unsatisfied then property No. 3 will be sold.

4. The appeal is accordingly allowed but we make no order as to costs.