

**(1912) 07 CAL CK 0045**

**Calcutta High Court**

**Case No:** None

Ram Borai Singh and Others

APPELLANT

Vs

Mohendra Prosad Singh and  
Others

RESPONDENT

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**Date of Decision:** July 22, 1912

**Acts Referred:**

- Limitation Act, 1963 - Article 83
- Transfer of Property Act, 1882 - Section 5(5)(6)

**Citation:** 16 Ind. Cas. 73

**Hon'ble Judges:** Lawrence Jenkins, C.J; N. Chatterjea, J

**Bench:** Division Bench

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### **Judgement**

1. The facts of this case appear to me to point so clearly "to the result that should follow on the plaintiffs" claim that I think it is convenient to commence with a brief narrative of those facts. On the 21st May 1887, the plaintiffs" father executed in favour of Musmmat Subhaga Koer a zur-i-pvshgi mortgage for Rs. 449-14. The mortgaged property was 11 bighas, 4 cottahs kasht land. On the 29th of January 1897, a second mortgage was executed of 8 bighas, 14 cottahs, part of the same piece of land--this time in favour of one Ramraj Singh by way of a zur-i-veshgi, and the mortgage amount was Rs. 576-15. Of this sum, Rs. 449-14 was left with Ramraj Singh for payment on the mortgagor"s behalf to the prior mortgagee. In fact this payment never was made. What was done with the sum representing the difference between Rs. 449-14 and Rs. 576-15 does not appear. On the 25th of May 1895, the plaintiff executed an instrument of sale for Rs. 891 in favour of defendants Nos. 1 to 7. The property was 5 bighas, 14 cottahs, part of the property mortgaged. Of this amount, Rs. 576-15 was left with defendants Nos. 1 to 7 for payment to Raniraj Singh on account of the zur-i-peshgi executed in his favour. This Rs. 576-15 was not paid. The result has been a suit by the first mortgagee against the plaintiff resulting in an adverse decree and sale of the plaintiffs" property. The purchasers have thus

paid Rs. 576-15 less than the full amount of the purchase-price, and the protection which the plaintiff expected to acquire by allowing them to retain that amount has not been afforded him. I am doubtful whether the position of the parties was correctly placed before the lower Courts. Where one buys from another an equity of redemption subject to a mortgage and merely pays for the value of that equity of redemption, he contracts to protect his vendor from the obligation of the mortgage. The buyer's contract with the mortgagor is that the debt shall not fall upon him. It is a contract of indemnity and the buyer would be bound without any specific contract to indemnify the seller. *Tweedale v. Tweedale* 2 Brown's C.C. 153 : 23 Beav. 341 : 113 R.R. 165. This principle is founded on good sense and finds expression in Section 55, Sub-section (5), Clause (6) of the Transfer of Property Act. It is, I think, by these considerations that we should be guided in this case. There may be some difficulty in determining the precise extent of the indemnity to which the vendor was entitled from the purchaser of the equity of redemption, having regard to the fact that only a part was purchased. But we have in the express agreement of the parties themselves a fair measure of the extent of this indemnity for which they contracted. That amount is manifestly in excess of the damages awarded to the plaintiff by the Court of first instance where a decree for Rs. 425 was given as against defendants Nos. 1 to 7. From that decree, the plaintiff did not prefer an appeal; therefore, that amount cannot be increased by us, and it is only for us in these circumstances to hold, as we do, that the indemnity extended at least to the amount of Rs. 425: and we must, accordingly, reverse the decree of the District Judge and restore that of the Munsif.

2. In coming to this conclusion, I do not overlook the contention that the statute of limitation constitutes a bar to this suit. But as the contract is one of indemnity, the Article that applies is Article 83, possibly extended by Article 116. But even if it be taken that Article 83 alone is the governing Article and the benefit of the extension provided by Article 116 cannot be claimed, still the suit is within time, as it is within three years of the time when the plaintiff was actually damaged. All that was urged against this view is that a contract in Article 83 means an express contract. I can see no warrant for placing that restricted meaning on the words of Article 83. It is a meaning which the words do not themselves require, nor would it be in accordance with the view of contract expressed in the Indian Contract Act, and so, there is no obstacle on the score of limitation to the decree I have indicated.

3. Having regard to the mode in which the case has been conducted in the lower Appellate Court, I think each party should bear their costs of the lower Appellate Court and of this Court.