

(1916) 05 AHC CK 0013
In the Allahabad High Court

Asharfi Lal

APPELLANT

Vs

Udit Narain Misir and Akhraj Lal and Others

RESPONDENT

Date of Decision : 23-05-1916

Acts Referred:

Citation : (1916) ILR (All) 502

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

Bench : Division Bench

Judgement

Henry Richards, C.J. and Muhammad Rafiq, J.—This appeal arises out of a suit to realize the amount of a mortgage, dated the 29th of June, 1904. The point for decision in the present appeal arises under the following stated facts. In the year 1907 the appellants (who are defendants to the suit) purchased a 10-pie share of mauza Bakhera. It has been found by the court below that Rs. 309 went to discharge a prior mortgage of 1899. The defendants had contended that all that was due upon this previous mortgage was Rs. 309, which they paid. The court below has found that the appellants did "in fact pay Rs. 309, but that they did not discharge the entire amount, due on foot of the mortgage of 1899. No claim, however, seems ever to have been made on foot of this mortgage of 1899, and it seems long to have been barred by limitation. We must, however, for the purpose of the present appeal assume that the court below rightly decided that the appellant had only discharged the prior mortgage in part. The question is whether, having not entirely discharged the mortgage, they are entitled to be substituted for the prior incumbrancer even to the extent of Rs. 309, which they admittedly paid. The court below has held that the appellants were not entitled to claim priority in respect of this sum against plaintiff. It seems to us that this decision was wrong. If a purchaser of the equity of redemption discharges a prior incumbrance he is under ordinary circumstances admittedly entitled to hold up that prior incumbrance as a shield against the puisne incumbrancer. By payment of the prior incumbrance the purchaser of the equity of redemption enhances the security of the puisne incumbrancer and he has relieved him of obligation to discharge the prior incumbrance or to be obliged to sell the property subject

thereto. The contention is that this right of the purchaser is limited to cases in which he has discharged the prior incumbrance in its entirety. It is difficult to see upon what principle this distinction proceeds. No doubt the prior incumbrancer is entitled to refuse a part payment of his mortgage debt. If, however, he accepts the part payment and allows the liability upon the property to be discharged in part, the puisne incumbrancer benefits in exactly the same way as he would if the entire debt had been discharged, though not the same extent. His security is enhanced to the extent that the debt has been discharged. There seems to be no reason why the purchaser of the equity of redemption should not be entitled to stand in the shoes of the prior incumbrancer where he has with the consent of that incumbrancer partially discharged the liability. In support, however, of the contention (which found favour in the court below) the learned advocate for the respondents has relied on the case of *Gurdeo Singh v. Chandrikah Singh* I.L.R (1909) Cal . 193, (193, 220). With great respect to the learned Judges who decided that case we are unable to agree with them. They quote a passage from *Jones on Mortgages*, which, with every possible respect, we think has been misunderstood. In the case of *Chetwynd v. Allen* 1899 Ch. D. 853 a prior mortgage had been partially paid off and the party so paying was held entitled to stand in the shoes of the prior incumbrancer to the extent of the money advanced. It is true that the particular question which arises in the present case was not discussed, but it would appear that no one ever thought of raising the point. In *The Baroness Wenlock v. The River Dee Co.* 1887 L.R. Q.B.D. 155 the doctrine of subrogation was discussed. In that case a Company had borrowed money beyond its powers. Part of that money was paid away by the Company in discharge of certain liabilities of the Company existing at the time the money was lent. A further portion of the money went to discharge liabilities incurred by the Company subsequent to the advance of the money. All sides admitted that the lender was entitled to stand in the shoes of the creditors whose debts existed at the time of the advance. The question was whether the lender was also entitled to stand in the shoes of the creditors whose debts were incurred and discharged subsequent to the loan. The Court of Appeal consisting of Lord Esher, M.R., Fry and Lopes, L.J., held that the lender was entitled to recover his money by being subrogated for the creditors of the Company. By reason of the fact that the appellants in the present case paid off the mortgage in part no further liability was thrown on the puisne incumbrancer or the property. In our opinion the appellants were entitled to stand in the shoes of the prior incumbrancer to the extent of the further sum of Rs. 309. We accordingly allow the appeal and modify the decree of the court below by directing that the plaintiff must pay to the appellants a further sum of Rs. 309, that is to say in all Rs. 434, as a condition precedent to bringing the 10-pie share of mauza Bakhera to sale. The money must be paid within six months from this date. If the money is not paid within that time the suit will stand dismissed as against the appellants in respect of 10-pie of the Bakhera. If the money is paid within the time aforesaid the plaintiff will be at liberty to add this amount to his own claim against the share and sell the said 10-pie; share. The appellant will have his costs of this appeal (to be paid by

the plaintiff respondent).