
(1928) 01 AHC CK 0024
In the Allahabad High Court

Aziz Ahmad Khan and Others

APPELLANT

Vs

Chhote Lal and Others

RESPONDENT

Date of Decision : 04-01-1928

Acts Referred:

Citation : (1928) 01 AHC CK 0024

Hon'ble Judges : Mukerji, J

Bench : Single Bench

Final Decision : Disposed Of

Judgement

Mukerji, J.—The appellants before this Court were the plaintiffs in the Court below. They brought the suit out of which this appeal has arisen for recovery of Rs. 26,972-8-0 by sale of certain villages, and, in the alternative, for recovery of different items of money byway of contribution, to be enforced against certain properties held by some of the defendants. The suit has been dismissed on two grounds, namely, one, that the plaintiffs did not put before the Court sufficient materials to enable it to work out the respective burdens to which the properties might be liable: and the other, that the plaintiff has failed to implead certain people who are necessary for a proper determination of the suit. The respondents support the judgment on these two points taken by the Court below and also on "the ground of limitation. The Court found that the suit was not time barred.

2. The points for determination in this appeal are:

1. Whether proper parties are before the Court and, if not, whether, with a view to the provisions of Order 1, Rule 9, Civil P.C., the Court should not have added the necessary parties and then determined the suit?
2. Whether the record does furnish sufficient materials for a proper adjudication on the merits of the case?
3. Whether the suit should have been dismissed on the ground of limitation as

well?

3. The facts of the case, so far as we are concerned with them in this appeal, are all admitted and are as follows:

One Jamil-ul-Rahman was the owner of considerable immovable property and was in a state of chronic indebtedness. He entered into eight transactions with respect to his properties, and they will be stated presently. The suit for contribution is based on transaction No. 6 which will be detailed at its proper place. The transactions are:

1. On 22nd September 1897 Jamil-ul-Rahman whom we shall hereafter call the mortgagor, made a simple mortgage for Rs. 12,000 of five properties, namely, a house in Moradabad, the villages Nagla, Rasulpur, Ganwari and two other villages. The mortgage was in favour of one Parshadi Lal who has died, but his legal representatives are on the record as defendants 5 to 8.

2. Jamil-ul-Rahman mortgaged, on 10th March 1899 for a sum of Rs. 1,000, a 5-biswa share in village Shadipur in favour of one Ganpat Rai, whose legal representative is a party in the suit, defendant 19.

3. The mortgagor mortgaged, on the same date, namely 10th March 1899, another 5-biswa share of the village Shadipur for a sum of Rs. 1,000 in favour of Jawahir Lal, whose legal representative is on the record, among the defendants, as defendant 20.

4. Jamil-ul-Rahman mortgaged to Hargu Lal, on 11th April 1899, for a sum of Rs. 8,000, three items of property, namely, Asmauli Mahal Green, Asmauli Thok Dhanno and the house mentioned in connexion with transaction 1. Hargu Lal is a party to the suit as defendant 33. On foot of this mortgage of Hargu Lal, a decree was passed in his favour in suit No. 72 of 1911. In execution of the decree the property described as Asmaul Mahal Green was sold at an auction sale and was purchased by one Pahladi Lal, defendant 35, for Rs. 40,000. This sale satisfied the mortgage entirely and left a balance in favour of the mortgagor.

5. Jamil-ul-Rahman, on 29th July 1899, mortgaged for Rs. 8,000 three properties mentioned in connexion with the transaction 4 along with three other properties, namely, Nagla, Munda Khera and a grove in the village of Asmauli. Hargu Lal filed a suit which was numbered as 219 of 1911 and got a final decree for sale. One Chhote Lal, a party to the decree, who was a subsequent mortgagee of the village Nagla and who had purchased a part of it satisfied the decree by a payment in full on 12th August 1916. The amount he paid was Rs. 31,731-4-0. Chhote Lal's mortgage was dated 10th March 1908. He became a subsequent purchaser of the village Nagla through benami purchases and later through direct purchases. Those facts are however, not very material for our present purposes. Chhote Lal having paid off the decree of Hargu Lal No. 219 of 1911, sold off his rights acquired by the payment to one Shafi Ahmad. Before he did this, he took a sum of Rs. 10,000 from one Hidayat Ali and purported to release the property in

his hand, from liability.

6. Jamil-ul-Rahman made a mortgage of ten items of property in favour of the same Hargu Lal, on 23rd September 1899, for a sum of Rs. 5,000. On foot of this mortgage the decree No. 220 of 1911 was passed on 26th July 1911. The properties mortgaged were:

(a) Nagla, (b) Jalalabad, (c) Munda Khera, (d) Asmauli Mahal Green, (e) Asmauli Thok Dhanna, (f) Asmauli Thok Sarjit, (g) the grove in Asmauli, (h) Shadipur, (i) Inayatpur, and (j) house in Moradabad.

Having obtained the final decree on 16th May 1914, Hargu Lal took out execution of his decree. Chhote Lal who was again a party to the decree, as a puisne mortgagee of village Nagla, and as a subsequent purchaser of the village, paid in full the decretal amount which exceeded Rs. 20,000, on 19th July 1916. He thereafter, sold all the rights that he acquired by such payment to plaintiff No. 1 and Tahauwar Shah Khan, the predecessor-in-title of the remaining plaintiffs. The plaintiffs sought to recover Rs. 26,000 odd, as is stated in the beginning of the plaint, by the sale of items (h) and (i) alone, on the ground that other properties were subject to prior mortgages. This portion of the claim has been abandoned and is no longer before us.

7. Jamil-ul-Rahman mortgaged to one Ganga Dei on 21st April 1901, the five items of property which were mortgaged in transaction No. 1 to Parshadi Lal and, along with them the village of Bundra. Mt. Ganga Dei paid off Parshadi Lal's mortgage, and having brought a suit for sale, sold some property, and her decree was satisfied.

8. Jamil-ul-Rahman mortgaged to Dharam Das for Rs. 8,000, on 23rd February 1901, Shadipur and Bhojra. Dharam Das filed the suit No. 173 of 1913 and proceeded to execute his decree. At the instance of Chhote Lal, such rights as he had acquired by satisfaction of decree No. 220 of 1911 (mentioned above) were notified, and one of the properties mortgaged, namely Shadipur, was sold, subject to Chhote Lal's charge. The decree-holder or his representatives purchased the property and paid off encumbrances Nos. 2 and 8 mentioned above. Defendants 21 to 24 are the legal representatives of Dharam Das.

4. The plaintiffs' claim now is that their predecessor-in-title, Chhote Lal, discharged the burden created by transaction No. 6 on the several properties mortgaged on 23rd September 1899. They claimed that the respective owners should make good the sums that may be found recoverable from the several properties, and in default, the moneys may be realized by sale of the several properties.

5. We now proceed to consider the several points that have been set forth above as arising for determination at the present stage of the litigation.

6. The first point is one of limitation. We have already said that the claim to enforce the payment of money by sale of two properties has been abandoned

before us. This relief had been claimed on the ground that Chhote Lal, having satisfied the decree passed in favour of Hargu Lal on foot of the mortgage of 23rd September 1899 (transaction No. 6) had stepped into the shoes of the mortgagee Hargu Lal and was therefore, entitled to recover by suit the money actually paid by him from all or some of the properties mortgaged under the said transaction No. 6. The plaintiff sought to exclude eight out of the ten properties on the ground that they were either sold in execution of a prior mortgage or were subject to prior mortgages. We need not consider whether the claim to enforce the original mortgagees rights, by Chhote Lal or his legal representatives, would be barred by time or not. The learned Subordinate Judge held, in accordance with a judgment of this Court in Asharfi Lal Vs. Musammat Nannhi and Others, that such a suit would not be time barred. We need not express any opinion at present as to how far this case was rightly decided. It would probably be necessary to re-consider the law laid down there when a suitable occasion arises. The contention, however, before us is not whether a puisne mortgagee, by paying a prior mortgage, gets 12 years time from the date of payment within which to enforce his newly acquired rights. The question before us is whether Chhote Lal, having paid the decretal amount, not as a puisne encumbrancer, but as a purchaser of the village of Nagla was entitled to exact contribution from the remaining nine properties; and whether this claim for contribution is within time. We have already said that Chhote Lal acquired the property of Nagla. It is stated in the judgment of the Court below, and it was admitted before us, that Chhote Lal had, prior to the deposit of the decretal amount, become, by certain benami purchases, the owner of a part at least of Nagla. His right to contribution has not been denied before us and it has not been contended that Chhote Lal's right to contribution has not passed to the plaintiffs. We, therefore, proceed to consider the question, on the basis of the facts that a right of contribution does exist in the plaintiffs, who stand in the shoes of Chhote Lal.

7. The payment by Chhote Lal of decree No. 220 of 1911 was made on 19th July 1916. It is claimed for the plaintiffs that their suit for contribution is within time, having been brought within 12 years of 19th July 1916. The contention of the respondents is that by satisfaction of the mortgage decree, Chhote Lal was subrogated to the position of Hargu Lal as a mortgagee of the date 23rd September 1899; that the plaintiffs right to enforce the contribution was virtually a right to enforce the mortgage of 23rd September 1899 and that the suit having been instituted more than 12 years from 1899 is barred by time. Reliance has been placed on a Calcutta case, Raj Kamini Debi v. Mukanda Lal Bandopadhyaya [1920] 57 I.C. 868. We have carefully examined the case, but are unable to agree with it.

8. The argument that found favour with the learned Judges of the Calcutta High Court was this. A puisne mortgagee who satisfies a prior mortgage is subrogated to the position of the prior mortgagee, and in order to enforce the rights acquired by him on such payment u/s 74, T.P. Act, he has the same period of limitation as

the mortgagee who has been redeemed. This, in our opinion, is a correct proposition, though it militates against the view taken in this Court in the case of Asharfi Lal Vs. Musammat Nannhi and Others, quoted above. It was pointed out that where a usufructuary mortgage is redeemed by one of the mortgagors, and he obtains possession of the property, the period of limitation within which his co-mortgagor can redeem his share of the mortgaged property from the co-sharer who has already redeemed the entire property is the same as has been prescribed for the redemption of the original mortgage. This is again a right proposition of law and is supported by the Pull Bench case of this Court, namely, Ashfaq Ahmad v. Wazir Ali [1891] 14 All. 1. Further it was pointed out that where one of the mortgagors redeems a prior mortgage, he is subrogated to the rights of the prior mortgagee and on that account has a priority, in enforcing a right of contribution, over transferee of a co-mortgagor although the actual payment that gave the plaintiff a right to enforce contribution was made subsequent to the mortgage made by the co-mortgagor. This is in accordance with a decision of this Court in Har Prasad v. Raghunandan Prasad [1908] 31 All. 166, and is, undoubtedly, a correct proposition of law. On the basis of these three statements of law, it was held, in the case of Raj Kamini Debi v. Mukanda Lal Bandopadhyaya [1920] 57 I.C. 868, that a suit to enforce contribution is a suit to enforce the rights of the prior mortgagee and that, therefore, the remedy of the prior mortgagee must be availed of within the period within which the prior mortgagee could enforce his remedies. The learned Judges recognize that this view might be hard in certain cases, but remarked that they were unable to come to any other conclusion. With due respect, it appears to us very clearly, that the learned Judges have missed the point. We have to look to the principles on which the first three propositions of law enunciated above, are based and we shall at once see why in the case of a suit for contribution, a different rule must apply.

9. Before we proceed further, it will be important to note that the word "subrogation" is not to be found within the four corners of the Transfer of Property Act. The word "subrogation" means substitution. The rule of substitution has been adopted and applied by Courts of equity, on the principle, "He who seeks equity, must do equity." If a certain party owning property and his property are relieved from a certain liability, it is the duty of the owner to see that the party who relieves is not allowed to suffer. This is the principle of subrogation. Now let us examine the three principles from which the learned Judges of the Calcutta High Court thought that the fourth proposition followed.

10. When a puisne mortgagee redeems a prior mortgage, he acquires the rights of the prior mortgagee. This is u/s 74, T.P. Act. By such payment the puisne mortgagee, redeeming the prior mortgagee, only temporarily relieves the subsequent mortgagees or the mortgagor from the burden of the earlier mortgage. He is allowed to step into the shoes of the prior mortgagee only in order that he might enforce the very remedies which were open to the prior mortgagee. There is no reason why a redemption by him should extend the duration of the liability of the mortgagor or subsequent mortgagees, by

extending the period of limitation. There is no principle, therefore on which the remedy of the prior mortgagee could be extended for the benefit of the puisne mortgagee making the payment. In this connexion the case decided in this Court, namely, Asharfi Lal Vs. Musammat Nannhi and Others, may have to be considered again. The learned Judges in this case thought that the subsequent mortgagee, by making the payment, came within the purview of Section 95, T.P. Act and by the act of payment, acquired a charge over the properties redeemed by him. If we read Section 95, T.P. Act, we shall at once see that this section has no application whatsoever to the case of a puisne mortgagee satisfying the prior mortgage. The learned Judges remarked that they were applying the principle underlying Section 95, T.P. Act, and that it had been held that it was not exhaustive. The learned Judges evidently had in their mind the case of Ahmad Wali Khan v. Shamsh-ul-Jahan Begam [1906] 28 All. 482, decided by their Lordships of the Privy Council, where it was held that although it might be said that Section 95 applied only to the case of usufructuary mortgages, that it could be read and it should be read as applying to all classes of mortgages. We are not aware of any case in which it has ever been held by the Privy Council that Section 95, T.P. Act, applied to the case of a payment made by a puisne mortgagee.

11. The second proposition of law is that where one of the mortgagors redeems a prior mortgage and obtains possession from the mortgagee, a co-mortgagor can redeem him only within the period within which he could redeem the original mortgagee. This is so because the redemption by one of the mortgagors does not serve in any way to extend the period of limitation in favour of the co-mortgagor. The co-mortgagor had the usual 60 years period of limitation for redemption. The fact that a co-mortgagor by redemption has stepped into the shoes of the mortgagee and has been allowed to hold the property, other than his own, as a security for enforcing payment by his co-mortgagors, is no ground for granting an indulgence to the co-mortgagor, who wishes to redeem later, by extending the period of limitation.

12. The third proposition of law is that a mortgagor who redeems a joint mortgage is entitled to the priority of the mortgagee as against a subsequent transferee of the co-mortgagor. This is so because the burden that has been relieved was of a debt prior in date to the subsequent encumbrance and the party who has relieved the earlier burden cannot be allowed to suffer.

13. The doctrine of subrogation has been applied for the benefit of a party making the payment in suitable cases and cannot be applied to the disadvantage of that party. Where a suit is brought to enforce a contribution, which is based on the maxim, "equity is equality" it is only partially right to say that the party making the payment and relieving the co-mortgagor's property from burden is subrogated to the position of the mortgagee. It is clear that he cannot enforce the right of the mortgagee to sell all or any of the properties to realize the entire money recoverable by him. The mortgagee would be entitled, without any

restriction, to enforce the payment of the entire mortgage-money against any one of the properties he might choose to proceed against; but the mortgagor seeking contribution has to exempt his own property (if it has not been sold) and must bear a proportionate part of the mortgage-money. Then, he has to split up his claim and must ask for a proportionate payment from the owners of the remaining properties. Properties would contribute some more and others less according to the respective values of the properties. Thus it is clear that a co-mortgagor seeking contribution is not exactly in the same position, in all respects, as the mortgagee whom he has redeemed. It was held in a Calcutta case, *Digambar Das v. Harendra Narain Pandey* [1910] 14 C.W.N. 617, that how far a party seeking contribution is to be subrogated to the position of the mortgagee redeemed must depend according to the circumstances of the case. We approve (with respect) of some of the remarks made in that learned judgment. At p. 623, col. 1, will be found the following:

It is only by a fiction of law that the mortgagor who redeems the security is substituted in the place of the original creditor, and although it is sometimes said that the substitute is put in all respects in the place of the party to whose rights he is subrogated, even a superficial consideration will show that the statement is too broad and requires qualification.

14. The learned Judges quote authorities for their statement in col. 2 of the same page, namely:

the extent to which subrogation would be carried in a particular case must be governed by equitable considerations.

15. This is a statement of law with which we agree. Then the learned Judges say:

If, therefore, one of several mortgagors satisfies the entire mortgage debt, though upon redemption he is subrogated to the right and remedies of the creditor, the principle has to be so administered as to attain the ends of substantial justice regardless of form; in other words, the fictitious cession of the rights and remedies of the creditor in favour of the person who effects the redemption, operates only to the extent to which it is necessary to apply it for his indemnity and protection.

16. This statement of the law is undoubtedly correct.

17. There can be no doubt that where a right of contribution exists, that right comes into play only when a payment is made. It would be absurd to say that although the right to exact contribution arose in *Chhote Lal* on 19th July 1916, the limitation against him had begun to run on 23rd September 1899 (the date of the mortgage) and that it had already been time barred on 23rd September 1911, i.e., even before the right accrued.

18. The principle of subrogation may have been applied and adopted by the Transfer of Property Act in certain cases, but the law that actually governs is that which is enacted within the four corners of the Transfer of Property Act. The

maxim of law is well known, viz., "Where there is law, there is no equity." Where legal rules are clear, equitable rules cannot be applied. Supposing, therefore, that equity would require that Chhote Lal's right to contribution should be co-extensive with Hargu Lal's right, we have to be governed by the provisions of Sections 82 and 95, T.P. Act, read with Section 100 of the same Act. The right of contribution in India, where the Transfer of Property Act, is enforced, arises under the provisions of Section 82 of the Act. Under the view expressed by their Lordships of the Privy Council in the case of Ahmad Wali Khan v. Shams-ul-Jahan Begam [1906] 28 All. 482, quoted above, Section 95 is equally applicable. On the satisfaction, therefore, of a mortgage by a co-mortgagor, a charge arises in favour of the person making the payment and that charge can be enforced u/s 100, T.P. Act. Thus we have the clearest sanction for holding that the right to enforce arose on payment and, under Article 132, Lim. Act, the person making the payment has 12 years within which to enforce the charge.

19. We hold, in disagreement with the case of Raj Kamini Debi v. Mukanda Lal Bandopadhyaya [1920] 57 I.C. 868, that the suit is not time barred.

20. The second and third points may be taken together. The argument that has found favour with the learned Subordinate Judge is this: Some of the properties which are the subject-matter of the 6th transaction were dealt with by previous mortgages. u/s 82, T.P. Act, each property is liable to contribute proportionately to its value. The value of a particular property is to be determined where it is subject to "any other encumbrance" by deducting from the actual value of the property the "amount of such encumbrance." It is argued that the encumbrance means mortgage and that the "amount of the encumbrance" must be taken to be the proportionate charge that would exist on a property, if it happened to be previously mortgaged along with other properties. To illustrate the meaning: if properties C, D and E are subject to a particular mortgage and for purposes of contribution, their values have to be determined we must see whether these or any of these properties are subject to any prior mortgages and what are the properties along with which they have been mortgaged. Then we have to determine what would be the proportionate liability under the prior mortgage of each of these properties. This argument, which found favour with the learned Subordinate Judge, appears to us to be unsound and opposed to the plain words of Section 82, T.P. Act.

21. To start with, the word "encumbrance" does not necessarily mean a mortgage. The word "encumbrance" has not been defined in the Transfer of Property Act and we must interpret it in the manner in which it has been used in legal parlance. Wharton, in his Law Lexicon, defines it as:

a claim, a lien or liability attached to property; as a mortgage, a registered judgment, etc.

22. If this definition be correct, and we must assume that it is correct, we shall see that a mortgage is not the only thing which can be described as an

encumbrance. Stroud, in his Judicial Dictionary, points out that a lease might be an encumbrance in certain cases. We have no doubt that the word "encumbrance" has a larger meaning than a mere mortgage. The Transfer of Property Act deals largely with mortgages and if, by the use of the word "encumbrance", the framers of the Act meant only a "mortgage," nothing would have been easier for them than to use the word mortgage and not the word "encumbrance." Where out of one of the properties "mortgaged," an estate, say, in the shape of a permanent lease, has been carved out, before the making of the mortgage, out of the satisfaction of which the question of contribution arises, the value of the property mortgaged, for the purpose of contribution, must necessarily be the value of the property minus the value of the permanent lease. The owner, before the mortgage, may have very much impaired the value of his property by the execution of a permanent lease of a considerable portion of the estate, In the circumstances the value for the purposes of contribution must be determined by deducting the value of the lease from the market-value of the property as a whole. Then, again, a property mortgaged may be subject to an attachment at the date of the mortgage. The attachment will be an "encumbrance" if it be still subsisting at the date of enforcement of contribution. If this view of the word encumbrance" be right, it is clear that the framers of Section 82 were not contemplating only prior mortgages when they used the word "encumbrance." This would considerably diminish the weight of the defendant's argument that the amount of an encumbrance" was meant to be the proportionate amount of mortgage-money which could be attributable to a property in a suit for contribution.

23. Where the language of a statute is plain in itself, it is not open to the interpreter to add to it or to deduct from it or even to consider whether the rule is likely to create hardships in particular cases if it be read in its ordinary sense. The words themselves alone must be considered to see the intention of the law given: (see p. 66, Caries" Statute Law, edition of 1923, Broom's Legal Maxim, edition of 1924, p. 343).

24. To give effect to the contention of the defendants, we have to add considerably to the language of Section 82. Assuming that the word "encumbrance" has been used in a much narrower sense, namely, in the sense of mortgage alone, the amount of an encumbrance or mortgage will be what has been described in the Transfer of Property Act itself as "the mortgage money," namely, the principal amount and the interest. If we ask ourselves the question, "what is the amount of a prior mortgage on a particular property?" we would readily get the answer which would indicate the total amount of the mortgage money, Nobody would think of saying:

although the total amount of mortgage-money recoverable from this property is Rs. 10,000, yet, because with this property several others have been together mortgaged, the mortgage money on this property is really Rs. 2,000.

25. We cannot, except by doing violence to the language of the section, read the

words "amount of any other encumbrance" as meaning

the amount which would be payable by the property, having regard to the proportionate value of this property and any other property which may be subject to the same mortgage.

26. It has been urged that if we do not accept the defendants' interpretation, we shall be doing great injury to the defendants, inasmuch as some of the properties which have been more than once mortgaged will practically escape from contribution. For example, it was pointed out that the house property has been subject to three previous mortgages, namely, transactions I, 4 and 5 and that the total amount of the mortgage-money payable under them would be no less than Rs. 28,000. It is urged that the house would practically be worth nothing if we attempt to deduct Rs. 28,000 from the value of the property. In fact, the property has been valued at only Rs. 6,000. This argument need not deter us. There are several answers to this objection. The argument comes to this only: that if we read Section 82 naturally we shall be obliged to exclude some of the properties which are heavily encumbered from contribution. When the sixth mortgagee accepted some of the heavily encumbered properties as his security, and, when the mortgagors gave those properties as part of the security, both the mortgagors and the mortgagee knew that the value of those properties, as security, was worthless. The prior mortgagees could easily enforce their claims against the house alone. If the house escaped the attack of the first mortgagee, it was not likely to escape the attack of the second or the third mortgagee. If we consider supposed cases of hardship," we can point out the possibility of similar supposed hard cases, if the interpretation contended for on behalf of the defendants were adopted. This very case illustrates the hardship of the interpretation contended for by the defendants.

27. In spite of making 36 people parties to the suit and in spite of bringing on the record a mass of evidence, the plaintiffs have been told that more people are necessary as parties and more evidence as to properties is necessary. We must remember that we are construing a rule of law and are not legislating. We have already said that if the language of the statute be plain, it is not open to us to consider whether that language would create any hardship or not. If there be hard cases, they may be good reasons for altering the law, but they cannot be good reasons for putting a meaning on the language which it does not bear.

28. Further, we find that the rule that has been enacted in Section 82 is liable to be abrogated or modified, by the mortgagors themselves. There appear in the section the very important words, "in the absence of a contract to the contrary." Where it is intended by the different owners of several properties, that each and every item should be liable to contribute in a manner different from the one described in Section 82, it would be open to them to agree among themselves to that effect. The legislature provided for a rule only where the mortgagors, among themselves or the mortgagors among themselves, and the mortgagee (assuming that the mortgagee too has a voice in the contract for contribution) did not come

to any terms. We can easily conceive that the legislature decided to lay down a simple rule in simplest possible language and left it to the parties to the transaction to lay down any different rule for themselves if they wanted any such different rule.

29. We are clearly of opinion that there is no justification for reading the word "encumbrance" as mortgage" and that further, there is no justification for holding that the words "amount of any other encumbrance" mean "proportionate mortgage money payable according to a rule of contribution.

30. Only one case has been cited to us as an authority for the defendants contention and that is the case of Hariraj Singh v. Ahmad-uddin [1897] 19 All. 545. We have carefully considered the case, but do not find anything in it to induce us to regard it as an authoritative pronouncement on the interpretation of Section 82, T.P. Act. The first thing that we have to observe in the case is that it does not appear that the parties put different constructions on Section 82 (as before us) and the learned Judges were called upon to pronounce an opinion as to which of the constructions was right. The learned Judges merely proceed to show how contribution should be calculated. It does appear, no doubt, from the judgment of the learned Judges, that the amount of the prior mortgage which was directed to be deducted from a particular property was a "proportionate amount" as contended for on behalf of the defendants. But it is also the case that the learned Judges proceeded to altogether exclude from consideration certain properties which had been sold in execution of prior mortgage decrees; and, thereby, adopted the interpretation contended for on behalf of the appellants before us. If we adopt the principle of "proportionate charge," there is no reason whatsoever for excluding from calculation the values of the properties sold in execution of prior mortgages. It is true that those properties could not be made liable, but if they are made to bear, in the calculation, proportionate part of the prior encumbrance, the prior encumbrance on unsold properties would diminish. It is clear, therefore, that the learned Judges who decided the case never felt called upon to decide as to whether Section 82 was capable of two different interpretations.

31. For the foregoing reasons we are of opinion that the learned Judge of the Court below was wrong in believing that it was incumbent on him to find out, in the case of each prior mortgage, what were the properties mortgaged along with any of the items mortgaged under the sixth transaction, what were the values of those properties, who were the owners of those properties and so on. The learned Judge need not have troubled himself with such a wide enquiry and should have confined himself to the enquiry as to the amounts of the mortgages (as explained above) under which particular properties were liable. If our view be correct, it is possible, nay it is probable, that, with the materials on the record and the parties before the Court, the latter would be able to come to a proper adjustment of the liabilities of the several properties owned by the parties to the suit. In the result, we set aside the decree of the Court below and remand the

suit to the learned Subordinate Judge with the direction that he shall restore the suit on its original number and proceed to dispose of it according to law, having regard to the foregoing remarks in our judgment. The costs here and hitherto will abide the result. If the learned Judge, in the Court below, should still find that certain necessary parties are not before him, having regard to the provisions of Order 1, Rule 9, Civil P.C. he must bring those parties on the record (subject to such orders as to costs as he may deem fit to pass) and proceed to try the suit.