

(1968) 02 GUJ CK 0002
In the Gujarat High Court
Case No : Appeal No. 653 of 1961

Bai Jayaben Girjashanker Oza

APPELLANT

Vs

Bai Bhanumati Damji and Another

RESPONDENT

Date of Decision : 13-02-1968

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 52, Order 34 Rule 1, Order 34 Rule 12, Order 34 Rule 13, Order 34 Rule 13(1)
Transfer of Property Act, 1882 — Section 73

Citation : AIR 1969 Guj 222 : (1969) GLR 754

Hon'ble Judges : J.M. Sheth, J

Bench : Single Bench

Advocate : D.U. Shah, for the Appellant; C.H. Doshi, for the Respondent

Final Decision : Allowed

Judgement

J.M. Sheth, J.—In this second appeal, a short but interesting question of law arises.

2. The facts giving rise to this second appeal are briefly stated as under :--

3. The respondent No. 1 Bai Bhanumati is a second mortgagee. The respondent No. 2 Harjivan is an original mortgagor, a judgment-debtor. One Damodar Chatrabhuj was a first mortgagee. He had filed a Civil Suit No. 46 of 1960 against the respondent No. 2 Harjivan for recovery of his mortgage dues and he had obtained a decree for recovery of his dues from the sale of the mortgaged property. The respondent No. 1 Bai Bhanumati in whose favour the second mortgage was executed by the said judgment-debtor was not a party to that suit. It means that the subsequent mortgagee was not a party to the suit filed by a prior mortgagee for recovery of his mortgage dues. The aforesaid suit was filed on 26th September, 1960. The said first mortgagee filed a Regular Darkhast No. 290 of 1960 to recover Ra 7.654.01 by a sale of the mortgaged property described in the Darkhast in the Court of the Joint Civil Judge, Junior Division, Rajkot on 31-12-1960. He also filed Darkhast No. 295 of 1960 in the same Court

for the execution of that very decree. The present appellant Bai Jayaben had filed a Civil Suit No. 839 of 1959 and had obtained money-decree in that suit in her favour against the respondent No. 2 on 2nd September, 1960 for Rs. 1,421.21 nPs. She filed a Darkhast No. 131 of 1961 against the respondent No. 2 to recover Rs. 1,589.11 nPs. for execution of the decree obtained by her, by attachment of the surplus amount lying in Regular Darkhasts Nos. 290 of 1960 and 295 of 1960 which were filed by Damodar Chattrabhuji, the first mortgagee against the second respondent, on 17th June, 1961. The learned Joint Civil Judge issued attachment warrant under Order 21, Rule 52 of the CPC for attaching the amount lying in the Court in the aforesaid Darkhasts, It will be proper to note at this stage that in execution of the aforesaid mortgage decree, the mortgaged properties were sold subject to the second mortgage with which we are concerned in this appeal and other subsequent mortgages also, and after satisfaction of the decretal dues of the first mortgagee who had obtained a decree, the surplus amount of the sale proceeds was lying in the Court and that amount was attached by the present petitioner as referred to above. The present respondent No. 1 Bai Bhanumati, the second mortgagee filed an application in Darkhasts Nos. 290 and 295 of 1960 on 27th June, 1961 requesting the Court to give the surplus amount lying in the said Darkhast to her as she was a second mortgagee in relation to the property which was auctioned in the said Darkhast. The said application was forwarded by the learned Civil Judge, Senior Division, Rajkot to the learned Judge concerned for favour of necessary action. The respondent No. 1 Bhanumati gave another application on 28th June, 1961 (Ex. 5 of the present proceedings of the Executing Court), in the Darkhast filed by Damodar Chattrabhuji against Harjivan Ravjibhai, stating that she was a second mortgagee and the decree-holder (first mortgagee) had been paid off and, therefore she was entitled to the surplus amount lying in the Court. She also urged that the present petitioner Jayaben had filed a Darkhast No. 131 of 1961 and got this amount attached, but it was not legal and she was not entitled to that amount and eventually, the said amount should be given to her. The learned 3rd Joint Civil Judge, Junior Division, Rajkot kept this application for hearing on the date of Civil Regular Darkhast No. 131 of 1961 on 7th July, 1961. The learned 3rd Joint Civil Judge, Junior Division, Rajkot, rejected that application on the ground that Bai Bhanumati who is a second mortgagee can recover the amount from the property which has been sold. He also passed an order below the Darkhast that the surplus amount lying in the Darkhast No. 290 of 1960 be paid to the present appellant. A cheque for Rs. 1,400.34 nPs. was issued on 7th July, 1961 in the name of the present appellant. The respondent No. 1 Bhanumati got an interim stay and eventually that cheque was not encashed.

4. Being dissatisfied with that order passed by the Executing Court, the respondent No. 1 Bhanumati filed a Civil Appeal No. 130 of 1961 in the District Court at Rajkot. The learned District Judge, Rajkot Mr. P. H. Parikh, relied upon a decision of the Madras High Court to which I will make a reference at an appropriate stage, and found that the present respondent No. 1, being a second

mortgagee was entitled to the surplus sale proceeds in preference to the present appellant who was an attaching creditor of the respondent No. 2 and eventually, allowed the appeal and set aside the order passed by the Executing Court.

5. Being dissatisfied with that order and decree, the attaching-creditor Bai Jayaben has preferred the present second appeal to this Court.

6. The learned Advocate Mr. D.U. Shah, appearing for the appellant, urged that in view of the position that the puisne mortgagee having intervened in the execution proceedings at the time of the sale and the property having been sold subject to her mortgage dues and the dues of other subsequent mortgagees the respondent No. 1 is not entitled to get the surplus of the sale proceeds that remained in the Court after the dues of the first mortgagee were satisfied from the sale proceeds of the mortgaged property in execution of the mortgage decree obtained by her for sale. He urged that the property having been admittedly sold, in such a mortgage decree for sale, as puisne mortgagee was not a party to that suit, she had an option to ignore the suit proceedings and execution proceedings. She had that option in law. If she had ignored those proceedings and had not intervened in the execution proceedings at the time of the sale and the property had been sold in execution of a decree obtained by the first mortgagee in a suit to which the second mortgagee was not made a party, the second mortgagee, i. e. the respondent No. 1 had two alternative remedies. She could proceed to get her mortgage dues satisfied from the surplus sale proceeds or she could keep her mortgage security intact, and proceed to get her mortgage dues satisfied by the sale of the mortgage property. The present case is not a case of that type. The second mortgagee intervened in the execution proceedings at the time of the sale. Her mortgage dues were duly notified in the sale proclamation. The property that was sold was subject to her mortgage dues and other mortgage dues with which we are not concerned in the present appeal. He therefore, contended that what was sold was the equity of redemption of the mortgagor, i. e. the interest which could be left in the mortgagor after the satisfaction of the mortgage dues of the subsequent mortgagees including the present respondent No. 1, the second mortgagee. The purchaser, therefore, paid the price only for the purchase of that interest. If the present respondent No. 1 is allowed to get her mortgage dues satisfied from the surplus sale proceeds of a sale which has taken place in the aforesaid circumstances, she would be getting the surplus sale proceeds that would be the amount to which the mortgagor would be really entitled. The reason is that the security of the present respondent No. 1 was kept intact, the property having been sold subject to her mortgage. The present appellant had obtained a decree against the mortgagor and had attached the said surplus sale proceeds by levying a valid attachment as contemplated by Order 21, Rule 52 of the Civil Procedure Code. She was, therefore, entitled to that amount and the respondent No. 1 had a right to proceed for recovery of her mortgage dues against the mortgaged property that has been purchased by the auction purchaser subject to her mortgage encumbrance. He urged that on a careful consideration of the case, K.N.

Krishnaswami Bhagavathar Vs. N.A. Thirumalai Iyar and Others, , relied upon by the learned District Judge, it appears that it has been decided in view of the particular facts of that case; it may be that there may be some observations made in that decision and which are in the nature of obiter dicta, may lend support to the argument advanced on behalf of the respondent No. 1, He urged that in view of the aforesaid circumstances of the instant case, that decision has no application. In support of his argument, he relied upon a decision of a Division Bench of the Punjab High Court in the case of Rattan Chand Vs. Prite Shah Sant Ram of Amritsar and Others, .

7. In reply to this argument, the learned Advocate Mr. Doshi, appearing on behalf of the respondent No. 1 contended that Order 34, Rule 1 of the CPC contemplates that a puisne mortgagee was a necessary party to the suit filed by the first mortgagee for recovery of his mortgage dues. Admittedly the second mortgagee, namely, the respondent No. 1 was not a party to that suit. The respondent No. 1 being a second mortgagee, was entitled to the mortgaged property in question minus the right of the first mortgagee, to keep that property in security for her mortgage dues. That being the position, when the mortgaged property was sold in execution of a mortgage decree, obtained by the first mortgagee, after the mortgage dues of the first mortgagee were satisfied, the surplus sale proceeds would be the substituted security for the mortgage dues of the respondent No. 1. She was entitled to those sale proceeds, the sale proceeds being a part of her security and furthermore, she could also proceed against the property in the hands of the purchaser. In short, his argument was that both the remedies were concurrent remedies available to the respondent No. 1, a second mortgagee and they were not mutually exclusive, meaning thereby, that they were not alternative remedies. He urged that the view taken by the learned District Judge was, therefore, quite justified. He also invited my attention to Section 73 of the Transfer of Property Act and the provisions of Order 34, Rules 12 and 13 of the CPC and to the case of Mukhram Marwari v. Bateswar Mahton AIR 1937 Pat 307 in support of his arguments.

8. In my opinion, the arguments advanced by the learned Advocate Mr. Shah for the appellant are well founded in view of the position that this respondent No. 1, a second mortgagee, though she was not a party to the Civil Suit No. 406 of 1959, has intervened in the execution proceedings taken by the first mortgagee for execution of her decree at time of the sale. In those Darkhasts Nos. 290 and 295 of 1960, wherein the mortgaged property came to be auctioned, this respondent No. 1 Bhanumati gave an application on 18th April, 1961, stating that she was a second mortgagee of the property mentioned in the Darkhast and her mortgage dues were to the extent of Rs. 2,433-10-0. It also appears that the third and the fourth mortgagees also filed similar applications stating their mortgage dues. In the sale proclamation that came to be issued, a note was made that this property was subject to second, third and fourth mortgagees of the said mortgagees. In short, the property was sold subject to the aforesaid mortgages. It was not sold free from those encumbrances. Only the remaining

mortgagor's interest was sold and it was purchased by one Kirankumar A. Sonpal. Damodar Chattrabhui, the decree-holder was paid up Rs. 7,786.66 nps. on 14th June, 1961. A further amount of Rs. 103/- was paid to him for poundage. The amount of Rs. 1,400.34 nps. remained in the Darkhast No. 290 of 1960 which amount was ordered to be attached as said above. These facts appear in the judgment of the learned District Judge and they have not been challenged. It is thus evident that what the auction purchaser has paid is for the interest of the mortgagor that remained after the subsequent mortgagees' dues came to be paid off. If this subsequent mortgagee, the respondent No. 1 had not intervened in the execution proceedings at the time of the sale, the position may have been possibly quite different. We have to confine ourselves to the circumstances of the present case and find out whether the respondent No. 1, the second mortgagee has got a right to get these surplus sale-proceeds in preference to the appellant, the attaching-creditor who had attached the amount as said above, in the circumstances of the present case.

9. Order 34, Rule 1 of the CPC states:

"Subject to the provisions of this Code, all persons having an interest either in the mortgage-security or in the right of redemption shall be joined as parties to any suit relating to the mortgage."

That rule is subject to the provisions of this Code. If a puisne mortgagee is not made a party to the suit filed by a prior mortgagee for recovery of his mortgage dues, he will not be affected by a decree that may be passed. He can ignore the suit proceedings as well as the execution proceedings.

10. Order 34, Rule 12 of the CPC deals with a case of sale of property subject to prior mortgage. The relevant part of it runs as under:--

"Where any property the sale of which is directed under this Order is subject to a prior mortgage, the Court may, with the consent of the prior mortgagee, direct that the property be sold free from the same, giving to such prior mortgagee the same interest in the proceeds of the sale as he had in the property sold."

The instant case is not a case of that type. In the instant case, the property was sold in execution of a decree obtained by a prior mortgagee for sale of the mortgaged property. Order 34, Rule 12 of the CPC has, therefore, no application.

11. Order 34, Rule 13 of the CPC states about the application of proceeds. It means that it has also got relation to Rule 12. Both the rules have to be read together. The only part of it which could have some relevance is the last clause of Sub-rule (1) of Rule 13, which runs as under:-

"Lastly, the residue (if any) shall be paid to the person proving himself to be interested in the property sold, or if there are more such persons than one, then to such persons according to their respective interests therein or upon their joint receipt"

If the second mortgagee elects to realise his mortgage dues by the receipt of the surplus sale proceeds, he has got that remedy open and he can choose that remedy. But if a second mortgagee intervenes in the execution proceedings at the time of the sale and the property is being sold subject to his mortgage rights, his security is not diminished in any manner. His security remains intact. He can follow the property in the hands of the purchaser as the property has been sold subject to his mortgage rights. In my opinion, these two rules do not help us in arriving at a decision of the vexed question.

12. The material part of Section 73 of the Transfer of Property Act, 1882 runs as under:--

""Where the mortgaged property or any part thereof or any interest therein is sold owing to failure to pay arrears of revenue or other charges of a public nature or rent due in respect of such property, and such failure did not arise from any default of the mortgagee, the mortgagee shall be entitled to claim payment of the mortgage-money, in whole or in part, out of any surplus of the sale-proceeds remaining after payment of the arrears and of all charges and, deductions directed by law."

That section also does not help us in deciding the question that arises in this appeal. There is no doubt that the second mortgagee has got an option to realise his dues by proceeding against the surplus sale-proceeds or by following the property in the hands of the purchaser if the second mortgagee is not a party to the suit filed by a prior mortgagee. The question for consideration is, what is the position if such a second mortgagee intervenes in an execution proceeding at the time of the sale and the property is sold subject to his mortgage rights. A single Judge of the Patna High Court, in the case of AIR 1937 Pat 307 has no doubt made certain observations which lend support to some extent to the arguments advanced by the learned Advocate Mr. Doshi, appearing for the respondent No. 1. The relevant observations made therein are as under:--

"Property under mortgage was sold for arrears of land revenue. There was some surplus left after satisfying the decree for arrears of rent. Another decree-holder of the mortgagor attached and withdrew that surplus while the mortgagee had applied for an injunction against the mortgagor restraining him from withdrawing the surplus. So the mortgagee brought a suit against the said decree-holder of mortgagor for refund of the amount so withdrawn by him. It was contended by the decree-holder that as the property was sold without annulling the encumbrances, the mortgagee had no right to proceed u/s 73, T. P. Act but the mortgagee could proceed against the property:

It was held that the right of the mortgagee to proceed against the surplus u/s 73 T. P. Act could not be taken away by the revenue sale being held either by or without annulling the encumbrance. (The two decisions reported in Kapuri Sahu and Another Vs. Mathura Das Marwari and Others, were relied upon).

It has been further observed therein as under:--

"Section 73 T. P. Act is intended to protect the mortgagee's right in the secured property. He should be in a position to realise his dues from the property mortgaged. If portions of the property are converted into cash, that cash also should be available to him as a part of the security, because Section 73 says that if any part of the property or interest in the property is sold the mortgagee's right comes into play to realise the money. It is either the property or any part of it or any interest in the property that is to say, the whole object is that the mortgagee's security should not be diminished and the moment there is any attempt to diminish it his remedy comes in. If any portion of such surplus is taken away by anyone else, the mortgagee has got a right to follow it"

13. A Division Bench of the Patna High Court in the case of Krishna Chandra Dhar Vs. Bipin Behari Padhi, , has taken a different view, distinguishing the case reported in Kapuri Sahu and Another Vs. Mathura Das Marwari and Others, , relied upon in the aforesaid decision of the Patna High Court. It was a decision of a single Judge. The relevant observations made therein by Courtney-Terrell C. J., are as under:--

"The object of Section 73 is only to protect a mortgagee whose security has been diminished. Hence, where the property is sold for a revenue debt subject to the mortgage, the mortgagee has no right to proceed against any surplus of the sale proceeds as the mortgagee's rights are not diminished by the sale." In the body of the judgment, at pages 179 and 180, the following observations have been made:--

"The 4 as. 7 p. residuary share in the estate which had included the mortgaged property was sold for arrears of revenue and in the circumstances by reason of Section 54 of the Revenue Sale law the sale was subject to the mortgagee's right in respect of 5p. 12 1/2 kr. share out of the property sold in the revenue sale. The property sold at the revenue sale was brought by Biswanath Paidia on 14th September, 1932 and the sale realised more than the amount of the revenue debt with the result that the surplus sale proceeds amounted to Rs. 22,662. The share of the judgment-debtor No. 5 out of this sum amounted to Rs. 2307-3-10. Now Bipin Behari Padhi before executing his mortgage decree by putting up the mortgaged property to sale made an application for the attachment of the sum of Rs. 2307-3-10, the share of the surplus sale proceeds attributable to this particular part of the property and withdrew that amount and then proceeded in execution to sell the mortgaged property and that sale has since been carried through.

Now certain facts are clear and beyond dispute. First of all it is clear that the revenue sale was in circumstances such as that the mortgagee was not deprived of his security, his mortgage was not affected by the revenue sale at all, and therefore, his security remained undiminished. Bipin Behari however justifies his attachment of the surplus sale proceeds amounting to Rs. 2307-3-10 by virtue of Section 73, T. P. Act, and the learned Subordinate Judge was of opinion that he had the right by reason of that Section not merely to realise his security by

means of his mortgage decree for sale, but also that he had the right to proceed against the surplus sale proceeds. Now Section 73, T. P. Act, creates no new law but merely gives effect to the old law of substitution....."

After referring to the decision of Kapuri Sahu and Another Vs. Mathura Das Marwari and Others, , the following observations have been made:--

"In that case a portion of the estate only which was subject to the encumbrance was sold for arrears of revenue and the result of the revenue sale was to diminish the security to a certain extent but without extinguishing it altogether; and in those circumstances, this Court applied the principle involved in the amendment and stated that to that extent the mortgage security was not diminished by the effect of the sale. The mortgagee had the right to proceed against the mortgaged property in addition to the right which he had to proceed against the sale proceeds in respect of the portion by which the security had been diminished. That is the only effect of the decision in Kapuri Sahu and Another Vs. Mathura Das Marwari and Others, . In this case however, the mortgagee's rights were not diminished by the sale at all and he had his full right to put the mortgaged property upto sale and to accede to the proposition that he can also proceed against the sale proceeds would mean that by reason of the revenue sale the security held by the mortgagee was increased. This was clearly not the intention of the Legislature. The only reason for Section 73 was to protect a mortgagee whose security has in fact been diminished. The mortgagee has put the property up for sale and to that extent he has been satisfied. The rupees 2307-3-10 is no part of the property of judgment-debtors 1 to 4 but is the property of Judgment-debtor No. 5 and that money which has been withdrawn by Bipin Behari Padhi must be replaced by him. If he has any further remedy for the balance of the mortgage debt against judgment-debtors Nos. 1 to 4 or indeed against judgment-debtor No. 5 by reason of the decree then he must take such appropriate steps as he may be advised for recovery of that balance as may be available to him."

In view of this decision of a Division Bench and which is also a later decision of the Patna High Court, the decision relied upon by the learned Advocate for the Respondent No. 1 cannot be of much persuasive character.

14. In the case of K.N. Krishnaswami Bhagavathar Vs. N.A. Thirumalai Iyar and Others, , Devadoss J. has made certain observations which may, to some extent lend support to the argument advanced by the learned Advocate Mr. Doshi, appearing for the respondent No. 1. It has been observed therein as under :--

"Where a prior mortgagee makes the puisne mortgagee a party and brings the property to sale the puisne mortgagee can only proceed against the proceeds in Court after satisfying the claim of the prior mortgagee. In other words, his right of suit against the mortgagor is taken away by his being made a party to the suit of a prior mortgage. But the sale cannot affect the title of a mortgagee who has not been made a party to the suit. He can, therefore, either proceed against the

mortgaged property in the hands of purchaser by bringing it to sale or proceed against the sale-proceeds in Court after satisfying the claims of the prior mortgagees. His right is only subject to that of the prior encumbrancer but he has a prior claim over any simple money creditor who attaches the money in Court attaches it as the property of the mortgagor and the mortgagor certainly is not entitled to the money in Court in preference to the mortgagee whose debt he is liable to discharge. Although Order 34, Rule 1, requires all mortgagees to be brought on record that would not take away the right of a puisne mortgagee not so joined as a party to claim any amount in Court on the ground that he has an interest in. the mortgaged property."

There cannot be any dispute about these propositions enunciated therein in the circumstances of that particular case.

15. At page 105, after referring to a decision of the Privy Council in *Raja Kishendatt Ram v. Raja Mumtaz Ali Khan* (1880) 6 Ind App 145 (PC), the following observations have been made:--

"When the sale is effected under a power of sale in the mortgage-deed, the mortgagee exercising such power is a trustee so far as the surplus proceeds are concerned and held that the Court was not in a better position than he. When the mortgagee exercises his power of sale, he sells it free of encumbrances and the purchaser gets it, free of all subsequent encumbrances. But when a Court sells the property under a decree to which the subsequent mortgagee is not a party, it does not sell it free of the subsequent encumbrances. But that does not alter the principle of the decision. The attaching creditor in that case could not keep his hold on the money when the mortgagee came along because the mortgagee had a prior claim by reason of his mortgage right. The mortgage right against the property is available against the proceeds into which it was converted, His right is only subject to that of the prior encumbrancer, but he has a prior claim over any simple money-creditor and the mortgagor. A simple money creditor who attaches the money in Court attaches it as the property of the mortgagor and the mortgagor certainly is not entitled to the money in Court in preference to the mortgagee whose debt he is liable to discharge."

At page 106, the following observations have been made:--

"When the mortgaged property is sold and is converted into money, the right of the puisne mortgagee is not thereby lost. I am assuming in this connection that he was not a party either to the suit or to the execution proceedings in which the assets were realized. The property was his primary security and when that is converted into money, his security is not thereby lost, but is transferred from the property to the sale-proceeds, and his right is only subject to that of a prior mortgagee or mortgagees. The objection to the puisne mortgagee proceeding against such assets is that the assets represented only the value of the equity of redemption remaining at the date of the sale and therefore the puisne mortgagee cannot proceed against the proceeds in Court. This argument

overlooks the fact that the equity of redemption, whatever be its value, is liable either in the hands of the mortgagor or of a purchaser from him to satisfy the claim of the mortgagee."

It is significant to note that these observations have been made, keeping in mind that the puisne mortgagee was not a party either to the suit or to the execution proceedings in which the assets were realized.

16. At page 107, the following observations have been made:--

"Reference is also made to a passage in Gour's Book on the Law of Transfer in British India, Section 1683. Referring to Section 73, T. P. Act, he says the section is inaccurately worded, but it is evidently intended to provide only for cases in which the sale is made free from all encumbrances. In any other view, the mortgagee would have both the surplus as well as the right to follow the land in the hands of the purchaser and this confers on the mortgagee an additional security merely because the mortgaged property is brought to sale. It is difficult to see how it can be said that the mortgagee gets additional security when the property mortgaged to him is sold and the proceeds are held in Court. The property mortgaged to him was liable for his debt and if the property is sold and the sale-proceeds are held in Court it cannot be said that he gets additional security for his debt. Supposing in this case the plaintiff brings the property to sale and in consequences of the fall in price or the state of the money market the mortgaged property goes to the prior encumbrancers or the price offered is just sufficient to cover the claim of the prior, mortgagees, can it be said that he is to be without any remedy? The surplus sale proceeds in Court cannot become the property of the mortgagor till all the mortgages are paid off. The sale proceeds in Court cannot be said to represent the equity of redemption for the whole of the property is security; the so-called equity of redemption is not merely the right of the mortgagor to redeem the property, but it also represents the difference between the value of the property and the amount due on the mortgage, and the difference in value cannot be absolved from the liability for the mortgage amount. That being so, it is difficult to see how the sale proceeds in Court in this case can be said to be additional security for the debt of the plaintiff. When the property was sold defendant 4 purchased it probably at its market value. But his title to the property is liable to be defeated when the plaintiff brings a suit to enforce his remedy under the mortgage. The question is not what the purchaser pays for the property. Whether he pays full value or not he only buys the interest of the mortgagor and the property which he buys is security for the debt of the puisne mortgagee who was not a party to the decree under which he purchased. Whatever may be the number of mortgages created on the property, the mortgagor can only have the surplus after meeting the claims of all his mortgagees."

At page 108, the following observations have been made:--

"In this case therefore there is no such thing as additional security by the mere

fact that the property was sold and the sale proceeds are more than sufficient to meet the claims of the prior mortgagees. There is no warrant in law for holding that in such a case as this that the sale proceeds are additional security. After a careful consideration of the cases quoted at the Bar, I could not find anything in equity or in law which militates against the right of the puisne mortgagee in a case like this to proceed both against the property in the hands of the purchaser as well as against the sale-proceeds in Court. It is not necessary in this case for the plaintiff to proceed against the property as the surplus proceeds in Court were more than sufficient to satisfy the claims of the plaintiff under the mortgage. The 8th defendant who withdrew the money from Court must pay it back as the amount was subject to the mortgage rights of the plaintiff, and the 8th defendant who obtained only money-decree against the mortgagor could not claim any preference over the plaintiff," In view of the facts of that case that a puisne mortgagee had not intervened in the execution proceedings at the sale, the observations made by the learned single Judge may be justified. In the instant case, the puisne mortgagee did intervene in the execution proceedings at the time of the sale and the property has been sold subject to his mortgage dues which are notified in the sale proclamation. The purchaser knows that what he is purchasing is a property sold subject to the subsequent mortgages. The dues of the present mortgage in question are notified. If the principle enunciated in the aforesaid Madras decision is extended to a case like the present case, the consequences would be that the purchaser would gain at the cost of the mortgagor or at the cost of the creditor of a mortgagor. That could not be envisaged. No doubt, in the Madras decision, Mr. Krishnaswami Iyer had contended, "in this case the property was sold subject to the mortgage." But it was observed: "the sale certificate does not support that contention." It has been further observed therein as under:--

"Though the hypothecation in favour of the plaintiff is mentioned therein it is distinctly stated that that hypothecation is subsequent to that of the plaintiffs in that suit and does not affect them. It is difficult to see how this can be construed into a sale subject to the encumbrance in favour of the plaintiff."

It could, therefore, be said with a good deal of justification that the said case would not govern the instant case in view of the fact that the property was sold subject to the mortgage in question and this subsequent mortgagee had intervened in the execution proceedings at the time of the sale.

17. A Division Bench of the Punjab High Court in the case of Rattan Chand Vs. Prite Shah Sant Ram of Amritsar and Others, , had to deal with a similar question. The relevant observations made therein are as under:--

"A second mortgagee, who is a party to the suit of a first mortgagee to enforce his mortgage, is entitled to redeem the first mortgage and on redemption he becomes entitled to apply for a final decree for sale instead of the first mortgagee, or to receive his mortgage money out of the surplus sale-proceeds remaining in Court after satisfaction of the first mortgage on the ground that the

same represent the security under his mortgage, the practical effect of either being to leave surplus proceeds to the second mortgagee towards a payment of his mortgage debt after satisfaction of the first mortgage.

Where a second mortgagee is not a party to the suit of the first mortgagee, he is not affected by the decree in the first mortgagee's suit, but is entitled to an opportunity of occupying the position which he would have occupied if he had been a party to the first mortgagee's suit and thus he has a right to sale of the property, subject to the rights of the first mortgagee, for his mortgage debts and to surplus sale-proceeds in Court after satisfaction of the claim of the first mortgagee.

The reliefs are alternative and not cumulative, otherwise a security that can be satisfied by one of the reliefs, that is to my, by sale of the mortgaged property, will savour of a double security obviously beyond the ambit of the mortgage.

In such a case a second mortgagee, when pursuing his claim in Court for alternative reliefs in an action, will have to elect which relief he will have in the action: He may, however, make the election in his pleadings and then he will be held to it: It follows that this will be so in all cases whether the surplus sale-proceeds in Court are sufficient to meet the mortgage debt of the second mortgagee or not.

Thus, where in execution of the mortgage decree in favour of the prior mortgagees, the subsequent mortgagees, who were not made a party to the mortgage suit, obtained an order for surplus sale proceeds from the executing Court and having done so, claimed the same relief in the alternative in a subsequent suit brought by them for the sale of property in the hands of the auction purchaser, in satisfaction of the same mortgage debt.

It was held that having elected to proceed against the surplus sale-proceeds in Court, they precluded themselves from subsequently asking for sale of the property. The reliefs to which the subsequent mortgagees were entitled being alternative, and they having elected to have one of those reliefs, they could not be permitted to pursue the other relief."

It has also been observed therein as under:

"The auction purchaser in execution of the decree based on the first mortgage occupies a dual capacity of a first mortgagee as well as the owner of the equity of redemption, and while in his first capacity he can use the first mortgage as a shield against the second mortgagee, in his second capacity he can redeem all subsequent mortgages."

At page 407, Mehar Singh, J. has referred to the aforesaid decision of the Madras High Court and has made the following observations:

"In regard to the second proposition above where the surplus sale-proceeds in Court, after satisfaction of the first mortgage, are sufficient to meet the

mortgage debt of the second mortgagee, the latter can as held by K.N. Krishnaswami Bhagavathar Vs. N.A. Thirumalai Iyar and Others, , either proceed against the mortgaged property in the hands of the auction-purchaser by bringing it to sale, subject of course to the claim under the first mortgage, or he can proceed against the surplus sale-proceeds after satisfaction of the claim under the first mortgage. The reliefs are alternative and not cumulative, otherwise a security that can be satisfied by one of the reliefs, that is to say by sale of the mortgaged property, will savour of a double security, obviously beyond the ambit of the mortgage. In either case AIR 1928 Lah 593 and K.N. Krishnaswami Bhagavathar Vs. N.A. Thirumalai Iyar and Others, , the second mortgagee was claiming surplus sale-proceeds, after satisfying the first mortgage, and the sale-proceeds were sufficient to meet his mortgage debt, In fact, in K.N. Krishnaswami Bhagavathar Vs. N.A. Thirumalai Iyar and Others, , the chief argument on behalf of the second mortgagee was that the reliefs are alternative and reply for the opposite side was that, he can only seek sale of the mortgaged property. However, for the opposite side it was also urged that the second mortgagee cannot have a right to both the property as well as against the surplus proceeds in Court, and the learned Judge observed:--

"But I do not think there is any objection in principle to the plaintiff proceeding both against the mortgaged property in the hands of the fourth defendant (auction purchaser) as well as against the surplus funds in Court."

To an argument that to allow the reliefs as cumulative is to confer on the second mortgagee an additional security, the learned Judge observed:

"that there is no warrant in law for holding additional security. After a careful consideration of the cases quoted at the Bar, I could not find anything in equity or in law which militates against the right of the puisne mortgagee in a case like this to proceed both against the property in the hands of the purchaser as well as against the sale-proceeds in Court."

The learned Judge then points out that it was not necessary for the mortgagee in that case to proceed against the property, as surplus sale-proceeds in Court were more than sufficient to satisfy his mortgage debt. it appears that the observations of the learned Judge on this aspect are obiter,"

In AIR 1928 Lah 593, Tek Chand J. read this Madras decision as proceeding on the view that the reliefs are alternative and it has been shown that to take the reliefs as cumulative is to go outside the scope of the mortgage security. Therein, a decision in the case of AIR 1638 Fat 179 has been referred to, and relied upon, to which I have already made a reference in the earlier part of the judgment.

18. At p. 408, the following observations have been made:--

"This is a case which is somewhat of a parallel to the present case. The sale of property C in execution of the mortgage decree in favour of defendant No. 3 has not in any respect resulted in diminishing the security of the plaintiff as against

the mortgaged property C. In the circumstances it seems obvious that he cannot have both the reliefs but can only have one of the two alternative reliefs. This seems to be the correct approach as, in the circumstances as those of this case, the second mortgagee is entitled to occupy the position he would have done had he been a party to the suit of the first mortgagee, and had that been so he would only be entitled to one relief, that is to say to surplus sale-proceeds alone."

With respect, I am in agreement with the principle enunciated by a Division Bench of the Punjab High Court.

19. Mahajan J. has, at page 409, in the body of the judgment, made the following observations, which are in my opinion, very material:--

"The contention of Mr. Mital, learned counsel for the auction-purchaser is that no doubt the puisne mortgagee can put the property to sale, but he having exercised his option qua the surplus sale proceeds resulting from the auction of the mortgaged property his right is only restricted to the surplus sale proceeds, while on the other hand the contention of the learned counsel for the puisne mortgagee is that he has the right to put the property to sale as well as to proceed against the surplus that has resulted from the sale of the mortgaged property. His contention is that these rights are concurrent and not mutually exclusive, where according to Mr. Mital these rights necessarily are mutually exclusive."

He has further observed in para 12 as under :--

"Before these contentions are examined, it will be proper to examine the legal position of the puisne mortgagee vis-a-vis the auction-purchaser or the prior mortgagee. It is well settled that the puisne mortgagee is not bound to accept the sale that has taken place at the instance of the prior mortgagee. He can ignore that sale and enforce his mortgage and in execution of the decree in his mortgage suit put the mortgaged property, which is in the hands of the auction-purchaser, to sale."

After referring to several decisions, it has been further observed as under:--

"This right of the puisne mortgagee, however, does not make the sale in the prior mortgagee's suit wholly void. That sale is valid so far as the mortgagor and the prior mortgagee are concerned. It wipes out the prior mortgage debt and relieves the mortgagor of the equity of redemption, the net result being that the equity of redemption as well as the rights of the first mortgagee get vested in the auction-purchaser. In other words, the auction-purchaser acquires a dual capacity qua the puisne mortgagee the dual capacity being that of a mortgagor as well as that of a prior mortgagee."

It has been further observed therein In para 14, after referring to two decisions of the Privy Council, as under :--

"Will the same result necessarily ensue where the puisne mortgagee is not a

party to such sale or to the suit which has resulted in such sale? In my view, this result can only follow in one contingency and that is where the puisne mortgagee at whose instance the first sale is voidable accepts the sale and does not seek to avoid the sale. Once he accepts the sale then necessarily his right under the mortgage will get transferred to the converted security i.e., the surplus of the sale proceeds after satisfying the prior mortgagee, otherwise it is not understandable how he can treat the surplus as representing his mortgage-security when the mortgaged property is available intact to him in spite of the sale under the prior mortgagee's decree. In this eventuality, the surplus sale proceeds will undoubtedly belong to the mortgagor free from any charge attaching to them inasmuch as the subsequent mortgage stands unaffected and so also the mortgage-security. The only authority, which has been relied upon in support of the contention that even where the puisne mortgagee is not a party to the suit resulting in a decree for sale of the mortgaged property, he has the right to proceed against the surplus on the ground that the surplus is converted mortgage security, is the case of K.N. Krishnaswami Bhagavathar Vs. N.A. Thirumalai Iyar and Others, . I will examine this authority in detail a little later. At this stage, I only wish to state that I am unable to agree with it So far as I can see, neither on principle nor on authority, it can be said that the puisne mortgagee can treat the surplus as a part of the mortgage-security when he is not prepared to accept the sale, which has resulted in bringing into being that surplus as binding on him. He can, of course, accept the sale as binding on him and once he does that, the sale becomes immune from attack and he cannot exercise the undoubted right that law gives him to put the property to sale."

20. In para 15, he has referred to the aforesaid decision of the Madras High Court and made the following observations:--

"It is interesting that the same decision has also been relied on by Mr. Mital, learned counsel for the auction-purchaser. It is no doubt true that this case does support the contention of Mr. K. L. Kapur. The learned Judge has come to the conclusion that a puisne mortgagee, who is not a party to the suit filed by the prior mortgagee, has two simultaneous and concurrent rights, namely, to claim the surplus resulting in that sale as well as to put the property to sale by ignoring the first sale, and lay claim to the surplus, if any, resulting therefrom after discharging the prior encumbrance. With utmost respect to the learned Judge, I am unable to agree with this conclusion. So far as support is sought to be derived for this conclusion, from the decision of the Privy Council in Barhamdeo Prasad's case ILR (1914) Cal 654 (PC), which came in appeal to the Privy Council from the decision of the Calcutta High Court in Barhamdeo Pershad v. Tara Chand ILR (1906) Cal 92 , I am unable to agree. The aforesaid conclusion at which the learned Judge arrived in K.N. Krishnaswami Bhagavathar Vs. N.A. Thirumalai Iyar and Others, is merely an obiter dictum."

It has been also observed therein as under :--

"On the correct reading of the Privy Council decisions, it appears to me that the

result that the puisne mortgagee's security attaches to the surplus sale proceeds will only follow if that sale is accepted by him. It cannot be that he in his undoubted right can ask for the sale of the mortgaged property and also in addition lay claim to the surplus. This would give him something in addition to his security for when he puts the property to sale he is fully exercising his right under the mortgage and is having the full benefit of the security. He cannot by this process claim any additional security. I am not unmindful of the fact that the surplus sale-proceeds in the event of puisne mortgagee exercising his right of sale would vest in the mortgagor and will be subject to meet his liabilities, but that will not bear the impress of the mortgage-security so as to entitle the puisne mortgagee to proceed against them on the basis that they are part of the mortgage-security,"

In para 17, the following observations have been made:--

"There is another way of looking at the matter. The moment the subsequent mortgagee makes a claim to the surplus resulting in the sale in a prior mortgagee's suit, he gives up his claim to avoid the sale, for he accepts a benefit under the sale and having accepted the benefit under the sale he cannot turn round and say that the sale is invalid. Therefore, once he accepts the sale as good he cannot by suit go behind the sale and put the property to sale a second time. To me it appears that neither on principle nor on authority the contention of the learned counsel for the respondent that the subsequent mortgagee can exercise these two rights simultaneously is tenable. The correct position appears to be that these rights are alternative rights or mutually exclusive rights and he has to elect as to which of the rights he is going to exercise."

He has, thereafter, quoted the observations of Tek Chand J., an eminent Judge, made in the case of AIR 1928 Lah 593, which can be referred to with advantage at this stage. They are as under :--

"It is well settled that the sale of a mortgaged property held in the circumstances described above, does not affect the title of the puisne mortgagee who had not been made a party to the suit by the prior mortgagee or who had not intervened at the sale. Such a person can either proceed against the mortgaged property in the hands of the purchaser by ringing it to sale or he can proceed against the surplus of the sale proceeds left with the Court after satisfying the claim of the prior mortgagee."

"This eminent Judge deduced this conclusion from the decision of Devadoss, J. in K.N. Krishnaswami Bhagavathar Vs. N.A. Thirumalai Iyar and Others, and not the conclusion contended by Mr. K. L. Kapur. I am in respectful agreement with these observations and they do support the conclusion at which I have arrived, though here also the learned Judge was not called upon to determine the question as to whether these rights are concurrent or alternative."

I am in respectful agreement with the observations made by a Division Bench of the Patna High Court. In my opinion, the aforesaid decision of the Madras High

Court can be distinguished as has been done by Tek Chand J. in AIR 1928 Lah 593 and also by one of the Judges of a Division Bench of the aforesaid Patna decision. In my opinion, these remedies are alternative. They are mutually exclusive. They are not concurrent remedies. In the instant case, the puisne mortgagee who was not a party to the suit filed by the prior mortgagee had an option to; ignore the suit proceedings as well as the execution proceedings. If she had done so, she could have elected any of the two aforesaid remedies, In the instant case, she intervened at the time of the sale in the execution proceedings started by the prior mortgagee who had obtained a decree for the sale of the mortgaged property. The property, therefore, came to be sold subject to her mortgage dues. The auction-purchaser, therefore, paid for the interest that was sold; if the present respondent No. 1, a puisne mortgagee is allowed to proceed against the surplus sale proceeds, keeping intact her right to recover mortgage dues from the property in the hands of the purchaser, which has been so kept, the result would be that the mortgagor would suffer a loss and the auction purchaser would be at an advantage and would get unnecessarily a benefit to which he will not normally be entitled. That could not have been contemplated. The learned District Judge has, in my opinion, therefore, committed an error in relying upon the aforesaid Madras decision and in coming to the conclusion that the Executing Court was wrong in allowing the attaching-creditor to get this surplus amount in preference to the puisne mortgagee, respondent No. 1.

21. The learned Advocate Mr. Shah, appearing on behalf of the appellant, did not pursue further his another submission that the respondent No. 1 had no right to appeal against the impugned order passed by the Executing Court and eventually, the order passed by the learned District Judge in such appeal, filed by the respondent No. 1 was without jurisdiction, as he succeeded on merits in this second appeal.

22. The net result is that the appeal succeeds.

23. The appeal is allowed. The order passed by the learned District Judge in Civil Appeal No. 130 of 1961 is set aside and the order passed by the Executing Court that the present appellant is entitled to the amount in dispute and the respondent No. 1 is not entitled to it is restored. The appellant will get the costs of this second appeal as well as the costs of the Civil Appeal No." 130 of 1961 from the respondent No. 1. The respondents Nos. 1 and 2 are ordered to bear their own costs in the second appeal as well as in Civil Appeal No. 130 of 1961.

24. If the respondent No. 1 has with drawn the amount in dispute, she is directed to deposit that amount in the Executing Court for payment to the present appellant within six weeks from to-day.