

(1944) 04 AHC CK 0021
In the Allahabad High Court
Case No : Second Appeal No. 1164 of 1942

Habib Sher Khan and Others

APPELLANT

Vs

Zahoor Khan and Others

RESPONDENT

Date of Decision : 18-04-1944

Acts Referred:

Citation : (1944) 04 AHC CK 0021

Hon'ble Judges : Sinha, J

Bench : Single Bench

Advocate : G.S. Pathaks, for the Appellant; M.L. Chaturvedi for Respondents, for the Respondent

Final Decision : Dismissed

Judgement

Sinha, J.—This is an appeal by the plaintiffs and arises out of an application for preparation of a final decree under Order 34, Rule 8 of the Code of Civil Procedure.

2. The facts briefly are these. One Rahiman Khatoon, the predecessor-in-title of the defendants 1 to 10, made a simple mortgage in favour of Umrai Lal and Puran Mal. After the death of the lady one of her heirs, Farook Mohammad Khan made a subsequent mortgage of part the property in favour of Habib Sher Khan and Abdul Majid Khan.

3. Umrai Lal and Puran Mal brought a suit on the basis of their mortgage without impleading the subsequent mortgagees, obtained a decree and in execution thereof they obtained possession of the hypothecated property. The subsequent transferees thereafter brought a suit for redemption of the prior mortgage. The learned Munsif dismissed the suit and this finding has been affirmed by the learned Civil Judge on appeal.

4. The plaintiffs have come before me in second appeal.

5. The view of law taken by the Courts below is undoubtedly sound. It has been

held by this Court that the mortgagee when he brings a suit out the basis of his first mortgage and obtains possession of the property is clothed with the rights of the mortgagor and the ultimate equity of redemption vests in him. It is, therefore, true that where as the plaintiffs are in this case entitled to redeem the prior mortgagees inasmuch as they were not cited as defendants in the suit based on the prior mortgage, it will be open to the mortgagees to finally redeem the subsequent mortgagees and it is for this reason that a decree for redemption has never been passed in circumstances such as these.

6. Reliance has been placed on the case *Parasram Singh v. Pandoni* (1922) 30 A L J 401 and also on *Ram Baran v. Bhagwati Pande* 1925 A L J 674. The principle has been finally affirmed by the Full Bench decision in *Ramsenahi Lal v. Janki Prasad* 1931 A L J 729 The main prayer of the plaintiffs must, therefore, fail.

7. It has, however, been argued by Mr. Gopalji Mehrotra that his clients, that is the subsequent mortgagees, are entitled to proceed upon their mortgage and the equities could have been worked out in this case.

8. I am, however, reluctant to disturb the order of the Court below inasmuch as it will be open, in the events of such a suit being brought by the subsequent transferees, to the present defendants to defend such a suit by proper pleas. In any case, the order complained of is a perfectly legal, and proper order I am not prepared to disturb it unless it is established that it is not so. It has certainly not been shown that it is not so. In the result I dismiss this second appeal with costs. Leave to appeal under the Letters Patent is refused.