

(1913) 01 AHC CK 0037
In the Allahabad High Court

Jamilunnissa and Others

APPELLANT

Vs

Pitambar Das and Another

RESPONDENT

Date of Decision : 15-01-1913

Acts Referred:

Citation : 18 Ind. Cas. 704

Hon'ble Judges : Henry Griffin, J;Chamier, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

1. On June 22nd 1883, Akbar Husain mortgaged a 7 1/2 biswas share in a village to Ram Charan and Bhola Nath on September 7th, 1886, he sold the share to one Asghar Ali Khan. At the time of the sale, the share was under attachment in execution of a money decree which had been obtained against Akbar Husain. The actual date of attachment appears to be August 28th, 1886. Shortly after purchasing the property, Asghar Ali paid off the mortgage of June 22nd, 1883. ON February 17th, 1888, he mortgaged the share to one Nazir Khan. A suit was brought on that mortgage and a decree was obtained in execution of which the share was sold to the present plaintiffs in April 1897. After the purchase by the plaintiffs, the share was put up for sale in pursuance of the attachment above mentioned, and six out of the seven and half biswas were purchased by defendants Nos. 1 to 9 or their ancestors. The defendants sued for possession of the property. The plaintiffs resisted the suit, but it was held that they were not entitled as purchasers of the property to possession of it as against the defendants. The present suit was brought in August 1910. The plaintiffs claim to be entitled to enforce the original mortgage of June 22nd, 1883. It is conceded that they stand in the same position as Asghar Ali and that if Asghar Ali was entitled to set up the mortgage of 1883 against the defendants, the plaintiffs are entitled to do so. The question is what was the effect of the discharge of the mortgage of 1883 by Asghar Ali. The Court below has held that he must be deemed to have intended to keep alive the mortgage of 1883 for the purpose of

resisting any claim made by a purchaser at an execution sale held in pursuance of the attachment, and the Court has held that the plaintiffs are entitled to recover so much of the amount due on the mortgage of 1883 as is proportionate to the six biswas purchased by the defendants. In our opinion, the decision of the Court below is correct. The case seems to us to be governed in principle by the decisions of their Lordships of the Privy Council in *Gopaldas Gopaldas v. Puranmal Premsukh Das* 10 C. 1035, 11 I.A. 126 and in *Dinabundhu Shaw Chowdhury v. Jogmaya Dasi* 29 C. 154, 12 M.L.J.73, 4 Bom. L.R. 238, 6 C.W.N. 209, 29 I.A. 9 (P.C.). In those cases, the law on the subject is stated thus: "When the owner of an estate pays charges on the estate which he is not personally liable to pay, the question whether those charges are to be considered as extinguished or as kept alive for his benefit is simply a question of intention. The intention may be found in the circumstances attending the transaction or may be presumed from a consideration of the fact whether it is or is not for his benefit that the charge should be kept on foot." In the present case, Asghar Ali paid off a debt which he was not personally liable to pay. He was, no doubt, aware at the time that the property had been attached and he cannot have intended to clear the property from the incumbrance for the benefit of any person who might purchase the property at an execution sale to be held in pursuance of the attachment. It must be presumed, we think, that he intended to keep the mortgage alive for his own protection. The appeal is dismissed with costs.