

(1924) 10 MAD CK 0063
In the Madras High Court

K.N. Krishnaswami Bhagavathar

APPELLANT

Vs

N.A. Thirumalai Iyar and Others

RESPONDENT

Date of Decision : 21-10-1924

Acts Referred:

Citation : AIR 1926 Mad 101 : 90 Ind. Cas. 410

Hon'ble Judges : Devadoss, J

Bench : Division Bench

Judgement

Devadoss, J.—Defendants Nos. 1 to 3 mortgaged their property on 24th April 1912, by two deeds in favour of Defendants Nos. 5 and 6 and Defendant No. 7. First defendant executed a third mortgage in favour of the plaintiff on 5th September 1916, Defendants Nos. 5 and 6 brought O.S. No. 3 of 1908, impleading the 7th defendant second mortgagee and obtained a mortgage decree. The third mortgagee, the plaintiff, was not a party to that suit. The property was sold in October 1919 and was purchased by the 4th defendant for Rs. 20,000. The 1st and 2nd mortgagees Defendants Nos. 5 and 6 and 7 were paid the amount due on the mortgages. Eighth defendant who had obtained a money-decree against Defendants Nos. 1 to 3 attached the surplus amount in Court and was paid by a cheque for Rs. 4,585. The plaintiff attempted to prevent the 8th defendant from cashing the cheque, but his attempts were of no avail. The money now in Court is about Rs. 1,000. The plaintiff has brought this suit on his mortgage and prays that the amount due to him on his mortgage may be paid out of the sum in Court and that the 8th defendant be directed to pay back into Court the sum drawn by him and that in the alternative the mortgaged property be sold for satisfying his debt and also prays for a personal decree against Defendants Nos. 1 to 3. The District Munsif gave a mortgage decree in favour of the plaintiff and held that the plaintiff was entitled to the surplus in Court realized in execution of the decree obtained by Defendants Nos. 5 and 6 and that the 8th defendant must refund the amount drawn by him. Against this decree 8th defendant appealed. On appeal the Subordinate Judge held that the plaintiff could only proceed against the property mortgaged to him and

purchased by the 4th defendant and the proceeds of the sale hold in execution of the decree in favour of the Defendants Nos. 5 and 6 were not subject to the mortgage right of the plaintiff and the amount remaining after meeting the claims of the 1st and 2nd mortgagees, Defendants Nos. 5, 6 and 7, was the property of the mortgagor and as such could not be proceeded against by the plaintiff. With regard to the amount in Court he held that it would be available to the plaintiff in case he is unable to realise his debt by the sale of the hypotheca. Fourth defendant has preferred this appeal.

2. The contention of Mr. Varadachari is that the sale proceeds in Court represent the mortgaged property and the plaintiff is entitled to proceed against the money in Court after the claims of the prior mortgagees have been satisfied. The surplus proceeds of the sale are sufficient to meet the claim of the plaintiff. It is urged that inasmuch as the plaintiff was not a party to the suit of the prior mortgagees, his right to proceed against the property is unaffected and the proceeds in Court have been realized by the sale of the mortgaged property and the lien of mortgage right against the property attaches itself to the money in Court. It is also urged that the plaintiff has an option either to proceed against the mortgaged property by bringing it to sale or to proceed against the surplus sale proceeds in Court if the proceeds are sufficient to satisfy his claim. On the other hand, Mr. K.V. Krishnaswami Iyer contends that the remedy of the puisne mortgagee who was not a party to the suit of the prior mortgagee is only against the mortgaged property. He could either redeem the prior mortgagees? or ask for the sale of the property and bring the property to sale ; but he cannot claim to be paid out of the surplus sale-proceeds in Court as they are the property of the mortgagor. He further contends that the sale was subject to the encumbrance of the plaintiff and what was sold represented the interest of the prior mortgagees as well as that of the puisne mortgagee together with the equity of redemption and that the puisne mortgagee should only look to the purchaser for payment of his mortgage debt and has no claim against the surplus in Court as his mortgage has been included in the sale in Court auction.

3. What are the rights of the puisne mortgagee who was not a party to the suit and the execution proceedings under the prior mortgage ? If the prior mortgagee makes the puisne mortgagee a party and brings the property to sale, it is well settled that the puisne mortgagee could 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 mortgagee. Where a puisne mortgagee is not made a party to the suit of the prior mortgagee, does the puisne mortgagee lose any of his rights which he had as a mortgagee? "When property is sold under a mortgage decree, what is sold is the interest of the mortgagor at the date of the mortgage on which the suit is brought. If the subsequent mortgagees are made parties to the suit, the sale in execution, of the decree would convey the interest of the mortgagor as it was at the date of the suit. In other words, what is sold under such a decree is the property of the mortgagor and the proceeds of the sale have to be applied in

discharge of all the encumbrances and the mortgagees have to be paid in the order of priority. But the sale cannot affect the title of a mortgagee who has not been made a party to the suit.

4. Section 75 of the Transfer of Property Act says that every second or other subsequent mortgagee has, so far as regards redemption, foreclosure and sale of the mortgaged property, the same rights against the mortgagor as against such prior mortgagee or mortgagees and the same rights-against the subsequent mortgagees as he has against his mortgagor. A puisne mortgagee has the right to redeem the prior mortgage or mortgages and has the right to bring the property of the mortgagor to sale and such a sale will be subject to the right of the prior mortgagee or mortgagees. A prior mortgagee cannot redeem the puisne mortgagee without his consent but if he acquires the equity of redemption, he will be entitled to redeem the puisne mortgagee. The plaintiff was not a party to O.S. No. 3 of 1918 and: the sale in execution of the decree in that suit cannot take away the rights of the plaintiff as mortgagee. The contention of the appellant is that the plaintiff has an option either to proceed against the mortgaged property by bringing it to sale or to proceed against the sale proceeds in Court after satisfying the claims of the prior mortgagees. The objection of the 8th defendant (respondent) is that the security for the debt cannot attach itself to the sale-proceeds in Court merely by the volition of the plaintiff; that the plaintiff's remedy is against the mortgaged property; and that when that mortgaged property was sold, it was sold subject to the plaintiff's encumbrance and he could not by making an election proceed against the money in Court realized by sale in which his own mortgage was included.

5. The contention that when property is sold in execution of a mortgage decree, it is sold subject to all the mortgages on it, is based upon two stray observations in *Chinnu Pillai v. Venkatasamy Chettiar* [1916] 40 Mad. 77. Mr. Justice Coutts-Trotter (as he then was) laid down two principles as governing the cases. The first is that what passes to a mortgagee is a right to sell the mortgagor's interest as it stood at the date of the mortgage subject only to this, that in his suit he must make all subsequent mortgagees parties if he wishes the sale to be free of their encumbrances. The other principle is that of any number of mortgagees, the later can always redeem the earlier, but cannot be compelled to do so and the earlier cannot redeem the later except by consent. Mr. Justice Srinivasa Iyengar in the course of his judgment observed: "To the suit of the second mortgagee the plaintiffs were not made parties. The second defendant's position is, therefore, that of an assignee of the first two mortgages and of the equity of redemption subject to the charge of the plaintiffs." At page 89 he further observed: The second mortgagee is entitled to, and must bring a fresh suit against the purchaser in the first sale to sell the property to the satisfaction of the second mortgage-debt subject to which the first purchaser took." Mr. K.V. Krishnaswami Iyer contends that these observations make it quite clear that the sale in execution of a mortgage-decree is subject to the mortgage in favour of a puisne mortgagee and, therefore, the puisne mortgagee can only proceed

against the property in the hands of the auction-purchaser and cannot proceed against the sale-proceeds in Court if a surplus remains after satisfying the claims of the prior mortgagee and that if it was possible to hold that the puisne mortgagee could proceed against the surplus assets in Court, the learned Judges would have said so. I do not think this is the correct way of interpreting the decision. The question whether the puisne mortgagee could proceed against the assets in Court was not raised before them. Nor were they called upon to consider whether the puisne mortgagee had any other right than that of proceeding against the mortgaged property. The question in that case was whether a puisne mortgagee could bring the property to sale after it was sold in execution of a decree obtained by a prior mortgagee. Mr. Justice Srinivasa Iyengar sets out the rights and liabilities of the mortgagees at the end of his judgment and the 7th principle he lays down is as follows: "If the first mortgagee sues first without making the second mortgagee a party, the second mortgagee is not affected and can bring his own action for sale making the mortgagor a party, if there had been no sale in the first mortgagee's suit or if there had been a sale, making the purchaser a party in his capacity of the ultimate owner of the equity of redemption." Reliance is also placed upon *Mulla Vittil Seethi Vs. Korambath Paruthooli Achuthan Nair and Others*, . In that case a Full Bench of this Court held that the second mortgagee was entitled to the same rights as the first mortgagee with reference to his security having regard to the nature of his mortgage. After an exhaustive review of a number of decisions, certain propositions were considered as established. "(1) A second mortgagee is entitled to the same" rights as the first mortgagee with reference to his security, having regard to the nature of the mortgage. (2) The purchase of the equity of redemption after the first mortgage and the second mortgage both stand on the same footing with respect to their respective rights against the first mortgagee when they have not been impleaded in the suit instituted by him on his mortgage. (3) Those rights are unaffected by the suit of the first mortgagee to which they are not made parties and the decree passed therein and the sale made in pursuance thereof. (4) The purchaser in such suit, whether it is a first mortgagee or a stranger, does not acquire the rights of the mortgagor as at the date of the first mortgage but only those that subsist in him at the date of the suit." This decision does not support the contention that the only remedy of the puisne mortgagee is against the mortgaged property. The words used by Mr. Justice Srinivasa Iyengar in *Chinnu Pillai v. Venkatasamy Chettiar* [1916] 40 Mad. 77 subject, to the charge of the plaintiffs at page 80 can only mean subject to such rights as the puisne mortgagee has. It does not mean that the property is sold subject to the charge in favour of the puisne encumbrancer. The expression is not tantamount to saying that the purchaser has undertaken to pay the subsequent encumbrancer but means that the purchaser buys the property subject to the rights which a puisne encumbrancer has in regard to that property. In applying case law to the case before us, care should be taken not to take one or two sentences of a judgment, apart from their setting and give to them a meaning which the Judge who delivered that judgment did not intend to convey

or did not think it would be capable of conveying. It should also be borne in mind when the decisions are sought to be applied to new facts, to see in what connexion and with reference to what facts the decisions or rulings were given. The contention of Mr. Krishma-swamy Iyer is that these two decisions support his contention by their silence as to the right of the puisne mortgagee to proceed against what is realized in execution of a decree obtained on a prior mortgage. I do not think that the Judges who decided them had that point argued before them nor do I think they intended to lay down the broad proposition that the puisne mortgagee's right is only to proceed against the property in the hands of the purchaser.

6. The facts in *Barhamdeo Prasad v. Tarachand* [1914] 41Cal. 654 are these: Certain immovable property was mortgaged in May 1887 to the appellants in that case. The same property was mortgaged in September 1887 to the respondents. Again in July 1889 the property was mortgaged to the appellants. The appellants brought a suit in 1890 impleading" the respondents and obtained a decree in execution of which the property was sold. After satisfying the decree the sale proceeds were deposited in Court. The appellants obtained a decree on their mortgage of 1889 without impleading the respondents as parties and in execution of that decree, without notice to the respondents they drew out of Court the surplus proceeds of the former sale. The respondents brought a suit in 1900 and claimed the money in Court. The question was whether that still was within time. Their Lordships of the Privy Council held that Article 132 of the Limitation Act applied and that "The surplus sale-proceeds in execution of the previous mortgage-decree represented the security which the plaintiffs had under their mortgage of the 19th September 1887, and did not cease to represent that security owing to the fact that Ram Berhamdeo Prasad and Ram Sumran Prasad had wrongfully and in fraud of the plaintiffs drawn them out of the Court in which they had been deposited." They also held that they were not against the view that there was a charge in favour of the plaintiffs in the hands of the appellants. Though the respondents were parties to the suit of the first mortgage, they did not take the trouble to appear, Notwithstanding that, their Lordships of the Privy Council held that the sale-proceeds in Court represented the security which they had and therefore, they were entitled to proceed against the surplus money in Court. This decision was on appeal from the decision in *Berhamdeo Prasad v. Tarachand* [1906] 33 Cal. 92 wherein two Judges of the Calcutta High Court differed as to the right of the puisne mortgagee to proceed against the assets realized in execution of a decree in a prior mortgagee's suit, and Sale, J., agreed with Henderson, J., in holding that when property is sold under a decree obtained by the first mortgagee the puisne encumbrancer has a right to follow the surplus sale proceeds after the decree-holder's claim has been satisfied. These two cases lay down that the rights of the subsequent mortgagee who is not a party to the mortgage-decree under which the property is brought to sale is entitled to be paid out of the surplus sale proceeds, if any, remaining after the decree-holder is paid. In *Gobind Lal Roy v. Ramjanam Misser* [1894] 21

Cal. 70 Lord Macnaghten in delivering the judgment of their Lord-ships observed in dealing with the contention of the counsel for the appellant that the puisne mortgagee should only look to the proceeds realized by the sale under a decree obtained by a prior incumbrancer: "That however, in their Lordships" opinion is not the necessary consequence of a sale under a decree obtained by a prior mortgagee against the mortgagor in a suit to which the puisne encumbrancers are not parties." It follows from this that the remedy of the puisne mortgagee against the property is not taken away by a sale.

7. It is well settled now that the puisne encumbrancer who is not a party to a mortgage decree under which the. sale is held can bring the property again to sale; and from the ruling in Gobind Lal Roy v. Ramjanam Misser [1894] 21 Cal. 70 it is also clear that the right of such mortgagee can also be enforced against the sale-proceeds in Court. After the consideration of a number of cases on the point, the Full Bench of the Calcutta High Court held in Debendra Narain Roy v. Ramratan Banerjee [1903] 30 Cal. 599 that a puisne mortgagee was entitled to sell the property secured by his mortgage where the property has been sold in execution of a decree obtained by the first mortgagee in a suit to which the puisne mortgagee was not a party.

8. In Padmanabh Bombshenvi v. Khemu Komar Naik [1894] 18 Bom. 684 the facts were these : P held a mortgage on a certain land belonging to the 1st defendant. The mortgage was not registered. M obtained a registered mortgage on the same property from the 1st defendant. M obtained a decree upon this mortgage and applied for sale. F intervened but his claim was rejected on the ground that his mortgage was an unregistered mortgage. The land was sold by auction to the 4th defendant and the proceeds of the sale were applied partly in satisfaction of M's claim and a further sum. of Rs. 164 was paid to one S who had obtained a money-decree against the mortgagor Defendant No. 1. The balance of Rs. 103 was paid into Court and subsequently returned to No. 1. F sued for payment of his mortgage-debt out of the proceeds of sale or from defendants. The lower Court held that the plaintiff could not be called upon to refund the money which had been paid to him out of the proceeds and the plaintiff had a cause of action only against the mortgagor and not merely for the balance of Rs. 103-8-11 but for the whole claim. The High Court held that F was in the position of a puisne mortgagee and as second mortgagee he had a right over the balance in Court. Sargent, C.J., in delivering judgment of the Court observed:

Although plaintiff's earlier mortgage was postponed to that of Defendant No. 2 by reason of its non-registration, the plaintiff still had the same rights over the balance as if he had been the second mortgagee in point of date.

9. The proceeds which are paid into Court after satisfying the first encumbrance become payable first to the other encumbrancers (if any) and then to the mortgagee, and so it is virtually provided by Section 97 of the Transfer of Property Act which directs that the residue is to be paid to the person proving

himself to be interested in the property sold." The learned Chief Justice relied upon the decision of the Privy Council in *Raja Kishendatt Ram v. Raja Mumtaz Ali Khan* [1880] 5 Cal. 198 to the effect that 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.

10. The facts in *Karan Sing v. Ishtiaq Husain* [1921] 43 All. 268 are: A mortgaged the same property first to B and then by the separate mortgage deeds to C. B and C both sued on the mortgages, each party without impleading the other, and obtained decrees. B's decree was executed first. The mortgaged property was sold and was purchased by K. B's mortgage was paid up and considerable surplus money remained which was deposited in Court. C then endeavoured to execute his decree against the surplus sale proceeds. He failed and the money was ultimately withdrawn by the mortgagor. C next proceeded with the execution of his decree against the property in the hands of K, the auction-purchaser, and K in order to retain possession paid up the amount of his decree. He then sued the representative of A to recover and the amount was paid. A Bench of the Allahabad High Court held that K was entitled to a decree. The learned Judges observed at page 269: "In our opinion upon the sale of the property the security held by Mahabbat Bahadur and others was transferred to the surplus sale proceeds which represented the mortgaged property." And they go on to say: "It cannot be said that the plaintiff purchased the property subject to the subsequent mortgage held by Mahabbat Bahadur and others. The sale was in execution of a decree obtained upon the prior mortgage held by Khurshed-un-nissa and others. The only defect in the plaintiff's title was that it was still open to the second mortgagees who had not been made parties to the first mortgagee's suit, to redeem the prior mortgage, but it cannot be said that the plaintiff did not acquire the property itself, but only such rights as remained in the mortgagors and subject to the subsequent mortgages." This case is an authority for the position that the mortgagee's right to proceed against the surplus proceeds in Court is unfettered if he was not a party to the decree in

execution of which the sale was effected. No doubt in that case it was found, that the surplus proceeds were sufficient to meet the claims of the subsequent mortgagee, but that was not the ground upon which the learned Judges held that the mortgage right attached to the proceeds in Court.

11. It is urged by Mr. Krishnaswami Iyer that the Bombay and Calcutta decisions should be read in the light of the previous decisions of those Courts, His contention is that it was considered at one time that the first mortgagee alone could bring the property to sale and not any subsequent mortgagee and such sale was clear of all encumbrances and they naturally took the view that then the property was sold in execution of a decree obtained by a prior mortgagee, the puisne mortgagees could only look to the sale proceeds to satisfy their decrees. I am unable to accept this contention. Whatever might have been the view before, the law is settled as to the right of the puisne mortgagee to proceed against the mortgaged property sold in execution of a mortgage decree obtained without his being a party to it, and it cannot be said that the learned Judges overlooked such a well-established principle and laid down the ruling that the subsequent mortgagee could only look to the sale proceeds realized in execution of the decree of a prior mortgagee for the satisfaction of his claim.

12. 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 connexion 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. Suppose two items of property are mortgaged to two persons: first to A and then to B and if A brings a suit on his mortgage without impleading B and brings one of the items to sale and some surplus remains after satisfying A's decree, can it be said that B cannot proceed both against the other item not sold in execution of A's decree as well as the proceeds in Court,? Take another instance: if a village or a large estate is mortgaged first to A and then to B, if A brings a suit and obtains a decree on his mortgage without impleading B and asks for a sale of the property, the Court would sell such portion of it as would be sufficient to meet A's claim And if after a portion of the property is sold and A is satisfied and surplus remains, can it be said that B cannot proceed against the rest of the property as well as the surplus money in Court ? His right is not in any way affected by the state in which he finds the property after the prior mortgagee's claim is satisfied He could certainly proceed against the rest of the property covered by his mortgage as well as against the money in Court. The

contention of Mr. Krishnaswami Iyer is that he cannot have a right to both the property as well as against the surplus money in Court in this case. 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 4th defendant as well as against the surplus funds in Court. Reliance is placed upon the observation of Mr. Ghose in his well-known book of Mortgages, page 292, 5th Edition, for the contention that the property must be lost to the subsequent encumbrancer so as to enable him to proceed against the surplus sale proceeds: It is hardly necessary to point out that if the mortgaged property is converted into money under circumstances which would prevent the mortgagee from following such property, security would attach to the money unless the conversion is attributable to the default of the mortgagee." Section 73 gives the right to a mortgagee to proceed against the surplus sale proceeds of a sale held on account of default of payment of revenue, provided the default was not occasioned by the mortgagee. This section applies only to sales for arrears of revenue and does not restrict in the case of sales under mortgage decrees the right of the mortgagee to the proceeds in Court, and cannot be interpreted as laying down the principle that it is only when the property cannot be pursued by the mortgagee that he can proceed against the money in Court. 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 of the Transfer of Property 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 field 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 consequence 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 the 4th defendant 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. Supposing a mortgagor mortgages the property to three different persons, and supposing the first mortgagee brings the property to sale and the property is sold for a very large sum and after satisfying the claim of the first mortgagee the surplus money is drawn out by the mortgagor, and supposing the second mortgagee who was not a party to the prior suit brings the property to sale without impleading the third mortgagee and sells the property and is not able to realize his debt in the second sale after meeting the claim of the first mortgagee, what is to become of the third mortgagee? Is the third mortgagee to go without any remedy for the simple reason that the mortgagor has withdrawn the money from Court which was subject to the mortgage rights of the second and third mortgagees? To hold that the mortgagor is entitled to the surplus money in Court in such a case would be going against the law of mortgages under which the property as well as cash into which the property is converted is security for the debt due on the mortgages. 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 any thing 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.

13. It is contended for the respondent that Order 34, Rule 13, can only apply to cases where all the mortgagees are parties. Under the Civil P.C., Order 34, Rule 1, all persons having an interest on the mortgage security or in the right of redemption should be joined as parties. Mr. Krishnaswami Iyer's contention is that Order 34, Rule 13, could only apply to cases where a subsequent encumbrancer is party to the suit and to the decree in execution of which the sale proceeds have been realized, and that when a puisne mortgagee is not a party to the suit Rule 13 cannot apply. No doubt Order 34, Rule 1. requires all Mortgagees to be brought on record, but that would not take away the right of puisne mortgagee to claim any amount in Court on the ground that he has an interest in the mortgaged property. For the last clause of Rule 13(1) says: "The

residue (if any) shall be paid to the person proving himself to be interested in the property sold." It does not say that such person should be a party to the suit. All it says is that after meeting the legitimate demands mentioned in Clauses 1 to 4 the balance shall be dealt with in a certain way and the last clause does not restrict it to persons who are parties to the suit in which the assets are realized.

14. Mr. Krishnaswami Iyer next contended that in this case the property was sold subject to the mortgage. Exhibit II, the sale certificate, does not support this contention. 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. What was sold under the decree in O.S. No. 3 of 1918 was the right of the mortgagor as it stood at the date of the second mortgage. This is clear from all the authorities and it is unnecessary to go over the ground again. Exhibit II cannot be construed into meaning that the sale was subject to the encumbrance in favour of the plaintiff.

15. Another point was urged on behalf of the respondent, that the present appeal is not by the plaintiff but by the purchaser and, therefore, incompetent. It is urged that the purchaser who is the 4th defendant has no right to come in and ask that the money in Court be paid to the plaintiff. Inasmuch as the plaintiff is also a party to the appeal this Court has power to pass a proper decree in a case like this. It is unnecessary that the 4th defendant should first pay up the amount due to the plaintiff on his mortgage and then proceed against the 8th defendant and Defendants Nos. 1 to 3 as was done in *Karan Singh v. Ishtiaq Husain* [1921] 43 All. 268 This will only multiply proceedings in Court. The Court has power in order to avoid further litigation, to give a decree in favour of the plaintiff.

16. The last contention is that the 8th defendant could not be compelled to pay into Court the amount drawn by his as there was neither a charge nor a trust in favour of the plaintiff. I have already held that the plaintiff had a mortgage right over the money in Court. The 8th defendant is bound to pay back the money into Court which was subject to the mortgage right of the plaintiff.

17. In the result I set aside the decree of the Subordinate Judge and restore that of the District Munsif. The 8th defendant will pay the costs of the 4th defendant in this Court as well as in the lower appellate Court. The other parties will bear their own costs.