

**(1929) 07 AHC CK 0009**  
**In the Allahabad High Court**

Kora Mal and Another

APPELLANT

Vs

Raghubir Lonia and Others

RESPONDENT

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**Date of Decision :** 17-07-1929

**Acts Referred:**

**Citation :** (1929) 07 AHC CK 0009

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**Judgement**

1. This is a second appeal by the plaintiffs whose decree for possession granted by the Court of first instance has been set aside by the lower appellate Court on the sole ground that the suit of the plaintiffs is barred by Order 9, Rule 9, Civil P.C. The facts are as follows:

2. There was a simple mortgage-deed executed on 6th October 1906, in favour of Ram Dehal, and it was executed by Raghubir on his own behalf and guardian of three minors, Sheojagat, Bharat and Har Lal. As interest was not paid in accordance with the mortgage-bond, Ram Dehal brought a suit No. 27 of 1911. and obtained a decree for possession of half the property. It was held that Raghubir was only entitled to mortgage the half which belonged to him. That decree was obtained in 1911 and possession was delivered to Ram Dehal in 1914, and Ram Dehal remained in possession until his death some time later. Subsequently defendants 4 to 6 Jainandan etc. who are the sons and heirs of Ram Dehal, brought suit No. 436 of 1923 for possession and for sale against defendants 1 to 3 and defendant 7 who represent the mortgagors. This suit was brought on the ground of dispossession after the death of Ram Dehal. During the pendency of this suit the plaintiffs who had obtained a simple money decree against the estate of Ram Dehal attached the mortgagee rights of defendants 4. to 6, on 2nd and 3rd November 1923. On 15th February 1924, the plaintiffs applied to be made parties to the suit, alleging that they feared the suit might be allowed to go by default by collusion of defendants 4 to 6. We may note that an attaching creditor has no right to be made a party in a mortgage suit, because his attachment creates no lien or title, but simply prevents alienation of the property attached in accordance with the provisions of Section 64 Civil P.C. On 27th February 1924 suit No. 436 of 1923 was dismissed for the default of

defendants 4 to 6, who were plaintiffs in that suit. Subsequently Jainandan made an application for restoration of that suit, but on the date fixed for hearing his application he was absent and merely sent a telegram asking for adjournment. His application for restoration was, therefore, dismissed. After the dismissal for default on 27th February 1924 the mortgagee rights of defendants 4 to 6 were put up for sale and were purchased by the present plaintiffs on 28th May 1924 at an auction-sale. Having acquired the rights of the mortgagees the present plaintiffs have brought their suit for possession and other reliefs on 15th November 1924. They alleged that they are not bound by the dismissal for default, because the former plaintiff's were acting in collusion with the former defendants. The evidence for fraud and collusion was partly oral and partly circumstantial. The trial Court rejected the oral evidence, but held that the circumstantial evidence was sufficient for the finding of fraud. The lower appellate Court dealt with this question as follows:

Now I am called on by the respondents' pleader to infer fraud from the very circumstances that the mortgagees Jainandan and others allowed the case to go off for default. I am not prepared to accede to the contentions put forth on behalf of the respondents for if this were so, so many dismissals for default taking place in civil Courts daily will have to be held to be tainted with fraud and the heirs and representatives of the plaintiffs will have a way open to them to lodge fresh suit and Order 9, R, 9 Civil P.C., will be successfully circumvented.

3. It was argued that this Court was bound by this finding, as it was a finding of fact. It has been laid down in AIR 1927 102 (Privy Council) as follows:

Their Lordships are well aware that questions of law and of fact are often difficult to disentangle. It is clear, however, that the proper effect of a proved fact is a question of law, and the question whether a tenancy is permanent or precarious seems to them, in a case like the present, to be a legal inference from fact and not itself a question of fact.

4. We consider that in the present case it is open to this Court to draw the inference of fraud from the circumstances which are admittedly proved in this case. After the rights of the mortgages were attached by the creditors of Ram Dehal on 2nd and 3rd November 1925 the plaintiffs in suit No. 436 of 1923 had no pecuniary advantage to be gained by continuing that suit. Under these circumstances the action of those plaintiffs in failing to appear on 27th February 1924, when the suit was fixed for hearing and failing to be present on the later date when the application for restoration was fixed for hearing, appears to us to be facts which warrant the inference that the action of those plaintiffs in that suit was fraudulent. Accordingly we consider that the circumstantial evidence does prove fraud in the present case. That being so, the appellant-plaintiffs are not bound by the order, dismissing the suit No. 436 of 1923, under Order 9, Rule 9, and there is no bar to the present suit. In the appeal before the lower appellate Court, as is shown on p. 19, line 4 of the paper-book, the appellant-defendants confined themselves to two grounds only. One of these grounds in regard to

limitation was held in favour of the plaintiffs. We have now held the other ground in favour of the plaintiffs. Accordingly there is no question which remains to be decided by the lower appellate Court. We, therefore, set aside the decree of the lower appellate Court and restore the decree of the Court of first instance for possession to the plaintiffs. The contesting defendants will pay the costs of the plaintiffs in all Courts and bear their own costs.