

**(1923) 04 CAL CK 0038**  
**In the Calcutta High Court**

Madhuram Hazarika

APPELLANT

Vs

Bhotong Chutiya and Others

RESPONDENT

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**Date of Decision :** 24-04-1923

**Acts Referred:**

**Citation :** AIR 1925 Cal 59

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**Judgement**

1. This appeal arises out of a suit for redemption of a mortgage against the decision of the Additional District Judge of the Assam Valley Districts reversing the decision of the Munsiff.

2. The relevant facts are these: The defendant No. 2 mortgaged 33 bighas odd of land to the defendant No. 1 on the 28th February, 1912. On the 23rd March, 1915 the defendant No. 2 executed another mortgage in favour of the plaintiff for 12 bighas of land which included 8 bighas out of the lands mortgaged to defendant No. 1. Subsequent to the second mortgage the defendant No. 1 brought a suit on his mortgage, obtained a decree and in execution of that decree purchased the mortgage property himself in December 1917. The plaintiff was not made a party to that suit. The plaintiff brought a suit on his mortgage and obtained a decree for sale against defendant No. 2. He also did not make defendant No. 1 a party to it. Apparently this suit was brought after the purchase by defendant No. 1 in execution of his own mortgage decree. When the plaintiff sought to bring the property under his mortgage to sale the defendant No. 1 objected to it and 8 bighas of the lands which were included in both the mortgages were released. The plaintiff then brought the present suit in order to redeem the entire 33 bighas of land which were mortgaged by defendant No. 2 in favour of defendant No. 1. The defence of defendant No. 1 which is now necessary to state was that the plaintiff was entitled to redeem only 8 bighas of land which were comprised within the plaintiff's mortgage and no more. The trial Court made a decree in favour of the plaintiff allowing him to redeem 8 bighas of land on payment of a proportionate share of the mortgage money that was due under the decree obtained by the defendant No. 1 on his own mortgage.

3. On plaintiffs' appeal to the Judge that decision has been set aside and a decree has been made in favour of the plaintiff allowing him to redeem the whole of the lands mortgaged by defendant No. 2 to defendant No. 1.

4. The defendant No. 1 appeals to this Court on the ground mainly that the plaintiffs should be allowed to redeem only 8 bighas of the land as decreed by the first Court. The learned Judge on appeal relied upon the case of *Mirza Tadalli Beg v. Tukaram* AIR 1921 P.C. 125 and has held that the plaintiff is entitled to redeem the entire property. In that case it will be observed that the redemption was sought by the owner of a part of the equity of redemption who was not made a party to the suit brought by the mortgagee on his mortgage and as an absent party the plaintiff in that case was not bound by the decree obtained by the mortgagee, and it was held according to the general principles of law that the owner of a portion of the equity of redemption was entitled to redeem the entire mortgage subject to the right of redemption of the other owners with regard to which no question arose before the Privy Council. Upon the facts found in this case the legal position is that the defendant No. 1 became the owner of the equity of redemption by virtue of his purchase of the mortgage property in execution of the decree which he obtained against the mortgagor, defendant No. 2, but the right of the plaintiff, the puisne mortgagee remained unaffected by that decree or sale, as he was no party to the suit. The plaintiff therefore has the right to redeem the mortgage in favour of defendant No. 1. The question is to what extent the defendant No. 1, the prior mortgagee, has become entitled absolutely to that portion of the mortgaged property which was not the subject of the second mortgage by his purchase. The mortgage therefore, has by the action of the mortgagee ceased to be indivisible. It was open to the plaintiff to seek to redeem only that portion to which he is entitled as mortgagee. But the question is whether he is entitled to redeem only that portion and no more.

5. Reference has been made on behalf of the appellant to the case of *Nawab Azimat Ali Khan v. Jawahir Singh* (1870) 13 M.I.A. 404 in support of his contention that the plaintiff is not entitled to redeem the entire property. While it is contended on behalf of the respondent that the plaintiff is entitled to redeem the whole of the property mortgaged to defendant No. 1 on general principles, it seems to us that if the plaintiff is allowed to redeem the entire property as contended for by the respondent, the defendant No. 1 as owner of the equity of redemption would in his turn be entitled to redeem the plaintiff not only with regard to the 33 bighas included in his own mortgage, but also with regard to the 4 bighas included in the plaintiff's mortgage but which was not included in the defendant's mortgage on the same principle on which the plaintiff relies, and this would lead to further complications.

6. We therefore consider, having regard to the fact that defendant No. 1 has not sought to redeem the plaintiff in his turn as owner of the equity of redemption of the mortgaged property, the best solution of the difficulty raised in this case would be to allow the plaintiff to redeem only the 8 bighas, which were included

in the plaintiff's mortgage as well as the mortgage of the defendant No. 1, on payment of a proportionate share of the money due to the defendant No. 1 on his mortgage as found by the trial Court. On these grounds we set aside the judgment and decree of the Court of appeal below and restore those of the trial Court. The case will be remitted to the trial Court to find the amount of money payable by the plaintiff to defendant No. 1 in terms of its judgment and to prepare a proper redemption decree.

7. The defendant No. 1 is entitled to the costs of this Court and of the Court of appeal below from the plaintiff.