

(1923) 01 AHC CK 0044
In the Allahabad High Court

Mahadeo Prasad	Vs	APPELLANT
Musammat Hamidan and Others		RESPONDENT

Date of Decision : 04-01-1923

Acts Referred:

Citation : AIR 1923 All 271 : (1923) ILR (All) 304 : 71 Ind. Cas. 457

Hon'ble Judges : Ryves, J;Gokul Prasad, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Ryves and Gokul Prasad, JJ.—This is an execution second appeal arising under the following circumstances: It appears that Abdul Aziz Khan, the original respondent, made a mortgage of some property in favour of Lachmi Narain and another in the year 1908. In the year 1913 he made a usufructuary mortgage of the same property in favour of Mahadeo Prasad, the appellant, and some money was left with Mahadeo Prasad to pay off the first mortgage in favour of Lachmi Narain and another. He failed to do so, and upon that Abdul Aziz sued to redeem the mortgage of the year 1913 in favour of Mahadeo Prasad. This suit resulted in a compromise under which Mahadeo Prasad was directed to pay off the first mortgage; by certain instalments and it was further provided that, in case Mahadeo Prasad failed to do so, the mortgagor, Abdul Aziz Khan, would be entitled to recover possession of the property mortgaged to him. This was on the 28th of April, 1917. Abdul Aziz has now applied to recover possession of the property mortgaged by him to Mahadeo Prasad, on the allegation that Mahadeo Prasad has failed to pay the amount due to Lachmi Narain and another, the prior mortgagees, by instalments as contemplated in the compromise decree. Mahadeo Prasad pleaded payment to the prior mortgagees as contemplated by the compromise decree. This payment to the prior mortgagees by Mahadeo Prasad was not certified in court as required by Order XXI, Rule 2, of the Code of Civil Procedure, and, accordingly, the courts below have dismissed the plea of payment raised by Mahadeo Prasad, under Clause (3) of Order XXI, Rule 2, of

the Code of Civil Procedure. Mahadeo Prasad comes here in second appeal and says that as the decree did not contemplate any payment to Abdul Aziz Khan, the mortgagor decree-holder, Order XXI, Rule 2, did not apply and such payment could be recognized and ought to have been recognized by the, court executing the decree. It might be mentioned here that Lachmi Narain and another, the prior mortgagees, have supported Mahadeo Prasad by admitting receipt of the money in accordance with the compromise decree, to which they were parties. The learned Counsel for the appellant contends that the payment of money contemplated by Order XXI, Rule 2, is a payment to the decree-holder, and, as the payment directed by the compromise decree was not a payment to be made to the decree-holder but to a third person, Order XXI, Rule 2, does not apply and the courts below ought to have given effect to the payment pleaded by the appellant. The words of Rule 2. are very general and there is nothing in them to limit the payment to the decree-holder only. The words used are, "Where any money payable under a decree of any kind is paid out of court or the decree is otherwise adjusted, etc. etc." We have no difficulty in coming to the conclusion that the payment directed to be made to a third person under a decree like the present one comes within the scope of this rule and the decision of the courts below was correct. Mahadeo Prasad ought to have proceeded, under Clause (2) of Rule 2, to safeguard his interest. Such payments having not been certified, the courts below were right in refusing to accept them. In our opinion the decree of the court below, was a "right decree. We dismiss this appeal, but without costs, as the respondents are not represented.