

**(1910) 03 AHC CK 0018**  
**In the Allahabad High Court**

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|------------------------------------|------------|
| Musammat Mumtaz-un-nisa and Others | APPELLANT  |
| Vs                                 |            |
| Bhagirath                          | RESPONDENT |

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**Date of Decision :** 19-03-1910

**Acts Referred:**

**Citation :** 6 Ind. Cas. 114

**Hon'ble Judges :** Tudball, J;Banerji, J

**Bench :** Division Bench

**Final Decision :** Dismissed

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## Judgement

1. The suit, which has given rise to this appeal, was brought under the following circumstances. Musammat Narani and Musamrnat Mumtaz-un-nissa sold a three biswas share out of a 5 biswas share to the plaintiff-respondent, Bhagirath, on the 9th of January 1895. A large part of the consideration was left in the hands of the vendee for payment of debts due to creditors, some of whom held mortgages over the property sold. On the same date, two agreements were executed, one by the vendors and the other by the vendees. The agreement executed by the vendors provides that if by reason of a prior hypothecation or by reason of any kind of interference on the part of the vendors, any portion of the property sold goes out of the possession of the vendee, the vendors would return the purchase money in whole or in part with interest at the rate of Rs. 1-8 per cent. per mensem. The vendee agreed under document executed by him to discharge the debts and to make good any loss which might accrue to the vendors in the event of his failing to do so. On the 11th of July, 1892, the vendors had executed usufructuary mortgages in respect of 4 biswas out of 5 biswas. One of those mortgages was in favour of Tota Ram and Gulzari Lal and comprised one biswa. Under the same mortgage deed, another one biswa was mortgaged to one Mian Khan. Tota Ram Gulzari Lal and Mian Khan brought a suit against the vendee, Bhagirath, and their mortgagors, for possession of the two biswas mortgaged to them, and attained a decree on the 15th of June 1897. Under this decree Bhagirath was deprived of possession of one out of the three

biswas sold to him. On the 10th of December 1905, Bhagirath got possession of this one biswas on the expiry of the term of the mortgage in favour of Tota Ram and Gulzari Lal. As he was out of possession of one biswa, from the 15th of June, 1897 to the 15th of December, 1905, that is for a period of eight years and six months, he brought the suit, out of which this appeal has arisen, for recovery of Rs. 2,500 as entered on one-third of the amount of consideration for the sale under the agreement executed by the vendors on the date of sale mentioned above. The Court of first instance granted him a decree which was affirmed in appeal by the lower appellate Court. The defendants have preferred this appeal and it is contended on their behalf that under the terms of the agreement of the 9th of January 1895, executed by the vendors, plaintiff was not entitled to claim and recover damages. This contention is, in our judgment, well founded. As has been stated above, the vendors undertook to refund the sale consideration with interest upon the happening of certain events, namely, if any portion of the property passed out of the possession of the vendee by reason of the existence of a prior hypothecation or by reason of anything done by the vendors. There is no question of a prior hypothecation in this case and nothing was done by the vendors to deprive the vendee of possession. There was a prior usufructuary mortgagee in the property. It was a registered mortgage and the vendee must be taken to have had notice of it. The presumption that he had such notice is further strengthened by the fact that the vendee was the lambardar of, and also a tenant in, the village. The vendee based his claim upon the terms of the agreement. We do not think that the case falls within the purview of the agreement. It has been found in the cross suit brought by the vendors against the plaintiff that he withheld a part of the consideration for the sale and a decree was passed in favour of the vendors for the value of the unpaid purchase money. So that, at the time when the plaintiff was deprived of possession, he had in his pocket a portion of the purchase money which he had not paid to his vendors. In spite of this, he claims to recover from the vendors a sum of Rs. 2,500 in the shape of damages. We are of opinion that he is not entitled to do so either on principles of equity or under the terms of the agreement executed by the vendors on the 9th of January 1895. The learned Counsel for the respondent relies on the terms of the sale-deed, but we are of opinion that, that document does not confer any right in the plaintiff to claim damages. The title which was conveyed was the proprietary title of the vendors. What the vendors undertook to do was to put the vendee in such possession as they themselves had, namely, proprietary possession. This was clearly subject to the possession of any prior mortgagee who was already in possession. For these reasons, we are of opinion that the plaintiff is not entitled to the decree which was passed in his favour. We set aside the decree of the Courts below and dismiss the plaintiff's suit with costs in all Courts, including in this Court fees on the higher scale.