

(1920) 06 AHC CK 0023
In the Allahabad High Court

Shafaat Muhammad Chaudhri	Vs	APPELLANT
Bhagwati Prasad and Another and Kulsum Bibi and Others		RESPONDENT

Date of Decision : 07-06-1920

Acts Referred:

Citation : (1921) ILR (All) 42

Hon'ble Judges : Tudball, J;Kanhaiya Lal, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Tudball and Kanhaiya Lal, JJ.—This appeal is connected with F.A. No. 321 of 1917, which we have just heard and decided. It is an appeal by the defendants 1 and 2, and relates to the three villages, Dharaoli, Kundrupur and Hanumanpur. The point taken before us is a very brief one. The present appellants are the representatives of Sarju Prasad who is the mortgagee under the three mortgages of the 1st of August, 1879, the 14th of December, 1883, and the 9th of January, 1885. It is an admitted fact that under the decrees obtained under two prior mortgages these three villages, Dharaoli, Kundrupur and Hanumanpur, were sold and purchase! by the decree-holder. It is for this reason, it is urged, that those three villages cannot be in any way liable for contribution towards the sum paid by the plaintiff to save his property from sale. The learned Subordinate Judge has calculated the value of these three villages in a certain manner to which exception is taken, but which we need not now consider. He found that the values were greater than the sums paid by the decree-holder when he purchased in execution of the decree obtained on the prior mortgages. As the decree-holder was also the decree-holder under the third mortgage, he has held that the three villages are proportionately liable with a fourth village Rupgarh, and in calculating the proportionate liability he has deducted, from their actual values, the sums paid by the decree-holder when he purchased them at auction sale. It is urged, and we think with considerable force, that, whatever may have been the price that the decree holder paid for them at the auction sale, the properties,

having once been sold to partly satisfy the decree under a prior mortgage, can no longer be held liable for any portion of the puisne mortgage debt. We think that the principle which underlies the decisions in *Hari Raj Singh v. Ahmad-ud-din Khan* ILR (1897) All. 545 and *Bohra Thakur Das v. The Collector of Aligarh* ILR (1906) All. 593 governs the present case. As was laid down in the former of these two decisions, the unsold portion of the mortgaged property affords the fund out of which the claims of the persons whose villages had contributed more than their common share of liability must be satisfied. In the latter of these two cases it was laid down that, where two properties are mortgaged under a second mortgage, and one of them is swallowed up by a first mortgage, the whole burden of the second mortgage falls entirely on the remaining property, the owner of which has no right to contribution against the owner of the property sold to satisfy the first mortgage. The fact that the auction purchaser at the sale in execution of the decrees obtained on the prior mortgages is a decree-holder and the same person who is the owner of the third mortgage and the third decree, and the fact that he obtained the property at a low price seem to us not to affect the case in any way. These three villages were liable for all three of the mortgages. They were sold under the first two decrees with several other properties and the decrees remain still unsatisfied. If the third mortgagee had been a separate person he could not possibly have proceeded against this property for the satisfaction of his decree. It is quite clear that so much of the security for the third mortgage had vanished and had been swallowed up in satisfying, partly, the claims of the first two mortgages. There remains nothing that could be sold under the third decree, and therefore nothing in these three villages which could possibly contribute towards the plaintiff's claim. "We think that the decision of the court below on this point is wrong and we, therefore, allow this appeal; so far as that decree directs that any portion of the sum decreed to the plaintiff shall be recoverable by the sale of these three villages, it is set aside. The suit as against the present appellants will therefore stand dismissed. They will have their costs in both courts.