
(1946) 11 PAT CK 0013
In the Patna High Court

Sheo Narain Sah and Others

APPELLANT

Vs

Mt. Deolochan Kuer and Others

RESPONDENT

Date of Decision : 27-11-1946

Acts Referred:

Transfer of Property Act, 1882 — Section 60, 82

Citation : AIR 1948 Patna 208

Hon'ble Judges : Bennett, J

Bench : Division Bench

Judgement

Bennett, J.—This is an appeal from the decision of the Subordinate Judge of the First Courts, Chapra, refusing to allow execution to proceed upon an execution petition filed by the appellant.

2. On 12th September 1925, one Tinkauri Singh mortgaged certain properties to the appellant to secure the repayment of a sum of Rs. 44,000 On 10th July 1987, the appellant instituted a suit against. Tinkauri Singh's widow and certain other defendants sued against as transferees of the right of redemption in the mortgaged properties, for the recovery of the mortgage monies plus interest to date and for an order for the sale of the mortgaged properties. On 22nd September 1988, a preliminary decree for sale in the mortgage suit was passed ordering the defendants to pay the sum of Rs. 101,896-14-0 with future interest at 6 per cent, per annum into Court on or before. 31st March 1989. In January 1989, some fifteen village comprised in the mortgaged properties were sold to the appellant, who had obtained leave to bid, in execution of a money decree obtained by the appellant against the owners of some of the mortgaged properties; and on 17th January 1939, the sale to the appellant was confirmed. The owners of the properties in question had been dismissed from the mortgage suit on the ground that they claimed a paramount title thereto into which claim the Court: did not consider it necessary to inquire In the proclamation for sale of the said villages the appellant had notified that they were sold subject to the encumbrance of the said mortgage to himself. On 8th July 1939, a final decree in

the mortgage suit was passed under which the mortgaged properties, including these purchased by the appellant in the execution of the above-mentioned money decree, were ordered to be sold and the proceeds were ordered to be applied in payment of the monies decreed in the preliminary decree. On 1st July 1942, the appellant applied for execution of the said final decree and on 11th July 1944, the order now under appeal was passed refusing to allow execution to proceed upon the ground that the appellant was bound first to ascertain the quota of the contribution which he was liable to make by reason of his above-mentioned purchase of some of the mortgaged properties under the provisions of Sections 60 and 82, T.P. Act, 1882, and to give a set off of that amount against the decretal debt in respect of which he was seeking execution.

3. Mr. S.N. Datta who argued the case for the appellants contended, firstly, that the respondents' right of contribution was a matter that might and ought to have been made a ground of defence in the suit for sale and was, therefore, *res judicata*, and secondly, that in any event the respondents' right of contribution was not *per se* a matter relating to the execution, discharge and satisfaction of the decree for sale within the meaning of Section 47, Criminal P.C., and could not, therefore, be raised in execution proceedings.

4. Mr. L.K. Jha, for the respondents, contended, firstly, that there was nothing on the record from which it could properly be inferred that the respondents could with the exercise of reasonable diligence have become aware, before the passing of the final decree in the mortgage suit, of the purchase by the mortgagee of the right of redemption in the mortgaged properties sold in Execution case No. 80 of 1937, or, therefore, of their right to claim contribution in the mortgage suit and that their right of contribution was not, therefore, barred by *res judicata*.

5. The right of contribution conferred by Section 82, T.P. Act, 1882, just as does any other right of contribution between co-obligors, operates solely as between the co-mortgagors and does not affect the relations between the mortgagors and the mortgagee as such. Thus the right of contribution arises only when one of the co-mortgagors has been compelled to pay to the mortgagee more than his rateable share. The right of contribution, *per se* therefore, is not a matter which is either directly or constructively in issue in a mortgage suit for sale, since until after decree and sale, no right of contribution arises, nor will it arise even after decree and sale, unless the mortgage is satisfied by less than the sale of the whole of the mortgaged properties. Mr. L.K. Jha, however, argued that a purchase by the mortgagee of a share in the right of redemption operates *pro tanto* to discharge the mortgage debt, that the amount of the mortgage debt was directly in issue in the mortgage suit, that, therefore, the *pro tanto* discharge thereof as a result of the purchase by the mortgagee was also constructively if not directly in issue in the mortgage suit, that in the absence of evidence that the respondents in question could by reasonable diligence have become aware of their right to claim the *pro tanto* discharge of the mortgage-debt there was no *res judicata* of that claim, that where a mortgagee decree-holder for sale

purchases part of the mortgage property, the decretal-debt is thereby pro tanto reduced, that in such a case the mortgagee cannot thereafter seek to enforce the execution of the decree for the full decretal amount but is bound to give credit for his rateable share and that if it be proper in such circumstances to compel the mortgagee to give credit for his rateable share, it was equally proper to do so in the circumstances of this case. In my opinion, this argument is fallacious in several respects. It is unnecessary for me to express any final opinion as to the proposition that the purchase by the mortgagee of a share in the right of redemption operates ipso facto as a pro tanto discharge of the mortgage debt. I would, however, remark that if any such principle exists, it is a little surprising that it should not have been expressly enunciated in so comprehensive an enactment as is the Transfer of Property Act, 1882, and I am inclined respectfully to agree with the view of the position taken by Herwill J., with whom Bell J. concurred in *Thirumala Venkata Shrinivasa Charyalu v. Srinivasa Venkatavaradacharyulu* AIR 1946 Mad. 155 where he observed that:

It is thus seen that the reason why a mortgagee who acquires the interest of a mortgagor cannot be given a decree for the full amount is that he has himself become owner of a part of the mortgaged property and be his share of the mortgage burden can be set off even in the mortgage suit against the claim on the mortgage. There is in such a case no fiction of a pro tanto discharge of the mortgage amount, except in a very loose sense of that expression.

But even so, the question of res judicata in relation to this right of set-off would still remain.

6. I am unable, however, to understand how in any event, this question can be gone into in execution proceedings. The executing Court must take the decree as it stands, its only power u/s 47, Civil P.C., is to decide questions relating to the execution, discharge or satisfaction of the decree and, whether the claim of the respondents in question is to an automatic reduction of the mortgage debt or to a right of set-off against the mortgage-debt, it is based upon an event which took place prior to the decree and can only now be adumbrated in contradiction of the decree. Such a question does not relate to the execution, discharge or satisfaction of the decree itself. A fortiori, if the claim is to an automatic reduction of the mortgage-debt, it cannot be entertained because the mortgage-debt has merged in the decretal debt and it cannot be suggested that the decretal-debt has been automatically reduced by something which took place prior to the date of the decree. The argument by way of analogy to the alleged position where a mortgagee decree-holder has himself purchased a share in the right of redemption is, in my opinion, incorrect in law. In this respect, I am bound by the decision of the Division Bench of this Court in *Sarju Lal v. Baijnath* AIR 1923 Pat. 44. In that case, the mortgagee decree-holders had purchased some of the properties subject to the mortgage from the mortgagors and in the execution proceedings the mortgagor contended that the properties so purchased should be sold first. The learned Subordinate Judge acceded to this argument

but, on appeal to this Court, his order was set aside. The grounds for the decision were thus stated by Das J.:

Numerous authorities were cited on behalf of the parties before us. It is unnecessary to discuss all these authorities; it is sufficient to say that though here and there a discordant note has been struck, still the balance of authorities is clearly in favour of the view that the decree-holder has the conduct of the sale and is entitled to execute the decree against any of the mortgaged properties he pleases and that, if any question of equity arises between the decree-holder and the persons to whom the equity of redemption in the mortgaged properties or in any of them may have subsequently become vested, that equity can only be enforced by an independent suit for contribution and not in proceedings for execution. It is quite true that each parcel of the mortgaged properties is liable rateably to its value and that the principle applies with equal force where the mortgagee himself buys the equity of redemption in one or more of such parcels or releases any part of the security; but I do not think that an enquiry as to rateable distribution of the mortgage-debt can be made in execution proceedings without serious complications.... As purchasers of some of the mortgaged properties, they must themselves contribute to the mortgage-debt, but the problem is not solved by compelling the decree-holders to sell the properties which they have themselves purchased. The course adopted by the learned Subordinate Judge has unduly favoured the respondents; and for that there is no warrant either in law or in equity. As I have said before, the equities arising as a result of the transactions that have taken place since the mortgage was executed cannot without serious inconvenience be worked out in the execution proceedings, and I must prefer the rule which gives the decree-holders complete dominion over the sale leaving the equities to be worked out in a properly constituted suit between the parties.

7. This decision has been followed and approved by Kuppuswami Ayyar J. in *Veerappa Chettiar v. Chandramouleswara Ayyar* AIR 1943 Mad. 637 and again quite recently by a Division Bench of the Madras High Court in *Thirumala Venkata Shrinivasa Charyalu v. Srinivasa Venkatavaradacharyulu* AIR 1946 Mad. 155. In this latter case, after stating his reasons as already above cited for concluding that there was no automatic and pro tanto discharge of the mortgage-debt when the mortgagee purchases a share in the right of redemption, Horwill J., continues as follows:

When we come to consider the case with which we have to deal in this appeal, namely, where a decree has been passed, it is still more difficult to see how by the acquiring of the decree the decree can be said to have been automatically discharged in part. It seems to us that a decree can only be discharged either by a payment of the whole or part of the decree amount or by agreement between the parties.

In *Ayamud Sarcar Vs. Ebaruddin Sarcar and Others*, . Mitter, J. after reviewing the authorities, arrived at the same conclusion by a different process of

reasoning. This first and main contention of the respondents, therefore, fails.

8. Mr. L.K. Jha next argued that by reason of the purchase by the appellant of a share in the equity of redemption the respondents acquired a right of partial redemption, that this right of partial redemption survives under Order 34, Rule 5 of Schedule 1, Civil P.C., until confirmation of the sale in the present execution proceedings, that since Order 34, Rule 5 deals at once with the right of redemption and the execution of the decree, it can hardly be suggested that this right of redemption is not a matter relating to the execution, discharge or satisfaction of the decree, that in order to enable the respondents to avail themselves of their right of partial redemption there must be an inquiry and apportionment which will necessarily result in the ascertainment of the appellant's liability to contribute and that once that liability is ascertained it would be inequitable to construe Section 47, Civil P.C., so as to debar the respondents from setting-off the amount so ascertained against the decretal debt, the more particularly since the effort of Section 60, T.P. Act, 1882, where the mortgagee acquires a share in the right of redemption is to translate the right of contribution into a right of partial redemption: AIR 1942 50 (Privy Council) .

9. The first answer to this contention is that the respondents in their petitions of objection to the execution petition have not asked for an inquiry or apportionment on any such grounds. The second answer is that the fact, if it be a fact, that Section 47, Civil P.C., may be invoked to require an inquiry and apportionment upon one ground is no reason to order an inquiry and apportionment upon some other ground if the latter ground is not within the scope of the section. Nevertheless, whether the above answers be good or bad, having regard to the fact that the execution petition was filed over four years ago and since the point has been raised and argued before us, I do not think it would be satisfactory to dispose of this appeal in one way merely to allow the respondents to take this point hereafter before the Subordinate Judge and come back here either as appellants from or respondents to an appeal from his decision thereon in another four years time. The first debatable issue in this contention seems to me to be whether the right of partial redemption of a co mortgagor, a party to the suit, survives under Order 34, Rule 5, Civil P.C., until confirmation of the sale made under a final decree for sale or whether the final decree for sale operates to extinguish the right of partial redemption. The mortgagor's right of redemption is a statutory right governed by Section 60, T.P. Act, 1882. The wording of the final paragraph of that section shows clearly that the right of partial redemption thereby recognized is a right corresponding in all essential respects to the right to redeem conferred upon the mortgagor by para. 1 thereof. But this right is expressly stated as a right to redeem the mortgage-money and the mortgage-money is referred to in Section 58(a) of the Act as the principal money and interest of which payment is secured for the time being. These monies are commonly referred to as the mortgage-debt and there is no doubt whatever that, upon the ordinary rules as to *res judicata*, the mortgage-

debt merges in the decretal debt, and that that is so under the provisions of Order 34, Civil P.C., is clear from the judgment of their Lordships of the Privy Council in AIR 1936 63 (Privy Council) . That being so, the moment the final decree is passed there is no longer any mortgage-debt or mortgage-money which the mortgagor can pay or tender to the mortgagee. That this is so follows conclusively from a consideration of the position as it would be if that were not so. In that event the mortgagor who, under the form of decree which the Court is directed to pass by the terms of Order 34, Rule 4(1) and Rule 5(3), is entitled to be paid thereunder, in addition to the mortgage money, the monies referred to in Order 34, Rules 2(1)(a)(ii) find (iii), would find himself liable u/s 60, T.P. Act, 1882, to be deprived of the full benefit of his decree and to lose his security against payment only of the mortgage-money. The Legislature cannot be taken to have intended this result; nor, indeed, does this result flow from the application of the ordinary canons of construction to the statutory provisions in question. Order 34, Rule 5 must be read together with Section 60, T.P. Act, if possible and, if it cannot, then Order 34, Rule 5 the later statutory enactment, which takes effect as if enacted in the CPC itself, will prevail. Not only can these two provisions be read together, but when Section 60, T.P. Act, 1882, is given what I understand as above-mentioned to be its ordinary meaning, it in no way conflicts with the provisions of Order 34 Rule 5. It follows from these considerations that not. only is the mortgage-debt merged in the decretal debt, but also firstly, that as between the mortgagee and the mortgagors parties to the suit for sale, the mortgage security merges in the decree and is replaced by the security of the order for sale which merger is also in accordance with the ordinary principles of res judicata, the lower mortgage security which the mortgagee necessarily relies upon in his suit for sale merging in the higher security of the resulting decree; and secondly, that the right to redeem conferred by Section 60. T.P. Act, 1882, including the corresponding right of partial redemption thereby conferred, is extinguishes by the final decree passed under Order 34, Rule 5(3) and that the mortgagor and so each co-mortgagor, receives in exchange the right to redeem granted by Order 34, Rule 5(1) namely, right to redeem the whole property by payment of the full decretal debt, the relationship between the parties as the use in Order 34, Rule 5, Civil P.C., of the words "plaintiff" and "defendant" themselves also indicates being no longer that of mortgagor and mortgagee but that of judgment-debtor and judgment-creditor governed by the decree and the terms of Order 34, Rule 5, Civil P.C. There is nothing inequitable in the right of partial redemption being so extinguished, since in the suit for sale each co-mortgagor could have cross-claimed, for partial redemption. Having failed to do so in the suit, it would be both inequitable and unsatisfactory to allow him to do so in the execution proceedings. In *Thirukonda Ellarayan v. Rangaswami Aiyar* AIR 1926 Mad. 816 a Division Bench of the Madras High Court arrived at the same conclusion; both the learned Judges relied upon the principles of res judicata to which I have adverted and Wallace J., analysed the effect of the repeal of the original Sections 86 to 93, T.P. Act, as follows:

Rules 2 and 3 of Order 34, Civil P.C., correspond to the old Sections 86 and 87, T.P. Act. Rules 4 and 5 to Sections 88 and 89 and Rules. 7 and 8 to Sections 92 and 93; but the clause u/s 89 relating to the extinguishment of the security and the right to redeem has disappeared, and does not appear in Rule 5, though similar clauses are retained in Rules 3 and 8. I think, however, it is clear that it does not appear in Rule 5 because it is not necessary. Under the old procedure the preliminary decree which allowed redemption remained the executable decree, and, therefore, the right to redeem was not extinguished automatically by the order absolute itself. So it was necessary to enact that on the passing of the order absolute it should disappear. Now the right to redeem embodied in the preliminary decree simply does not appear in the final decree which is now the executable decree. Therefore it disappears when the final decree is passed just as before it disappeared when the order absolute was passed. What was previously effected by direct statutory provision is now effected by procedure.

10. The learned author of Edn. 2 of Sir Dinshah Mulla's commentary on the Transfer of Property Act, 1882, in his note upon the scope of the phrase "decree of a Court" in para. 2 of Section 60, T.P. Act, 1882, states that the phrase extends only to final decrees for foreclosure under either Order 34, Rule 3(2) or under Order 34, Rule 8(3), Civil P.C., and not to a final decree for sale. The reasons advanced in the note in Edn. 2 of the commentary are as follows:

In decrees for sale the repealed Sections 89 and 93 of the Act provided that on the making of the order for sale the right of redemption was extinguished. The decisions of the Privy Council in *Het Ram v. Shadi Ram* AIR 1918 P.C. 34 and *Matrumal v. Mt. Durga Kunwar* AIR 1920 P.C. 79 were based on the law as enacted in these sections. But all the Courts hold that a mortgagor could atone a sale u/s 291, Civil P.C., 1882, and all the Courts except Calcutta held that a mortgagor could have a sale set aside under Section 310 of the same Code. This seemed to imply that the right of redemption continued even after order absolute for sale, and the Calcutta High Court was constrained to construe Section 89 as referring to the extinction of the right of redemption on the actual sale and distribution of the sale proceeds. This was doing violence to the section; but the section was bad law, for a decree for sale is but a judgment on the debt and though the debt merges in the judgment the collateral security of the mortgage does not merge: *Drake v. Mitchell* (1803) 3 East. 251. The provision for the extinction of the right of redemption was therefore omitted in Rules 5 and 8 of Order 34. The Privy Council in *Mt. Sukhi v. Ghulam Safdar* A.I.R.1922 P.C. 11, said that the effect of this omission was that the law remained the same as it was before the passing of the Transfer of Property Act. And before the Act a decree for sale had not the effect of extinguishing the right of redemption. The Allahabad High Court held that the effect of the repeal of Section 89 was that the right of redemption was not extinguished by the decree for sale but by the sale. The Legislature has however made the law quite clear, for the Rules 5 and 8 as amended by Act 21 [XXI] of 1929 expressly state that the mortgagor's right of redemption subsists till the confirmation of the sale held in execution of the

decree for sale on a mortgage, A Bench of the Calcutta High Court seemed to accept this; but another Bench took the opposite view on the ground that the amending Act 21 [XXI] of 1929 was not retrospective. After the section of the Transfer of Property Act was transferred to the Code of Civil Procedure, 1908, the High Court of Calcutta has held that a mortgagor can have a sale set aside under Order 21, Rule 89, corresponding to Section 310A, Civil P.C., 1882.

11. In my respectful opinion, the learned author has lost sight of the fact that we are not dealing with antiquity of redemption but with two separate and statutory rights of redemption conferred by the Transfer of Property Act, 1882, the one u/s 60 upon the mortgagor or mortgagors and the other u/s 91 upon persons besides the mortgagor. There was no principle of law or justice which required that upon the extinction of the right of redemption conferred by Section 60 the other right of redemption conferred by Section 91 should also be extinguished, but this unfortunate and probably unintended result flowed from the now repealed provision in Section 89, T.P. Act, 1882, under which the mortgage security was, extinguished by a final decree for sale. It was for this reason that the old Section 89, T.P. Act, 1882, operated inequitably, I respectfully disagree with the proposition that a decree for sale is but a judgment on the debt. A debt in itself provides no ground upon which to claim a sale of immovable property, that claim is based on the mortgage security and when the claim based thereon is decreed the mortgage security necessarily merges in the decree vis-a-vis the defendant in the suit. The case in *Drake v. Mitchell* (1803) 3 East. 251, is no authority for the proposition that a decree for sale is but a judgment on the debt. All that was decided is that where a security for a debt is given, the security does not merge in a judgment for the debt given in an action based solely on the debt. Even if, before the Transfer of Property Act, 1882, the mortgagor's right of redemption, as distinct from the right of redemption possessed by persons other than the mortgagor, continued even after an order absolute for sale, there is no inference that the replacement of Section 89, T.P. Act, 1882, by Order 34, Rule 5, has thrown the law back to what it was before the passing of the Transfer of Property Act; that question depends entirely upon the proper construction to be put upon Order 34, Rule 5, which now governs the position; it is only if Order 34, Rule 5 is itself consistent with an intention to revert to the earlier law that such a result would follow and I have already given my reasons for thinking that the wording of Order 34, Rule 5 is inconsistent with such a result so far as concerns the mortgagor's right to redeem u/s 60, T.P. Act, 1882. The decision of their Lordships of the Privy Council in *Mt. Sukhi v. Ghulam Safdar* AIR 1922 P.C. 11, is not, in my respectful opinion, an authority to the contrary, since it relates only to the effect of a final decree for sale upon the right of redemption granted by Section 91, T.P. Act, 1882, to persons, other than the mortgagor, who are not made parties to the suit for sale. Upon the ordinary principles of law, the rights of such persons should not be affected by a decree to which they were not parties, but that was the unfortunate and unfair result which flowed from the provision in the now repealed Section 89, T.P. Act, 1882, that

upon the passing of a final decree for sale the security was extinguished. The omission of that provision from Order 34, Rule 5, Civil P.C., now avoids that result and there being nothing in Section 91, T.P. Act, which compels or even indicates such a result, the effect of the replacement of Section 89, T.P. Act, 1882, by Order 34, Rule 5 so far as persons who are entitled to redeem u/s 91, T.P. Act, and who are not made parties to the suit for sale, is to place them in the same position as they were before the Transfer of Property Act, 1882. It seems to me, therefore, that Order 34, Civil P.C., and Sections 60 and 91, T.P. Act, 1882, now form a consistent series of provisions whose symmetry will in any way be interfered with by holding that upon the application of the ordinary rules of *res judicata* and upon the plain and ordinary meaning of Order 34, Rule 5, Civil P.C., and Section 60, T.P. Act, the words in Section 60, T.P. Act, 1882, provided that the right has not been "extinguished by decree of a Court" include an extinguishment of the mortgagor's rights of total and partial redemption by the merger of these rights in the final decree for sale and in the separate and different right of total redemption granted by Order 34, Rule 5, Civil P.C. It follows that the respondents' contention based upon the continuance of the right of partial redemption after final decree for sale entirely fails. Neither the right of total redemption nor the right of partial redemption conferred upon the mortgagor by Section 60, T.P. Act, 1882, survives the final decree for sale; all that remains thereafter is the different right of total redemption conferred by Order 34, Rule 5, Civil P.C.

12. I have already explained my reasons for thinking that the judgment of their Lordships of the Privy Council in *Mt. Sukhi v. Ghulam safdar* AIR 1922 P.C. 11 is not inconsistent with the conclusions which I have reached, For the same reasons, I do not think that the other case relied upon in this connection by Mr. L.K. Jha as being inconsistent with the views of the learned Judges of the Madras High Court in *Thirukonda Ellarayan v. Rangaswami Aiyar* AIR 1926 Mad 816 above referred to, namely *Jageswar Mandal v. Sridhar Lal* AIR 1928 Pat. 589 which also relates to the rights of redemption of a puisne mortgagee not a party to the suit for sale, is of any assistance to the respondents. Similarly, I do not think that either the decision of the Bombay High Court in *Ramji Bapuji Patil Vs. Pandharinath Ravji*, which deals with the right of redemption under Order 34, Rules 7 and 8, Civil P.C., or of their Lordships of the Privy Council in AIR 1934 205 (Privy Council) which dealt with the right of redemption under the old Section 92, T.P. Act, 1882, which is now replaced by Order 34, Rule 7, Civil P.C., assist the respondents. Mr. L.K. Jha also referred us to *Rameshwar Prasad v. Devendra Narayan* AIR 1944 Pat. 179 and *Harihar Prasad v. Gopal Saran* AIR 1935 Pat. 385, but these cases merely establish that the right of contribution survives the preliminary decree and that matters occurring after the preliminary decree and before the final decree and affecting the amount due thereunder are properly taken into account in the final decree.

13. No doubt, it might be argued that on the facts of this particular case, there had been no merger of the mortgagors' rights of partial redemption, because

proper to the date of the final decree they were not and could not with the exercise of reasonable diligence have become aware that this right had arisen. In my opinion, so long as the final decree stands, it is not open to the respondents to contend that the merger has not taken place. Their remedy, if any, is to attack the decree itself, but that they cannot do in execution proceedings. Even if that were not so, it seems to be most undesirable that questions of this nature involving a complicated inquiry into questions of fact should be allowed to be raised in execution proceedings and the undesirability is greatly emphasised in the particular circumstances of this case where the question of the paramount title to the properties purchased by the mortgagee will necessarily be in issue.

In regard to the cross-objection taken by the respondents based on the fact that in the execution petition the decree-holders have mentioned certain villages which have two Thana numbers, whereas the mortgage decree contains no mention of any Thana number and only names of certain villages with certain Tauzi numbers, and to the effect, therefore, that the decree-holders are entitled to proceed only against one Thana number, I did not understand Mr. L.K. Jha to press this objection and, in any event, I agree with the learned Subordinate Judge in overruling the objection. It does not seem to me that the alleged discrepancy between the execution petition and the mortgage decree raises any doubt as to the actual properties included in the decree, and the discrepancy, therefore, appears to me to be one of extra but not absolutely necessary description.

14. For these reasons I would allow the appeal and dismiss the cross-objection and direct that the case be remanded to the learned Subordinate Judge with a direction to proceed with the execution in due course of law.

15. The respondents will pay the appellants costs both of the appeal and of the cross-objection.

16. Imam J. The decision of this Court in *Sarju Lal v. Baijnath* AIR 1923 Pat. 44 referred to by my learned brother is binding upon us. If the circumstances appearing in this appeal had warranted a conclusion to the contrary, the only course open would have been to refer the case to a larger Bench.

17. The deceased Tinkauri Singh had executed a mortgage bend dated 12th September 1925, in favour of the appellants for Rs. 44,000. The respondent is the widow of Tinkauri Singh. This bend shall hereafter be referred to as the mortgage bend in question, The appellants obtained a preliminary decree on the mortgage bend in question in conformity with Order 34, Rule 4, Civil P.C. This preliminary decree was passed on 22nd September 1938, and a final decree was passed on 8th July 1939. It is this final decree which the appellants seek to execute

18. It is necessary to state some further facts as would appear from the judgment of the Subordinate Judge in Mortgage suit No. 38 of 1937, as a result of which the aforesaid preliminary and final decrees were passed. One Krishna

Bahadur Singh was the owner of the Amnaur estate, and on his death there was a scramble for possession of his estate by Tinkauri Singh and one Tejpertap Singh. This dispute resulted in Title Suit No. 92 of 1928. There was a compromise between these rival claimants whereby it was recognised that 8 annas share in the said estate belonged to Tejpertap Singh and the other 8 annas to Tinkauri Singh.

19. The appellants obtained a decree in a money suit against Tejpertap and his heirs, and in execution of the said decree purchased at the court sale on 29th April 1938, certain properties belonging to them. The sale was confirmed on 17th January 1939. Some of the properties purchased at the sale are mentioned in the mortgage bend in question and the appellants had it stated in the sale proclamation that these properties were subject to the encumbrance arising out of the mortgage bend in question.

20. The appellants made Tejpertap's heirs defendants 2 to 5 in the Mortgage suit No. 33 of 1937 on the ground that they were subsequent transferees of Tinkauri Singh. These defendants contended that they were unnecessary parties to the suit and that there could be no mortgage decree against them as the properties which Tinkauri Singh purported to mortgage by the mortgage bend in question belonged to them, and that they were not subsequent transferees. It was conceded before the Subordinate Judge that the mortgage bend in question was not confined to the properties in which Tinkauri Singh got a share under the compromise but, extended also to properties wholly allotted to the heirs of Tejpertap. In the mortgage suit, however, it was not shown to the Subordinate Judge what were the properties allotted to the heirs of Tejpertap. In the circumstances, he held that it would be better to leave the question open in the suit as involving a question of paramount title as between the respondent Deolachan Kuer, defendant 1, and the heirs of Tejpertap, defendants 2 to 5. He then held as follows:

...And these defendants 2 to 5 not being transferees from Tinkauri Singh but claiming independently of him and adversely to him must be held to have set up a title paramount to that of the mortgage and would not accordingly appear to be necessary parties to the suit.

21. He accordingly dismissed the mortgage suit filed by the appellants against the heirs of Tejpertap but decreed the suit as against Deolachan Kuer, and the appeal was repaid preliminary decree and the final decree followed in consequence of his decision.

22. The argument on behalf of the respondent is to the effect that the appellants had purchased the equity of redemption when they sold the properties of Tejpertap Singh having notified that the sale was subject to their encumbrance on the mortgage bend in question. This argument assumes that Tejpertap Singh was a subsequent transferee, and that Tinkauri Singh had the right to mortgage all the properties mentioned in the mortgage bend in question. To accede to the

submissions made on behalf of the respondent, which have been set out in the judgment of my learned brother, it would be necessary to hold that an executing Court can go behind the final decree in the Mortgage Suit No. 33 of 1937 as well as the findings of the Subordinate Judge in that suit to the effect that Tejpertap's heirs were not transferees of Tinkauri Singh, and that they must be held to have set up a paramount title to that of Tinkauri Singh. I am clearly of the opinion that it is not open to an executing Court to go behind a final decree or to question the findings arrived at in the suit on which the final decree is based. Such a matter does not relate to the execution, discharge or satisfaction of the decree. The right of contribution can, if a cause has arisen for the same, be enforced in a regular suit and it would be unfortunate indeed to hold that a complicated question such as the right of Tinkauri Singh to mortgage all the properties mentioned in the mortgage deed in question should be allowed to be raised in execution proceedings particularly in view of the findings of the Subordinate Judge which have already been stated.

23. For these additional reasons I agree with the view taken by my learned brother and direct that the appeal must be allowed with costs, and the case be remanded to the learned Subordinate Judge to proceed with the execution in due course of law.

24. The cross-objection by the respondents I would dismiss as, in my opinion, it is without merit. I agree with the view taken by the learned Subordinate Judge.