

(1957) 09 P&H CK 0018
In the Punjab And Haryana At Chandigarh
Case No : Civil Original No. 68 of 1953

Simla Banking and Industrial Co. Ltd.	Vs	APPELLANT
Firm Luddar Mal Khushi Ram and Others		RESPONDENT

Date of Decision : 27-09-1957

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 90, Order 34 Rule 1, 38
Transfer of Property Act, 1882 — Section 52, 92

Citation : AIR 1959 P&H 490

Hon'ble Judges : Tek Chand, J

Bench : Single Bench

Advocate : D.R. Manchandra, for the Appellant; D.N. Agarwal and I.D. Dua, for the Respondent

Judgement

Tek Chand, J.—The plaintiff instituted a suit in the Court of the Senior Sub-Judge, Simla, on 16-4-1952, claiming payment of Rs. 44,000/-, together with costs and future interest from the date of institution of the suit till realization, or in default had prayed for the sale of the mortgaged property. It was also prayed, that in case the proceeds of the sale were found to be insufficient to pay the amount due to the plaintiff then the plaintiff should have liberty to apply for a decree for the balance.

The Senior Sub-Judge, Simla, passed a preliminary decree in favour of the plaintiff on 10-1-1953, ordering the defendants Nos. 1 to 3 to pay into Court on or before 10-7-1953, a sum of Rs. 46,502/2/6 together with future interest at the rate of 6 per cent per annum on the sum of Rs. 44,000/- from the date of the suit till realisation. The mortgaged property described in the preliminary decree consisted of three-fourths share of five storeyed property No. 74 situate on the Mall Road at Simla and one-half share of five storeyed property No. 73/8 situate at Ram Bazar, Simla.

It was ordered that out of the mortgaged properties one-half of property No. 73/8 and one-half of shop No. 74 would be liable for the repayment of Rs.

24,400/-, and three-fourths of the costs and future interest at 6 per cent per annum on that sum from the date of the suit. Defendants Nos. 4 and 5, Tarsim Chand and Jagan Nath, were made liable for this sum to the extent of property No. 73/8 in their possession but they were not to be personally liable for the amount or for the costs of this suit. One-fourth share of the property No. 74 was made liable for the payment of Rs. 18,000/- and one-fourth costs plus future interest on the sum of Rs. 18,000/- at the rate of 6 per cent, per annum from the date of the suit till realisation.

The rest of the decretal amount was held to be unsecured amount. Defendant No. 6. L. Salig Ram, was held liable to the extent of shop No. 74 purchased by him at a public auction but he was not personally liable for any part of the decretal amount or the costs of the suit. On 24-7-1953, the plaintiff made an application in the Court of the: Senior Sub-Judge, Simla, under Order 34, Rule 5, Civil Procedure Code, for making the preliminary decree absolute. It was stated in that application that on 5-6-1953, defendants 4 and 5, Tarsim Chand and Jagan Nath, had paid Rs. 8,000/- to the plaintiff and got released one-half of property No. 73/8 in their favour.

The plaintiff had appropriated the said sum of Rs. 8,000/- towards three-fourths of costs and interest on Rs. 24,400/- up to 5-6-1953. As the date of payment of the balance amount had expired and nothing had been paid by defendants Nos. 1 to 3 and 6, a prayer was made for the passing of the final decree. Defendant No. 6, L. Salig Ram, filed written statement raising several objections which are the subject-matter of the issues. This case has come to this Court by transfer from the Court of the Senior Sub-Judge, Simla, and the following issues were framed by Falshaw J. on 25-6-1954, and the evidence has been recorded by him :

1. Did Khushi Ram, proprietor of Messrs. Lud-dar Mal Khushi Ram mortgage on 28-12-1941, one-half of the property No. 74, the Mall, Simla in favour of Badri Das for a sum of Rs. 9,000/-?
2. Did Badri Das obtain an award dated 4-5-1951. and was it made a rule of the Court on 23-8-1951?
3. Did Badri Das bring the property to sale and was it auctioned on 18-8-1952, and purchased by the objector? If so, to what effect?
4. Is the plaintiff bound by the decree obtained by Badri Dass?
5. Is the objector not bound by the preliminary decree dated 10-1-1953?
6. Is the alleged sale dated 18-8-1952, not hit by the principle of lis pendens?
7. Are the objections not barred by the rule of res judicata?
8. Is the objector not bound by the release by the decree-holder of one-half of property No. 73/ 8?
9. Did the plaintiff have knowledge of the first mortgage in favour of Badri Das

and, if so what is the effect?

2. Before examining the arguments advanced by the learned counsel for the parties a brief survey of the earlier history of the case is desirable. Khushi Ram defendant No. 2 and his son Vidya Parkash defendant No. 3 are the proprietors of firm Luddar Mal Khushi Ram. This firm owned one-half share in shop No, 74 on the Mall, Simla. Out of the remaining one-half one-fourth share was owned by Shri Salig Ram defendant No. 6 and one-fourth share by Dr. Mukand Lal. On 29-12-1941, firm Luddar Mal Khushi Ram mortgaged its one-half share with Badri Das for Rs. 9,000/- by means of a registered deed of mortgage Ex. P 1/A. On 5-9-1946 defendant No. 1 opened a cash credit account with the plaintiff up to the limit of Rs. 16,000/-.

A promissory note for that amount was executed. The half share of property No. 74 situated on the Mall Simla, and one-half share of the property No. 73/D situate at Ram Bazar, Simla, was equitably mortgaged with the plaintiff by depositing the title deeds. In the meanwhile. Dr Mukand Lal had sold his one-fourth share in the property No. 74 to defendant No. 1 and on 30-4-1947, having borrowed a further amount of Rs. 12,000/- from the bank further equitably mortgaged to it one-fourth share of the property No. 74 by depositing the original sale deed dated 23-4-1947, executed by Dr. Mukand Lal in favour of defendant No. 2, Khushi Ram. On 15-4-1952, the bank had instituted a suit for the payment of Rs. 44,000/- in the Court of the Senior Sub-Judge, Simla (Suit No. 36 of 1952),

3. On 9-11-1949, one Mehar Chand obtained a simple money decree against defendants 1 to 3 for the sum of Rs. 3,236-4-0 with interest at the rate of 14 annas per cent per month. In execution of this decree of Mehar Chand, defendant No. 6 Shri Salig Ram purchased the equity of redemption of defendants 1 to 3 on 3-5-1951.

4. The dispute between Badri Das first mortgagee and defendants 1 to 3 relating to the mortgage of 1941 was referred to the arbitration of Shri Atma Ram Advocate and the arbitrator gave his award on 4-5-1951, awarding Rs. 11,405/- to the mortgagee Badri Das together with future interest at 6 per cent. On 22-8-1951, this award was made a rule of the Court and a decree was passed in terms of the award. It was ordered that if the decretal amount was not paid till 4-11-1951, the mortgaged property would be sold, and if any portion of the decretal money still remained due that would be recoverable from the person and other property of the judgment-debtor.

As payment could not be made by the judgment-debtor, the mortgaged property was sold in execution of the decree at Court auction on 18-8-1952, and was purchased by defendant No. 6, L. Salig Ram for Rs. 5,100/-. The sale was confirmed on 18-8-1952, and a sale certificate Ex. DW2/4 was issued on 28-11-1952. It was certified that on 18-8-1952, one-half share of the property No. 74 situate on the Mall, Simla, belonging to Khushi Ram defendant No. 2,

which was mortgaged with Badri Das, had been purchased at auction sale for Rs. 5,100/-.

At this stage it may be noted that Shri Salig Ram had three capacities. Firstly, he was owner of one-fourth of property No. 74 in his own right; secondly, he was the purchaser of equity of redemption with respect to one-half share of this property in the decree of Mehar Chand relating to the first mortgage in favour of Badri Das; and thirdly, he became, as evidenced by sale certificate Exhibit DW2/4, purchaser on payment of Rs. 5,100/- of the mortgagee rights of Badri Das, mortgagee. It may also be mentioned at this stage that in their suit instituted by the bank on 15-4-1952, Badri Das the first mortgagee, was not made a party,

5. Now I may deal with arguments addressed by the learned counsel on the issues framed in this case. On the first and second issues, the plaintiff's learned counsel Shri Daulat Ram Manchanda has nothing to say. He admits that Khushi Ram defendant No. 2, proprietor of defendant No. 1 firm had mortgaged one-half of the property No. 74 in favour of Badri Das for Rs. 9,000/- and that Badri Das obtained an award on 4-5-1951, which was made a rule of the Court on 23-8-1951, and a decree in terms of the award was passed. On the third issue, Shri Daulat Ram Manchanda admits, that the property was auctioned on 18-8-1952, at the instance of Badri Das and had been purchased by L. Salig Ram, but it is contended on behalf of the bank that by virtue of this sale for Rs. 5,100/- Shri Salig Ram did not acquire the status and the rights of the first mortgagee Badri Das. He has drawn my attention to the provisions of Sections 59A and 92 of the Transfer of Property Act. For facility of reference the two sections are reproduced below :

59A. "Unless otherwise expressly provided, references in this Chapter to mortgagors and mortgagees shall be deemed to include references to persons deriving title from them respectively."

92. "Any of the persons referred to in Section 91 (other than the mortgagor) and any co-mortgagor shall, on redeeming property subject to the mortgage have so far, as regards redemption, foreclosure or sale of such property, the same rights as the mortgagee whose mortgage he redeems may have against the mortgagor or any other mortgagee.

The right conferred by this section is called the right of subrogation, and a person acquiring the same is said to be subrogated to the rights of the mortgagee whose mortgage he redeems.

A person who had advanced to a mortgagor money with which the mortgage has been redeemed shall be subrogated to the rights of the mortgagee whose mortgage has been redeemed, if the mortgagor has by a registered instrument agreed that such persons shall be so subrogated.

Nothing in this section shall be deemed to confer a right of subrogation on any

person unless the mortgage in respect of which the right is claimed has been redeemed in full."

6. The principle of subrogation, as embodied in Section 92, has been applied to the Punjab although the Transfer of Property Act has not been extended to this part: vide *Sham Lal v. Chhaju Ram* AIR 1941 Lah 53, and *Mt. Gopal Devi v. Mt. Ghulam Fatima* AIR 1943 Lah 113. In the former decision it was observed that :

"If a principle is to be imported from a statute and acted upon in a province where the statute does not apply, it is not fair to pick and choose, for that would always lead to arbitrary results. The principle of subrogation as it stands is now embodied in Section 92 and must be applied on the lines indicated there."

7. Section 92 gives effect to the doctrine of subrogation and the important limitation on subrogation is placed by the last paragraph of Section 92. This section does not confer a right of subrogation unless the mortgage in respect of which the right is claimed has been redeemed in full. The first question is, whether Shri Salig Ram has complied with this requirement. As has been already stated that he had paid Rs. 5,100/- only out of a total mortgage decretal amount of Rs. 11,405/- and future interest. The balance of the decretal money, according to the terms of the decree, was recoverable from the person and other property of the judgment-debtor. Shri Salig Ram could not claim to be subrogated on payment of a portion of the decretal amount, he not having redeemed the mortgage in full.

On receipt of Rs. 5,100/- the status of Badri Das as the mortgagee did not come to an end, By sale of mortgaged property, the mortgage was not extinguished, so long as any portion of the mortgagee's claim remained outstanding. There is a well-recognised distinction between the redemption of a mortgage and the redemption of the property mortgaged. All that can be said on behalf of the defendant No. 6 Shri Salig Ram is, that he had purchased the property which had been mortgaged with Badri Das for Rs. 5,100/-, but this purchase by him, is not tantamount to redemption of the mortgage which had been created in favour of Badri Das.

It is true, that by payment of Rs. 5,100/- the rights of Badri Das over the mortgaged property had not become extinguished. But there had been no payment off of the mortgage-money. Thus there can be no subrogation if only a part of the money due under the incumbrance in respect of which the defendant claims to be subrogated has been paid; Their Lordships of the Privy Council in AIR 1940 38 (Privy Council) examined this matter and approving the decision of Mookerjee J. in *Gurdeo Singh v. Chandrikah Singh* ILR 36 Cal 193, observed as follows :

"Turning now to the statute the first thing to be observed is that para 3 of Section 92 only applies where the mortgage has been redeemed. In the present case it is said that the mortgage has not been redeemed inasmuch as there has been no reconveyance, or what in India takes a place of a reconveyance. This

contention however loses sight of the distinction between the redemption of a mortgage and the redemption of the property mortgaged. In their Lordships opinion it is clear that the words in the Section "mortgage has been redeemed" refer merely to the payment off of the mortgage-money and not to an extinction of the mortgagee's rights over the mortgaged property. If such rights had become extinguished there would be none to which the person advancing the money could be subrogated Para 4 moreover seems to contemplate that a mortgage may be redeemed in part and this clearly shows that by redemption is meant no more than payment of the mortgage-money. That being so, and the mortgage of 27-12-1927 having been duly registered, respondent 4 is entitled to be subrogated to the rights of the appellants under the first three mortgages by virtue or the plain terms of Section 92 if such section be applicable. If it is not applicable he has a conventional or contractual right to be so subrogated under the pre-existing law. But in neither case could he have been so subrogated if only a part of the money due under the incumbrances in respect of which he claims to be subrogated has been paid."

8. This matter was again considered by the Privy Council in AIR 1944 96 (Privy Council) where their Lordships remarked :

"Partial subrogation is now disallowed by para 4 of Section 92, T. P. Act. This section is new and was inserted by the amending Act 20 of 1929. After explaining the nature of "subrogation" in para 3, para 4 of the section states that : "Nothing in this section shall be deemed to confer a right of subrogation on any person unless the mortgage in respect of which the right is claimed has been redeemed in full." In AIR 1940 38 (Privy Council) their Lordships approving the dictum of Mookerjee J. in ILR 36 Cal 193, that "a person who claims to be subrogated to the rights of a mortgagee must pay the entire amount of the incumbrance in question." and "that payment of a portion only of the incumbrance is not sufficient,"....."

9. Shri Dwarka Nath Aggarwal on behalf of, Shri Salig Ram objector has relied upon certain authorities which though laying down correct proposition of law are distinguishable on facts from the present case before me. In Gopal Singh v. Ladha Mal AIR 1930 Lah 1063 a second mortgagee had brought a suit on his mortgage and had impleaded as defendants the mortgagor, the prior mortgagee and one Ladha Mal, who had purchased the equity of redemption after the execution of the second mortgage by paying off the first mortgagee before the decree in the suit was passed.

It was held in that case that Ladha Mal having already purchased the equity of redemption in view of the provisions of Section 101 of the Transfer of Property Act stood in the same position as a prior mortgagee for purposes of Order 34, Rule 12, Civil Procedure Code, and the property could not be sold otherwise than subject to the claim of Ladha Mal. The important distinction is that Ladha Mal had "paid off" the first mortgagee whereas Shri Salig Ram in this case has by paying Rs. 5,000/- only, out of Rs. 11,405/-, had not paid off Badri Das the first

mortgagee. The expression "paid off" means "to pay in full". Payment of a portion of the mortgagee's claim therefore is not paying off,

In the second authority relied upon by the learned counsel for the defendant *Diwan Chand v. Punjab and Sind Bank, Ltd.* AIR 1935 Lah 218 the prior mortgage had been redeemed and there was no question of partial payment. In *Radha Kishun v. Khurshed Hossein* ILR 47 Cal 662: AIR 1920 PC 81 the facts were that the appellant was the assignee of the original mortgagee. In this case, of course, there was no assignment of the mortgage in favour of Shri Salig Ram. In *Mt. Sukhi v. Ghulam Safdar Khan* ILR 43 All 469: AIR 1922 PC 11 it was held, that a mortgagee who had obtained a sale or foreclosure decree without joining a puisne mortgagee and who afterwards, was sued on the puisne mortgage, could use his mortgage as a shield against the puisne mortgagee; but the condition precedent was, that such a person must be a prior mortgagee which Shri Salig Ram was not, he not having replaced Badri Das whose mortgage-claim on receipt of Rs. 5,100/- only had not been extinguished.

10. My attention was then drawn by the defendants' counsel to the following observations in *Mali-reddi Ayyareddi v. Gapalakrishnayya* ILR 47 Mad 190 : AIR 1924 PC 36 :

It is now settled law, that where in India there are several mortgages on a property, the owner of the property, subject to the mortgages may, if he pays off an earlier charge, treat himself as buying it and stand in the same position as his vendor, or to put it in another way he may keep the incumbrance alive for his benefit and thus come in before a later mortgagee."

But in that case as is clear from the above observation the earlier charge had been paid off. In *Goka/-das Gopaldas v. Puranmal Premsukhdas* ILR 10 Cal 1035 the first mortgage had been "paid off". Following the above Privy Council decision the Lahore High Court in *Karam Chand v. Ram Singh* AIR 1937 Lah 665 held as under :

"Where there are several mortgages on a property, the purchaser of the property subject to the mortgage may, if he pays off an earlier charge, treat himself as buying it and in the same position as the mortgagee whose mortgage he has paid or to put it in another way, he may keep the incumbrance alive for his benefit and thus come in before a later mortgagee."

11. Throughout the long line of rulings a distinction has been kept in view and that is, that before a right of subrogation can be claimed the previous mortgage must be redeemed in full and the prior mortgagee paid off. In view of what has been stated above, my finding is, that by the purchase of the mortgaged property as evidenced by the sale certificate Exhibit DW2/4 for Rs. 5,100/-, and while the balance of the mortgage-money was still outstanding, Shri Salig Ram could not be deemed to have redeemed the earlier mortgage of Badri Das in full, and therefore he could not invoke the principle of subrogation in his favour.

12. Section 92 of the Transfer of Property Act confers right of subrogation upon a person "other than the mortgagor". In Section 59A of the same Act reference to mortgagors and mortgagees in Chapter 4 --which includes Section 92--is deemed to include reference to persons deriving title from them respectively. Therefore, even if Shri Salig Ram had paid off the entire money to Badri Das, he would have been deemed to be mortgagor and on making the payment even, he could not have reaped the benefit of Section 92 and therefore no question of subrogation could arise.

In *Piarey Lal and Others Vs. Dina Nath and Others*, the plaintiff had purchased the equity of redemption and thus had derived his title from the mortgagor and being therefore a mortgagor within the meaning of Section 59A, he was held not to be entitled to the right of subrogation u/s 92. Reference may also be made to AIR 1937 372 (Nagpur) and *Har Dial v. Guruditta Ram* AIR 1940 Lah 201. In the light of what has been discussed above, I decide issue No. 3 against the defendant and hold that after the property in question had been auctioned in favour of Shri Salig Ram, no right of subrogation was conferred upon him thereby.

13. ISSUE NO. 4.--Order XXXIV, Rule 1 of the CPC requires that all persons, having an interest either in the mortgage-security or in the right of redemption, shall be joined as parties to any suit relating to the mortgage. In the suit instituted by Badri Das, the plaintiff Bank was not impleaded as a party, though it should have been made a defendant. The plaintiff is not, therefore, bound by the decree of Badri Das, as he was not a party to the suit. The explanation to Rule 1 of Order XXXIV exempts the puisne mortgagee, from impleading the prior mortgagee as a party to the suit, A prior mortgagee need not be joined in a suit to be redeemed by subsequent mortgagee, but not vice versa : See *Hargu Lal Singh v. Govind Rai* ILR 19 All 541 and *Ram Sanahi Lal and Another Vs. Janki Prasad and Others* therefore, decide issue No. 4 in favour of the plaintiff and hold that the plaintiff was not bound by the decree obtained by Badri Das.

14. ISSUE NO. 5.--Under this issue, the question is whether the objector, Shri Salig Ram, was not bound by the preliminary decree dated 10-1-1953, passed in favour of the Bank in a suit dated 15-4-1952, to which he was a party as defendant No. 6, By that decree, it was ordered, that out of the mortgaged properties, half of the property No. 73/8 and one-half of shop No. 74, would be liable for the repayment of Rs. 24,400/- and three-fourth of the costs, and future interest at six per cent per annum on that sum from the date of the suit. The liability of defendants 4 and 5, Tarsim Chand and Jagan Nath, was confined to the extent of property No. 73/8 in Ram Bazar, Simla, which they had purchased from Khushi Ram defendant No. 2.

One-fourth share of property No. 74 was held to be liable for payment of Rs. 18,000/- and one-fourth cost plus future interest on that sum. That decree also stated "defendant No. 6, Shri Salig Ram Advocate, is liable to the extent of shop No. 74 purchased by him in public auction, but he is not personally liable for any part of the decretal amount or the costs of the suit." The above terms of the

preliminary decree of 10-1-1953, make Shri Salig Ram liable. No appeal from this decree having been instituted, it became final and conclusive. At the time of the institution of this suit on 16-4-1952, the property under mortgage with Badri Das had not yet been purchased by Shri Salig Ram. That transfer was effected on 18-8-1952, during the pendency of the bank's suit. If Shri Salig Ram had not acquired any rights as auction-purchaser, there could be no doubt as to his liability as defendant No. 6.

The contention raised on his behalf is, that by virtue of the transaction of sale of mortgaged property for Rs. 5,100/- in the execution of the decree of Badri Das first mortgagee, he had improved his status. But as has been already discussed by me while deciding issue No, 3. acquisition of the mortgaged property in that sale does not protect him. That transaction cannot be treated as a shield against the claim of the bank as puisne mortgagee. Issue No, 5 is, therefore, decided against the objector Shri Salig Ram, and I hold that he is bound by the preliminary decree dated 10-1-1953, and is liable to the extent of shop No. 74 purchased by him at the public auction.

15. ISSUE NO. 6.--The question raised under this issue is, whether the sale dated 18-8-1952, by Shri Salig Ram in the decree of Badri Das, is not hit by the principle of lis pendens. In view of what has been decided already, decision of this issue is not really necessary, because this issue has to be discussed on the assumption that Section 92 of the Transfer of Property Act does not stand in the way of the objector and that he had been subrogated to Badri Das, or, in other words, the mortgage in favour of Badri Das is to be treated as having been redeemed in full by him. This issue involves the scope of the rule of lis pendens to the facts and circumstances of this case. Mr. D. N. Aggarwal has cited *Chinnaswami Padayachi v. Darmalinga Padayachi*, AIR 1932 Mad 566 and has cited the following passage occurring at page 572 :

"With the greatest respect, I understand by lis pendens the rule by which by reason of a suit being pending about the rights to some property, subsequent dealings of the parties with that property so as to prejudicially affect the determination of those rights in that suit are invalidated. The proceedings in earlier instituted suits cannot be affected by lis pendens by suits subsequently instituted. If earlier proceedings are affected or rendered ineffective by subsequent proceedings the reason must be not lis pendens but something else.

Not only so, but I find difficulty in understanding how a mortgage suit brought by a mortgagee can be affected by lis pendens because some one else who does not claim from him, i.e., another mortgagee has already sued to enforce his own rights. Both have rights against the same property not derived from each other but from the same owner. In my view the opinion expressed by Mukerjee, J. in *Ram Sanahi Lal and Another Vs. Janki Prasad and Others* on the subject of lis pendens in mortgage suits is correct.

It is that the rule only applies to transfers by the plaintiff or defendant or their

respective inter rests after the suit including transfer by Court sale in money decrees against either property. But it does not apply to previously existing transfers (including mortgages) or legal proceedings to enforce such transfers, by those entitled. On principle the sale in pursuance of a mortgage decree, the mortgage having been executed before the institution of the suit, is not affected by the doctrine of *lis pendens*; cf. per Mitra, J., in *Har Parshad v. Dalmardan Singh* ILR 32 Cal 891 . *Venkatrama Aiyar Vs. A.V. Rangiyar Chetty and Another, and (Haji A.S.) Abdul Muhammad Rowther and Others Vs. Seethalakshmi Ammal and Others*,

16. The above view has also been endorsed in several other rulings including *M.G. Natesa Chettiar Vs. S. Subbunarayana Ayyar and Others*, and *Gendmal Amolakchand v. Laxman Tanba* AIR 1945 Nag 86.

17. There is a difference of opinion on this question and the opposite view is represented by *Mulkh Raj v. Nanak* AIR 1933 Lab 10, *Lalit Mohan v. Hardat Rai* AIR 1939 Lab 146. *Moham-mad Saddiq v. Ghasi Ram* AIR 1946 Lah 322 *Sarat Chandra Ghose Vs. Chintamani Behera and Others, Ram Sanahi Lal and Another Vs. Janki Prasad and Others and Moti Lal v. Karrabuldin* ILR 25 Cal 179 . In AIR 1939 Lab 146, Bhide J. said :

"It is well settled that the principle of *lis pendens* applies even to Court sales; see *Transfer of Property Act* by Mulla, 1933, p. 210. It seems to me therefore that the mortgagees' decree would be binding on the present plaintiffs. The plaintiffs merely purchased the right, title and interest of the mortgagor at the Court sale and as that interest was subject to the mortgagees' rights, they cannot claim any better rights than the mortgagor himself."

In the case of AIR 1946 Lah 322 it was observed at pages 327-28 :

"The rule of *lis pendens* applies equally to voluntary and involuntary transfers otherwise falling within its ambit. In spite of the express exclusion of execution sales from the operation of the *Transfer of Property Act* the rule has been held applicable, on general principles, to such sales even in provinces where that Act is in force, although Section 52 of the Act giving statutory recognition to the rule cannot govern those sales."

In ILR 25 Cal 179 their Lordships of the Privy. Council applied the doctrine of *lis pendens* to a transfer of property in execution of a decree pending a suit for a declaration of title to that property. It was stated by their Lordships that the transfer would be affected by *lis pendens* notwithstanding that the attachment under which the property was sold, had been effected before the institution of the suit inasmuch as the attachment did not confer any title on the attaching creditor. *Moti Lal's* case ILR 25 Cal 179 was one in which a sale in execution of a mortgage decree was held pending a suit for declaration, and it was found that the doctrine of *lis pendens* would apply to the case. The decisions referred to above holding that the doctrine of *lis pendens* is not applicable did not refer to *Moti Lal's* case ILR 25 Cal 179 .

18. In *Faiz Hussain Khan v. Prag Narain* ILR 29 All 339 (PC) the plaintiff was a purchaser in execution of a decree based on a first mortgage of the property in suit. The defendant was in possession as a prior purchaser in execution of a decree on a second mortgage of the same property, passed in a suit to which the first mortgagee was not made a party. The second mortgage was executed after the institution of the suit on the first mortgage but before the summons had been served. It was held by their Lordships of the Privy Council, that the doctrine of *lis pendens* applied, and that the plaintiff had a better title. Their Lordships followed the leading case of *Bellamy v. Sabine* (1857) 44 ER 842 in which case the principle on which the doctrine of *lis pendens* rested, was explained. The earlier view which had prevailed in England that the rule of *lis pendens* was based upon the assumption of constructive notice, did not find favour. In the words of Lord Chancellor at page 847.

"It is scarcely correct to speak of *lis pendens* as affecting a purchaser through the doctrine of notice, though undoubtedly the language of the Court often so describes its operation. It affects him not because it amounts to notice, but because the law does not allow litigant parties to give to others, pending the litigation, rights to the property in dispute, so as to prejudice the opposite party. Where a litigation is pending between a plaintiff & a defendant as to the right to a particular estate, the necessities of mankind require that the decision of the Court in the suit shall be binding, not only on the litigant parties, but also on those who derive title under them by alienations made pending the suit, whether such alienees had or had not notice of the pending proceedings. If this were not so, there could be no certainty that the litigation would ever come to an end. A mortgage or sale made before final decree to a person who had no notice of the pending proceedings would always render a new suit necessary, and so interminable litigation might be the consequence."

Lord Justice Turner at page 849 expressed the same view in the following words :

"The doctrine of *lis pendens* is not, as I conceive, founded upon any of the peculiar tenets of a Court of Equity as to implied or constructive notice. It is, as I think, a doctrine common to the Courts both of law and of Equity, and rests, as I apprehend upon this foundation -- that it would plainly be impossible that any action or suit could be brought to a successful termination, if alienations *pendente lite* were permitted to prevail. The plaintiff would be liable in every case to be defeated by the Defendant's alienating before the judgment or decree, and would be driven to commence his proceedings *de novo*, subject again to be defeated by the same course of proceedings."

It is ordinarily immaterial whether the doctrine of *lis pendens* be considered as based on constructive notice or on public policy. The rationale of the doctrine is, that during the pendency of a suit neither party to the litigation can alienate the property in dispute so as to affect the rights of his opponent. It is based upon the maxim *pendente lite, nihil innovetur*, which means, that pending the suit nothing should be changed. The rule of *lis pendens* extends the scope of the rule of *res*

judicata, the principle of which, is, that the parties and their privies are bound by the judgment of the Court. The rule of lis pendens goes a step further and lays down that whoever purchases a property during the pendency of an action, is held bound by the judgment that may be made against the person from whom he derived his title, even though such a purchaser was not a party to the action or had no notice of the pending litigation.

It is a rule of public policy for otherwise successive alienations will defeat the very purpose of litigation, making it interminable. But "the effect (of rule) is not to annul the conveyance but only to render it subservient to the rights of the parties in the litigation. AS to the rights of these parties the conveyance is treated as if it never had any existence" Story on Equity, Third Edition page 166 para 406: See also Pomeroy's Equity Jurisprudence, Fifth Edition Volume 2 page 726 para 632 and 54 C. J. S. para 625.

19. The intention of the doctrine is to invest the Court with complete control over alienations in the res which is pendente lite, and thus to render its judgment binding upon the alienees, as if they were parties, notwithstanding the hardship in individual cases. Hardship is outweighed by public necessity. Shri Salig Ram acquired property No. 74 in the execution sale, during the pendency of the bank's suit, and in view of the doctrine of lis pendens, he must take the property subject to the result of the pending suit. As defendant No. 6, in the Bank's suit, he had notice of the pending suit. But even if he had none, the lack of knowledge or want of notice is of no consequence. In view of what has been discussed above I cannot persuade myself to agree with the contention of the learned counsel for the objector. I am of the view that the transaction of 18-8-1952, is hit by the principles of lis pendens. I, therefore, decide issue No. 6 in favour of the plaintiff.

19a. ISSUE NO. 7. I am not impressed by the argument of Shri Daulat Ram Manchanda that the objections are barred by the rule of res judicata. In the Bank suit Shri Salig Ram was made a defendant in his capacity as an auction-purchaser of the equity of redemption in execution case Mehar Chand v. Khushi Ram and Vidya Parkash, and being a subsequent transferee he was impleaded as a defendant. He was not impleaded as a successor of Badri Das, the prior mortgagee. Even if Shri Salig Ram be considered as a party, in his capacity as an assignee or first mortgagee, -- which in my view he was not -- there was no issue as to determining the rights of the first mortgagee. The provisions of Section 11 of the CPC are not applicable to the facts of this case. This issue is decided against the plaintiff.

20. ISSUE. No. 8. The facts giving rise to this issue, are that according to the terms of the preliminary decree dated 10-1-1953 out of the mortgaged properties, half of property No. 73/8 and one half of shop No. 74 would be liable for the repayment of Rs. 24,400/- and three-fourths of the costs and future interest at six per cent per annum. Defendants 4 and 5. Tarsim Chand and Jagan Nath, would be liable for this sum to the extent of the property No. 73/8 in

their possession and purchased by them from Khushi Ram defendant-mortgagor. Defendants 4 and 5 approached the Bank for determining the value of their property so that they might liquidate their liability.

By a resolution of the Board of Directors of the Bank, Exhibit D.H./1, a sub-committee was constituted to determine the value of the property, i.e., of half share of property No, 73/8 in Ram Bazar. The members of the sub-committee were Kanwar Sir Dalip Singh, Shri Avtar Singh and Shri Mela Ram. The report of the sub-committee was adopted and it was resolved that a sum of Rs. 8,000/- be accepted from Tarsim Chand and Jagan Nath in settlement of the decree account against half share of house No. 73/8, Ram Bazar, Simla. The three members of the sub-committee have appeared as witnesses on behalf of the Bank. P.W. 1 Kanwar Sir Dalip Singh stated that the value put by the "sub-committee on the property was Rs. 8,000/-. P. W. 2 Sardar Avtar Singh stated that he and Shri Mela Ram P.W. 3 went to the spot and found that Rs. 1,100/- was the rental value of one-half of that property and the amount of house-tax and property-tax on half portion was Rs. 300/-.

They fixed the value of the property at ten times the net annual rental value which came to Rs. 8,000/-. Statement of P.W. 3 Shri Mela Ram is to the same effect. Shri Salig Ram in his written statement stated that this property has been wrongly released by the Bank to his detriment and to the benefit of defendants 4 and 5. As D.W. 2, he made a statement that the Bank had made a private compromise with Tarsim Chand and Jagan Nath without his knowledge and his rights had thereby been affected. In cross-examination he admitted that he had no occasion to get the value of the property assessed. He also stated that if he had funds he would be prepared to buy the half share of Khushi Ram in this property for Rs. 10,000/. No evidence has been led by Shri Salig Ram to show that the property was in fact worth more than Rs. 8,000/-. D.W. 1 Khushi Ram in his cross-examination stated that the value of the property in Simla had slightly dropped after the partition of the country.

21. Once a mortgage decree is passed against several items of property, the mortgagee-decree-holder is entitled to realize the entire amount from any part of those properties and he can also sell them in any order that he wishes to choose. Neither the judgment-debtor nor any transferee pendente lite from him is entitled to have the decretal amount split up and the liability apportioned : See *Moti Chand and Others Vs. Mahabir Prasad* My attention has been drawn to Section 81 of the Transfer of Property Act which deals with marshalling of securities, and Section 82, which relates to contribution to mortgage-debt. Shri Salig Ram, as found by me, did not have the status of a mortgagee and the provisions of Section 81 of the Transfer of Property Act do not apply to him. These two provisions are not applicable as the case is neither of marshalling nor of contribution.

The provisions of the Transfer of Property Act have not been extended to the Punjab. Though the principles underlying the Act are followed as rules of justice,

equity and good conscience. The equities of this case also do not justify the applicability of Sections 81 and 82 even if these provisions were considered to govern this case. The amount of Rs. 8,000/- had been properly assessed to be the value of half share of the property in Ram Bazar, and there is no evidence worth the name in rebuttal. It fetched a fair price and there is nothing to suggest that it could have fetched more. I, therefore, decide issue No, 8 against the objector.

22. Issue No. 9. This issue has not been seriously pressed by Shri D. N. Aggarwal. Assuming that the plaintiff had knowledge of the first mortgage in favour of Badri Das, that fact cannot stand in the way of the suit being decreed. Explanation to Order 34, Rule 1, C. P. C., allows a "puisne mortgagee" to sue for sale without making the prior mortgagee a party to the suit; and a prior mortgagee need not be joined in a suit to redeem a subsequent mortgage. I decide issue No. 9 against the defendant.

23. In the result, I find no force in the objections of Shri Salig Ram which are dismissed.

24. On 5-6-1953 defendants 4 and 5 had paid Rs. 8,000/- to the plaintiff and got half share of property No. 73/8 released in their favour. This sum of Rs. 8,000/- had been appropriated by the plaintiff towards three-fourths costs and interest on Rs. 24,400/- up to 5-6-1953. This left a balance of Rs. 20,010/5/3 together with interest thereon at six per cent per annum from 6-6-1953 till receipt, realizable by sale of half of property No. 74, the Mall, Simla. No other payment towards the balance due under the decree has been made so far by defendants 1 to 3 and 6. The plaintiff is, therefore, entitled to a final decree being passed in his favour against defendants 1 to 3 and 6, I, therefore, pass a final decree in the following terms :

25. A decree for Rs. 59,610/15/3 and one-fourth of the costs amounting to Rs. 625/8/6 and future interest at six per cent per annum on Rs. 19,600/- from the date of the suit till realization and Rs. 20,010/15/3 from 6-6-1953 till realization is passed against defendants 1 to 3. The above decree shall be realizable as follows :

26. Rs. 20,010/15/3 together with future interest at six per cent per annum from 6-6-1953 till realization shall be realised from one-half of property No. 74, the Mall, Simla, and Rs. 18,000/- and costs amounting to Rs. 625/8/6 and future interest on Rs. 18,000/- at six per cent per annum from the date of the suit till receipt will be realizable from the other one-fourth of property No. 74, the Mall Simla. In the circumstances of the case, there will be no order as to costs of these proceedings.