The Indian Law Reports

APPELLATE CIVIL

Before Mehar Singh and Daya Krishan Mahajan, JJ.

SETH RATTAN CHAND,—*Appellant.*

versus

MESSRS PRITE SHAH-SANT RAM AND OTHERS,—*Respondents.*

Regular First Appeal No. 39 of 1955.

1961

September, 13th

Mortgages—Prior and puisne mortgagees—Suit brought by prior mortgagee for sale of the mortgaged property—puisne mortgagee not made party to the suit—Property sold in execution of the decree obtained in the suit—Rights of puisne mortgagee vis-a-vis *the auction-purchaser and the prior mortgagee—Nature and extent of—Puisne mortgagee—Whether entitled to surplus money resulting from the sale in prior mortgagee's suit to which he was not a party as well as to proceed against the mortgaged property.*

Held (per Mehar Singh, J. that the following propositions are well-settled :—

(1) A second mortgagee, who is a party to the suit of the first mortgagee to enforce his mortgage, is entitled to redeem the first mortgage and on redemption he becomes entitled to apply for a final decree for sale instead of the first mortgagee, or to receive his mortgage-money out of the surplus sale-proceeds remaining in Court after satisfaction of the first mortgage on the ground that the same represent the security under his mortgage, the practical effect of either being to leave surplus proceeds to the second mortgagee towards a payment of his mortgage debt after satisfaction of the first mortgagee.

(2) Where a second mortgagee is not a party to the suit of the first mortgagee—

(a) he is not affected by the decree in the first mortgagee's suit, but is entitled to an opportunity of occupying the position which he would have occupied if he had been a party to the first mortgagee's suit, and thus

(b) he has a right—

(i) to sale of the property, subject to the rights of the first mortgagee, for his mortgage debt,

(ii) to surplus sale-proceeds in Court after satisfaction of the claim of the first mortgagee.

(3) The auction-purchaser in execution of the decree based on the first mortgage occupies a dual capacity of a first mortgagee as well as the owner of the equity of redemption, and while in his first capacity he can use the first mortgage as a shield against the second mortgagee, in his second capacity he can redeem all subsequent mortgages.

In regard to the second proposition above where the surplus sale-proceeds, resulting from the sale in prior mortgagee's suit to which puisne mortgagee was not a party, are sufficient to meet the mortgage debt of the puisne mortgagee after satisfaction of the first mortgage, the puisne mortgagee can either proceed against the mortgaged property in the hands of the auction-purchaser by bringing it to sale, subject of course to the claim under the first mortgage, or he can proceed against surplus sale-proceeds after satisfaction of the claim under the first mortgage. The reliefs are alternative and not cumulative, otherwise a security that can be satisfied by one of the reliefs, that is to say, by sale of the mortgaged property, will savour of double security, beyond the ambit of the mortgage.

Held (per Mahajan, J.)—

that a puisne mortgagee is not bound to accept the sale that has taken place at the instance of the prior mortgagee in a suit to which he was not a party. He can ignore that sale and

enforce his mortgage and in execution of the decree in his mortgage suit put the mortgaged property, which is in the hands of the auction-purchaser, to sale. This right of the puisne mortgagee, however, does not make the sale in the prior mortgagee's suit wholly void. That sale is valid so far as the mortgagor and the prior mortgagee are concerned. It wipes out the prior mortgage debt and relieves the mortgagor of the equity of redemption, the net result being that the equity of redemption as well as the rights of the first mortgagee get vested in the auction-purchaser. In other words, the auction-purchaser acquires a dual capacity *qua* the puisne mortgagee—the dual capacity being that of a mortgagor as well as that of a prior mortgagee. Therefore, the right of the puisne mortgagee in this situation undoubtedly is to get the property sold subject to the prior mortgagee's charge which, in the altered conditions, stands transferred to the auction-purchaser. He has also the right to redeem the prior mortgage, but that right is subject to the right of the prior mortgagee as representing the mortgagor to redeem him. This priority is acquired on the footing that the auction-purchaser is the owner of the equity of redemption and not in his capacity as a prior mortgagee. The auction-purchaser being the mortgagor himself is, therefore, entitled to redeem his own mortgage.

First Appeal from the decree of the Court of Shri Ram Singh Bindra, Sub-Judge, First Class, Amritsar, dated the 24th day of December, 1954, granting the plaintiffs a preliminary decree for the recovery of Rs. 15,000 together with interest at the rate of 6 per cent from the date of the suit till the date of the realization on the sum of the pricipal mortgage money of Rs. 10,000 against all the defendants, etc. etc.

F. C. MITTAL AND D. R. MANCHANDA, ADVOCATES, for the Appellant.

S. L. PURI, K. L. KAPUR, ROOP CHAND, KRISHAN KUMAR AND H. L. SARIN, ADVOCATES, for the Respondents.

JUDGMENT

Mehar Singh, J.

MEHAR SINGH, J.—This is an appeal by defendant No. 4 from the decree, dated December 24, 1954, of the First Class Subordinate Judge of Amritsar.

The facts, for the purposes of this appeal, are not really in dispute. On November 12, 1943, defendant No. 1 and his two brothers mortgaged property C with Prabhat Bank Limited, defendant No. 3, by deposit of title deed, of which the copy is Exhibit D. 4, accompanied by the letter Exhibit D. 7 asking for acknowledgment receipt of the title deed for the mortgage of the property for Rs. 10,000. On March 13, 1945, by a registered mortgage deed Exhibit P. 3 defendant No. 1 mortgaged his one-third share in the properties A, B and C, along with some other properties which do not concern the present litigation, for a consideration of Rs. 10,000 in favour of the plaintiff firm, Prite Shah-Sant Ram, of which plaintiffs Nos. 2 to 5 are the partners. On September 27, 1945, defendant No. 1 again mortgaged his one-third share in the three properties A, B and C for a consideration of Rs. 15,000 in favour of defendant No. 2 by a registered mortgage-deed Exhibit P. 13. On August 1, 1946, defendant No. 3 instituted a suit to enforce its mortgage security under the mortgage of November 12, 1943, in its favour. To that suit plaintiff No. 1 or its partners were not made parties as second mortgagees. Defendant No. 3 obtained a preliminary decree in that suit against defendant No. 1 and his two brothers on December 18, 1946, and final decree on February 20, 1947. In execution of that decree property C was put to sale and it was purchased by defendant No. 4 in auction on August 3, 1948. The sale was confirmed on March 10, 1949, and two days later sale certificate was issued to the auction-purchaser, defendant No. 4. After meeting the mortgage debt of defendant No. 3, the surplus sale-proceeds left in Court were Rs. 6,428-9-6. On October 27, 1948, before confirmation of the sale plaintiff No. 1 made the application Exhibit D. 2 in the executing Court

under Order 34, Rule 13, and section 151 of the Code of Civil Procedure that as it was second mortgagee of one-third share of defendant No. 1 in property C and had not been made a party to its mortgage suit by defendant No. 3, it was entitled to payment of the surplus proceeds in Court towards the satisfaction of its mortgage, pointing out at the same time that it was not bound by the mortgage decree in favour of the first mortgagee, defendant No. 3, nor by the sale of the property and reserving all its other rights against the property. It claimed the amount as substituted security. Defendant No. 1 on March 31, 1949, replying to this application of plaintiff No. 1 in his application Exhibit D.A. did not question the existence or the validity of the mortgage in favour of plaintiff No. 1 but claimed that, as plaintiff No. 1 was not a party to the suit, the sale of the mortgaged property does not in any way affect its rights and consequently it is not entitled to meet its mortgage debt from the sale-proceeds in Court. The prayer was that the application of plaintiff No. 1 be dismissed and it be directed to seek its remedy in a competent Court. In the meantime other creditors of defendant No. 1, defendants Nos. 5 to 7, had obtained money decrees against defendant No. 1 respectively for amounts Rs. 2,301-8-0, Rs. 1,457-8-0, and Rs. 2,631-0-0. They moved for an attachment of the surplus sale-proceeds in Court. On April 2, 1949, plaintiff No. 1 moved by application Exhibit D. 11 in the executing Court that the surplus sale-proceeds be not sent to any Court in connection with any simple money decree against defendant No. 1. On August 23, 1949, plaintiff No. 2 made the statement Exhibit D. 1 in the executing Court claiming the surplus sale-proceeds and stating that he had a charge on those sale-proceeds belonging to defendant No. 1 after payment of the claim of defendant No. 3. On the same date the executing Court made its order Exhibit D. 16 that "the mortgage deed in favour of the petitioners is proved. The balance will be utilized as directed in Order 34, Rule 13(1). Lastly the Judgment Debtor will get any money if left after payment to this petitioner."

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So the plaintiffs obtained an order from the executing Court for payment of the surplus sale-proceeds from the sale of property C under the mortgage decree of defendant No. 3. But somehow they did not succeed in actually obtaining the amount. The amount to the extent of the money decrees of defendants Nos. 5 to 7 was withdrawn by these three defendants and the remaining amount by defendant No. 1. On October 24, 1949, plaintiff No. 1 moved application Exhibit D. 12 to recover the amount from defendants Nos. 1 and 5 to 7 to whom it had been paid. A similar, but amended, application was again moved by plaintiff No. 1 on March 3, 1950, which is Exhibit D. 13. On March 16, 1950, the executing Court refused to issue any further direction in the matter under Order 34, Rule 13 of the Code of Civil Procedure and directed plaintiff No. 1 to have recourse to an action. On May 12, 1948, while the execution proceedings in the decree of defendant No. 3 were in progress, defendant No. 2 instituted a suit on the foot of his mortgage (Exhibit P. 13) of September 27, 1945, to recover the amount due under the mortgage. To that suit of course defendant No. 1 as the mortgagor was a party and the second defendant was plaintiff No. 1. Defendant No. 3 was not a party to that suit. In that suit as between the defendants, present defendant No. 1 and present plaintiff No. 1, the matter of consideration of the mortgage of present plaintiff No. 1 came for consideration of the Court. The trial Judge in his judgment, Exhibit P. 14, of October, 29 1949, with reference to plaintiff's mortgage says—"Defendant No. 1 has not cared to deny the defendant's charge and according to the mortgage deed Exhibit D. 1 and the various Hundis which passed in lieu of the mortgage amount, the charge of defendant No. 2 comes to Rs. 10,000 principal alone with interest according to the mortgage deed Exhibit D. 1. The charge of defendant No. 2 has priority over the plaintiff's mortgage because defendant No. 2 is a previous mortgagee." In that suit the mortgage deed is Exhibit D. 1 in favour of plaintiff No. 1 on the basis of which present suit has been instituted by the plaintiffs.

On February 19, 1954, the plaintiffs instituted the suit, giving rise to the present appeal by defendant No. 4, against the mortgagor defendant No. 1, subsequent mortgagee defendant No. 2, prior mortgagee defendant No. 3, auction purchaser at the sale pursuant to the decree of the prior mortgagee defendant No. 3 and that is defendant No. 4, and defendants Nos. 5, 6 and 7 who, as decree-holders against defendant No. 1, withdrew parts of the surplus sale-proceeds after satisfaction of the mortgage debt of defendant No. 3 in execution of the decree obtained by this defendant. In the suit the plaintiffs, in paragraph No. 6, give the date of the mortgage in favour of defendant No. 3 to be November 12, 1945, whereas the actual date is November 12, 1943. The mortgage in favour of the plaintiffs is dated March 13, 1945. In the same paragraph the plaintiffs refer to the suit of defendant No. 3 and the decrees obtained by it against defendant No. 1. With this knowledge it cannot be accepted that the plaintiffs did not know the date of the mortgage in favour of defendant No. 3 for that must have been stated in the suit of defendant No. 3, and it appears that they stated wrong date of the mortgage of defendant No. 3, with the object of showing defendant No. 3 as a subsequent mortgagee and themselves as prior mortgagees. It is in the wake of this stand in the plaint by the plaintiffs that in the relief paragraph they first claim satisfaction of their mortgage debt by an outright sale of the three mortgaged properties A, B and C to the extent of course of the share of defendant No. 1. This has proceeded on the basis that their mortgage is prior to that in favour of defendant No. 3. The alternative relief claimed by the plaintiffs has been that, if one-third share of property C is proved to have been validly sold by auction in execution of the decree of defendant No. 3 and the equitable mortgage of defendant No. 3 is proved to have been validly effected, a decree for the recovery of the decretal amount be made first by the sale of defendant No. 1's share in properties Nos. A and B and then by recovery of the amounts withdrawn by defendants Nos. 1 and 5 to 7 from the

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sale-proceeds in Court after the sale of property C in execution of the decree in favour of defendant No. 3 and then further prayer is for personal decree for the remaining amount against defendant No. 1. The plaintiffs have framed their reliefs in the alternative, as pointed out, because of their stand in the plaint that they are prior mortgagees as compared to defendant No. 3, but, at the same time, they appear to have been conscious that defendant No. 3 might well prove to be prior mortgagee, and they the second mortgagees, and hence the alternative relief claimed by them. In the manner in which reliefs have been claimed by the plaintiffs in the alternative there has been some argument on behalf of defendant No. 4 that while the first relief claims sale of defendant No. 1's share in the three properties and proceeds on the basis that the plaintiffs' mortgage is prior to that in favour of defendant No. 3, in the alternative relief claimed the plaintiffs expect mortgage in favour of defendant No. 3 to be proved as prior to their mortgage, they do not claim then sale of property C in the hands of the auction-purchaser, defendant No. 4. It has been said on behalf of defendant No. 4 that in the circumstances no relief to the plaintiffs against property C in the hands of defendant No. 4 as auction-purchaser by way of sale of it can be given. The plaintiffs have, as explained, taken this stand because of the frame of the plaint, but in their replication dated June 9, 1954, they clearly stated that "the plaintiff is entitled to put every item of property to sale." If, therefore, any ambiguity was created by the manner in which the plaint has been framed on behalf of the plaintiffs and in regard to the meaning of the reliefs claimed by them that matter has been clarified in the replication. In the circumstances this approach on behalf of defendant No. 4 on the basis of the form of the alternative reliefs claimed in the plaint is without substance.

It is not necessary to refer to the pleas in defence by the other defendants for the present appeal is only by defendant No. 4, and even in his

case it is only necessary to refer to three of his defence pleas for those are the only pleas upon which arguments have been addressed during the hearing of this appeal. Those pleas are (a) that plaintiffs are not entitled to decree because plaintiffs' firm was an unregistered partnership, it was dissolved by a decree of the Court in October, 1949, and therafter a new firm by the name of Prite Shah-Sada Shiv came into existence, to which firm the mortgage debt due to plaintiff No. 1 was transferred, and that firm alone could sue, but it is not a plaintiff in the suit, (b) that the mortgage in favour of plaintiffs is without consideration, no cash consideration having been paid for it, and Hundis referred to in it were in fact paid for by defendant No. 1 and consequently nothing is due under the mortgage, and (c) that the plaintiffs having accepted, according to their own application, from the executing Court, executing the mortgage decree in favour of defendant No. 3, the surplus sale-proceeds after the sale of the property in execution of that decree as substituted security, they have no right to and are estopped from claiming second sale of property C in the hands of the auction-purchaser, defendant No. 4. The learned trial Judge has found against this defendant on all these pleas. The suit of the plaintiffs has been decreed and the learned trial Judge has awarded the plaintiffs a preliminary decree for recovery of Rs. 15,000, together with interest at the rate of 6 per cent per annum from the date of the suit till realisation of the principal mortgage money of Rs. 10,000 against all the defendants. The direction is that the amount shall be realised first from sale of properties A and B and balance, if any, shall be realisable by the sale of property C, with the condition that this property shall be sold subject to prior mortgage charge in favour of defendant No. 3, obviously that in the hands of defendant No. 4 as auction-purchaser. The plaintiffs have also been granted decree that if after sale of properties A and B, balance remains to be paid to the plaintiffs, to recover from defendants Nos. 5 to 7 the amounts withdrawn by them from the surplus sale-proceeds in Court in consequence of the auction sale

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of property No. C under the mortgage decree of defendant No. 3. The details of the amounts have already been given. Other directions follow as usual in a preliminary mortgage decree. No other defendant has appealed against the decree, but defendant No. 4.

The partners of plaintiff No. 1 were plaintiffs Nos. 2 to 5 and one Sant Ram, wo died in 1946. Subsequently at the instance of his widow and his adopted son a suit having been brought for rendition of accounts of the firm, there followed a compromise between the parties, Exhibit P. 5, upon which followed order of the Court. The widow and adopted son of Sant Ram, deceased, thereby accepted some property and cash and severed their connection with the firm totally. The partners of the firm then remained plaintiffs Nos. 2 to 5 and they have continued to be partners naming their firm afterwards as Prite Shah-Sada Shiv. What is to be noted is that one partner has dropped out and the other partners have continued to be partners only changing the name of the firm. All the partners, except the deceased partner, of plaintiff No. 1 and also of firm Prite Shah-Sada Shiv are plaintiffs. In fact apart from the change of the name of the firm in substance there has been no alteration for plaintiffs Nos. 2 to 5 have continued to be partners all the time. The learned counsel for defendant No. 4 refers to transliteration of the account of the firm of defendant No. 1, Exhibit P. 7, with plaintiff No. 1 and on March 31, 1950, there is a sum of Rs. 10,000-9-3 shown on the debit side as also on the credit side. Then follows transliteration of account of defendant No. 1's firm appearing in the Khata Bahi of firm Prite Shah-Sada Shiv and in this account against the date of March 31, 1951, defendant No. 1's firm has been given credit of Rs. 10,000-9-3 and on the debit side against the date of March 31, 1950, is shown the same amount having come from the Bahi or account book of plaintiff No. 1. It will be seen that the date of the debit entry in this account is the same as the date of the entries in the first portion of the account of plaintiff No. 1 in Exhibit

P. 7. The object of the learned counsel for defendant No. 4 in making reference to these entries is that on the dissolution of plaintiff No. 1 in consequence of the death of Sant Ram and subsequent litigation by the widow and adopted son of Sant Ram, plaintiffs Nos. 2 to 5 constituted a new partnership under the name of Prite Shah-Sada Shiv, and it was to this firm that this amount owing from defendant No. 1's firm was assigned by plaintiff No. 1. This is a new case that is being set up on behalf of defendant No. 4 in this appeal. It was never the case of any party in pleadings or at any stage before the trial Court that debt owing from defendant No. 1 had been assigned by plaintiff No. 1 to another firm or new firm of plaintiffs Nos. 2 to 5. Apart from this plaintiffs Nos. 2 to 5 are parties on the record and they are the only partners of plaintiff No. 1, the representatives of the dead partner having gone out and they are the only partners of what is called the new firm of Prite Shah-Sada Shiv. In substance they are the persons entitled under the mortgage in suit and it is not clear how the suit cannot be maintained by the plaintiffs. There is no question of assignment nor was any such question raised at the trial. If it had been raised it would have been open to the plaintiffs to show that no question of assignment could or did arise at all. After all a question of assignment is a question of fact and a party against whom such an argument is being urged is entitled to meet it at the proper stage if it is raised at such a stage. There is no substance in the first argument on behalf of defendant No. 4.

In the second argument on behalf of defendant No. 4 there is no substance whatsoever. No doubt defendant No. 1 has questioned the consideration for the mortgage in suit but the learned trial Judge has found on this against him, and he has not appealed against the decree. In the earlier litigation between defendant No. 2 as plaintiff and present defendant No. 1 and plaintiff No. 1 as respectively defendants Nos. 1 and 2 the finding of the trial Court was that the mortgage in favour of the plaintiff is for consideration. That judgment is binding on defendant

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No. 1. The copy of the judgment is Exhibit P. 14. In the face of these aspects of the matter it is not open to defendant No. 4 to urge that the mortgage in suit is without consideration. Defendant No. 4 is a third party. It having been found against the mortgagor, defendant No. 1, that the mortgage is for consideration, it is not open to a third party, such as defendant No. 4, to urge that it is without consideration. Even upon the evidence the conclusion of the learned trial Judge is correct that the mortgage in suit is for consideration. This argument also fails.

The substantial argument in the appeal is based on the third defence plea of defendant No. 4. The argument by the learned counsel for defendant No. 4 is that the plaintiffs in execution of the mortgage decree of defendant No. 3 having applied for payment of the surplus proceeds in Court as substituted security and having obtained an order from the executing Court for payment of the surplus sale-proceeds, even though they did not succeed in actually obtaining the amount, cannot further claim sale of mortgaged property C in the hands of the auction-purchaser, defendant No. 4. He contends that the plaintiffs not having been parties to the mortgage decree obtained by defendant No. 3, their right is to one of the two alternative reliefs, that is to say either to surplus sale-proceeds in Court left over on sale of the mortgaged property after payment to defendant No. 3 or to ask for sale of this property in the hands of the auction-purchaser, defendant No. 4. The plaintiffs having elected to have the first relief, they have no right to the second. The reply by the learned counsel for the plaintiffs is that the two reliefs are not alternative but are cumulative and the plaintiffs can both have the surplus sale-proceeds in Court as also proceed against the mortgaged property C by way of sale in the hands of the auction-purchaser, defendant No. 4. It being a case of cumulative reliefs available to the plaintiffs, no question of election arises. The learned counsel further urges that in any case election must be made in a proper forum and an order obtained

within jurisdiction. He says that the application of the plaintiffs under Order XXXIV, rule 13, and section 151 of the Code of Civil Procedure to the executing Court executing the mortgage decree of defendant No. 3 was not competent and did not lie in that Court and so the order passed on the application being without jurisdiction, it cannot be treated as a valid election of a relief available to the plaintiffs out of alternative two reliefs. This is the main stand of the parties upon this question.

These propositions are well settled—

(1) A second mortgagee, who is a party to the suit of a first mortgagee to enforce his mortgage, is entitled to redeem the first mortgage and on redemption he becomes entitled to apply for a final decree for sale instead of the first mortgagee, or to receive his mortgage money out of the surplus sale-proceeds remaining in Court after satisfaction of the first mortgage on the ground that the same represent the security under his mortgage : *Barhamdeo Prasad and another* v. *Tara Chand and others* (1), and *Hem Chandra Roy Chaudhury* v. *Suradhani Debya Chawdhurani and others* (2), the practical effect of either being to leave surplus proceeds to the second mortgagee towards a payment of his mortgage debt after satisfaction of the first mortgagee.

(2) Where a second mortgagee is not a party to the suit of the first mortgagee—

(a) he is not affected by the decree in the first mortgagee's suit: *Debendra Narain Roy* v. *Ramtaran Banerjee* (3), *Umes Chunder Sircar* v. *Mussummat Zahoor Fatima and others* (4), *Rajah Gobind Lal Roy* v. *Ramjanam Misser and others* (5), and

(1) 41 I.A. 45.=I.L.R. 41 Cal. 654
(2) 67 I.A. 309.
(3) 30 Cal. 599 (F.B.).
(4) 17 IA. 20
(5) 20 I.A. 165.=I.L.R. 21 Cal. 70

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Sukhi v. *Ghulam Safdar Khan and others* (6), but is entitled to an opportunity of occupying the position which he would have occupied if he had been a party to the first mortgagee's suit : *Sukhi* v. *Ghulam Safdar Khan and others* (6), and *Abdul Gafoor* v. *Sagun* (7), and thus—

(b) he has a right—

(i) to sale of the property, subject to the rights of the first mortgagee, for his mortgage debt: *Debendra Narain Roy* v. *Ramtaran Banerjee* (3), *Rajah Gobind Lal Roy* v. *Ramjanam Misser and others* (5), and *Sukhi* v. *Ghulam Safdar Khan and others* (6),

(ii) to surplus sale-proceeds in Court after satisfaction of the claim of the first mortgagee: and *Barhamdeo Prasad and another* v. *Tara Chand and others* (1).

(3) The auction-purchaser in execution of the decree based on the first mortgage occupies a dual capacity of a first mortgagee as well as the owner of the equity of redemption, and while in his first capacity he can use the first mortgage as a shield against the second mortgagee, in his second capacity he can redeem all subsequent mortgagees: *Sukhi* v. *Ghulam Safdar Khan and others* (6), *and Abdul Gafoor* v. *Sagun* (7).

In regard to the second proposition above where the surplus sale-proceeds in Court, after satisfaction of the first mortgage, are sufficient to meet the mortgage debt of the second mortgagee, the latter can, as held by Tek Chand, J., in *Gian Chand* v. *Gopi Chand and another* (8), with reference to *Barhamdeo Prasad and another* v. *Tara Chand*

(6) 48 I.A. 465.
(7) 27 Pat. 526.

and others (1), and *Basheshar Nath and others* v. *Diwan Devi Parshad and others* (9), either proceed against the mortgaged property in the hands of the auction-purchaser by bringing it to sale, subject of course to the claim under the first mortgage, or he can proceed against the surplus sale-proceeds after satisfaction of the claim under the first mortgage. The reliefs are alternative and not cumulative, otherwise a security that can be satisfied by one of the reliefs, that is to say by sale of the mortgaged property, will savour of a double security, obviously beyond the ambit of the mortgage. In either case *K. N. Krishnaswami Bhagvathar* v. *N. A. Thirumalai Iyer* (10), and *Gian Chand* v. *Gopi Chand* (8), the second mortgagee was claiming surplus sale-proceeds, after satisfying the first mortgage, and the sale-proceeds were sufficient to meet his mortgage debt. In fact in *K. N. Krishnaswami Bhagavathar* v. *N. A. Thirumalai Iyer* (10), the chief argument on behalf of the second mortgagee was that the reliefs are alternative and reply for the opposite side was that he can only seek sale of the mortgaged property. However, for the opposite side it was also urged that the second mortgagee cannot have a right to both the property as well as against the surplus proceeds in Court, and the learned Judge observed—"But I do not think there is any objection in principle to the plaintiff proceeding both against the mortgaged property in the hands of the fourth defendant (auction-purchaser) as well as against the surplus funds in Court." To an argument that to allow the reliefs as cumulative is to confer on the second mortgagee an additional security, the learned Judge observed "that there is no warrant in law for holding in such a case as this that the sale-proceeds are additional security. After a careful consideration of the cases quoted at the Bar, I could not find anything in equity or in law which militates against the right of the puisne mortgagee in a case like this to proceed both against the property in the

(8) 108 I.C. 173=A I.R. 1928 Lah. 593
(9) 19 I.C. 410
(10) 90 I.C. 410=A.I.R. 1926 Mad. 101

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hands of the purchaser as well as against the sale-proceeds in Court." The learned Judge then points out that it was not necessary for the mortgagee in that case to proceed against the property, as the surplus sale-proceeds in Court were more than sufficient to satisfy his mortgage debt. It appears that the observations of the learned Judge on this aspect are obiter. In *Gian Chand* v. *Gopi Chand and another* (8), Tek Chand, J., read *K. N. Krishnaswami Bhagavathar* v. *N. A. Thirumali Iyer* (10), as proceeding on the view that the reliefs are alternative, and it has been shown that to take the reliefs as cumulative is to go outside the scope of the mortgage security. In *Krushna Chandra Dhar* v. *Bepin Behari Padhi* (11), the mortgaged property, after decree had been obtained for its sale on the foot of the mortgage, was sold at a revenue sale by reason of section 54 of the Revenue Sale Law but subject to the rights of the mortgagee under his mortgage so that the mortgagee's mortgage was protected and he could proceed against the property by way of sale in execution of a decree. The revenue sale fetched an amount in excess of the revenue demand for which the sale was made. The mortgagee withdrew the surplus sale-proceeds. He thereafter proceeded in execution to sell the mortgaged property and succeeded in carrying out the sale. This right was claimed on behalf of the mortgagee under section 73 of the Transfer of Property Act. So in the case in view of section 54 of the Revenue Sale Law the mortgage of the mortgagee was protected and his right to recovery of his mortgage debt by sale of the mortgaged property remained intact and under section 73 of the Transfer of Property Act he claimed to have become entitled to the surplus sale-proceeds, the sale having taken place in default of revenue demand. The mortgagor claimed to recover the sale-proceeds from the mortgagee. The trial Judge held that the mortgagee had the right not merely to realise his security by means of his mortgage decree for sale, but also that he had the right to proceed against the surplus sale-proceeds in view

(11) I L.R. 16 Patna 299.

of section 73 of the Transfer of Property Act. The learned Judges held that the mortgagee could only have right to both the reliefs if his mortgage security was in any respect diminished as a result of the revenue sale, but not otherwise and observed—"In this case, however, the mortgagee's rights were not diminished by the sale at all and he had his full right to put the mortgaged property up to sale and to accede to the proposition that he can also proceed against the sale-proceeds would mean that by reason of the revenue sale the security held by the mortgagee was increased." This is a case which is somewhat of a parallel to the present case. The sale of property C in execution of the mortgage decree in favour of defendant No. 3 has not in any respect resulted in diminishing the security of the plaintiff as against the mortgaged property C. In the circumstances it seems obvious that he cannot have both the reliefs but can only have one of the two alternative reliefs. This seems to be the correct approach as, in circumstances as those of this case, the second mortgagee is entitled to occupy the position he would have done had he been a party to the suit of the first mortgagee, and had that been so, he would only be entitled to one relief, that is to say to surplus sale-proceeds alone. On behalf of defendant No. 4 the learned counsel refers to *Ganga Sahai and another* v. *Tulshi Ram* (12), in which at page 373, the learned Judges observed—"We are unable to see how the acceptance of the surplus proceeds of the auction sale could be in any way a relinquishment of the right of the mortgagee to recover by all legal means the remaining mortgage money due to them", and he contends that the opinion of the learned Judges was that a mortgagee is entitled both to surplus proceeds of an auction sale as also to proceed against the property to sale, but the observation of the learned Judges cannot be divorced from the facts of the case. In that case the mortgagee obtained a mortgage decree for the sale of the mortgaged property. The property was put to sale for revenue demand. At the auction

(12) I.L.R. 25 All. 371.

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it was purchased by the mortgagor *benami* in the name of another person. There were surplus sale-proceeds after defraying the revenue demand, and the same were withdrawn by the mortgagee towards satisfaction of his mortgage debt. The sale-proceeds being short of the total amount of the mortgage debt, and in the meantime it coming to the knowledge of the mortgagee that the mortgagor was the real purchaser of the property, he applied for sale of the property in execution of his mortgage decree, and this right claimed by him was maintained by the learned Judges making the observation as stated above. It is obvious that on facts the case has no bearing whatsoever on the present case. The decision in that case substantially proceeded on the ground that a mortgagor cannot set up against his on encumbrancer any other encumbrance created by himself and the learned Judges were of the opinion that encumbrance resulting from arrears of revenue demand was due to the fault of the mortgagor and was on the same basis as encumbrance created by the mortgagor himself. This case does not advance the argument on behalf of defendant No. 4. So in a case like the present the reliefs are alternative and not cumulative. In such a case a second mortgagee, when pursuing his claim in Court for alternative reliefs in an action, will obviously have to elect which relief he will have in the action: *Attorney-General* v. *Earl of Sandwich* (13). He may, however, make the election in his pleadings and then he will be held to it: *Vine* v. *National Dock Labour Board* (14). It follows that this will be so in all cases whether the surplus sale-proceeds in Court are sufficient to meet the mortgage debt of the second mortgagee or not and a different rule will not apply where the sale-proceeds are sufficient as compared to a case where sale-proceeds are not sufficient to meet the mortgage debt of the second mortgagee.

An attempt has been made on behalf of defendant No. 4 to show that in the present suit the plaintiffs have in claiming the alternative relief

(13) (1922) 91 L.J. Ch. 758.
(14) (1956) 1 A.E.R. 1.

made election to proceed to recover the surplus sale proceeds in the hands of defendants Nos. 5 to 7 and as they have not claimed satisfaction by sale of mortgaged property C in the hands of defendant No. 4, so they must be held to that election. This, as has already been explained, is not correct because in their replication the plaintiffs seek satisfaction of their mortgage debt by sale of all the three properties, including property C, to the extent of the share of defendant No. 1. The plaintiffs, however, by their application Exhibit D. 2 of October 27, 1948, intervened in the execution of the mortgage decree in favour of defendant No. 3 and claimed the surplus sale proceeds in Court towards the satisfaction of their mortgage. They obtained an order in their favour from the executing Court. It is true that they were not able to realise the amount pursuant to that order for before they could do that defendants Nos. 5 to 7 withdrew the amounts due to them under the decrees they held against defendant No. 1. That does not change the position so far as the plaintiffs are concerned for in the development as it has taken place they have a right of action to recover those amounts from defendants Nos. 5 to 7. They have in fact obtained a decree against those defendants who, as stated, have not filed an appeal against the decree. Application Exhibit D. 2 of the plaintiffs was under Order 34, Rule 13 and Section 151 of the Code of Civil Procedure. Rule 13 only comes in where Rule 12 applies and this Rule applies where property the sale of which is directed under Order 34 is subject to a prior mortgage, and then the Court is given discretion, with the consent of the prior mortgagee, to direct the sale of the property free from the prior mortgage, giving the prior motgagee the same interest in the proceeds of the sale as he had in the property sold. This was not the position when this application was moved by the plaintiffs in the executing Court in the execution of the mortgage decree of defendant No. 3 for that decree was obtained by defendant No. 3 as first mortgagee, the plaintiffs being second mortgagees. Obviously Rules 12 and 13 of Order 34 had no application to the case of the

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plaintiffs at the time when they moved Exhibit D. 2 in the executing Court. Rule 4(1) of Order 34 provides, after defraying the sale proceeds as detailed in that sub-rule,—"and the balance, if any, be paid to the defendant or to other persons entitled to receive the same." But even Rule 4 applies only to the case of parties to a mortgage suit. Same is the position with regard to Rules 12 and 13. But if claim to surplus sale-proceeds in Court is made in execution as was done by the plaintiffs and the existence and validity of the mortgage is not challenged, the claimant may obtain relief under his mortgage from the sale proceeds. In the present case the plaintiffs did make application to the executing Court and in reply defendant No. 1 did not challenge the existence or validity of the mortgage in their favour. All that he did was to urge that they were not entitled to the relief claimed by them in the execution proceedings but must seek their remedy otherwise. This objection was over-ruled and the executing Court made an order in favour of the plaintiffs. The plaintiffs having obtained that order in execution of the mortgage decree in favour of defendant No. 3 for all practical purpose became party to the execution proceedings and placed themselves in the position as if they had been party to the suit and in execution of the mortgage decree were claiming the surplus sale-proceeds in satisfaction of their mortgage debt. They placed themselves in the position in which, not having been made a party to its mortgage suit by defendant No. 3, they were entitled to be placed. Of course they could have ignored altogether the decree and the consequent execution proceedings, and claimed in an action sale of the mortgaged property subject to the rights of the auction-purchaser as representing the decree-holder mortgagee, but instead of doing that they chose to place themselves in a position as if they were parties to the suit and their right was to the surplus sale-proceeds in satisfaction of their mortgage debt. They definitely made themselves parties to the execution and obtained an order in their favour. Having done so they did all they possibly could at that

stage to make election to proceed against the surplus sale-proceeds in Court thereby precluding themselves from subsequently asking for sale of the property. Actually in their application they have claimed the surplus sale-proceeds as substituted security. So at that stage they have left no doubt about their intention that they were claiming the sale-proceeds in Court as substitute for their security. If they are now allowed a decree for sale of property C in the hands of the auction-purchaser, defendant No. 4, the result will obviously be that they will have that security under their mortgage and an additional or increased security by having the surplus sale-proceeds from the previous auction sale under the mortgage decree of defendant No. 3. The reliefs to which the plaintiffs are entitled being alternative and they having elected to have one of those reliefs, they cannot be permitted to pursue the other relief. In this view the plaintiffs are not entitled to decree for the sale of property C against defendant No. 4. Consequently the appeal of defendant No. 4 is accepted and the suit of the plaintiffs against this defendant is dismissed, but, in the circumstances of the case, the parties are left to their own costs in this appeal.

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MAHAJAN, J.—I entirely agree. However, in view of the importance of the question involved I would like to add a few words of my own on one matter, which presented considerable difficulty, namely, what are the rights of a puisne mortgagee, who is not a party in the previous mortgagee's suit whereby the mortgaged property was sold in execution of the decree obtained in that suit. For the sake of convenience puisne mortgagee henceforth will connote subsequent mortgagee who was not made a party to the prior mortgagee's suit resulting in the sale of the mortgaged property and similarly the auction-purchaser henceforth will connote the auction-purchaser in such a sale.

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The contention of Mr. Mital, learned counsel for the auction-purchaser, is that no doubt the

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puisne mortgagee can put the property to sale but he having exercised his option qua the surplus sale-proceeds resulting from the auction of the mortgaged property his right is only restricted to the surplus sale-proceeds, while, on the other hand, the contention of the learned counsel for the puisne mortgagee is that he has the right to put the property to sale as well as to proceed against the surplus that has resulted from the sale of the mortgaged property. His contention is that these rights are concurrent and not mutually exclusive whereas according to Mr. Mital these rights necessarily are mutually exclusive.

Before these contentions are examined, it will be proper to examine the legal position of the puisne mortgagee *vis-a-vis* the auction-purchaser or the prior mortgagee. It is well settled that the puisne mortgagee is not bound to accept the sale that has taken place at the instance of the prior mortgagee. He can ignore that sale and enforce his mortgage and in execution of the decree in his mortgage suit put the mortgaged property, which is in the hands of the auction-purchaser, to sale. See in this connection *Nannu Mal* v. *Ram Charn Lal and another* (15), *Debendra Narain Roy* v. *Ramtaran Banerjee* (3), and *Udho Dass* v. *Girdhari Lal and others* (16). This right of the puisne mortgagee, however, does not make the sale in the prior mortgagee's suit wholly void. That sale is valid so far as the mortgagor and the prior mortgagee are concerned. It wipes out the prior mortgage debt and relieves the mortgagor of the equity of redemption, the net result being that the equity of redemption as well as the rights of the first mortgagee get vested in the auction-purchaser. In other words, the auction-purchaser acquires a dual capacity qua the puisne mortgagee—the dual capacity being that of a mortgagor as well as that of a prior mortgagee. *Vide Abdul Gafoor* v. *Sagun* (7), and the decision of the Privy Council in *Sukhi* v. *Ghulam Safdar Khan and others* (6). Therefore, the right of the puisne mortgagee in this situation

(15) I.L.R. 52 All. 331.
(16) 43 P.L.R. 6,

undoubtedly is to get the property sold subject to the prior mortgagee's charge, which in the altered conditions, stands transferred to the auction-purchaser. He has also the right to redeem the prior mortgage, but that right is subject to the right of the prior mortgagee as representing the mortgagor to redeem him. This priority is acquired on the footing that the auction-purchaser is the owner of the equity of redemption and not in his capacity as a prior mortgagee. The auction-purchaser being the mortgagor himself is, therefore, entitled to redeem his own mortgage. See in this connection *Ram Sanehi Lal* v. *Janki Parsad* (17), and *Abdul Gafoor* v. *Sagun* (7). It is beyond question that in his capacity as a prior mortgagee the auction-purchaser cannot redeem the subsequent mortgagees except by consent.

It is now settled beyond dispute that a puisne mortgagee, who is a party to the mortgage suit filed by the prior mortgagee to enforce his mortgage is bound by the sale that ensues as a consequence to a decree for sale obtained in that suit. His charge merely gets transferred to the surplus sale-proceeds, if any, which remain after the prior mortgagee's charge is satisfied.

These propositions are not controverted by any of the parties. All that is claimed by Mr. Mital for the auction-purchaser is that as there are two alternative remedies open to the puisne mortgagee, namely, to put the mortgaged property to sale or to claim the surplus sale-proceeds that has resulted in the sale of the property at the instance of the prior mortgagee and the puisne mortgagee having exercised his option qua the surplus sale-proceeds he is debarred from enforcing his alternative right to put the mortgaged property to sale. Both sides are agreed that the puisne mortgagee has a right to the surplus of such sale-proceeds when the sale was brought about in proceedings

(17) I.L.R. 53 All 1023 (F.B.)

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to which he was not a party. What then is the basis of this right ? The rule is settled that if mortgage security is converted into cash, as for instance, this may happen when the mortgaged property is compulsorily acquired under the provisions of the Land Acquisition Act, the charge gets transferred to the converted property, i.e., the compensation money or where the mortgaged property is put to sale at the instance of the prior mortgagee to which the puisne mortgagee is a party, the mortgage-security of the puisne mortgagee gets transferred to the surplus of the sale-proceeds, if any, left after satisfying the prior mortgagee's charge. This follows from the two decisions of the Privy Council in *Gobind Lal* v. *Ramjanam Misser* (5), and *Barhamdeo Prasad* v. *Tara Chand* (1). Will the same result necessarily ensue where the puisne mortgagee is not a party to such sale or to the suit which has resulted in such sale ? In my view, this result can only follow in one contingency and that is where the puisne mortgagee at whose instance the first sale is voidable accepts the sale and does not seek to avoid the sale. Once he accepts the sale then necessarily his right under the mortgage will get transferred to the converted security, i.e., the surplus of the sale proceeds after satisfying the prior mortgagee, otherwise it is not understandable how he can treat the surplus as representing his mortgage-security when the mortgaged property is available in tact to him in spite of its sale under the prior mortgagee's decree. In this eventuality, the surplus sale-proceeds will undoubtedly belong to the mortgagor free from any charge attaching to them inasmuch as the subsequent mortgage stands unaffected and so also the mortgage-security. The only authority, which has been relied upon in support of the contention that even where the puisne mortgagee is not a party to the suit resulting in a decree for sale of the mortgaged property, he has the right to proceed against the surplus on the ground that the surplus is converted mortgage-security, is the case of *K. N. Krishnaswami Bhagavathar* v. *N. A. Thirumalai Iyer and others* (10). I will examine this authority in detail a

little later. At this stage, I only wish to state that I am unable to agree with it. So far as I can see, neither on principle nor on authority, it can be said that the puisne mortgagee can treat the surplus as part of the mortgage-security when he is not prepared to accept the sale, which has resulted in bringing into being that surplus as binding on him. He can, of course, accept the sale as binding on him and once he does that, the sale becomes immune from attack and he cannot exercise the undoubted right that law gives him to put the property to sale.

This brings me to consider in some detail *Krishnaswami's case* on which great reliance has been placed by the learned counsel for the puisne mortgagee. It is interesting that the same decision has also been relied on by Mr. Mital, learned counsel for the auction-purchaser. It is no doubt true that this case does support the contention of Mr. K. L. Kapur. The learned Judge has come to the conclusion that a puisne mortgagee, who is not a party to the suit by the prior mortgagee, has two simultaneous and concurrent rights, namely, to claim the surplus resulting in that sale as well as to put the property to sale by ignoring the first sale, and lay claim to the surplus, if any, resulting therefrom after discharging the prior encumbrance. With utmost respect to the learned Judge, I am unable to agree with this conclusion. So far as support is sought to be derived for this conclusion from the decision of the Privy Council in *Barhamdeo Parsad's case,* which came in appeal to the Privy Council from the decision of the Calcutta High Court in *Berhamdeo Pershad* v. *Tara Chand* (18), I am unable to agree. The aforesaid conclusion at which the learned Judge arrived in *Krishnaswami's case* is merely an *obiter dictum.* In that case, the surplus was more than enough to meet the entire secured debt of the puisne mortgagee and the claim had been made to that surplus alone and the right to that surplus was being disputed on the ground that puisne

(18) I.L.R. 33 Cal. 92.

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mortgagee's only right was to put the property to sale. It was not necessary to decide that the puisne mortgagee had both the rights, namely, to appropriate the surplus of the first sale and also to put the property to sale a second time in his undisputed right to do so by reason of the fact that he was not a party to the suit in which the first sale had resulted. In order to appreciate what their Lordships of the Privy Council decided in *Berhamdeo Pershad's* case, it will be proper to refer to the decision of the Calcutta High Court in this very case, where the facts have been more elaborately stated. It is apparent from that decision that the puisne mortgagees were parties. Moreover, their Lordships of the Privy Council were aware of the fact that the puisne mortgagees were parties, for they observed that they had absented from the trial. Therefore, when their Lordships made the observations to the effect that the surplus represented the mortgage-security, they were merely making the same in that context. The puisne mortgagees being parties, the sale would undoubtedly bind them and their claim would only be to the surplus. This decision does not lend any support to the conclusion at which Devadoss, J., arrived in *Krishnaswami's case.* However, there is another case of the Privy Council, namely *Gobind Lal's case,* wherein there are observations to the effect that the right of such a puisne mortgagee is not necessarily restricted to the sale-proceeds resulting from the sale of the mortgaged property in the decree of the prior mortgagee, but also that the puisne mortgagee has an independent right of sale. But it is nowhere laid down in this decision that the two rights are concurrent. Their Lordships were merely pointing out that there are two rights and not that both these rights are concurrent and not alternative. On the correct reading of the Privy Council decisions, it appears to me that the result that the puisne mortgagee's security attaches to th surplus sale-proceeds will only follow if that sale is accepted by him. It cannot be that he in his undoubted right can ask for the sale of the mortgaged property and also in addition lay claim to the surplus. This would

give him something in addition to his security, for when he puts the property to sale he is fully exercising his right under the mortgage and is having the full benefit of the security. He cannot by this process claim any additional security. I am not unmindful of the fact that the surplus sale-proceeds in the event of puisne mortgagee exercising his right of sale would vest in the mortgagor and will be subject to meet his liabilities but that will not bear the impress of the mortgage-security so as to entitle the puisne mortgagee to proceed against them on the basis that they are part of the mortgage-security.

At this stage, I may point out that the puisne mortgagee's right, in either of the eventualities, is a right to the surplus, for, even when the exercises his right of sale, he is only entitled to the surplus that remains after satisfying the prior mortgagee's charge ; and in the other case too, i.e., where he is a party to the sale, he is again only entitled to the surplus, which has resulted from such sale. Therefore, can it be said with any reasonableness that he is entitled to both the surpluses just as can it be said that in enforcing his mortgage he can put the other property of his mortgagor to sale without obtaining a personal decree against the mortgagor or attach and appropriate the monies of the mortgagor in a bank without again obtaining a personal decree, for neither the other property of the mortgagor nor the monies of the mortgagor in bank can be said to be part of his security ? Till he exhausts his security he has no other claim against the mortgagor and in this case we are merely concerned with the stage of his exhausting the security.

There is another way of looking at the matter. The moment the subsequent mortgagee makes a claim to the surplus resulting in the sale in a prior mortgagee's suit, he gives up his claim to avoid the sale, for he accepts a benefit under the sale and having accepted the benefit under the sale he cannot turn round and say that the sale is invalid. Therefore, once he accepts the sale as good,

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he cannot by suit go behind the sale and put the property to sale a second time. To me it appears that neither on principle nor on authority the contention of the learned counsel for the respondent that the subsequent mortgagee can exercise these two rights simultaneously is tenable. The correct position appears to be that these rights are alternative rights or mutually exclusive rights and he has to elect as to which of the rights he is going to exercise.

In the end I only wish to quote the observations of Tek Chand, J., in *Gian Chand* v. *Gopi Chand and another* (8), which are in these terms :—

> "It is well settled that the sale of a mortgaged property held in the circumstances described above, does not affect the title of the puisne mortgagee who had not been made a party to the suit by the prior mortgagee or who had not intervened at the sale. Such a person can either proceed against the mortgaged property in the hands of the purchaser by bringing it to sale or he can proceed against the surplus of the sale-proceeds left with the Court after satisfying the claim of the prior mortgagee."

This eminent Judge deduced this conclusion from the decision of Devadoss, J., in *Krishnaswami's case* and not the conclusion contended for by Mr. K. L. Kapur. I am in respectful agreement with these observations ant they do support the conclusion at which I have arrived, though here also the learned Judge was not called upon to determine the question as to whether these rights are concurrent or alternative.

K.S.K.