

Courts below dismiss the plaintiffs' suits. In the peculiar circumstances of the case, however, we leave the parties to bear their own costs in this Court.

Punjab State  
v.  
Chaman Lal  
and another.

I agree.  
R. S.

K. L. Gosain, J.  
Harbans Singh,  
J.

APPELLATE CIVIL.

Before D. K. Mahajan, J.

GOBIND AND OTHERS,—Appellants.

*versus*

CHHAJJAN AND OTHERS,—Respondents.

Regular Second Appeal No. 201 of 1955.

*Contract Act (IX of 1872)—Section 62—Novation of a contract—meaning of—Giving up a part of the mortgaged property—Whether amount to novation.*

1959

Nov., 25th

*Held*, that novation of a contract means that for an existing contract a new contract is substituted and the new contract implies concurrence of both the parties to the contract. If there is no such concurrence, there can be no novation. By giving up a part of the mortgaged property, there is no question of a new agreement or contract between the mortgagee and the mortgagor. In such circumstances it cannot be held that there is novation of the contract nor does a change in the security necessarily imply novation.

*Second Appeal from the decree of the Court of Shri A. S. Gilani, Senior Sub-Judge, with Enhanced Appellate Powers, Gurgaon; dated the 9th Decemer, 1954, reversing that of Shri Banwari Lal, Sub-Judge 1st Class, Palwal; dated the 1st June, 1954 and granting the plaintiff a decree for a declaration as prayed for with costs throughout against the contesting defendant.*

P. C. PANDIT, for Appellants.

J. N. SETH, for Respondents.

JUDGMENT

MAHAJAN, J.—The short question in this second appeal is whether by giving up a part of the property mortgaged there is novation of the contract of mortgage.

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The land in dispute, along with *khasra* No. 7800, was mortgaged by Balwant to Ram Parshad for a sum of Rs. 35 some time before 1877, and the mortgage was with possession. In the year 1906 the mortgagee gave up possession of *khasra* No. 7800 on the plea that the profits of the land had been excessive, and mutation of this *khasra* number was entered in the name of the mortgagor free from all encumbrances. On Balwant's death the plaintiff inherited  $\frac{1}{8}$ th share of the mortgaged land, while the remaining  $\frac{7}{8}$ th share was inherited by the defendants. On the 2nd January, 1933, the present suit was filed by the plaintiff, who is the successor-in-interest of the mortgagee, that the defendants, who are the successors-in-interest of the mortgagor, had lost their right of redemption by the lapse of 60 years, and that under section 28 of the Indian Limitation Act the plaintiff had become owner of the suit land. To this suit the defence was that the mortgage was not more than sixty years old and that, in any case, there were acknowledgments by the mortgagee which saved limitation. On the 1st June, 1954, the trial Court dismissed the suit, leaving the parties to their own costs. It held that there was a novation of contract and that a fresh mortgage came into being in the year 1906 by reason of the mutation whereby *khasra* No. 7800 was handed back by the mortgagee to the mortgagor, and that, therefore, limitation would run from the year 1906, and as 60 years had not elapsed from this date the plaintiff's suit was liable to dismissal. Against this decision the plaintiff preferred an appeal to the Senior Subordinate Judge, Gurgaon, who allowed the appeal on the 9th December, 1954, holding that no novation of the contract of mortgage had been proved, nor was there any acknowledgment of the mortgage by the mortgagee, and that, as the period of 60 years had

elapsed, the plaintiff had become owner of the land in view of the provisions of section 28 of the Limitation Act. Against this decision the defendants have come in second appeal to this Court.

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The contention of Mr. Pandit, learned counsel for the defendants-appellants is that the real question arising in this second appeal is as to what is the true nature of the transaction of 1906. According to learned counsel, a new mortgage came into being in 1906, while, according to the contention of the plaintiff-respondents what happened in 1906 was that the mortgagee released a part of the mortgaged property. In order to arrive at a correct decision, one has to see what novation of a contract implies. In ordinary parlance, novation of a contract would mean that for an existing contract a new contract is substituted and the new contract implies concurrence of both the parties to the contract. If there is no such concurrence, there can be no novation. By giving up a part of the mortgaged property, there is no question of a new agreement or contract between the mortgagee and the mortgagor. In such circumstances, it cannot be held that there is novation of the contract. Thus in the present case the mortgage prior to 1877 stands and is not replaced by a new mortgage in the year 1906 when only part of the land was surrendered by the mortgagee. Mr. Pandit relied strongly on a decision of this court reported as *Tika v. Harchandi* (1), decided by a Division Bench of this Court (consisting of Gosain and Grover, JJ.), on the 24th February, 1959, and maintains that by any change in the security there is necessarily a novation. I am afraid I am unable to agree with the learned counsel's interpretation of that decision. In that case the mortgaged property was substituted by a

(1) R.S.A. 830 of 1951

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totally different property and this could only be done by concurrence of both the mortgagor and the mortgagee. In such circumstances there would be a new contract and as such there would be novation. Nothing of this type has happened in the present case.

For the reasons given above this appeal fails and is dismissed but, in view of the circumstances of this case, I leave the parties to bear their own costs throughout.

R. S.

APPELLATE CIVIL.

Before D. K. Mahajan, J.

MANGE RAM AND ANOTHER,—Appellants.

*versus*

KARAM SINGH AND OTHERS,—Respondents.

Regular Second Appeal No. 619 of 1958.

1959  

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Dec., 8th

*East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act (L of 1948)—Section 44—Suit filed in a civil court for injunction restraining the defendant from taking possession of the land allotted to him in repartition proceedings—Whether competent—Scheme of the Act noticed.*

*Held*, that under the East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act, 1948, a draft scheme is prepared and objections are invited to the scheme. After the objections are settled, a scheme is finally published. After the scheme is published, repartition proceedings start and the land is allotted to the various right-holders in the village. Under section 21 of the Act, it is provided that people, who are dissatisfied with the repartition, can raise objections to the repartition and an appeal and a revision are also provided against the orders of the Consolidation Officer while dealing with the