

upon a courtyard which their neighbours had a right to use. I cannot see that there is any principle of equity as to acquiescence involved in this case. This is not a case in which we should send back an issue as to whether there was acquiescence or not. I concur with the view of the lower appellate Court, and I think that this appeal must be dismissed with costs.

BRODHURST, J.—I concur with the learned Chief Justice in dismissing both the appeals with costs.

*Appeals dismissed.*

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Brodhurst.*

JHUNA (DEFENDANT) v BENI RAM (PLAINTIFF)\*

*Sale of immoveable property—Covenant by vendor of good title—Suit and decree on a previous mortgage against purchaser—Suit by vendor to set aside mortgage and decree as fraudulent—Vendor not competent to maintain the suit—Act 1 of 1877 (Specific Relief Act) s. 39.*

A vendor of land who had covenanted with his vendees that he had a good title, and who, after the sale, had no interest remaining in the property, brought a suit in which he claimed to set aside as fraudulent a mortgage on which the defendant had obtained a decree against the vendees, and the decree itself. He based his right to maintain the suit upon his liability under his covenant. The vendees were not parties to the suit.

*Held* that as the defendant's mortgage had merged in his decree, the suit could only be maintained if the plaintiff could show himself entitled to have the defendant's decree set aside, and that he had shown no interest which would entitle him to maintain a suit for such a purpose.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the Chief Justice.

Babu Ratan Chand, for the appellant.

Babu Ram Das Chakarbati and Munshi Madho Prasad, for the respondent.

EDGE, C. J.—In this action, the plaintiff, who had sold a shop to persons called Ram Chand and Raghubar Dial, claimed to have a mortgage on which the defendant had previously brought an action and obtained a decree against Ram Chand and Raghubar Dial, set aside, and the decree for the enforcement of lien on that mortgage against this shop also set aside, or to have the shop

\* Second Appeal, No. 596 of 1886, from a decree of Rai Chheda Lal, Sub-ordinate Judge of Farakhabad, dated the 17th December, 1885, reversing the decree of Maulvi Zakir Husain, Munsif of Farakhabad, dated the 15th April, 1884.

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exempted from the effect of that decree. Now in the previous action, the plaintiff's—the present defendant's—claim was as mortgaged. In that action, his mortgage was established, and a decree was given as against the shop in question and Ram Chand and Raghubar Dial, who were in possession and apparently the owners of the shop. Before that action, the present plaintiff had sold the shop, or any interest he had in it to Ram Chand and Raghubar Dial, and he had covenanted with them that he had a good title. In the present action, to which Ram Chand and Raghubar Dial were not parties, the plaintiff claims to set aside that mortgage and the decree obtained in the previous action on the ground that the mortgage, the subject-matter of the previous action, was fraudulent and did not bind him, and on the ground that, as he was liable on his covenant, he was entitled to maintain this action.

The first Court dismissed the claim, on the ground that the plaintiff had no interest, and, for the reasons to be stated hereafter, I think the first Court was right. The lower appellate Court went into the matter and came to the conclusion that the mortgage was a fraudulent one, and that the plaintiff was entitled to maintain, under s. 39 of the Specific Relief Act, the present action.

We must see how far the latter conclusion was justified. That section gives to any person against whom a written instrument is void or voidable, who has reasonable apprehension that such instrument if left outstanding may cause him serious injury, a right to bring an action for the cancellation of the instrument. With regard to this, my first observation is that the instrument in question had merged in the decree, and practically this action can only be maintained if Mr. *Chakarbatî* could satisfy us that his client was entitled to have the decree in the prior suit set aside. The present plaintiff has no interest in the property in question, he parted with all his interest before the suit, and it is admitted that the hypothecation bond cannot be enforced as against the plaintiff himself. Under these circumstances, can this action be maintained? I am clearly of opinion that the plaintiff has shown no interest which would entitle him to maintain this action. He has shown no authority for the proposition that he can question the decree which was passed in a properly instituted suit in a previous litigation, and against parties interested at the time. The conclusion I come to on this

point is that the plaintiff had no interest, and consequently cannot maintain his action ; and in my opinion this appeal must be allowed, and the judgment of the first Court affirmed with costs.

BRODHURST, J.—I am of the same opinion.

*Appeal allowed.*

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Brodhurst.*

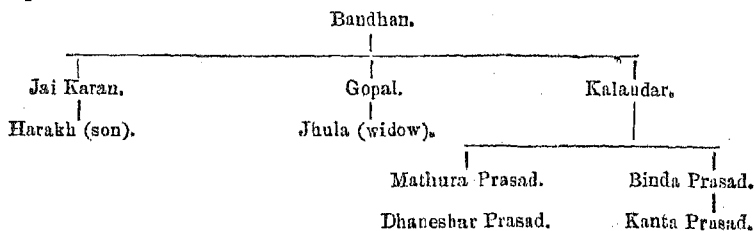
JHULA AND ANOTHER (DEFENDANTS) v. KANTA PRASAD AND ANOTHER  
(PLAINTIFFS).\*

1887  
February 25.

*Hindu Law—Hindu widow—Alienation—Suit by reversioner to set aside alienation—Nearest reversioner—Collusion.*

The only person who can maintain a suit to have an alienation by the widow of a childless Hindu declared inoperative beyond the widow's own life interest is the nearest reversioner who, if he survived the widow, would inherit ; unless it is shown or found that he refused without sufficient cause to sue, or precluded himself by his own act from suing, or colluded with the widow, in which case only can the more remote reversioners maintain such a suit. *Rani Anand Koer v. The Court of Wards* (1) and *Raghunath v. Thakuri* (2), referred to. *Rumphal Rai v. Tula Kuari* (3) and *Madan Mohan v. Furak Mal* (4) distinguished.

The parties to this suit were related in a manner which may be represented thus :—



On the 29th January, 1885, Jhula, the widow of Gopal, a childless Hindu, between whom and the other members of his family a partition had been effected, executed a deed of gift of certain moveable and immoveable property left by her husband, and in her possession as his widow, in favour of Harakh. The present suit was brought by Kanta Prasad and Dhaneshar Prasad as reversioners for a declaration that the gift was inoperative, so far as concerned their interest in the property, on the ground that the donor, as a Hindu

\* Second Appeal, No. 521 of 1886, from a decree of W. J. Martin, Esq., District Judge of Mirzapur, dated the 8th February, 1886, modifying a decree of Babu Ishri Prasad, Subordinate Judge of Mirzapur, dated the 3rd September, 1885.

(1) L. R., 3 I. A. 14. (3) I. L. R., 6 All. 116.  
(2) I. L. R., 4 All. 16. (4) I. L. R., 6 All. 238.