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no doubt that the title of the plaintiffs is superior to that of the defendant, but the question is whether the plaintiffs have come into Court in time to assert and enforce that title. In the view which we have taken of the case, their claim was beyond time and was rightly dismissed by the court of first instance. The plaintiffs are themselves to blame for having lost through their own laches the title which they acquired under their auction purchase. We allow the appeal, set aside the order of the lower appellate court, and dismiss the appeal to that Court with costs. The appellant will get his costs of this appeal.

Appeal decreed.

1899
March 13.

Before Mr. Justice Banerji and Mr. Justice Aikman.

MUHAMMAD NIAMAT ALI KHAN (PLAINTIFF) v. GHAFFAR MUHAMMAD KHAN AND OTHERS (DEFENDANTS).*

Mortgage—Suit for sale—Pleadings—Purchaser of mortgaged property paying off prior incumbrances.

The purchaser of a portion of certain mortgaged property paid off certain prior mortgages on the property. The subsequent mortgagee brought a suit for sale on his mortgage and made the purchaser a defendant, but did not offer to redeem the prior mortgages. *Held*, that the suit would not for that reason necessarily fail, but the plaintiff ought to be given an opportunity of redeeming the defendant's prior mortgages. *Salig Ram v. Har Charan Lal* (1), distinguished. *Kali Charan v. Ahmad Shah Khan* (2), followed.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *Abdul Raoof* and Pandit *Sundar Lal* for the appellant.

The respondents were not represented.

BANERJI and AIKMAN, JJ.—The plaintiff-appellant brought the suit, which has given rise to this appeal, for sale upon a mortgage, dated the 1st of November 1890, made in his favour by the first defendant Ghaffar Muhammad Khan. The second defendant Maulvi Nazir Hasan purchased a part of the mortgaged property, which he sold to the third defendant, his wife. The

* First Appeal No. 137 of 1897 from a decree of Rai Shankar Lal, Subordinate Judge of Saharanpur, dated the 4th March 1897.

(1) (1890) I. L. R., 12 ALL., 548.

(2) (1894) I. L. R., 17 ALL., 48.

other defendants are purchasers of different other portions of the mortgaged property. The third defendant opposed the claim, among other grounds, upon the plea that she had discharged some mortgages which were prior in date to the mortgage of the plaintiff, and that the plaintiff was not entitled to a decree for the sale of the property purchased by her without paying to her the amount which she had paid in discharge of the prior mortgages, or a proportionate share thereof. The Court below has totally dismissed the suit on the single ground that the plaintiff had not offered in his plaint to redeem the prior mortgages which the third defendant had discharged, and in support of this opinion the learned Subordinate Judge has referred to the ruling of this Court in *Sabig Ram v. Har Charan Lal* (1). We cannot agree with the learned Subordinate Judge that that case is not distinguishable from the present case. That was a case in which the purchasers were themselves prior mortgagees, the consideration for their purchase being the amount of the prior mortgage. That case, in our opinion, cannot be regarded as a basis upon which every suit for sale, in which the plaintiff impleads as defendant a subsequent purchaser, but owing to ignorance or some similar cause does not mention in his plaint the fact of the purchaser having discharged a prior mortgage, should be dismissed. In the judgment in *Kali Charan v. Ahmad Shah Khan* (2), the learned Judges who decided that case observed:—"We are unable to lay down as a rule of universal application the principle that a plaintiff who claims too much or fails to admit reasonable deductions from his claim is therefore to be deprived of that to which he is legally entitled." With that observation we concur. This case more nearly resembles the case to which we have just referred, and which should have been followed by the lower Court. As we have said above, the third defendant or her husband from whom she purchased a portion of the mortgaged property was not a prior mortgagee of that property; it is only by reason of her having

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paid off a prior mortgage that she can use that mortgage as a shield against the plaintiff's claim to the extent of the amount paid by her. The fact that the plaintiff made no mention in his plaint of the alleged payment, was not, in our opinion, a valid reason for totally dismissing the suit. The amendment which the plaintiff asked for should have been granted, and the suit decided on the merits and a proper decree passed. We allow the appeal, and, setting aside the decree of the Court below, remand the case to that Court under section 562 of the Code of Civil Procedure, with directions to readmit it under its original number in the register and decide it on the merits. The appellant will get his costs of this appeal; other costs heretofore incurred will abide the event.

Appeal decreed and cause remanded.

REVISIONAL CIVIL.

1899
March 14.

Before Sir Arthur Strachey, Knight, Chief Justice, and Mr. Justice KANN.

JANKI PRASAD AND ANOTHER (APPLICANTS) v. SUKHRANI (OPPOSITE PARTY).*

Civil Procedure Code, section 108—Decree ex parte—Death of judgment-debtor—Application by legal representative to have the decree set aside.

Held, that where a defendant, against whom a decree has been passed *ex parte* for default of appearance, dies, his legal representative is not competent to apply under s. 108 of the Code of Civil Procedure for an order to set the *ex parte* decree aside.

THIS was a reference made by the District Judge of Jhansi under section 617 of the Code of Civil Procedure. The facts of the case are thus stated in the order of reference. "The appellants in this case are the sons of one Jhalkan deceased, against whom the respondent got an *ex parte* decree on the 26th November 1897. There was no decree against the two appellants. On the 1st of July 1898, the respondent executed the *ex parte* decree by issuing a notice to the appellants under section 248 of the Code of Civil Procedure. The appellants at once filed an application under section 108 of the Code to restore the original

* Miscellaneous No. 34 of 1899.