

attachment Maula Bakhsh could not have paid the sum of Rs. 164-8-0 to Fida Husain without being called upon by the Court, which had forbidden him to make the payment, to answer for his conduct. The only way in which he could have obtained immunity from liability was by paying the amount mentioned in the attachment order into Court. In order to reap the fruits of the decree obtained by him, he was also bound to make the payment within the three months allowed in the decree, and as he made the payment to the person who, as I have said above, was the only person who could withdraw it from Court, the payment to such person was equivalent to payment into Court, and consequently to a payment made to Fida Husain. That being so, Maula Bakhsh complied with the decree, and was entitled to an order absolute for sale under section 89. The fact that after the order of the Lower Appellate Court allowing the objections of Fida Husain, Maula Bakhsh deposited the Rs. 164-8-0 over again, does not preclude him from maintaining his present objection. I allow the objection, and, setting aside the order of the Lower Appellate Court with costs, restore the order of the Court of first instance.

The appeal must necessarily fail, and I dismiss it with costs.

Appeal dismissed.

 1897

FIDA
HUSAIN
v.
MAULA
BAKSH.

Before Sir Arthur Strachey, Knight, Chief Justice, and Mr. Justice Know.
ISHAQ ALI KHAN (PLAINTIFF) v. CHUNNI AND OTHERS (DEFENDANTS)*.
Act No. IV of 1882 (Transfer of Property Act) section 85—Mortgage—Non-joinder of parties—Subsequent mortgagee after suit on prior mortgage filed.

 1898
December 12.

Held, that section 85 of the Transfer of Property Act, 1882, does not require the joinder in a suit on a prior mortgage of a subsequent mortgagee whose mortgage was only executed subsequently to the filing of such suit.

In this case one Moti Singh, who was the owner of a certain share in mauza Muhammadpur Ghiror, mortgaged, on the 12th

*Second Appeal No. 825 of 1896, from a decree of H. W. Lyle, Esq., District Judge of Mainpuri, dated the 7th July 1896, confirming a decree of Maulvi Muhammad Mazhar Husain, Subordinate Judge of Mainpuri, dated the 23rd December 1895.

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of September, 1881, one-half of his share in favour of Chunni and Kharagjit. On the 31st of January, 1884, Chunni and Kharagjit brought a suit for sale of the mortgaged property, for interest on their mortgage, against Moti Singh. On the 24th of April, 1884, Moti Singh caused the mortgaged property to be recorded in equal shares in the names of Bhup Singh, his son, and Zabar Kunwar, his wife. Moti Singh died in 1884, and the names of Bhup Singh and Zabar Kunwar were recorded as defendants to the suit of the mortgagees then pending. The mortgagees obtained a decree in that suit on the 15th of May, 1885. Bhup Singh subsequently to the filing of the suit, namely, on various dates between the 15th of July, 1884, and the 2nd of November, 1885, mortgaged a half share of the property, which Moti Singh had caused to be entered in his name in 1884 to Imam Ali Khan, the father of Ishaq Ali Khan. On the 22nd of July 1886, Chunni and Kharagjit filed a second suit for recovery of interest by sale of the mortgaged property against Bhup Singh, and obtained a decree on the 5th August, 1886. Neither in this suit nor in the former suit of the 31st of January, 1884, was the subsequent mortgagee Imam Ali Khan made a party. On the 19th of April, 1895, Ishaq Ali Khan (his father, the subsequent mortgagee, having died) brought the present suit against Chunni and Kharagjit, the original mortgagees, Bhup Singh and another person alleged to be in possession of a portion of the mortgaged property, in which he asked for a declaration that unless the defendants Chunni and Kharagjit obtain as against the plaintiff such decrees as they have obtained as against Bhup Singh and Zabar Kunwar (dated the 15th of May, 1885), and against Bhup Singh (dated the 5th of August, 1886), and get the property entered in the name of Zabar Kunwar to be charged, they cannot take out execution of those decrees for sale of the share of the village Muhammadpur Ghiror entered in the revenue papers against the name of Bhup Singh and mortgaged to the plaintiff.

The Court of first instance (Subordinate Judge of Mainpuri) dismissed the plaintiff's suit *in toto*.

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ISHAQ ALI
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On appeal by the plaintiff the lower appellate Court (District Judge of Mainpuri) confirmed the decree of the first Court, though upon different grounds. The District Judge found as follows:—"The lower Court has pointed out that appellant's deeds were executed *pendente lite* and are therefore void as against the first suit. As regards the second suit, however, the deeds were prior to its institution, and the lower Court has got out of the difficulty by finding that the deeds were not proved. This reason will not stand. The deeds were never denied, and no issue was framed as to whether they were valid or not. Under the circumstances no proof was adduced with regard to them, and none was necessary. It seems to me, nevertheless, that the deeds are bad in respect to both suits. Both suits are for interest on the same deed, it having been apparently stipulated that interest should be separately sued for. I cannot hold that deeds which were void owing to having been executed while the first suit was pending are valid with regard to a second suit for interest on the same deed but for a subsequent period. One suit must be regarded as a continuation of the other, and appellant's deeds are void with regard to both."

The plaintiff thereupon appealed to the High Court.

The Court (STRACHEY, C. J., and KNOX, J.), allowed the appeal so far as it related to the decree against Bhup Singh, dated the 5th of August, 1886, but dismissed it so far as it related to the decree against Bhup Singh and Zabar Kunwar of the 15th of May, 1885, observing that it was not necessary for the mortgagees of 1881 to have made Imam Ali Khan a party to their first suit, inasmuch as the earliest of his mortgages was not executed until after that suit was filed.

Decree modified.