

v. *Bhola Nath Banerjee* (1) and *Jageswar Sarma v. Dinaram Sarma* (2) that the question of the amount of damages is a question of fact and it is not open to the High Court to interfere in second appeal upon such a question. We are not prepared to dissent from the view held in those cases, and accordingly dismiss the appeal with costs.

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DHUMAN  
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SYED  
ABDULLAH  
KHAN

*Appeal dismissed.*

*Before Sir John Stanley, Knight, Chief Justice and Mr. Justice Banerji.*

HAMIDA BIBI AND ANOTHER (PLAINTIFFS) v. AHMAD HUSAIN

(DEFENDANT).\*

1909

March 12.

*Act No. IV of 1882 (Transfer of Property Act), section 60—Inheritance of mortgagee's rights by mortgagee—Integrity of the mortgage broken up.*

Where the equity of redemption in respect of a part of the mortgaged property becomes vested in the mortgagee whether by purchase or by inheritance or otherwise there is a merger of rights and the integrity of the mortgage is broken up.

*H* mortgaged certain property to *B* who transferred his mortgagee right to *M. M* died leaving *A* as his sole heir. *H* died leaving 51 heirs one of whom was *A*. Some heirs of *H* brought this suit for redemption of their shares only. *Held* that the plaintiffs were entitled to redeem their shares inasmuch as the mortgagee having inherited part of the property mortgaged the integrity of the mortgage was broken up. *Lachmi Narain v. Muhammad Yusuf* (3) distinguished. *Sobha Sah v. Inderjeet* (4), followed. *Azimat Ali Khan v. Jowahir Singh* (5), *Kallan Khan v. Mardan Khan* (6), *Munshi v. Daulat* (7) referred to.

THIS was a suit for redemption of a usufructuary mortgage executed by one Hafiz in the year 1858 in favour of one Babu Lal. Babu Lal transferred his mortgagee rights to one Ahmad Kareem in 1875. The plaintiff is one of the fifty-one surviving heirs of the original mortgagor. The defendant Ahmad Husain is also one of the heirs of the mortgagor but he has also succeeded by right of inheritance to the mortgagee rights of Ahmad Kareem as his sole heir. The plaintiff brought this suit for redemption of her share in the mortgaged property on payment of a proportionate amount of the mortgage money. The defence was that the plaintiff could not redeem her own share only in the mortgaged property. Both the courts below

\* Appeal No. 8J of 1908 under section 10 of the Letters Patent.

(1) (1868) 10 W.R., 164.

(4) (1873) 5 N. W. P., 148.

(2) (1898) 3 C. L.J., 340.

(5) (1870) 13 M. I. A., 404.

(3) (1894) I. L. R., 17 All., 68.

(6) (1905) I. L. R., 28 All., 155.

(7) (1906) I. L. R., 29 All., 262.

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decreed the plaintiff's suit. The defendants preferred a second appeal to the High Court, which was decreed by GRIFFIN, J.

The plaintiffs appealed under section 10 of the Letters Patent.

Mr. *M. L. Agarwala*, for the appellant, submitted that as the defendant, who represented the mortgagee, had acquired, as one of the heirs of the mortgagor, a share of the rights of the latter, the plaintiffs had a right under section 60 of the Transfer of Property Act to redeem their own shares only. The word "acquire" used in section 60 of the said Act was a general word and included acquisition by inheritance. He relied on *Kallu Khan v. Mardan Khan* (1), and *Munshi v. Dawlat* (2).

Maulvi *Muhammad Rahmatullah*, for the respondent, submitted that the exception to the general rule laid down in section 60 of the Transfer of Property Act would not apply to the present case. When the mortgagee acquired the interests of one of the mortgagors the integrity of the mortgage was broken up; and therefore the law allowed other mortgagors to redeem their own shares. That was the principle of the exception laid down in section 60. That principle did not apply to a case, like the present where the mortgagor acquired the rights of a mortgagee. Ghose's *Law of Mortgage*, 3rd Edition, pages 305 and 306. The fact that one of the mortgagors acquired the rights of the mortgagee by inheritance did not break up the integrity of the mortgage. The object of section 60 was to protect the original mortgagors and mortgagees and it did not take into account the legal incidents that might follow. It had been held that even where the mortgagee allowed the mortgagor to pay a portion of the mortgage debt and released a proportionate part of the property, the mortgagor or his representative was not entitled to redeem the rest of the mortgaged property piecemeal. He cited *Lachmi Narain v. Muhammad Yusuf*, (3), Ghose: *Law of Mortgage*, 3rd Edition, pages 310 and 311, *Salig Ram Singh v. Barun Rai* (4), and *Narayan v. Ganpat* (5).

STANLEY, C. J. and BANERJI J.—This appeal arises out of a suit for the redemption of a mortgage made in 1858 by one Hafiz

(1) (1905) I. L. R., 28 All., 155.

(2) (1906) I. L. R., 29 All., 262.

(3) (1894) I. L. R., 17 All., 63.

(4) (1872) N.-W. P. H. C., Rep., 92.

(5) (1896) I. L. R., 21 Bom., 619, 626.

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Baksh in favour of Babu Lal. The latter transferred his rights as mortgagee to one Muhammad Karim whose sole representative, by right of inheritance, is the respondent Ahmad Husain. The mortgagor Hafiz Baksh died leaving several heirs among whom are the defendant Ahmad Husain and the plaintiffs. The plaintiffs seek to redeem their own share of the property on payment of a proportionate part of the mortgage money. The defendant's contention was that the plaintiffs could only redeem the mortgage as a whole and were not entitled to claim redemption of their own share only. The court of first instance overruled this objection and decreed the claim on the ground that the integrity of the mortgage was broken up by reason of the defendant having inherited a part of the mortgagor's right. The lower appellate court having affirmed this decree a second appeal was preferred to this Court by the defendant. Our learned colleague who heard the appeal was of opinion that the suit as framed was not maintainable and dismissed it. From his judgment this appeal has been preferred under the Letters Patent.

The learned counsel for the appellants urges that as the defendant, who represents the mortgagee, has acquired in part the share of the mortgagor, the appellants have the right under section 60 of the Transfer of Property Act to redeem their own share only. In our judgment this contention is well founded. Section 60 provides, in its last paragraph, that nothing in the section "shall entitle a person interested in a share only of the mortgaged property to redeem his own share only on payment of a proportionate part of the amount due on the mortgage, except where a mortgagee, or, if there are more mortgagees than one, all such mortgagees, has or have acquired in whole or in part the share of a mortgagor." This provision gives legislative effect to the well-known rule that when a portion of the mortgaged property becomes vested in the mortgagee himself the mortgage security is broken up and one of the mortgagors or his representative becomes entitled to redeem his share on payment only of that portion of the mortgage debt which is attributable to that share. Our learned colleague, after referring to the above provision, observes: "The cases on the point appear to me to proceed on the principle that where a mortgagee has by his act recognized

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a severance of interest among his mortgagors and has allowed one of them to redeem his share of the mortgaged property on payment of a proportionate amount of the mortgage money, he cannot justly refuse to allow the other mortgagors to redeem their shares in the same way. The present case does not fall strictly under the exception as it is worded. Here one of the mortgagors has acquired by the accident of inheritance the entire rights of the mortgagee. He has not by any act of his own recognized any severance of interest between the mortgagors." We feel ourselves unable to agree with the last portion of the remarks of our learned brother. Where the equity of redemption in respect of a part of the mortgaged property becomes vested in the mortgagee there is a merger of rights and the integrity of the mortgage is broken up by reason of the right of redemption and the right of the mortgagee passing to the same person. The mortgagee cannot throw the whole burden of the debt on the remainder of the property and compel the other mortgagors to redeem the whole mortgage. In order to bring about this result it is not necessary that the fusion of rights should be by act of parties. What is necessary is that the mortgagee should have acquired the share of a mortgagor. Whether he acquires it by purchase or by inheritance or otherwise, the result is the same and the mode of acquisition is immaterial. The true reason for the rule was thus stated in *Sobha Suh v. Inderjeet* (1):—"The whole estate, as to one portion of the property, has merged in the mortgagee and the mortgagor if compelled to redeem by payment of the whole debt, would have to sue the mortgagee for contribution afterwards, and thus by two suits between the same parties attain the result which under the law as above interpreted is now attained by one suit." In view, therefore, of the fact that the defendant, who inherited a part of the mortgaged property from the mortgagor, has acquired by inheritance the whole of the mortgagee's rights, the mortgage security has been broken up and the plaintiffs are entitled to redeem their interests on payment of a proportionate part of the mortgage debt. As for the inconvenience which may arise in consequence of the numerous heirs of the mortgagor being

allowed to bring separate suits for the redemption of their own shares only, the same inconvenience will be the result if the plaintiffs be compelled to redeem the whole mortgage, inasmuch as each of the other heirs of the mortgagor, 50 in number in this case, who are defendants to the suit, will admittedly be entitled to redeem his own share from the hands of the plaintiffs. The principle of the rulings in *Azimat Ali Khan v. Jowahir Singh* (1), *Kallan Khan v. Mardan Khan* (2) and *Munshi v. Darulat* (3), is applicable to this case. The learned vakil for the respondent relied on *Lachmi Narain v. Muhammad Yusuf* (4), but that case has, in our opinion, no bearing on the question before us. For the above reasons we allow the appeal and setting aside the decree of the learned Judge of this Court restore that of the lower appellate court.

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*Appeal allowed.*

*Before Mr. Justice Richards and Mr. Justice Karamat Husain.*

MURARI LAL AND ANOTHER (DEFENDANTS) v. KUNDAN LAL (PLAINTIFF)\*  
*Hindu law—Construction of will—Bequest to a female and on her death to her adopted son—Interpretation of word ‘Malik’—Bequest not conditional on adoption.*

1909

*March 16.*

A testator bequeathed all his property to S and on her death to her adopted son K. K being the daughter's son of S could not be adopted under the Hindu Law. The testator further directed under the will that his daughter and his predeceased son's daughters were to be excluded. *Held* that it was the intention of the testator to make K the object of his bounty irrespective of adoption. *Fanindra Deb v. Rajeswar* (5) referred to.

THE facts of this case are as follows:—

One Hargu Lal to whom the property in dispute originally belonged executed a will on 1st April 1889. The will commenced by reciting that the testator had made a previous will in favour of Sant Lal his son who had predeceased him, and he was therefore transferring the office of legatee to his daughter-in-law Musammam Sukhi. It then went on to say that all the testator's moveable and immoveable properties should remain his own during his life and that after his death Musammam

\* Second Appeal No. 199 of 1908, from a decree of Austin Kendall, Additional District Judge of Meerut, dated the 18th of November 1907, confirming a decree of H. David, Subordinate Judge of Meerut, dated the 19th of June 1907.

(1) (1870) 13 M. I. A., 404.

(3) (1906) I. L. R., 29 All., 262.

(2) (1905) I. L. R., 28 All., 155.

(4) (1894) I. L. R., 17 All., 63.

(5) (1885) L. R., 12 I. A., 72.