

action. As in the present case there was no fresh invasion of the right of the plaintiffs, the rulings referred to are inapplicable. We accordingly dismiss the appeal with costs.

*Appeal dismissed.*

*Before Mr. Justice Richards and Mr. Justice Griffin.*

JOTI PRASAD (PLAINTIFF) v. AZIZ KHAN AND OTHERS (DEFENDANTS). \*  
*Act No. IV of 1882 (Transfer of Property Act), section 85—Mortgage—Suit for sale on a mortgage—Parties.*

In a suit for sale on a mortgage the ordinary rule is that a plaintiff mortgagee cannot be allowed so to frame his suit as to draw into controversy the title of a third party, who is in no way connected with the mortgage and who has set up a title paramount to that of the mortgagor and mortgagee. *Jaggisoor Dutt v. Bhuvan Mohan Mitra* (1), *Mon Mohini Ghose v. Parvati Nath Ghose* (2) and *Khairati Lal v. Banni Begam* (3) referred to.

THIS was a suit for sale upon a mortgage executed on the 10th August 1888 by one Karam Khan. The defendants were the sons, daughters and widow of Karam Khan, who had died before suit. The mortgage deed described the property mortgaged as the mortgagor's personal share in his possession. Its execution was admitted by the defendants; but they alleged that the property mortgaged originally belonged to one Salahi, the father of Karam Khan, and that there were other heirs of Salahi besides the mortgagor. In paragraph 2 of the additional pleas in the written statement it appeared that the mortgage was a mortgage of the entire property and that the mortgagees had been realizing the profits from the tenants. The Court of first instance (Subordinate Judge of Saharanpur), finding that Karam Khan was entitled to a two-fifths share only in the property mortgaged, gave the plaintiff a decree for sale to that extent only. The plaintiff appealed and his appeal was dismissed by the District Judge. The plaintiff thereupon appealed to the High Court.

*Dr. Satish Chandra Bunerji and Lala Girdhari Lal Agarwala*, for the appellant.

*Babu Jogindro Nath Chaudhri* (for whom *Babu Sarat Chandra Chaudhri*), for the respondents.

\* Second Appeal No. 735 of 1907 from a decree of H. Dupernex, District Judge of Saharanpur, dated the 25th of March 1907 confirming a decree of Girdhari Lal, Subordinate Judge of Saharanpur, dated the 31st of July 1906.

(1) (1906) I. L. R., 33 Calc., 425. (2) (1905) I. L. R., 32 Calc., 746.

(3) Weekly Notes, 1908, p. 100.

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AKBAR  
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JOTI PRASAD  
v.  
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RICHARDS and GRIFFIN, JJ.—The plaintiff sued on a mortgage executed on the 10th of August 1888 by one Karam Khan. The deed specified the property mortgaged, which was described in the body of the document as the mortgagor's personal share in his possession. This mortgage was set out in paragraph 1 of the plaint, which was admitted in the written statement filed by the defendants, who are the sons, daughters and widow of Karam Khan, the executant. In the last paragraph of the written statement it is alleged that the property mortgaged originally belonged to one Salahi, father of Karam Khan, and that there were other persons besides Karam Khan who were heirs to Salahi. On the other hand in paragraph 2 of the additional pleas of the written statement it appears that the mortgage was a mortgage of the entire property and that the mortgagees had been realizing the profits from the tenants. The Court of first instance finding that Karam Khan was entitled to a two-fifths share only in the property mortgaged gave the plaintiffs a decree for sale of a two-fifths share of the property mortgaged. The plaintiff appealed, and his appeal was dismissed by the lower appellate Court. The sisters and another person said to be interested in the property were not joined as parties. The plaintiff appeals to this Court, and it is contended that on a true construction of the mortgage deed he was entitled to a decree for the sale of the entire property mortgaged, and that the defendants who stand in the shoes of Karam Khan cannot be allowed to say that Karam Khan had no power to mortgage the entire property. We think that this latter contention is well founded. If Karam Khan were alive, he would not be permitted to plead that he had no authority to mortgage the property which he purported to mortgage. The defendants, who are his representatives, cannot stand in a better position. The sisters of Karam Khan may or may not have rights in the property in suit, and we do not know whether they lay claim to any such rights. As they are not parties to this suit, their rights are not affected by the decree in this case. It is contended that having regard to the provisions of section 85 of the Transfer of Property Act, it was obligatory on the plaintiff to join them as parties. According to the deed of mortgage the sisters of Karam Khan had no interest in the mortgaged property. The defendants, as said

above, cannot be allowed to set up a defence which Karam Khan could not have pleaded. In this connection we would refer to the ruling in *Jaggewar Dutt v. Bhuban Mohan Mitra* (1) in which Mookerjee, J., held "that the ordinary rule is that the plaintiff mortgagee cannot be allowed so to frame his suit as to draw into controversy the title of a third party, who is in no way connected with the mortgage and who has set up a title paramount to that of the mortgagor and mortgagee." Much to the same effect is the ruling in *Mon Mohini Ghose v. Parvati Nath Ghose* (2). The same principle was followed in *Khairati v. Banni Begam* (3). We think that in this case the plaintiff was entitled to a decree for sale of the entire property. We allow the appeal, and, setting aside the decrees of the Courts below in so far as they dismissed the plaintiff's claim in respect of a three-fifths share of the property mortgaged, decree the plaintiff's claim against the entire property mortgaged. The appellant will get his costs from the respondents.

*Appeal decreed.*

## FULL BENCH.

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

SADAR-UD-DIN AHMAD AND OTHERS (PLAINTIFFS) v. CHAJJU AND OTHERS (DEFENDANTS).\*

*Mortgage—Compromise in course of mutation proceedings purporting to vary the terms of a registered deed.*

*Held* that a compromise entered into between the parties to mutation proceedings before a Court of Revenue which purported to modify the conditions of a pre-existing mortgage, upon the basis of which mutation was sought, could not be allowed to take effect in opposition to the distinct terms of the registered instrument of mortgage. *Nur Ali v. Imaman* (4) distinguished. *Raghubans Mani Singh v. Mahabir Singh* (5) and *Pranal Anni v. Lakshmi Anni* (6) referred to by Banerji and Richards, J J.

ONE Chajju executed a mortgage of certain property in favour of Husain Bakhsh and Nathu to secure a principal sum of

\* Second Appeal No. 1332 of 1907, from a decree of Soti Raghubans Lal, Additional Judge of Meerut, dated the 12th of July 1907 reversing a decree of Rama Das, Munsif of Muzaffarnagar, dated the 14th of March 1907.

(1) (1906) I. L. R., 33 Cal., 425.

(2) (1905) I. L. R., 32 Cal., 746.

(3) Weekly Notes, 1908, p. 100.

(4) Weekly Notes, 1884, p. 40.

(5) (1905) I. L. R., 28 All., 78.

(6) (1899) I. L. R., 22 Mad., 508.

1908

JOYI PRASAD  
v.  
AZIZ KHAN

1908  
November 9.