

in law, that valuation determined the grade of court which had jurisdiction to entertain and try the suit." We are unable to agree with the decision in *Golap Singh v. Indra Coomar Hazra*.

These were the only two points which were argued before us by the learned counsel for the appellant. We dismiss the appeal with costs.

Appeal dismissed.

FULL BENCH.

SUDARSHAN
DAS
SHASTRI
v.
RAM PRASAD.

1910
July 26.

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

MUHAMMAD SADIQ (DEFENDANT) v. GHAUS MUHAMMAD (PLAINTIFF).
Mortgage—Private sale of mortgaged property—Consideration left with purchaser for discharge of two mortgages—First mortgage alone discharged—Suit for sale by second mortgagee—Purchaser not entitled to hold up first mortgage as a shield.

Where a purchaser of mortgaged property undertook to discharge out of the purchase money two subsisting mortgages, and in fact discharged only the earlier one; *Held* that it was not competent to him to hold up this mortgage as a shield against the suit of the puisne mortgagee for sale. *Gopal Das v. Puran Mal* (1) referred to.

THE facts of this case were as follows:—

The property in dispute was mortgaged on the 19th January, 1886, to one Chet Ram, who was alleged to be a *benamidar* for the plaintiff's vendors. It had also been mortgaged on 21st June, 1881, to one Kadheri Mal. A part of the mortgaged property was sold by the heirs of the mortgagors to one Wilayati Begam on the 13th July, 1886. In the sale-deed it was provided that the consideration for the sale was to be left with the vendee for the discharge of the two mortgages of 1881 and 1886. Wilayati Begam made a gift of the property purchased to the defendant. The defendant discharged the mortgage of 1881 in favour of Kadheri Mal, but did not discharge that of 19th January, 1886, in favour of Chet Ram, the predecessor in title

* Second Appeal No. 14 of 1910 from a decree of B. J. Dalal, District Judge of Shahjahanpur, dated the 24th of August, 1909, confirming a decree of Muhammad Mubarak Husain, Subordinate Judge of Shahjahanpur, dated the 29th of April, 1909.

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of the plaintiff. The plaintiff brought this suit for sale upon his mortgage. The defendant appellant resisted it on the ground that he having paid off a prior mortgage was in the position of the prior mortgagee. The suit was decreed by the courts below which held that in paying off the prior mortgage, the defendant had acted as an agent of the mortgagors and could not therefore claim the benefit of the payment as against the plaintiff. The defendant appealed.

Maulvi *Muhammad Ishaq*, for the appellant, relied on *Mattiullah Khan v. Banwari Lal* (1), *Dinobundhu Shaw Chowdhry v. Jogmaya Dasi* (2) and *Gokal Das Gopaldas v. Puran Mal Premsukhdas* (3). The defendant was in the position of a prior mortgagee. The fact that money was left with the defendant did not alter his position. He meant the prior mortgage to be kept alive in his favour.

Maulvi *Shah-uz-zaman*, for the respondent, was not called upon.

STANLEY, C. J., and BANERJI and CHAMBER, JJ.—This appeal arises out of a suit for sale upon a mortgage, dated the 19th of January, 1886, executed in favour of one Chet Ram. It has been found that Chet Ram was only *benamidar* for the vendors of the plaintiff and that those persons were the real mortgagees. On the 13th of July, 1886, the heir of the mortgagors sold a portion of the mortgaged property to Wilayati Begam, the mother of the appellant, Muhammad Sadiq. The consideration for the sale was Rs. 875, and it was stated in the sale-deed that the vendors had received the whole of the amount of the consideration in cash, but had left it with the vendee to pay off debts due to Chet Ram and Kadheri Mal, and that the vendee was to pay those debts and obtain receipts from the creditors. One of the debts which the vendee undertook to discharge was the debt due under the mortgage deed of the 19th of January, 1886, of which Chet Ram was the nominal mortgagee. Wilayati Begam made a gift of the property to the appellant Muhammad Sadiq. His contention is that the mortgage in favour of Kadheri Mal was discharged by Wilayati Begam, and

(1) (1910) I. L. R., 32 All., 138. (2) (1901) I. L. R., 29 Calc., 154.
(3) (1884) I. L. R., 10 Calc., 1035.

that as the said mortgage was dated the 21st of June, 1881, and was thus of a date prior to the date of the mortgage on foot of which the plaintiff has brought this suit, he (the appellant) has priority over the plaintiff to the extent of the amount which was paid to Kadheri Mal and can hold up the mortgage so discharged as a shield against the claim of the plaintiff. In the court of first instance no such plea was put forward in the written statement, nor was any issue joined on the point, but in the lower appellate court, the plea was advanced. That court overruled it on the ground that the appellant or his predecessor in title had acted in the matter of the payment of Kadheri Mal's mortgage as the agent of the mortgagors and could not therefore claim the benefit of the payment as against the plaintiff. The correctness of this view of the learned Judge is questioned in this appeal.

In all cases where a subsequent purchaser claims priority over a puisne mortgagee by reason of his having discharged a prior mortgage, the question is always one of intention, that is, whether it was the intention to keep the prior mortgage alive as against the puisne mortgagee. As observed by their Lordships of the Privy Council in *Gokul Das v. Purn Mal* (1), the first question is, is there express evidence of the intention, and if there is no such evidence what intention should be ascribed to the person who makes the payment? In this case it seems to us that, having regard to the circumstances, the intention clearly was, at the time when the sale in favour of Wilayati Begam was executed, that the prior mortgages in favour of Kadheri Mal and Chet Ram should be extinguished by payment out of the consideration for the sale in the hands of the purchaser. The purchaser, as has been said above, undertook to discharge not only the debt due to Kadheri Mal but also the debt due under the mortgage upon which the present suit is based. He paid Kadheri Mal, but he did not pay Chet Ram, and he kept in his own pocket the portion of the consideration which should have been appropriated to the discharge of the mortgage debt in favour of Chet Ram. Not having paid that debt, he seeks to hold up as a shield against the claim made for the recovery of the debt, which he was also bound to pay, the payment of the prior debt,

(1) (1884) I. L. R., 10 Calc., 1035 (1046).

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We are of opinion that he cannot do so. It was clearly the intention at the time when the sale was effected that the prior mortgage in favour of Kadheri Mal would be extinguished and not kept alive. Now what was the intention at the time when that mortgage was discharged? We think that the evidence of the intention of the parties, as afforded by the sale-deed of the 13th of July, 1866, at the time of that sale, negatives the idea, that at the time when the prior mortgage was discharged, it was intended to keep it alive for the benefit of the subsequent purchaser. This is further manifest from the fact that when the defendant appellant filed his written statement, he did not assert that he had priority over the plaintiff by reason of his having discharged the earlier mortgage. This was clearly an afterthought. Under the circumstances we are of opinion that the appellant cannot hold up as a shield the mortgage which he has paid off against the debt which he undertook to pay but which he did not discharge. In this view the plea of the appellant is untenable and we disallow it, though not on the ground set forth in the judgement of the court below. We dismiss the appeal with costs.

Appeal dismissed.

1910
July 27.

APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.
LALJI MISR AND OTHERS (PLAINTIFFS) v. JAGGU TIWARI AND ANOTHER
(DEFENDANTS).*

Pre-emption--Wajib-ul-arz--Construction of document--"Intiqal"--Perpetual lease.

Held that the word "intiqal" used in the pre-emptive clause of a wajib-ul-arz was wide enough to include a perpetual lease. *Jagdam Sahai v. Mahabir Prasad (1)* and *Ahmed Ali Khan v. Ahmed (2)* referred to.

THIS was a suit for pre-emption based on the terms of the village wajib-ul-arz, the pre-emptive clause of which ran as follows:—"Whenever any co-sharer transfers (*intiqal*) his share in any mahal, he shall transfer it first to a near co-sharer and after that to a remote co-sharer in his patti, &c.," The transaction sought to be pre-empted was a perpetual lease with a substantial

*Second Appeal No. 331 of 1909 from a decree of Chhajju Mal, officiating District Judge of Ghazipur, dated the 14th of December, 1909, reversing a decree of Gobind Sarup Mathur, Munsif of Muhammadabad, dated the 7th of August, 1909.

(1) (1905) L. L. R. 28 ALL., 69. (2) (1866) I N. W. P. H. C. Rep., 101.