

1922

RAMESHWAR  
DAYAL  
v.  
MAHARAJ  
CHARAN.

lower appellate court, was a proper decree and this appeal must be allowed. We, accordingly, set aside the decree of the learned Judge of this Court and restore that of the lower appellate court. We direct the parties to bear their own costs.

*Appeal allowed.*

1922

January, 28.

*Before Mr. Justice Ryves and Mr. Justice Gokul Prasad.*

BECHAN LAL AND OTHERS (DEFENDANTS) v. KISEAN LAL (PLAINTIFF)  
AND JILLO KUNWAR (DEFENDANT).\*

*Pre-emption. Sale consideration in part cash and in part a mortgage of the property purchased—Mortgage binding on pre-emptor.*

A house was sold for a consideration which was partly cash and partly a mortgage upon the house.

Held that a successful pre-emptor would be bound to pay off the mortgage before he was entitled to possession. *Kanta Prasad v. Mohan Bhagat* (1) distinguished.

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

Dr. S. M. Sulaiman, Babu Piari Lal Bimerji and Munshi Harnandan Prasad for the appellants.

Dr. Surendra Nath Sen for the respondents.

RYVES and GOKUL PRASAD, JJ. :—The facts out of which this appeal arises are as follows :—On the 4th of October, 1914, the plaintiff sold a house to Musammat Jillo, defendant No. 1, for Rs. 1,800. It was stated in the sale-deed that out of the consideration money Rs. 900 was paid in cash and that a mortgage of the house had been given for the balance. It was quite clear that the consideration for the sale was the mortgage plus the balance in cash. On the 5th of October, 1914, Musammat Jillo executed the mortgage. Defendants Nos. 2 and 3, Bechan Singh and Bishnath Singh, appellants here, brought a suit to pre-empt the sale and they made both the plaintiff and Musammat Jillo parties to it. That suit was compromised between Musammat Jillo and the appellants. The mortgagee plaintiff was exempted from the suit. According to that compromise it was agreed that

\* Second Appeal No. 127 of 1920, from a decree of O. F. Jenkins, District Judge of Benares, dated the 19th of September, 1919, reversing a decree of P. K. Ray, Additional Subordinate Judge of Benares, dated the 17th of May, 1919.

Musammat Jillo should receive in cash Rs. 1,375 and it was stated that although the appellants did not admit the validity of the mortgage which had been executed by Musammat Jillo in favour of the plaintiff, nevertheless, if Musammat Jillo was held liable on that mortgage, they undertook to pay whatever her liabilities might be. This suit was brought by the plaintiff on his mortgage and he made Musammat Jillo the first defendant and Bechan Singh and Bishnath Singh defendants Nos. 2 and 3. The main defence was that the mortgage was not genuine and that in any case it was not binding upon the property. The first court decreed the claim in part against Musammat Jillo by giving a simple money-decree against her and dismissed it as against the present appellants. The judgment of the trial court proceeded chiefly on the case of *Kamta Prasad v. Mohan Bhagat* (1). On appeal by the plaintiff the learned Judge held that the case of *Kamta Prasad v. Mohan Bhagat* (1) was not applicable to the facts here, and in that opinion we agree. In that case the mortgage was executed for a different debt altogether, although both the sale and the mortgage were of the same date. Here we hold that, although the mortgage was actually executed a day after the sale, nevertheless the mortgage was a part of the consideration for the sale and must be regarded as part of the same transaction. In this view the case of *Kamta Prasad v. Mohan Bhagat* (1) has no application. It must be remembered that the pre-emptors in this case knew of the existence of the mortgage because it was mentioned in the sale-deed under which they pre-empted. It was open to them as prudent men to see that the mortgage was paid off before the money which they paid into court reached the hands of Musammat Jillo. We cannot see how the plaintiff who was no party to the compromise can be adversely affected by anything they chose to do behind his back. In our opinion the view taken by the court below is right. We, therefore, dismiss this appeal with costs.

*Appeal dismissed.*

(1) (1903) I. L. R., 32 All., 45.

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