

## FULL BENCH

Before Mr. Justice Iqbal Ahmad, Mr. Justice Harries and  
Mr. Justice Bajpai

CIRDHAR LAL AND ANOTHER (DEFENDANTS) *v.* ALAY HASAN  
(PLAINTIFF)\*

1938  
February, 18

*Transfer of Property Act (IV of 1882), section 73(2)—Retrospective effect—Acquisition by Government of part of mortgaged property—Compensation money realized by mortgagor—Alternative remedies of mortgagee—Mortgagee's right to obtain, in enforcement of his security, a simple money decree in respect of the compensation money—Substituted security, doctrine of—Limitation—Limitation Act (IX of 1908), article 132—Terminus a quo—Transfer of Property Act, section 68.*

Section 73(2) of the Transfer of Property Act is not exhaustive of the remedy that a mortgagee has in the event of compulsory acquisition of the whole or a part of the mortgaged property, and even if he has not availed himself of the quick and simple remedy given thereby, he still has a right to follow the compensation money in the hands of the mortgagor if the latter has already realised the same. The compensation money awarded on the acquisition of the mortgaged property represents the security which the mortgagee has under his mortgage, and according to the doctrine of substituted security the rights of the mortgagee are transferred to the compensation money which becomes impressed with the same liability as the mortgaged land. The mortgagee is therefore entitled to obtain, in enforcement of his mortgage security, a simple money decree for the amount of the compensation money realised by the mortgagor, inasmuch as it would be meaningless to pass a decree for sale of money.

Section 73(2) of the Transfer of Property Act, which was added by the Amending Act of 1929, has retrospective effect.

There is nothing in the language of section 73(2) to warrant the view that by this amendment the legislature intended to confine the remedy of the mortgagee to the remedy given by it and to deprive him of his recognized right to enforce his security against the property substituted for the original mortgaged property.

In interpreting a particular statute all that a court is entitled to do is to examine its language and to put on that language

\*First Appeal No. 320 of 1934, from a decree of Ram Saran Das, Civil Judge of Muttra, dated the 5th of April, 1934.

1938

GIRDHAR  
LAL  
P.  
ALAY  
HASAN

its natural meaning, uninfluenced by any consideration derived from the previous state of the law, but, in the absence of a definite and express indication by the legislature of an intention to deprive a person of an existing and recognized right, there is no justification for attributing such an intention to the legislature.

Where, after a part of the mortgaged property is compulsorily acquired by Government and the compensation money is realised by the mortgagor, the mortgagee in a suit to enforce his mortgage prays for a decree for sale of the remaining property as well as a simple money decree for the recovery of the compensation money realised by the mortgagor, the plaintiff's cause of action is not the withdrawal of the compensation money by the mortgagor but the non-payment of the mortgage debt on the due date. Article 132 of the Limitation Act applies to the suit and the period of limitation for both the prayers is 12 years from the date when the mortgage money became payable.

The proper form of the decree in such a suit is that it should primarily be a decree for sale of the remaining mortgaged property, and should further provide that in the event of non-realisation of the entire mortgage debt by such sale the mortgagee would be entitled to a simple money decree against the mortgagor for an amount not in excess of the amount realised by him as compensation money.

Section 68 of the Transfer of Property Act, which provides for the cases in which the mortgagee can sue for the mortgage money, does not mention the case of withdrawal of the compensation money by the mortgagor after the compulsory acquisition of the mortgaged property; but this does not disentitle the mortgagee from instituting a suit for enforcing his mortgage security against that money. The cases enumerated in section 68 are those in which the mortgagee gives up his security and claims only a simple money decree, whereas in the case under consideration the mortgagee, far from giving up his security, sues to enforce the same.

Mr. *Baleshwari Prasad*, for the appellants.

Mr. *Mushtaq Ahmad*, for the respondent.

IQBAL AHMAD, J.:—The following questions of law have been referred for decision to this Full Bench:

(1) Can a simple money decree with regard to the amount of compensation money received from the

treasury by the appellants be passed in favour of the respondent under the circumstances of the present case?

(2) What is the period of limitation for the passing of such a personal decree and when does the cause of action for the same arise?

The circumstances referred to in question (1) are as follows. On the 17th of February, 1915, two persons named Ganeshi Lal and Ram Chand, who were members of a joint Hindu family, executed a bond of simple mortgage for a sum of Rs.8,500 in favour of Syed Alay Hasan plaintiff respondent. The stipulated period for payment of the mortgage money was five years and the cause of action for the recovery of the mortgage debt, therefore, arose on the 17th of February, 1920. The suit giving rise to the present appeal was instituted a day before the expiry of 12 years from the date of the accrual of the cause of action, viz. on the 16th of February, 1932.

In the year 1917 partition was effected between Ganeshi Lal and Ram Chand by means of an arbitration award and the mortgaged property was allotted to the share of Ganeshi Lal. Ganeshi Lal is dead and his legal representatives are defendants 1 to 5. Ram Chand is also dead and his legal representatives were impleaded as *pro forma* defendants in the suit, but we are not concerned with them as they, after the partition, had no interest left in the mortgaged property.

In the year 1927 the Government acquired 26.92 acres of land out of the mortgaged property and a sum of Rs.2,193 was awarded as compensation to defendants 1 to 5. This compensation money was withdrawn by defendants 1 and 2 (defendants 3 to 5 being then minors) either in the year 1927 or in the year 1928. The exact date on which the compensation money was withdrawn is immaterial for the decision of the question referred to above.

On the date of the suit the amount due to Alay Hasan plaintiff respondent on the basis of the mortgage was a

1938

GIRDHAR  
LAL  
v.  
ALAY  
HASAN

*Iqbal  
Ahmad, J.*

1938

GIRDHAR  
LAL  
v.  
ALAY  
HASAN

Iqbal  
Ahmad, J.

sum in excess of Rs.22,000 but he sought a decree only for a sum of Rs.18,500. The relief prayed for by him was as follows: "Defendants Nos. 1 to 5 may be ordered to pay Rs.18,500 together with *pendente lite* and future interests to the plaintiff within the time to be fixed by the court, otherwise the property detailed below may be sold by auction, and out of Rs.18,500, the amount of suit, Rs.2,075, the amount of compensation realised by defendants Nos. 1 to 5, together with the *pendente lite* and future interests may also be awarded by passing a personal decree against the said defendants."

It would be noted that over and above a decree for sale the plaintiff claimed a simple money decree for the compensation money against defendants 1 to 5 and it is this prayer of the plaintiff that has given rise to the two questions of law mentioned above. The compensation money withdrawn by defendants 1 and 2 amounted to Rs.2,193 and it appears that by some oversight the plaintiff claimed a simple money decree only for a sum of Rs.2,075.

Defendants 1 to 5 contested the suit *inter alia* on the ground that the plaintiff was not entitled to a personal decree for the amount of compensation realised by defendants 1 and 2 and that the suit was barred by limitation. We are not concerned with the remaining pleas urged in defence.

The trial court observed in the course of its judgment that the point of limitation was not pressed and accordingly it was not necessary to decide the issue relating to limitation. It overruled the other pleas urged in defence and passed a simple money decree for the amount of compensation money against defendants 1 and 2 who had withdrawn the same. It further passed a decree for sale under order XXXIV, rule 4 of the Civil Procedure Code against defendants 1 to 5 for the mortgage money minus the amount of

compensation with respect to which a simple money decree was passed against defendants 1 and 2.

The first question that arises for consideration is whether the court below was right in passing a simple money decree against defendants 1 and 2 with respect to the compensation money withdrawn by them. Prior to the passing of Act No. XX of 1929 which effected amendments in the Transfer of Property Act (Act IV of 1882) there was no statutory provision entitling a mortgagee to claim the compensation awarded by the Government on the compulsory acquisition of the whole or a part of the mortgaged property, but such a right has now been given by the amendment introduced in section 73 of the Transfer of Property Act. It is this amendment which has occasioned the reference of the first question mentioned above to this Bench.

In order to appreciate the respective contentions of the parties it is convenient to put side by side section 73 as it stood in Act IV of 1882, and section 73 as now amended.

Section 73 of Act IV of 1882: "73. Where mortgaged property is sold through failure to pay arrears of revenue or rent due in respect thereof, the mortgagee has a charge on the surplus, if any, of the proceeds, after payment thereout of the said arrears, for the amount remaining due on the mortgage, unless the sale has been occasioned by some default on his part."

Section 73 as amended: "73. (1) Where the mortgaged property or any part thereof or any interest therein is sold owing to failure to pay arrears of revenue or other charges of a public nature or rent due in respect of such property, and such failure did not arise from any default of the mortgagee, the mortgagee shall be entitled to claim payment of the mortgage money, in whole or in part, out of any surplus of the sale proceeds remaining after payment of the arrears and of all charges and deductions directed by law.

"(2) Where the mortgaged property or any part thereof or any interest therein is acquired under the Land Acquisition Act, 1894, or any other enactment for the time being in force

1938

GIRDHAR  
LAL  
v.  
ALAY  
HASAN

Iqbal  
Ahmad, J.

1938

GIRDHAR  
LAL  
v.  
ALAY  
HASAN

for the compulsory acquisition of immovable property, the mortgagee shall be entitled to claim payment of the mortgage money, in whole or in part, out of the amount due to the mortgagor as compensation.

“(3) Such claim shall prevail against all other claims except those of prior incumbrancers, and may be enforced notwithstanding that the principal money on the mortgage has not become due.”

*Iqbal  
Ahmad, J.*

It would be noted that in the case before us the compensation money was withdrawn by defendants 1 and 2 before the passing of the amending Act mentioned above. But this fact is immaterial for the decision of the first question as the argument in the case has proceeded on the assumption that section 73 as amended has retrospective effect. Apart from this it has been laid down by a Full Bench of this Court in *Hira Singh v. Jai Singh* (1) that the sections of the Transfer of Property (Amendment) Act XX of 1929 which are not mentioned in section 63 of that Act have a retrospective effect, at least where no action was pending on 1st April, 1930, when that Act came into force. Section 73 is not mentioned in section 63 of the amending Act and accordingly, in accordance with the Full Bench decision, section 73 must be deemed to govern the present case. As the Full Bench decision is binding on me it is not open to me to construe section 63 of the Act otherwise than in accordance with the interpretation put on that section by the Full Bench.

It is argued on behalf of the defendants appellants that, as by clause (2) of section 73 the legislature has given to a mortgagee the right to claim payment of the mortgage money out of the compensation awarded under the Land Acquisition Act, a mortgagee who has not availed himself of that right is precluded from claiming a decree for the compensation money as against the mortgagor. The argument is that section

(1) I.L.R. [1937] All. 880.

73(2) is exhaustive of the remedy that a mortgagee has in the event of compulsory acquisition of the whole or a part of the mortgaged property, and that he has no right to follow the compensation money in the hands of the mortgagor, if the latter has realised the same. In this connection the omission of the word "charge" in the amended section is emphasised and it is pointed out that the word "charge" which found a place in original section 73 was deliberately omitted by the legislature with a view to put it beyond doubt that a mortgagee has no charge on the surplus sale proceeds or on the compensation money as the case may be, and that his only remedy is to realise the same before it passes into the hands of the mortgagor.

The contention on behalf of the plaintiff respondent, on the other hand, is that the compensation awarded on the acquisition of the mortgaged property represents the security which the mortgagee has under his mortgage and the mortgagee is therefore entitled to follow that security and to claim the compensation money from the mortgagor if he has wrongfully withdrawn the same. It is argued that section 73(2) is an enabling section and gives the mortgagee a quick and speedy remedy to realise the whole or a portion of the mortgage money from the compensation money but has not the effect of depriving the mortgagee of the security that he has under his mortgage.

Now, even before the passing of the amending Act of 1929 the weight of judicial authority was in favour of the view that on the compulsory acquisition of the mortgaged property the rights of the mortgagee are transferred to the compensation money and that money becomes impressed with the same liability as the land. In other words, when the property covered by the mortgage is compulsorily acquired the lien which attached to the property is transferred to the compensation money which becomes a security in a new form. To this

1938

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 GIRDHAR  
LAL  
v.  
ALAY  
HASAN

*Iqbal  
Ahmed, J.*

1938

GIRDEHAR  
LAL  
v.  
ALAY  
HASANIqbal  
Ahmad, J.

effect were the decisions in *Venkata Viraragavayyan-  
gar v. Krishnasami Ayyangar* (1), *Jotoni Chowdhurani  
v. Amar Krishna Saha* (2), *Ashutosh Rai v. Babu Lal*  
(3) and *Prag Din v. Nankau Singh* (4). All these deci-  
sions give effect to the well recognized doctrine of sub-  
stituted security by virtue of which the rights and  
interests of the mortgagee in the mortgaged property  
attach to the property which may replace the mort-  
gaged property. The original section 73 of the  
Transfer of Property Act was also based on the  
principle of substituted security.

The contrary view was taken by this Court in *Basa  
Mal v. Tajammul Husain* (5) and by the Oudh Judicial  
Commissioner's court in *Sajjadi Begam v. Mst. Janki  
Bibi* (6). In *Basa Mal's* case it was held that a mort-  
gagee who omits to claim the compensation money  
before it is paid to the mortgagor is not entitled to  
realise the same in execution of a decree for sale passed  
on the basis of a mortgage, and in the Oudh case it was  
observed that there was no authority in the Transfer of  
Property Act for the proposition that when a mortgaged  
property is acquired under the Land Acquisition Act  
the mortgagee has a charge on the purchase money.

It was in this state of conflict of judicial decisions  
that clauses (2) and (3) were added to section 73 and  
the word "charge" was omitted from clause (1) of the  
section by the amending Act of 1929. The question  
then arises whether the legislature by this amendment  
intended to lay down that on the acquisition of the  
mortgaged property the principle of substituted security  
would not apply to the compensation money. It can-  
not be doubted that the principle embodied in original  
section 73 was the principle of substitution of pro-  
perties and securities in favour of a mortgagee who,  
through no fault of his own, was deprived of his original  
properties and securities, and I can discover nothing

(1) (1883) I.L.R. 6 Mad. 344.

(3) (1920) 5 Pat. L. J. 650.

(5) (1893) I.L.R. 16 All. 78.

(2) (1904) 13 C. W.N. 350.

(4) (1930) I.L.R. 5 Luck. 702.

(6) (1917) 42 Indian Cases, 793.



in the amendments now made to that section to warrant the inference that in the event of the sale or of acquisition of the mortgaged property the legislature intended to deprive the mortgagee of his security altogether and to restrict his remedy only to the claiming of the surplus sale proceeds or of the compensation money. I recognize that in interpreting a particular statute all that a court is entitled to do is to examine its language and to put on that language its natural meaning uninfluenced by any consideration derived from the previous state of the law, but, in the absence of a definite and express indication by the legislature of an intention to deprive a mortgagee of his ordinary remedy to enforce his security as against every item of the mortgaged property, I do not find any justification for attributing such an intention to the legislature. The omission of the word "charge" from clause (1) of section 73 is attributable to the recognition by the legislature of the fact that even apart from any statutory provision the mortgagee has, in accordance with the principle of substituted security, a charge on the surplus sale proceeds. Further, the word "charge" has acquired a technical meaning, and special procedure is provided by law for its enforcement, and as the legislature intended to give the mortgagee a right to claim the surplus sale proceeds without resorting to that special procedure, it omitted the word "charge" from the section. The addition of clauses (2) and (3) to section 73 was in my judgment intended to set at rest the conflict in the judicial decisions mentioned above and to give the mortgagee a similar right with respect to compensation money as was given to him with respect to surplus sale proceeds. It is, however, clear that there are no words of limitation in the section that may lend colour to the suggestion that by the amendment the right of the mortgagee to follow the property substituted for the mortgaged property was put an end to and his remedy was confined only to claiming of surplus

1938

---

 GIRDHAR  
LAL  
v.  
ALAY  
HASAN

*Iqbal  
Ahmad, J.*

1938  
 CHEDHAR  
 LAL  
 v.  
 ALAY  
 HASAN

*Iqbal  
 Ahmad, J.*

sale proceeds or the compensation awarded in the acquisition proceedings. If the legislature had intended to nullify the security of the mortgagee so far as the surplus sale proceeds or the compensation money were concerned, I would have expected the legislature to make a provision in so many words in the section. There is, however, nothing in the section to restrict the right of the mortgagee only to the claiming of the sale proceeds or the compensation money. I, therefore, hold that the rights given to a mortgagee by section 73 are over and above the rights that he has under the law to enforce payment of the mortgage money. That this is so is manifest by the provision in clause (3) of section 73 that gives the mortgagee the right to claim the surplus sale proceeds or the compensation money even before the principal money on the mortgage has become due. Ordinarily a mortgagee has the right to claim the mortgage money after the same has become due. There are certain exceptions to this rule that are provided for by certain clauses of section 68 of the Transfer of Property Act which I shall notice in due course. It is, however, important to note that a provision that gives a mortgagee the right to realise the whole or a portion of the mortgage money even *before* the same has become due cannot be interpreted to mean that such rights as accrue to a mortgagee to enforce payment of the mortgage debt *after* the same has become due have been taken away from him.

The doctrine of substituted security is a doctrine of wide application. If the subject of a mortgage is an undivided share and the joint sharers effect a partition the security of the mortgagee, accordig to that doctrine, attaches to the share allotted in severalty to his mortgagor. Similarly the doctrine was applied by their Lordships of the Judicial Committee in *Barhamdeo Prasad v. Tara Chand* (1) to a case where the mortgaged property was sold in enforcement of a decree

(1) (1913) I.L.R. 41 Cal. 654.

1938

GIRDHAR  
LAL  
v.  
ALAY  
HASAN*Iqbal  
Ahmad, J.*

obtained on a prior mortgage and after the satisfaction of that decree surplus sale proceeds were left. In a suit by the second mortgagee their Lordships held that the surplus sale proceeds represented the security which the second mortgagee had under his mortgage, and he was therefore entitled to a decree with respect to the same in enforcement of his mortgage. Similarly in *Punnayya v. Venka'tappa Rao* (1) the doctrine was applied to a case in which the house mortgaged was pulled down by the representative in interest of the mortgagor and the materials were utilised by him for other building. It was held that the mortgage attached to the property in its converted state, i.e., to the building in the construction of which the materials of the house mortgaged were utilised. It is unnecessary to enumerate the other instances in which the doctrine has been or may be applied. It is, however, clear that there is nothing in the Transfer of Property Act to indicate that the scope of the application of that doctrine was in any manner intended to be restricted.

But it may be asked, why by enacting section 73 the legislature did in particular give to a mortgagee an additional right with respect to proceeds of revenue sale or compensation money apart from the rights that the mortgagee has under the principle of substituted security? To my mind the answer to this question is simple. The right of the owner of an immovable property to mortgage the same is subject to his liability to pay Government revenue or other charges of a public nature or rent due in respect of such property and is also subject to the right of the Government to acquire that property in accordance with the provisions of the Land Acquisition Act, 1894. The right to realise the revenue, etc., by sale of the property or the right to acquire that property is, therefore, paramount to the right of the mortgagee to enforce his security as against that property, and in cases contemplated by clauses (1)

(1) A.I.R. 1926 Mad. 343.

1938

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GIRDHAR  
LAL  
v.  
ALAY  
HASAN

*Iqbal  
Ahmad, J.*

and (2) of section 73 the mortgage is nullified so far as the property is concerned. In other words, the sale or the acquisition of the mortgaged property is free from the operation of the mortgage, and as the sale or acquisition may take place before the amount secured by the mortgage has become due, the legislature, with a view to protect the mortgagee from the loss that may accrue to him by the withdrawal of the surplus sale proceeds or the compensation money by the mortgagor, has, by section 73, given him a right to claim those proceeds or that money even though the mortgage debt may not have become due.

The obvious object of a decree for sale in enforcement of a mortgage is to secure the payment of the mortgage debt by converting the mortgaged property into money, and the mere fact that the mortgaged property has been sold or acquired and thus converted into money cannot disentitle the mortgagee from recovering the amount of his debt from the sale proceeds or the acquisition money. It follows that if the mortgagor has wrongfully withdrawn those proceeds or that money the mortgagee is entitled to a decree with respect to the same as against the mortgagor. Ordinarily a decree passed in enforcement of a deed of simple mortgage is a decree for sale, but as on sale or acquisition the mortgaged property is converted into money, and it would be meaningless to pass a decree for sale of money, the only decree that the court can grant to the mortgagee in enforcement of his security in such a case is a decree for money against the mortgagor. It is, however, manifest that the claim of the mortgagee in such a case is not to enforce as against the mortgagor the remedy which the mortgagee has on a personal covenant by the mortgagor to pay. The suit in such a case is essentially to enforce payment of the mortgage debt by realisation of the security in the new form.

Reliance was however placed by the learned counsel for the appellants on section 68 of the Transfer of

Property Act which provides that a mortgagee has not the right to sue for the mortgage money except in the cases enumerated in that section. It is a fact that the case of withdrawal of surplus sale proceeds or of compensation money is not provided for by section 68, but this, in my judgment, does not disentitle a mortgagee to institute a suit for enforcing his security against those proceeds or that money. The cases enumerated in section 68 are those in which the mortgagee gives up his security and claims only a simple money decree, whereas in the case under consideration the mortgagee, far from giving up his security, sues to enforce the same.

For the reasons given above I am of the opinion that the right given to a mortgagee by section 73 is over and above the right that he has under the law to realise the mortgage debt by enforcing his security against the mortgaged property or the property substituted for the mortgaged property. As the surplus sale proceeds or the compensation awarded under the Land Acquisition Act represent the mortgaged property in a new form the mortgagee is entitled to recover the same in enforcement of his security.

In discussing the first question referred to us I have to a great extent anticipated the answer to question No. (2). The plaintiff's suit is a suit not for the refund of the compensation money withdrawn by defendants 1 and 2 but is in fact and in substance a suit to enforce his mortgage against all the properties the subject of that mortgage. A portion of the mortgaged property having been acquired by the Government is now beyond the reach of the mortgagee, but the lien that attached to that portion of the property was transferred to the compensation awarded by the Government and in praying for a personal decree against defendants 1 to 5 the plaintiff was only suing to enforce payment of money that was charged upon immovable property. The plaintiff's cause of action was not the withdrawal of the compensation money by defendants

1938

---

 GIRDIHAR  
LAL  
v.  
ALAY  
HASAN

*Iqbal*  
*Ahmad, J.*

1938

GIRDHAR  
LAL  
v.  
ALAY  
HASANIqbal  
Ahmad, J.

1 and 2, but was the non-payment of the mortgage debt by the mortgagor on the stipulated date. The plaintiff could be granted a decree for the compensation money only on proof of the fact that his right under the mortgage was a subsisting right and that the mortgage debt was due, and further that the compensation money which was withdrawn by defendants 1 and 2 was money which, in accordance with the principle of substituted security, he was entitled to regard as part of his mortgage security. In this view of the matter there is no escape from the conclusion that the suit was "to enforce payment of money charged upon immovable property" within the meaning of article 132 of the first schedule to the Limitation Act and the cause of action for the suit arose on the 17th of February, 1920. The view that I take is in consonance with the decision of their Lordships of the Privy Council in *Barhamdeo Prasad v. Tara Chand* (1).

The use of the words "claim" and "due to the mortgagor" in clause (2) of section 73 indicates that the right given by that clause to the mortgagee could be exercised by him so long as the mortgagor had not withdrawn the compensation money from the court in which the same was in deposit. If the mortgagee does not avail himself of this right, there is nothing in the section to deprive him of his original rights as mortgagee and he can bring a suit and claim to enforce his security as against the compensation money withdrawn by the mortgagor, provided he brings his suit within 12 years of the accrual of the cause of action as prescribed by article 132. It may be that in the event of the withdrawal of the surplus sale proceeds or compensation money by the mortgagor the mortgagee has a cause of action based on the provisions of section 73 to sue for the recovery of the amount withdrawn, but even then his right as a mortgagee remains intact. It is one thing to sue for the infringement of the right given to a mortgagee by

(1) (1913) I.L.R. 41 Cal. 654

section 73 and it is quite another to sue to enforce the security given by the mortgage.

My answer to the questions referred to this Bench, therefore, is that the plaintiff is entitled to a simple money decree with regard to the compensation money withdrawn by defendants 1 and 2 and that the period of limitation is 12 years from the date of the accrual of the cause of action and that the cause of action accrued on the 17th of February, 1920.

I may add that notwithstanding the view expressed above, the decree passed by the court below in this case is, in my judgment, not in accordance with law. Only a portion of the mortgaged property was acquired by the Government and the rest of that property is still available to satisfy the plaintiff's claim. If the amount realised by the sale of the available property is enough to satisfy the plaintiff's claim a simple money decree against the mortgagor with respect to the compensation money would be superfluous. I, therefore, consider that the decree in such a case should primarily be a decree for sale of the available mortgaged properties under order XXXIV, rule 4 of the Civil Procedure Code and should further provide that, in the event of the non-realisation of the entire mortgage debt by the sale of those properties, the mortgagee will be entitled to a simple money decree against the mortgagor for an amount not in excess of the amount withdrawn by him on account of compensation money.

HARRIES, J.:—I agree.

BAJPAL, J.:—I agree.

1938

GIRDHAR  
LAL  
v.  
ALAY  
HASAN

*Iqbal  
Ahmad, J.*