

MISCELLANEOUS CIVIL

Before Mr. Justice G. H. Thomas, Chief Judge, and Mr. Justice
Radha Krishna Srivastava

KISHEN GOPAL (APPELLANT) v. ABDUL LATIF KHAN
AND OTHERS (RESPONDENTS)*

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Mortgage—Several mortgagors—Entire equity of redemption transferred to mortgagee by some mortgagors only—Suit for redemption, whether can be brought by other mortgagors—Limitation Act (IX of 1908), articles 144 and 148—Article 148 and not article 144 applies to the suit—Redemption by payment in cash and transfer of property, difference between.

Where there are several co-mortgagors and the entire equity of redemption in the mortgage is transferred to the mortgagee by some only of the co-mortgagors, the possession of the mortgagee as regards other co-mortgagors remains only that of a mortgagee. A suit by such co-mortgagors would be a suit for redemption and not a suit for possession on payment and would be governed by article 148 of the Indian Limitation Act. *Khiarajmal and others v. Daim and others* (1), and *Mst. Gujrati Kunwar and others v. Bhagwati Din Singh and others* (2), relied on. *Imam Bandi v. Mutsaddi* (3), *Karnam Kandasami Pillai v. Chinnabba alias Subbaroya Pillai* (4), *Mahendra Bahadur Singh v. Chandrapal Singh* (5), *Sheo Nath and another v. Babu Tulsipat Ram* (6), *Makhdam Khan v. Musammatt Jadi and others* (7), *Mata Din v. Sheikh Ahmad Ali* (8), and *Janki Shah and others v. S. Mohammad Abbas and others* (9), referred to.

There is a material difference between a case where cash is paid in satisfaction of a mortgage debt and where property is transferred in satisfaction thereof. In cases where cash is paid the moment the money is appropriated, redemption takes place in fact, but where property is transferred the redemption depends upon whether the title in the property sold in law has passed to the mortgagee or not. Where the satisfaction of a mortgage debt is brought about by transfer of property mortgaged the mortgage debt is extinguished to the extent to which the transfer is valid.

*Miscellaneous Appeal No. 24 of 1937, against the order of W. Y. Madeley, Esq., I.C.S., District Judge of Lucknow, dated the 9th March, 1937.

(1) (1904) L.R., 32 I.A., 23. (2) (1930) A.I.R., Oudh, 17.
(3) (1918) I.L.R., 45 Cal., 878 (P.C.). (4) (1920) I.L.R., 44 Madras, 253.
(5) (1920) 24 O.C., 155. (6) (1925) A.I.R., Oudh, 385.
(7) (1905) 9 O.C., 91. (8) (1912) L.R., 39 I.A., 49.
(9) (1921) 25 O.C., 245.

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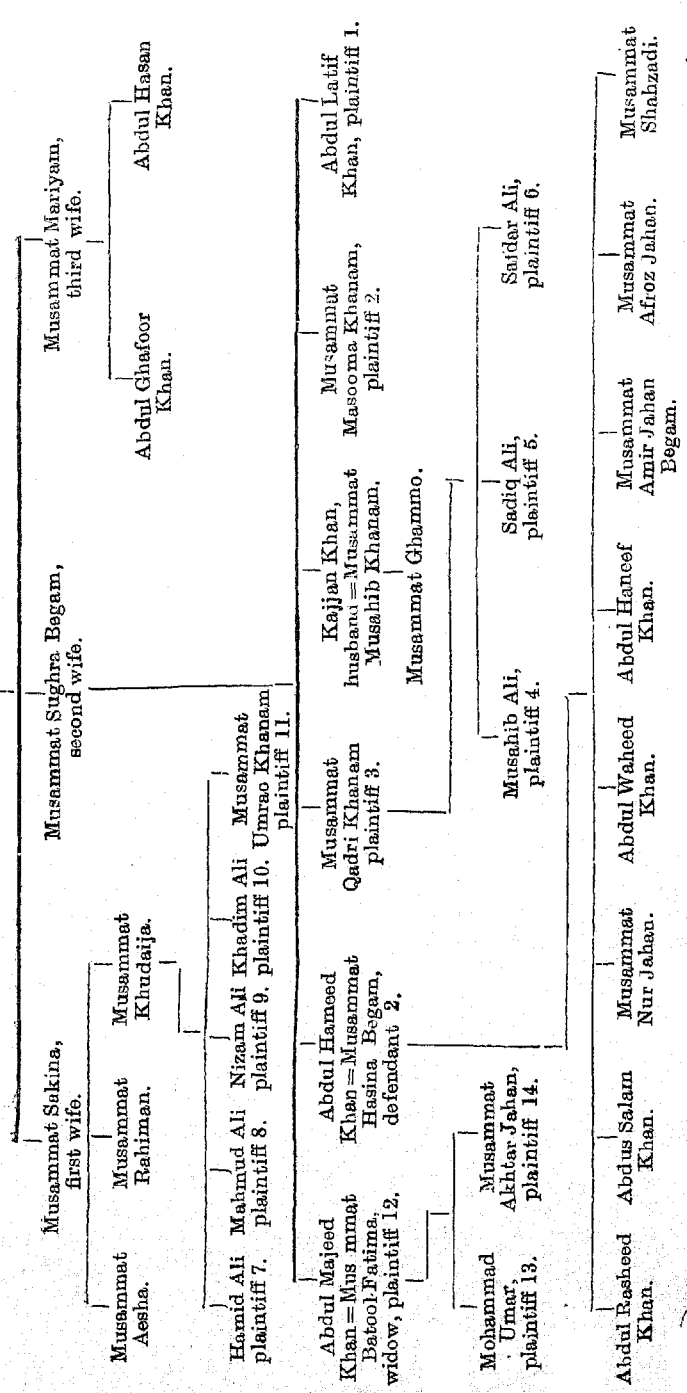
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Messrs. *P. L. Banerji, Haidar Husain and Nazir Uddin*, for the appellant.

Messrs. *M. Wasim, A. Rauf, A. P. Nigam, and Ali Hasan*, for the respondents.

THOMAS, C.J., and RADHA KRISHNA, J.:—This is an appeal against an order of remand passed by the learned District Judge of Lucknow. In order to appreciate the facts of the case leading up to the present appeal it is necessary to set forth the following pedigree:

DR. ABDUR RAHMAN KHAN



(Defendants nos. 3 to 10.)

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Dr. Abdur Rahman Khan, mentioned in the above pedigree, was the owner of the property in dispute and two other houses which are not in dispute, in all consisting of three houses, and two shops situated at Aminabad in the city of Lucknow. He mortgaged with possession on the 8th September, 1884, the entire property belonging to himself to one Shaikh Pir Bakhsh for Rs.2,500. The names of Abdul Ghafoor Khan, Abdul Majeed Khan, Abdul Hameed Khan and Abdul Hasan Khan, the sons of Dr. Abdur Rahman Khan, under his guardianship, were also added as the executants of the deed. As regards interest it was agreed that the mortgagor should execute a *sarkhat* in favour of the mortgagee for Rs.25 per mensem by way of rent and should continue to pay that rent every month. The mortgagor failed to pay the rent stipulated in the *sarkhat*, whereupon the mortgagor with the consent of the mortgagee sold to one Mangal two houses out of the property mortgaged and the money received as consideration was paid to the mortgagee in respect of the rent that had accumulated and was due to him.

Subsequently on the 13th April, 1893, the mortgagee assigned his mortgagee rights in the property in suit for a sum of Rs.1,700 in favour of Ram Karan, the predecessor-in-interest of the defendant-appellant.

On the 7th December, 1894, Abdul Majid Khan, Abdul Hameed Khan, Sughra Begam on her own behalf and as guardian of Musahib Khanam, Abdul Latif Khan and Masooma Khanam sold the entire property under mortgage to the mortgagee for an ostensible consideration of Rs.2,850 (*vide* Ex. A-3). Rs.350 out of the consideration were paid in cash and the rest, i.e. Rs.2,500 are recited to have been left with the mortgagee as due on the mortgage. Later by a deed of the 12th August, 1895 (Ex. A-4), Abdul Hasan and his mother Mst. Mariyam in lieu of a sum of Rs.150 ratified the sale-deed of 1894 (Ex. A-3).

The plaintiffs, who are some of the representatives of the original mortgagor, Dr. Abdur Rahman Khan,

have brought the present suit for recovery of the property in suit by redemption of the mortgage dated the 8th September, 1884.

It may be noted here that the plaintiffs Nos. 1 and 2 are Abdul Latif Khan and Mst. Masooma Khanam themselves. Plaintiff No. 3 is the representative of Mst. Musahib Khanam; plaintiffs Nos. 4 to 11 are the representatives of Mst. Khudaija Begam and Mst. Qadri Khanam; plaintiffs Nos. 12 to 14 are the representatives of Abdul Majeed Khan and defendants Nos. 2 to 10 are the representatives of Abdul Hameed Khan. Thus all the representatives of the original mortgagor are parties in the suit.

The defendant contested the suit on the ground among others that by the sale-deeds, dated the 7th December, 1894, and the 12th August, 1895. (Exs. A-3 and A-4), he purchased the equity of redemption from all the persons interested as mortgagors and had become the absolute owner of the property mortgaged.

The trial court framed the following issues from which other defences will also appear:

(1) Is the pedigree given in the plaint so far as it is denied genuine?

(2) (a) Was the equity of redemption sold to the defendant No. 1, as alleged in paragraph 16 of the written statement?

(b) Is the sale binding on plaintiffs as alleged in paragraph 17 of the written statement? Was Musahib Khanam a minor at the date of the sale?

(3) Is the defendant No. 1, owner of the property in suit by adverse possession?

(4) Is the suit barred by limitation?

(5) Have the plaintiffs a right of accounting under the deed in suit?

(6) Is the *shape* F. E. X. Y. Z. also included in the mortgage in suit?

(7) To what relief are the plaintiffs entitled?

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On issues Nos. 1 and 2 the trial court held that the pedigree was correct and that Mst. Khudaija Begam and Mst. Qadri Khanam, the two daughters of Dr. Abdur Rahman Khan, who had survived him, were no parties to the deed of 1894 and that Mst. Masooma Khanam and Abdul Latif Khan were minors. Mst. Sughra Begam purported to sell the property as their guardian and, therefore, the sale in view of the decision of their Lordships of the Privy Council in *Imam Bandi v. Mutsaddi* (1) was void. As to Musahib Khanam the trial court held that she was a major and in existence but as she did not join the sale-deed it was ineffective against her interest.

On issues Nos. 3 and 4 it held that the defendant No. 1, and his predecessor had been holding the property adversely for about 40 years and hence the suit was barred by limitation.

On issue No. 5, it was held that the plaintiffs were not entitled to any accounting.

Issue No. 6 was decided in favour of the defendants.

As a result of the findings on issues Nos. 3 and 4 the trial court dismissed the suit.

In appeal the lower appellate court agreed with the trial court in holding that the sale-deed of 1894 was not effective against the shares of Mst. Khudaija Begam, Qadri Khanam, Masooma Khanam, Abdul Latif Khan and Musahib Khanam, but on the question of limitation it held that the suit was governed by article 148 of the Indian Limitation Act and was not barred. The appeal was allowed and the case was sent back to the trial court for decision after determining the shares of the plaintiffs.

The defendant No. 1, has come up in appeal to this Court against the said order and the sole point argued is that on the facts of the case the article applicable to the suit is article 144 and not article 148 of the Indian

(1) (1918) I.L.R., 45 Cal., 878(P.C.).

Limitation Act. The contention of the learned counsel for the appellant is that the effect of the sale-deed of 1894 was the redemption of the mortgage of 1884 in its entirety even though the sale of the property to the mortgagee may not be effective to its entire extent, that after the sale of 1894 there was a change in the nature of the possession of the mortgage and his possession thereafter was adverse and the article applicable to the present suit was article 144. On the other hand, the case of the respondents is that the effect of the sale of 1894 was a transfer of a portion of the equity of redemption to the mortgagee and the mortgage subsisted in respect of the shares of Abdul Latif Khan and Masooma Khanam plaintiffs Nos. 1 and 2 and Mst. Khudaija Begam and Mst. Qadri Khanam and Mst. Musahib Khanam, the predecessors-in-interest of the plaintiffs Nos. 3 to 11 and no redemption of the mortgage as a whole took place.

On the nature and scope of the transaction of sale of 1894 (Ex. A-3) it was argued by the counsel for the appellant that on a proper interpretation of it the transaction was not a sale of mere equity of redemption and that it consisted of two separate transactions, one the redemption of mortgage on payment of Rs.2,500 and the other the sale of the mortgaged property. We may note at once that this is a new case and was not put forward on behalf of the defendant in his written statement (*vide* paragraphs 16 and 17 of the written statement). A perusal of these paragraphs will show that it was not the case of the defendant that any redemption of the mortgage had taken place in fact or was contemplated as a transaction precedent to the sale. The case put forward was that as the ownership in property also vested in the mortgagee by virtue of the sale of 1894 he became the absolute owner of it. It would be too much to allow the appellant to set up a new case now outside the pleadings.

The learned District Judge observed in his judgment as regards this argument as follows:

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"The theory of redemption in the case before me is only a fiction. Full ownership of the property was by the mortgage divided into two parts: the equity of redemption and the rights of the mortgagee. What the vendors did in fact (it makes no difference what were the terms of the sale-deed since these terms did not come to the knowledge of the appellants) was to transfer the whole equity of redemption to the mortgagee though it did not belong to them."

We agree with his view that what the vendors did in fact was to transfer the equity of redemption. We have ourselves read the deed very carefully. In our view the ostensible consideration of the deed was fixed at Rs.2,850 only for the purposes of fixing the value of the equity of redemption and Rs.2,500 shown as left with the mortgagee was not intended to bring about a redemption in fact. This sum of Rs.2,500 was not paid in cash by the vendors. There is a material difference between a case where cash is paid in satisfaction of the mortgage debt and where property is transferred in satisfaction thereof. In cases where cash is paid the moment the money is appropriated, redemption takes place in fact, but where property is transferred the redemption depends upon whether the title in the property sold in law has passed to the mortgagee or not. In our view where the satisfaction of a mortgage debt is brought about by transfer of property mortgaged the mortgage debt is extinguished to the extent to which the transfer is valid. In the present case the transfer was not valid to the extent of the share of the plaintiffs Nos. 1 and 2 and the predecessors-in-interest of the plaintiffs Nos. 3 to 11 and to the extent of their shares the mortgage was not satisfied.

On the main question of law several cases were cited by the learned counsel for the appellant and we proceed to consider them.

Among the cases cited on behalf of the appellant in support of his contention there were cases where the transfer of the equity of redemption by the sole mortgagor, or where there were more mortgagors than one by all the mortgagors, was invalid in law and

inoperative. In such cases although the transfer of the equity of redemption failed, yet it was held that there was change in the character of the possession of the mortgagee who after that held under a claim of full proprietorship. These cases may be dismissed from consideration as their decision may be justified on the ground that it is open to the mortgagee and all the mortgagors concerned, acting together, to agree among themselves as to what the character of possession held by the mortgagee would be in future.

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The cases, *Karnam Kandasami Pillai v. Chinnabba alias Subbaroya Pillai* (1), *Mahendra Bahadur Singh v. Chandrapal Singh* (2) and *Sheo Nath and another v. Babu Tulsipat Ram* (3), cited by the appellant's counsel belong to this category and need not be considered. In the present case the plaintiffs Nos. 1 and 2 or the predecessors-in-interest of the plaintiffs Nos. 3 to 11 were no parties to the sale and it is admitted that their interests did not pass by it. There is no evidence to indicate that the plaintiffs or their predecessors-in-interest ever exhibited any acquiescence on their part amounting to a release of their interest in the equity of redemption or any consent, express or implied, to the change in the mortgagee's possession from a mere mortgagee to a full owner.

In *Makhdam Khan v. Musammat Jadi and others* (4) it was held that when one of several co-mortgagors redeems the entire property, it cannot be said that he has the same rights and stands exactly in the same position as the mortgagee with regard to the share of his co-mortgagors. The debt in the case of such a payment is entirely discharged and the mortgage is redeemed; and the redeeming co-mortgagor has no right in the shares of his co-mortgagors other than that of a charge on those shares for the money paid for redemption and the proper costs incurred in so redeeming.

(1) (1920) I.L.R., 44 Madras, 253.

(2) (1920) 24 O.C., 155.

(3) (1925) A.I.R., Oudh, 385.

(4) (1905) 9 O. C., 91.

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This view is no longer law in view of section 92 of the Transfer of Property Act as amended in 1929. This section is new and was inserted by the Amending Act XX of 1929. The effect of this section read with section 91 is that although a co-mortgagor alone has a right to redeem the entire mortgage, yet on redemption he comes to occupy the position of a mortgagee as regards the share of the non-redeeming co-mortgagor.

So far as this Court is concerned, it has been finally held that the present section 92 of the Transfer of Property Act has retrospective effect and that the redeeming co-mortgagor stands in the position of a mortgagee to the non-redeeming mortgagor *qua* his share and has as regards redemption, foreclosure or sale of such property, the same rights as the mortgagee had against the mortgagors.

Great reliance was placed on two cases particularly, i.e. *Mata Din v. Sheikh Ahmad Ali* (1) and *Janaki Shah and others v. S. Mohammad Abbas and others* (2). We shall consider these at some length.

Mata Din v. Sheikh Ahmad Ali (1)

The facts of this case were that a mortgage-deed with possession of the property in dispute was executed in 1885. In this mortgage-deed the important thing to note is that there was a condition by which redemption was not allowed within ten years. Two years after, the mortgagor died leaving as his heirs four grandsons one of whom was a minor and three majors. The three major grandsons acting for themselves and as guardian of their minor brother sold the mortgaged property to the mortgagee in 1889. A suit was instituted by the fourth grandson, who was minor at the time of the sale-deed, for redemption in 1905, in disregard of the sale-deed. Their Lordships of the Privy Council held that the right of redemption did not accrue till 1895, i.e. ten years calculated from 1885, and the suit was well

(1) (1912) L.R., 39 I.A., p. 49.
at p. 55.—15 O.C., 49.

(2) (1921) 25 O.C., 245.

within limitation. Their Lordships observed that the possession of the mortgagee had not become adverse to the plaintiff. It would be observed that on the view taken by their Lordships no question of the application of article 144 as distinguished from article 148 arose. The point arising in the present case did not arise directly before their Lordships of the Privy Council and they did not hold that possession of the mortgagee in the circumstances of the case had become adverse from the date of the sale. Their Lordships probably were merely dealing with the argument raised on behalf of the plaintiff in that case that at the most the possession of the mortgagee could become adverse after the expiry of the period fixed for redemption and not earlier.

Janki Shah and others v. S. Mohammad Abbas and others (1)

The facts of this case were that two brothers, Mohammad Abbas and Mohammad Husain, mortgaged certain property by way of conditional sale to one Ghasite in 1880. In 1882 Mohammad Husain alone sold the entire property to Ghasite, the mortgagee, claiming that he alone was the owner of the property. In 1895 the heirs of Ghasite mortgagee, other than his widow, sold a 14 annas 3 pies share in the property mortgaged to Samsam Ali with a declaration that they were the *full owners of the share of the property transferred by the deed*. The plaintiff, Mohammad Abbas, and his transferee brought a suit in 1917 to redeem half the mortgaged property and the main question raised in defence was that the suit was barred by the provisions of article 134 of the Indian Limitation Act because it was brought more than 12 years after 1895 when Ghasite's heirs transferred the property to Samsam Ali as full owners. In second appeal arising out of that case the late Court of the Judicial Commissioner of Oudh set aside the decrees passed by the two lower

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courts and remanded the case for a decision whether Samsam Ali had purchased in good faith without notice of the mortgage of 1880. This was done apparently on the finding that article 134 applied to the case. After remand the court of first instance held in favour of the defendants and dismissed the suit. On appeal the first appellate court held that Samsam Ali had constructive notice of the mortgage and if he had acted with proper care and caution he would have discovered that Ghasite was only a mortgagee of half the property and not full owner. The plaintiff's suit for redemption was decreed.

In second appeal the late Court of the Judicial Commissioner of Oudh in view of the previous order of remand held that it was not open to the appellants to raise again the question of the interpretation of article 134 which was decided against them by that order. On this view the appeal was liable to be dismissed but the learned Judicial Commissioners went on future to consider the alternative case that article 144 barred the suit inasmuch as Ghasite, the original mortgagee, held the property adversely from the year 1882, that is the sale in his favour by one of the two mortgagors. They held that from the time of that sale-deed Ghasite was holding adversely to Mohammad Abbas, the plaintiff, on the ground that by virtue of that sale-deed the mortgage had become extinct. A perusal of this judgment shows that the alternative point raised before the learned Judicial Commissioners was not properly argued. There is no adequate discussion of this point. The decision is based really upon an assumption that the effect of the sale-deed was to extinguish the mortgage in its entirety. No case law was cited. The point arose only incidentally the decision of which was not required for the purposes of the case. In our view this case stands by itself and no other case has been cited before us which supports the view taken in this case. We consider that this

decision on the point under discussion does not lay down correct law.

In our opinion the correct law is that where there are several co-mortgagors and the entire equity of redemption in the mortgage is transferred to the mortgagee by some only of the co-mortgagors, the possession of the mortgagee as regards other co-mortgagors remains only that of a mortgagee. If this view of ours is correct, then it follows that a suit by such co-mortgagors would be a suit for redemption and not a suit for possession on payment as urged by the appellants' counsel and would be governed by article 148 of the Indian Limitation Act.

In our opinion the sale of 1894, although purporting to be in respect of the entire equity of redemption as against the plaintiffs Nos. 1 and 2 and predecessors of the plaintiffs Nos. 3 to 11, who were no parties to it, was a nullity and did not affect their share in it at all. The effect of the sale deed was to bring about a sale of the share in the equity of redemption only of those mortgagors who were properly parties to it and to that extent the mortgagee became full owner of the property, but as regards the shares of the plaintiffs Nos. 1 and 2 and predecessors of plaintiffs Nos. 3 to 11 his position as a mortgagee did not undergo any change. In this view we are amply supported by a decision of their Lordships of the Privy Council in *Khizarajmal and others v. Daim and others* (1) and a Bench decision of this Court in *Mst. Gujrati Kunwar and others v. Bhagwati Din Singh and others* (2). In our opinion the mortgagee who comes into possession of land as a mortgagee is not in a position to deny the rights of any of his mortgagors to redeem the mortgage so long as the equity of redemption or any part of it subsists. The share in the equity of redemption of the plaintiffs Nos. 1 and 2 and predecessors-in-interest of the plaintiffs Nos. 3 to 11 subsisted in spite of the sale of 1894.

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(1) (1904) 1 R., 32 I.A., 23.

(2) (1930) A.I.R., Oudh, 17.

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We are, therefore, of opinion that the judgment of the learned District Judge is correct. The trial court will proceed to dispose of the suit after determining the shares of the plaintiffs, who have been found entitled to redeem their shares.

The result is that the appeal fails and is dismissed with costs.

Appeal dismissed.

Before Mr. Justice Ziaul Hasan and Mr. Justice A. H. deB. Hamilton

SHAMBHU DAYAL AND OTHERS (DEBTORS-APPELLANTS) v.
L. KUNDAN LAL (CREDITOR-RESPONDENT)*

1939
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United Provinces Encumbered Estates Act (XXV of 1934), sections 4 and 9(5)—“Joint debtor” under section 9(5), whether includes subsequent transferee of mortgaged property—Mortgagee having obtained decree against mortgagors and subsequent transferees—Subsequent transferees who were parties to decree, whether necessary parties to application under section 4.

The expression “joint debtors” in section 9(5) of the Encumbered Estates Act includes subsequent transferees of a mortgaged property.

Where a mortgagee of an applicant under section 4 of the Encumbered Estates Act had obtained a decree on his mortgage against his mortgagor and the subsequent transferees, section 9(5) (a) makes it compulsory that all the persons who were parties to the decree, being joint debtors, should be made parties to the application under section 4.

Mr. *Data Prasad Khare*, for the appellants.

Mr. *Pearey Lal Varma*, for the respondent.

ZIAUL HASAN and HAMILTON, JJ.:—This is an appeal under section 45 of the Encumbered Estates Act. The appellants, who are father and sons, filed an application under section 4 of the Act impleading Lala Kundan Lal respondent as the creditor-opposite-party. Lala Kundan Lal filed a written statement in which he

*Miscellaneous Appeal No. 50 of 1937, against the order of Pandit Braj Kishan Topa, Special Judge, 1st Grade, of Lucknow, dated the 27th April, 1937.