

their being assigned, sublet or otherwise parted with without the consent of the landlord and clause (b) (ii) of section 9 (1) would not apply."

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Tara Devi

For the foregoing reasons, I would allow the petition for revision, set aside the judgments and decree passed by the Courts below and dismiss Civil Suit No. 234 of 1949.

Harnam  
Singh,  
J.

Arrears of rent together with the costs of the suit have been paid.

In the circumstances of the case, I would leave the parties to bear their own costs throughout.

KHOSLA, J.—I agree.

Khosla, J.

#### APPELLATE CIVIL

*Before Kapur and Soni JJ.*

GURCHARAN SINGH AND OTHERS,—*Plaintiffs-Appellants*

1952

*versus*

August, 21st

SUBEDAR SAWAN SINGH AND OTHERS,—*Defendants-Respondents.*

Regular Second Appeal No. 436 of 1948.

*Civil Procedure Code (Act V of 1908)—Section 100 and Order 41 rule 33—Question of necessity—Whether finding of fact—Powers of the Appellate Court under Order 41 rule 33—Transfer of Property Act (IV of 1882) Sections 91 and 92—Co-mortgagor redeeming property—Subrogation of such co-mortgagor in place of the mortgagee.*

Held, that the question of necessity is one of fact and as the finding has been given on the evidence on the record, it cannot be challenged in second appeal.

Held, that under Order 41, Rule 33, of the Civil Procedure Code the appellate Court has the power to pass any decree and make any order which ought to have been passed or made and this power may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have appealed or filed cross-objections.

Held, that under section 91 of the Transfer of Property Act a co-mortgagor (and the plaintiffs are co-mortgagors

now) can redeem the whole of the mortgage by paying the whole of the mortgage amount and be subrogated in place of the mortgagee and they cannot under section 60 of that Act redeem their own share. This provision of the Transfer of Property Act is not affected by the principles of Customary law.

*Bishan Singh v. Nathu (1), and Sir Hari Sankar Pal v. Anath Nath Mitter (2),* relied on.

Second appeal from the decree of Shri Hans Raj Bhalla, Additional District Judge, Amritsar, dated the 6th March, 1948, affirming that of Shri Salahud Din Hanif, Sub-Judge, 1st Class, Amritsar, dated the 28th February 1947, dismissing the suit in respect of fields numbers 277 and 725 and in respect of 1/3rd share in the other fields. The mortgage in favour of Ujagar Singh was held to be for consideration and legal necessity only to the extent of Rs 3,802. As two fields have been held to be non-ancestral and suit regarding one-third share in the fields had also been dismissed the amount for which legal necessity has not been proved can be adjusted against the land for which the suit had been dismissed. The suit for which legal necessity had been established is more than 2/3rd of the consideration, therefore, the mortgage in favour of Ujagar Singh defendant, cannot be upset. It has, however, been held that there was no necessity for fixing a period, therefore the plaintiffs are entitled to get possession of 2/3rd of the land mortgaged with him excepting the field No. 725 on payment of Rs. 3,802. Therefore a decree in favour of the plaintiffs for possession of 2/3rd share mortgaged with Ujagar Singh excepting field number 725 on payment of Rs. 3,802 is passed.

2. The mortgage in favour of defendant No. 2 was for Rs. 2,250, but it was proved for consideration and legal necessity only to the extent of Rs. 1,830. The mortgage cannot be set aside but as there was no necessity for fixing the period a decree is passed in favour of plaintiffs for possession of 2/3rd of the fields Nos. 3130, 3141, 3151, 3152, 3204 and 3207, on payment of Rs. 1,830.

3. The mortgage in favour of defendant No. 3 Atma Singh was for Rs. 1,200, but consideration and legal necessity is proved only to the extent of Rs. 60 therefore a decree is passed in favour of the plaintiffs for possession of 2/3rd share in fields Nos. 745, 749, 754 and 765 on payment of Rs. 60.

4. The mortgage in favour of Jawala Singh was for Rs. 2,730. Consideration and legal necessity has been

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(1) 4 I.C. 892.

(2) 1949 F.C.R. 36.

proved to the extent of Rs. 2,072. While dealing in case of defendant No. 1, a decree is passed in favour of plaintiffs for possession of 2/3rd share in field Nos. 3125, 3126, 3219, 3145, 3221, on payment of Rs. 2,072.

5. The mortgage in favour of defendants Nos. 5 and 6 was for Rs. 400 but consideration and legal necessity has been proved for Rs. 380. Hence a decree is passed in favour of plaintiffs for possession of 2/3rd share in field number 829 against defendants Nos. 5 and 6 on payment of Rs. 380. The parties are left to bear their own costs.

PARTAP SINGH and SURINDER SINGH, for Appellants.

AMAR CHAND HOSHIARPURI,—for Respondents.

#### JUDGMENT

KAPUR, J. This is a plaintiffs' appeal against an appellate judgment and decree of the Additional District Judge, Amritsar, dated the 6th March, 1948, modifying the decree of the trial Court who had passed a decree in the plaintiffs' favour.

Kapur, J.

Wassan Singh, the father of the plaintiffs and defendant No. 7, made five mortgages—

- (1) On the 8th July 1941 by a document Exh. D. 9 for Rs 2,250 to Sawan Singh.
- (2) On the 14th December, 1942 by a document Exh. D. 12 for Rs 2,730 to Jowala Singh.
- (3) On the 9th April 1943 by a document Exh. D. 38 for Rs 1,200 in favour of Atma Singh.
- (4) and (5) are not necessary because they are not the subject-matter of this appeal. I would, however, mention them. On the 12th March 1934 Wassan Singh mortgaged for Rs 5,000 a piece of land in favour of Ujagar Singh by Exh. D. 1 and on the 22nd February 1943 he created a mortgage in favour of Santa Singh and Banta Singh for Rs 400 by a document Exh. D. 4.

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—  
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The learned District Judge has held that the mortgage in favour of Sawan Singh for Rs 2,250 was for consideration and necessity. In the case of the second mortgage, dated the 14th December, 1942, he held Rs 2,674 to be for necessity and in the case of the third mortgage, dated the 9th April 1943 in favour of Atma Singh only Rs 60 were for necessity. In the case of the other two mortgages no appeal was taken to the District Judge. The plaintiffs have come up in appeal to this Court and after hearing Mr. Partap Singh we are of the opinion that the question of necessity is one of fact and as the finding has been given on the evidence on the record it cannot be challenged in second appeal. We would, therefore, confirm the decree of the appellate Court in regard to the amounts which are binding on the plaintiffs and on defendant No. 7.

A further question has been raised by Mr. Partap Singh and that is that the decree provides that the plaintiffs will be entitled to get possession of 2/3rd of the land mortgaged on payment of the whole of the sum decreed which he contends is contrary to section 91 of the Transfer of Property Act which provides that "any person (other than the mortgagee of the interest sought to be redeemed) who has any interest in, or charge upon, the property mortgaged or in or upon the right to redeem the same" can redeem the mortgage. Section 92 of the Transfer of Property Act provides for subrogation. Reading these two sections together counsel submits that the plaintiffs would be entitled to the redemption of the whole of the land on payment of the whole of the mortgage money found due and be subrogated in place of the mortgagees. Mr. A. C. Hoshiarpuri in reply contends that no appeal was taken against the decree passed by the trial Court to the District Judge and, therefore, the plaintiffs are not entitled to get a variation of the decree in their favour in regard to this matter, specially because they had brought a suit for possession of 2/3rds on the ground that the alienations were without consideration and legal necessity and therefore not binding on them.

Thus far the respondents are right when they say that under the Customary Law the plaintiffs' right is only to get possession of 2/3rds because they are only entitled to 2/3rds of the estate left by their father but that does not settle the question. Under section 91 of the Transfer of Property Act a co-mortgagor—and the plaintiffs are co-mortgagors now—can redeem the whole of the mortgage by paying the whole of the mortgage amount and be subrogated in place of the mortgagee and they can not under S. 60 of that Act redeem their own share. This provision of the Transfer of Property Act is not affected by the principles of Customary Law.

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and others  

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Kapur, J.

The only question that remains to be settled is whether the plaintiffs who did not appeal to the District Judge are entitled to have the variation in the decree which they are asking for. Under Order 41, rule 33, the appellate Court has the power to pass any decree and make any order which ought to have been passed or made \* \* \* and this power may be exercised \* \* \* in favour of all or any of the respondents or parties, although such respondents or parties may not have appealed or filed cross-objections. The proper decree which should have been passed in their favour, considering that there is section 91 of the Transfer of Property Act, was that the plaintiffs would be entitled to redeem the whole on payment of the mortgage money which was found to be binding on them. This decree the appellate Court did not pass. This really amounts to an accidental slip which could have been corrected under section 152 of the Code of Civil Procedure because the decree passed by the District Judge as also by the Subordinate Judge is inconsistent with the provisions of section 91 of the Transfer of Property Act which is one of the cardinal principles of the law of mortgages and as was held in *Bishen Singh v. Nathu* (1), such a slip can be corrected "on further appeal" although no appeal was brought against the decree of the first Court.

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(1) 4 I.C. 892

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and others  
—  
Kapur, J.

Resently the Federal Court in *Sir Hari Sankar Pal v. Anath Nath Mitter* (1), held the provisions of Order 41, rule 33, to be applicable and upheld the order of review passed by the High Court which modified its decree on review at the instance of certain respondents who had not appealed against the decree of the original Tribunal. Mukherjea J., said at p. 47—

“The High Court accepted the appellants’ contention and reversed the decision of the Tribunal and in allowing the appeal, it was certainly within its powers to reverse the decree with regard to the non-appealing proprietors as well who figured as respondents in the appeal, if it considered such order or decree to be necessary for doing complete justice between the parties \* \*”.

It appears to me that the decree passed by the District Judge is contrary to the provisions of section 91 of the Transfer of Property Act. What the learned Judge’s decree amounts to is this that the plaintiffs will have to pay the whole of the mortgage amount and be entitled to recover possession of only 2/3rds of the property in dispute. That section read with section 92 of that Act allows a co-mortgagor to be subrogated in place of the mortgagee. I am, therefore, of the opinion that the decree of the District Judge should be modified to this extent that the plaintiffs will be entitled to recover possession of the whole on payment of the whole of the amount found to be binding on them.

The appeal is, therefore, allowed to the extent indicated above but in view of the circumstances of this case the parties will bear their own costs throughout.

Soni, J.

SONI, J.—I agree.