

cross-objections under certain circumstances. Therefore, there appears to be no material difference between cross-objections and a cross-appeal.

Arjan Singh,  
v.  
Mohan Singh,  
and another,

P. C. Pandit, J.

Finding as I do, that in cross-objections the respondent can take advantage of this amending Act, there is no necessity of deciding the cross-objections on merits, because even if there is no force in these cross-objections the provisions of the new section 31 of the Punjab Pre-emption Act will come into play and this Court will not pass a decree for pre-emption in favour of a fourth degree collateral of the vendor.

In view of what I have said above, the appeal is dismissed as having been withdrawn, but the cross-objections are accepted and the plaintiff's suit is dismissed. In the circumstances of this case, however, the parties are left to bear their own costs throughout.

TEK CHAND, J.—I agree.

APPELLATE CIVIL.

*Before Mehar Singh and K. L. Gosain, JJ.*

NAND SINGH *alias* TULA AND ANOTHER,—Appellants.

*versus*

RAM SARUP,—Respondent.

Regular Second Appeal No.193 of 1958.

*Custom—Mortgage of ancestral property created—Revisioners challenging the same by a declaratory suit—Decree passed that the mortgage will not be binding on the reversioners except for a specified amount found for necessity—Reversioners not availing themselves of the decree by*

1960

Oct. 6th.

*filling suit for possession within three years of the death of the original mortgagor—Effect of—Whether can maintain a suit for redemption on payment of the mortgage amount.*

*Held*, that the decree in the previous declaratory suit could be interpreted only to mean that the mortgage was not to bind the plaintiff at all and that he was entitled to take possession of the property on payment of Rs. 1,200 not because the property was to be treated as one under mortgage for that amount but because the plaintiff was bound to pay that sum, for the estate, which he claimed, had benefited to that extent. If the plaintiff so chose, he was certainly entitled to take advantage of this decree and to take possession of the property on payment of Rs. 1,200. This, however, could be done within the period of limitation prescribed for such a suit. The plaintiff did not elect to avail of the said remedy and he did not file the foresaid suit for possession within the period of limitation prescribed for that. This could not, however, deprive him of his ordinary remedies as an heir of the mortgagor.

*Held*, that it can not be said that the successor-in-interest of the mortgagor cannot maintain a suit for redemption of the original mortgage simply because he obtained a declaratory decree that the mortgage was not binding on him and that he could take possession of the property on payment of Rs. 1,200 and failed to avail of the decree. It was for the plaintiff to avail of the decree or not to do so, and if he chose not to avail of it, he cannot be deprived of his rights to obtain redemption of the mortgage as an heir of the mortgagor on payment of the mortgage money in terms of the mortgage deed itself.

*Second Appeal from the decree of the Court of Shri Badri Parshad Puri, Additional District Judge, Karnal, dated the 23rd day of December, 1957, reversing that of Shri Avtar Singh Gill, Sub-Judge, II Class, Kaithal, dated the 15th July, 1957 and granting the plaintiff a preliminary decree for possession by redemption of the land in suit on payment of Rs. 4,000 and directing the parties to bear their own costs throughout and further ordering that the plaintiff would deposit Rs. 4,000 in the lower court within two months from 23rd December, 1957, whereafter he would be*

*entitled to have the decree made final and to secure possession of the land in suit.*

SHUMAIR CHAND, P. C. JAIN AND A. L. BAHRI, ADVOCATES,  
for the Appellants.

D. C. GUPTA AND J. V. GUPTA, ADVOCATES, for the Res-  
pondent. h)x Cs

#### JUDGMENT

GOSAIN, J.—This is a defendants' second appeal against the appellate decree of Shri Badri Parshad Puri, Additional District Judge, Karnal, dated the 23rd December, 1957, setting aside that of the learned trial Judge, dated the 15th July, 1957, and granting the plaintiff-appellant a preliminary decree for possession by redemption of the land in suit on payment of Rs. 4,000 but leaving the parties to bear their own costs in both the Courts.

Gosain, J.

On the 22nd February, 1934, Dhania mortgaged the agricultural land in dispute with defendants 1 and 2 for a sum of Rs. 4,000. A house was also mortgaged by Dhania for a sum of Rs. 500 and one mortgage deed was executed in respect of both the aforesaid items of property. On the 23rd April, 1936, Ram Sarup, son of Dhania filed a declaratory suit that the mortgage would not affect his reversionary interest after the death of his father. On the 22nd June, 1936, the aforesaid suit was decreed in its entirety and this decree was upheld by the Court of first appeal on the 7th February, 1938. On a second appeal filed in the Lahore High Court, the decree was modified to the extent that the reversioners were allowed to take possession of the property after the death of Dhania on payment of Rs. 1,200, which was found to be for necessity. Dhania died on a date which is not clearly brought out on the record.

Nand Singh  
alias Tula  
and another  
v.  
Ram Sarup  

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Gosain, J.

The suit giving rise to this appeal was brought on the 24th October, 1956, by Ram Sarup for possession of the agricultural land in dispute by redemption on payment of such sum as may be found due to the mortgagees. The suit was resisted by the mortgagees *inter alia* on the ground that the plaintiff having failed to bring the suit for possession of the said property within three years of the date of the death of his father, the same was barred by time. Various other defences were also taken but it is not necessary to deal with them in the present judgment. The learned trial Judge framed as many as six issues in the case but it is necessary only to mention issue No. 3, which was as under:—

“Whether the plaintiff was bound to bring a suit for possession of the suit property on payment of Rs. 1,200 within 3 years of the date of the death of his father when the succession opened and the cause of action accrued to him and this suit is barred by time?”

The aforesaid issue, i.e., issue No. 3 was found against the plaintiff and he was non-suited on this basis. He went up in appeal to the Additional District Judge, Karnal, who reversed the finding of the trial court on issue No. 3 and granted the plaintiff a preliminary decree for possession by redemption of the land in suit on payment of Rs. 4,000.

In this second appeal by the defendants mortgagees the only contention raised before us is that the findings of the learned District Judge on issue No. 3 are erroneous and are liable to be set aside. The argument raised is that the rights of the plaintiff in respect of the mortgage in question merged in the decree passed by the High Court on the 6th

June, 1938, in the second appeal arising out of the declaratory suit and on an interpretation of the decree it must be held that the mortgage was entirely wiped out and the plaintiff was left only with a right of getting possession of the property on payment of Rs. 1,200 within three years from the death of Dhania (Mortgagor). Reliance for this extraordinary proposition of law was placed by the learned counsel for the appellants on a case, *Fazal Ahmed and others v. Shahab Din and others* (1), in which a Division Bench of the Chief Court held that in declaratory suits by reversioners to have an alienation declared void after the death of the alienor, if the Court finds that the alienation is in part only for necessity, the decree should declare (1) that the alienation shall not take effect at all against the reversioners after the death of the alienor, and (2) that the reversioners shall not be entitled to possession until they have paid the sum found to be for "necessity". At page 462 of the report Johnstone, J., who delivered the main judgment observed as under:—

"When a sonless male proprietor, subject to Punjab Customary Law, sells a piece of ancestral land and upon a suit by a reversioner for a declaration that the sale, not being for consideration and 'necessity', does not affect his reversionary interests, the Court finds that only a portion of the consideration passed for a necessary purpose, that Court does not, and cannot, 'convert the sale into a mortgage', though the language used in judgments and decrees would sometimes seem to imply that this was so. We are aware of no law under which a Court having, so far as concerns the

Nand Singh  
alias Tula  
and another,  
v.  
Ram Sarup.  
Gosain, J.

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(1) 92 P.R. 1909.

Nand Singh  
alias Tula  
and another,  
v.  
Ram Sarup,  

---

Gosain, J.

plaintiffs' rights, cancelled a sale, can create a mortgage for the sum of money found to be for 'necessity'. What it does, is to find the sale invalid as against plaintiff and then to rule that, inasmuch as he who seeks equity must do equity, plaintiff, who has benefited by the liquidation of debts that would have been binding on the estate in his hands, must, before taking possession after the alienor's death, repay the benefit so received."

There can be no two opinions about the correctness of the aforesaid remarks and, if I may say so with respect, the ruling in question lays down perfectly correct law. All that this means is that the High Court's decree in the previous declaratory suit could be interpreted only to mean that the mortgage was not to bind the plaintiff at all and that he was entitled to take possession of the property on payment of Rs. 1,200 not because the property was to be treated as one under mortgage for that amount but because the plaintiff was bound to pay that sum, for the estate, which he claimed, had benefited to that extent. If the plaintiff so chose, he was certainly entitled to take advantage of this decree and to take possession of the property on payment of Rs. 1,200. This, however, could be done within the period of limitation prescribed for such a suit. The plaintiff did not elect to avail of the said remedy and he did not file the aforesaid suit for possession within the period of limitation prescribed for that. This could not, however, deprive him of his ordinary remedies as an heir of the mortgagor. The mortgagor had a right

to redeem the property on payment of the mortgage amount and those rights obviously vested in his successor-in-interest which the plaintiff admittedly is.

Nand Singh  
alias Tula  
and another,  
v.  
Ram Sarup,

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Gosain, J.

Mr. Shamair Chand then refers to another case *Ror Singh and others v. Hukam Chand and others* (1), in which it was held by a learned Single Judge of this Court that "where the widow of a person mortgages the property and the Court, in a suit for declaration by the reversioners of the deceased that the mortgage is not binding on them finds that a part of the consideration *qua* the reversioners has never passed, the mortgage wholly fails and is not subsisting for purposes of section 4 of Punjab Act (IV of 1938)". The facts of that case are entirely distinguishable from those of the present case. There, Mst. Attar Kaur and Mst. Prem Kaur mortgaged 197 bighas and 3 biswas of land in favour of one Ishaq Lal for a sum of Rs. 1,625. Some of the reversioners filed a suit for declaration that the mortgage made by Mst. Attar Kaur and Mst. Prem Kaur were without consideration and necessity and were not binding on the reversioners of their husbands. A decree was passed by the trial Court on the 30th October, 1888, saying that the mortgage of the share of Mst. Attar Kaur's land was without consideration and necessity, and was not, therefore, binding upon the reversioners of her husband but the mortgage of Mst. Prem Kaur was valid to the extent of Rs. 1,350 only. That decree was mainly upheld by the lower Appellate Court but the terms of the decree were slightly changed so as to provide that the mortgage of Kishan Singh's share measuring 199 *bighas* and 13½ *biswas* will only be operative during the life

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(1) A.I.R. 1950/E.P. 64.

Nand Singh  
alias Tula  
and another,  
v.  
Ram Sarup,  
Gosain, J.

time of Mst. Attar Kaur and will not affect the reversionary rights of the plaintiff and that on the death of Mst. Prem Kaur plaintiffs will be entitled to redeem Jang Singh's share amounting to 199 *bighas* 13½ *biswas* on payment to Ishaq Lal of a sum of Rs. 1,350. It appears that the reversioners filed a suit for possession by redemption of the land somewhere in 1925 but were nonsuited on the ground that the decree passed on 30th October, 1888 did not create a judicial hypotheca and that the suit was barred by time. An attempt was again made by the reversioners to obtain possession of the land by redemption of the mortgage allegedly created by the decree, dated the 13th October, 1888 and this attempt succeeded with the Special Collector appointed under the Punjab Act, IV of 1938. A suit was then brought challenging the aforesaid decree on the ground that there was no mortgage created by the decree, dated the 13th October, 1888 and that the Special Collector had, therefore, no jurisdiction to redeem the mortgage under the Restitution of Mortgaged Lands Act (IV of 1938). This suit was decreed by the lower appellate Court and the said decree was upheld by the learned Single Judge of this Court who mainly relied on *Fazal Ahmed and others v. Shahab Din and others* (1) and found that the previous decree could not be deemed to have created any mortgage.

In the present case, however, reliance is not placed on any mortgage created by the decree. The original mortgage made on the 22nd February, 1934, is sought to be redeemed by the plaintiff, who is successor-in-interest of the mortgagor and who has failed to take advantage of the declaratory decree passed in his favour. We are not inclined to

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(1) 92 P.R. 1909.



hold that the successor-in-interest of the original mortgagor cannot maintain a suit for redemption of the original mortgage simply because he obtained a declaratory decree that the mortgage was not binding on him and that he could take possession of the property on payment of Rs. 1,200 and failed to avail of the decree. We are definitely of the opinion that it was for the plaintiff to avail of the decree or not to do so, and if he chose not to avail of it, he cannot be deprived of his rights to obtain redemption of the mortgage as an heir of the mortgagor on payment of the mortgage money in terms of the mortgage deed itself. The view taken by the lower appellate Court seems to us to be quite correct and in the result we dismiss the appeal with costs.

Nand Singh  
alias Tula  
and another,  
v.  
Ram Sarup,  

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Gosain, J.

MEHAR SINGH, J.—I agree.

R.S.

REVISIONAL CRIMINAL.

*Before D. Falshaw and Harbans Singh, JJ.*

JODH SINGH AND OTHERS,—*Petitioners.*

*versus*

MAHANT BHAGAMBAR DASS AND OTHERS,—*Respondents.*

Criminal Revision No.1873 of 1959

*Code of Criminal Procedure (V of 1898)—S. 145(1)(4) and (9)—Procedure prescribed by—Difference in procedure introduced by the Amendment Act (XXVI of 1955) Persons whose affidavit not filed in Court—Whether can be summoned to give evidence—Proceedings under section 145—Nature and object of.*

1960

Oct. 11th.

Held, that a comparison of the provisions of sub-section (1) and (4). as they existed prior to the amendment