APPELLATE CIVIL.

Before Mr. Justice Wilson and Mr. Justice Field.

TAPONIDI HORDANUND BHARATI AND ANOTHER (TWO OF THE DEFENDANTS) *v.* MATHURA LALL BHAGAT (PLAINTIFF).*

1885 *December* 22.

Civil Procedure Code, 1882, *ss.* 294, 295—*Rateable distribution of assets—Allowance of set-off of purchase money against amount of decree—Suit for share of sale proceeds—Limitation—Principle of distribution.*

In execution of a decree against *M* the plaintiff attached and advertized for sale certain property in mouzah *A*. At that time there were pending proceedings in execution of two other decrees obtained against *M* by the first and second defendants respectively. These two decrees were obtained on a bond executed by *M*, by which an eight annas share of mouzah *A* was hypothecated as collateral security; and in execution of those decrees the defendants brought to sale, and themselves purchased, not an eight annas share only but the whole of mouzah *A*, and were allowed by the Court to set off the purchase money against the amounts due to them under their decrees. At the same time the plaintiff's execution case was struck off on 30th June 1880. In a suit brought by the plaintiff under s. 295 of the Civil Procedure Code for his share of the sale proceeds of mouzah *A*, in which the plaintiff alleged fraud on the part of the defendants in selling the whole mouzah under their decrees, of which he only became aware in July 1882, from which time he dated his cause of action, the defendants denied the fraud and contended that the suit should have been brought within a year of the order of the 30th June 1880; that a set-off having been allowed to the defendants, the plaintiff was not entitled to any rateable distribution; and that if any rateable distribution were allowed, they were entitled to have an allowance made in respect of a mortgage which the plaintiff held in a two annas share of mouzah *A*, which they had paid off subsequently to the transactions now in question. *Held*, that the existence of the order of the 30th June 1880 was not inconsistent with the plaintiff's right, and the suit was therefore not barred as not having been brought within one year of that order. *Held*, also, that the fact of the set-off being allowed in exercise of the power given in s. 294 of the Code, instead of actual payment into Court, did not alter the substantial nature of the transaction, so as to render the purchase money less applicable to the satisfaction of the debts of other attaching creditors.

Held, further, that the defendants were not entitled to deduct the sum paid by them to clear off the plaintiff's mortgage, from the amount of the

* Appeal from Appellate Decree No. 1569 of 1885, against the decree of J. B. Worgan, Esq., Judge of Cuttack, dated the 19th of March 1885, modifying the decree of Baboo Radha Krishna Sen, Subordinate Judge of that District, dated the 21st of May.

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purchase money, before the Court could determine the amount rateably distributable among the parties concerned. *Quære*—Whether they were even entitled to reckon the amount so paid as one of the claims in respect of which, with others, a rateable distribution should be made.

THE facts of this case were stated as follows, in the judgment of the Subordinate Judge:—

"The plaintiff and Mussamut Golap Kumar and Bacha Dei had obtained a decree for Rs. 2,470 against one Mohanund Bun Gossain, the guru of the defendant No 3, and in execution of this decree they attached and caused to be advertized for sale mouzah Arol, the rent-free property of the said Gossain. Afterwards Golap Kumar and Bacha Dei sold their interest in the decree to the plaintiff, who thus became the *sole* decree-holder in execution case No 111 of 1879. There were, however, two other execution cases, Nos. 151 and 152 of 1879, pending at the time against Mohanund Bun Gossain, the decree-holder in one of them being defendant No. 1, and in the other the defendant No. 2, who had purchased his decree from one Hur Sahoy Lal. Mohanund had borrowed some money from the defendant No. 1 and Hur Sahoy Lal, and executed a bond in their favor on the 11th December 1869, by which he had hypothecated an eight annas share of mouzah Arol, as collateral security for the realization of the money lent. The defendant No. 1 and Hur Sahoy Lal, however, brought two separate suits, and each obtained a decree, declaring his mortgage lien over the eight annas share of mouzah Arol. The defendants Nos. 1 and 2 also brought the whole of mouzah Arol to sale, fraudulently representing that the same was mortgaged by the bond, dated the 11th December 1869, and they were allowed by the Court to set off the purchase money against the amounts due to them. On the same day, 30th June 1880, the plaintiff's execution case was struck off the file.

"The plaintiff being thus deprived of his share in the sale proceeds of eight annas of the property which were not mortgaged with the defendant No. 1 and Hur Sahoy Lal, has instituted this suit under s. 295 of the Civil Procedure Code, and he avers that he became aware of the defendants' fraud in the month of July 1882, whence he dates his cause of action. He claims Rs. 1,752 in satisfaction of his decree out of the sale-proceeds appropriated by the defendants.

"The defendants Nos. 1 and 2 reply that the Court having held that the plaintiff was not entitled to any rateable distribution of the sale-proceeds of mouzah Arol, struck off his execution case on the 30th June 1880, and the suit not having been brought within one year of that date, is barred by limitation; that of the sale proceeds only Rs. 135-14-1 were paid into Court, the remainder being allowed to be set off against the amounts due to the defendants Nos. 1 and 2, and the Court could not therefore make a rateable distribution; that the plaintiff's allegation, as to his being ignorant of the

whole of mouzah Arol having been mortgaged with defendant No. 1 and Hur Sahoy Lal, and the defendants committing a fraud against him, is wholly false; that two annas of mouzah Arol was mortgaged with the plaintiff by Mohanund Bun Gossain, and the plaintiff having obtained a decree, declaring his mortgage lien over the said two annas, applied for the execution of his decree (in execution case No. 115 of 1882); that at the time of the sale of mouzah Arol, the defendant No. 2 had another execution case (No. 136 of 1880) pending in Court against the debtor Mohanund Bun Gossain for the realisation of Rs. 3,631-1-7, but had received Rs. 5-7-1 out of the sale-proceeds on account of the money due to him; and that, therefore, even if the Court ordered at the time any rateable distribution of the sale-proceeds, all these decrees would have been taken into consideration."

The issues settled were: (1), whether the suit was barred by limitation; (2), whether the plaintiff was entitled to maintain the suit; (3), whether the plaintiff could recover any portion of the sale proceeds of mouzah Arol from the defendants? If so to what extent?

The Subordinate Judge held that the suit was barred by limitation, and dismissed it without deciding on the other issues.

The Judge reversed that decree and decided the issue as to limitation in favor of the plaintiff.

On the second issue, with respect to which the cases of *Vishvanath Moheshvar* v. *Virchand Panachand* (1); and *Viraragava Ayyangar* v. *Varada Ayyangar* (2) were referred to, the Judge held that the fact of the set-off being allowed to the defendants, and the purchase-money thereby prevented from coming actually into the hands of the Court, did not interfere with the right of the plaintiff to maintain the suit.

On the 3rd issue the judgment of the lower Appellate Court was as follows: —

"There were, it is said, *five* decrees in execution against the debtor Mohanund Bun Gossain, at the time of the sale in the defendants' execution cases, *inclusive* of their two decrees in original suits Nos. 14 and 15 of 1874, in which the plaintiff was decree-holder, and in original suit No. 36 of 1879 in which defendant No. 2 was so; and it was said that, if there had been rateable distribution at the time of the sale of May 1880, it would have had to be between the decree-holders in these five decrees, and not only as prayed for by the plaintiff.

"To this it was replied that there were no other *decrees for money* under execution at the time. The defendant's decree, in original suit No. 36 of

(1) I. L. R., 6 Bom., 16. (2) I. L. R., 5 Mad., 123.

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1879, was not a money-decree, being a decree on a mortgage bond in which defendant No. 2 was the mortgagee, and as such not entitled to share in the surplus.

"As regards this matter of mortgage in the execution on the above suit being execution case No. 136 of 1880, it was said that the mortgage caused no bar to the defendant, as the property was not sold subject to the mortgage. Reference was made to *Fukeer Buksh* v. *Chutturdharee Chowdhry* (1) and *Joy Chunder Ghose* v. *Ram Narain Poddar* (2), to show that the fact of there being an undisclosed mortgage would make no difference. I find that in the sale proclamation in the case nothing was said of the second mortgage of January 1876 on which defendant No. 2 sued, and as far as the public went, the mortgage was undisclosed, and the bidding may be taken to have been what it would have been for an unencumbered property. Any way I do not see how I could, in the face of the rulings cited, say that the property was *sold subject to the mortgage*, and, if so, the defendant would not have been barred from rateable distribution, his first execution in suit No. 36 of 1879 having been started before the sale of May 1880 in No. 86 of 1880.

It is worthy of note that the plaintiff himself in asking for rateable distribution does so on the strength of a decree, which is solely a decree for money. He had a mortgage of two annas on the Arol mouzah when he took out execution of this decree, but *he* also said nothing then of this. No sale-proclamation has as yet issued. In his case also it cannot be said that the property, when it was sold, was sold subject to his mortgage.

It was urged that the decree in No. 36 of 1879 was barred when the plaintiff sued, and there can be no rateable distribution as regards it now. To this, however, it was said that, if there is to be rateable distribution at all, it must be such as would have been made at the time of the sale of May 1880, had the Court at the time acted in accordance with the law. This principle seems to me a proper one to adopt.

"It was further urged that as the defendants paid off the plaintiff's two annas mortgage in execution suit No. 115 of 1882 of original suit No. 15 of 1874, if the plaintiff is now to get rateable distribution, the money so paid by them, being some Rs. 1,981, must be deducted from what he would otherwise get, as, had he got this at first, *they* would not have had to pay him it. To this it was urged that this money cannot come into the hotchpot, having been paid long after the rateable distribution would have been made.

"Having regard to the character of the five decrees which the defendants say should form the subject of rateable distribution if ordered at all, and to the dates of their execution applications, and to what was made public in such sale-proclamations as are seen to have been issued, I am of opinion that the contention of the respondents-defendants' pleader on the point is

(1) 14 W. R., 209. (2) 21 W. R., 43.

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correct, and that the half of the Rs. 12,040 representing the proceeds of the unmortgaged eight annas of Arol at the sale in execution cases Nos. 151 and 152 of 1879, ought to have then been rateably divided between the decree-holders in the five cases. As regards the payment of Rs. 1,981 which defendants made in plaintiffs' two annas' mortgage execution, I do not think they are entitled to get any allowance for this now, as I am ascertaining what would have been the rateable distribution *then*, and it was their own fault if they, owing to their own wrongful act excluding plaintiff from rateable distribution, had to pay him the money they did on *another* account. The five decrees must be taken at what they stood at on the date of sale, *viz.*, the 15th of May 1880, being the decrees in original suits Nos. 12 (part), 14, 15 and 16 (part) of 1874, and No. 36 of 1879 of the Subordinate Judge's Court, and the Rs. 6,020 must be divided amongst the holders of these decrees in proportion to their decrees as found to be. Whatever amount is found by this calculation to be what plaintiff would have received had there *then* been a rateable distribution on this principle, that sum he is entitled to get from the defendants, who, as we have seen, took the whole money. He will also get interest on such sum at 6 per cent. from the date of sale to date of this judgment, and costs in both Courts."

Defendants Nos. 1 and 2 appealed from this decision to the High Court.

Mr. *R. E. Twidale*, and Mr. *H. E. Mendes*, for the appellants.

Baboo *Mohesh Chandra Chowdhry*, and Baboo *Karuna Sindhu Mukerji*, for the respondent.

The judgment of the Court (WILSON and FIELD, JJ.) was as follows:—

The facts of this case sufficiently appear in the judgment of the Court below.

Three points have been discussed before us. The first is the question of limitation. It has been argued that the suit is barred, because it was not brought within a year from the date of the order of the 30th June 1880. On that point we entirely agree with the lower Appellate Court. This is *not* a suit to set aside any order at all. It is a suit brought to enforce a right which the law gives to the plaintiff, and which right arose by virtue, among other things, of that order; but the existence of that order in full force is in no sense inconsistent with the right of the plaintiff. It is a suit governed by some one or other of

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the articles in the schedule to the Limitation Act. It is not necessary for us to discuss under which article it falls, because under whatever article it falls the suit is in time.

The second point taken before us is this, that, because in this case the defendants as to the larger part of the purchase-money were allowed to set it off against their judgment-debt instead of actually paying it into Court in coin, therefore the purchase-money never became assets of the estate of the judgment-debtor applicable to the satisfaction of the debts of those creditors who had obtained decrees and orders for execution. We are of opinion that the power given in s. 294 of the Code of Civil Procedure is not intended to alter the substantial nature of the transaction. In a proper case, in order to prevent trouble and inconvenience, the law allows the Court to sanction a set-off instead of a payment in followed by a payment out. But the purchaser who has obtained this indulgence cannot, in our opinion, take advantage of it so as to alter the substance of the transaction and alter the rights of other creditors.

Then it is argued that, assuming this to be the state of the law, the principle of distribution adopted by the Court below has been too favorable to the plaintiff. It is said, granting that as to the eight annas of the property sold, the defendants, who were both the selling creditors and the purchasers, were only entitled to share rateably with other creditors, and granting that the plaintiff under his money decree was entitled to a rateable share, there was another judgment-debt as to which execution proceedings had been taken, and in respect of which allowance should be made, that is to say, the debt arising out of a decree obtained by the plaintiff in respect of his mortgage of a two annas share of the property in question, which mortgage and decree the defendants in this suit, subsequently to the transactions now in question, paid off. In other words, they claim to be allowed to deduct the money which they paid in satisfaction of that claim of the plaintiff from the amount of the purchase money in question, before the Court can say what was the amount distributable rateably among the parties concerned. This contention seems to us wholly untenable. The claim of the present plaintiff with regard to that matter was a mortgage claim in

respect of two annas of the property, and ho was, so far as appears, the sole mortgagee. Therefore, the present defendants, when they purchased that property upon which the plaintiff hold a mortgage, and purchased it under proceedings to which the plaintiff was no party, purchased subject to the mortgage. *Primâ facie*, therefore, when the defendants paid off that mortgage, they paid it off for their own benefit in order to clear their property of an encumbrance. What the District Judge appears to have done was this, not to allow them to deduct the whole of that amount before ascertaining what was distributable, but to allow them to reckon this judgment-debt as one of the claims in respect of which, with others, a rateable distribution was to be made. Whether he was right in doing that, and whether he may not, perhaps, have dealt with the matter on a footing too favorable to the present defendants, it is not necessary for us to consider, because there is no cross-appeal before us. It is clear, we think, that the principle on which the matter has been dealt with has not given undue advantage to the plaintiff.

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The result is that the appeal will be dismissed with costs.

J. V. W. *Appeal dismissed.*

Before Mr. Justice Mitter and Mr. Justice Agnew.

LALA JUGDEO SAHAI (PLAINTIFF) *v.* BRIJ BEHARI LAL AND OTHERS (DEFENDANTS).*

1886 *January* 14.

Transfer of Property Act (IV of 1882), s. 131—Transfer of Debts—Notice of transfer—Assignment of Mortgage—Mortgagor, Liability of, to Assignee of Mortgagee when no notice of Assignment given.

The provisions of the Transfer of Property Act apply to the assignment of a mortgage made after that Act came into force, although the mortgage may have been made before the commencement of that Act.

An assignment is perfectly valid though the notice referred to in s. 131 of the Transfer of Property Act has not been given, though the title of the assignee as against third parties is not complete until such notice has been given; the object of such notice being the protection of the assignee.

* Appeal from Appellate Decree No. 746 of 1885, against the decree of Baboo Grish Chundra Chatterji, Officiating Subordinate Judge of Tirhoot, dated the 27th of January 1885, affirming the decree of Baboo Gopal Chundra Banerji, Munsiff of Hajipore, dated the 29th May 1884.