

tuted after the Act came into force. I cannot understand why the Legislature should have so intended, for though a suit may have been instituted before the Act was passed no right of special appeal would accrue, so the Act cannot be said to operate unjustly in taking away by retrospective action any right of appeal already accrued, when it is made to apply to decrees or orders passed after it came into force. The provisions of the new Civil Procedure Code may not be applicable for deciding this case, but it may be noticed that the provisions of s. 586 of Act X of 1877 admit of no doubt on the point, and they were presumably intended to re-enact the old law on the point, and the view I take is in accordance with a Full Bench of the Calcutta Court (1).

On the above view of the law, I am of opinion that this Court had not jurisdiction to hear the appeal, and I allow the review of judgment and dismiss the appeal. Each party should pay his own costs in this Court.

Appeal dismissed.

Before Mr. Justice Turner and Mr. Justice Oldfield.

BHAGIRATH (DEFENDANT) v. NAUBAT SINGH (PLAINTIFF),*

Mortgage—Contribution.

M, *B*, and *N* held mauza *D* in equal one-third shares, and *M* also held a share in mauza *A*. On the 3rd January, 1863, *M* and *B* mortgaged their shares in mauza *D* to *L* to secure a loan of certain moneys. On the 16th March, 1870, *M*, *B*, and *N* mortgaged mauza *D* to *R* to secure a loan of Rs. 600 and on the same day, by a separate deed, they mortgaged mauza *D*, and *M* mortgaged his share in mauza *A*, to *R*, to secure a loan of Rs. 1,600. On the 8th December, 1875, *L* obtained a decree for the sale of the shares of *M* and *B* in mauza *D* for the satisfaction of the mortgage-debt due to her. On the 18th April, 1876, *R* obtained a decree for the realisation of the mortgage-debts due to him by the sale of mauza *D* and *M*'s share in mauza *A*. On the 23rd October, 1876, the shares of *M* and *B* in mauza *D* were sold in the execution of *L*'s decree, and were purchased by *R*. A portion of the purchase-money was applied to satisfy *L*'s decree, and the balance of it was deposited in Court. Instead of applying to the Court to pay him this balance in execution of his decree dated the 18th April, 1876, *R* attached and obtained payment of such balance in execution of a decree for money which he held against *M* and *B*. On the 20th June, 1877, *R*, in execution of his decree dated the 18th April,

1879

BHICHUK
SINGH
v.
NAGESHAR
NATH.

1879

January

(1) 12 B. L. R. 224 ; 14 W. R., F. B. 30.

* Second Appeal, No. 836 of 1878, from a decree of W. Lane Esq., Judge of Moradabad, dated the 13th June, 1878, reversing a decree of Maulvi Muhammad Sami-ul-la Khan, Subordinate Judge of Moradabad, dated the 6th March, 1878.

1879

AGIRATH
v.
NAUBAT
SINGH.

1876, brought to sale *N*'s one-third share in mauza *D*, and became its purchaser. On the 20th July, 1877, *R*, in execution of a decree for money against *N*, brought to sale his share in mauza *A*, and became its purchaser. Held, in a suit by *N* against *R* in which he claimed that the sum due by him under the two mortgages dated the 16th March, 1870, and the decree dated the 18th April, 1876, might be ascertained, and that, on payment of the amount so ascertained, the sale of his one-third share in mauza *D* might be set aside, and such share declared redeemed, that the sale of *N*'s share in mauza *D* could not be set aside.

Held also that, if it were shown that the sum realised by the sale of his one-third share in mauza *D* exceeded the proportionate share of his liability on the two mortgages, he was entitled to recover one moiety of such excess as a contribution from mauza *A*.

As it appeared that there was such an excess the Court gave *N* a decree for a moiety of such excess together with interest on the same from the date of the sale of *N*'s share at the rate of twelve per cent. per mensem, and further directed that, if such moiety together with interest were not paid within a certain fixed period, *N* would be at liberty to recover it by the sale of the share in mauza *A*, or so much thereof as might be necessary to satisfy the debt.

THIS was a suit in which the plaintiff claimed a declaration of the amount due by him under certain mortgages, and the decree enforcing those mortgages, and that, on payment of the amount so declared, the sale of his interest in the mortgaged property might be set aside and such interest declared redeemed. The Court of first instance dismissed the suit. The lower appellate Court, on appeal by the plaintiff, gave him a decree, against which the defendant preferred the present appeal to the High Court. The facts of the case are sufficiently stated for the purposes of this report in the judgment of the High Court.

Pandit *Bishambar Nath*, *Mir Zakur Husain*, and *Munshi Hanuman Prasad*, for the appellant.

Munshi Kashi Prasad and *Sukh Ram*, for the respondent.

The High Court (*TURNER, J.* and *OLDFIELD, J.*) delivered the following

JUDGMENT.—*Mahtab Singh*, *Balwant Singh*, and *Naubat Singh*, the respondent, held mauza *Darni* in equal one-third shares and *Mahtab Singh* also held a $2\frac{1}{2}$ biswa share in mauza *Atwa*. On the 3rd January, 1863, *Mahtab Singh* and *Balwant Singh* hypothecated their share in mauza *Darni* to secure a loan advanced by *Ladli Begam*. On the 16th March, 1870, *Mahtab Singh*, *Balwant Singh*, and

Naubat Singh hypothecated mauza Darni to the appellant to secure a loan of Rs. 600, and by another deed executed on the same date the same persons hypothecated mauza Darni, and Mahtab Singh his $2\frac{1}{2}$ biswa share in mauza Atwa, to the appellant to secure a loan of Rs. 1,600. On the 8th December, 1875, Ladli Begam obtained a decree for the sale of the shares of Mahtab Singh and Balwant Singh in mauza Darni for the satisfaction of the mortgage debt to her. These shares were accordingly sold on the 23rd October, 1876, and purchased by the appellant for Rs. 7,000. Of this sum Rs. 5,954-12-0 were applied to satisfy the decree held by Ladli Begam and the balance Rs. 1,322-4-0, after deducting Rs. 18 commission on the sale, were deposited in Court. On the 18th April, 1876, the appellant obtained a decree for the realisation of the mortgage-debts due to him by sale of mauza Darni and the $2\frac{1}{2}$ biswa share in mauza Atwa. In execution of this decree he might and it may be should have applied to the Court to pay to him the surplus remaining in Court after the satisfaction of the decree of Ladli Begam, but instead of so doing he attached and obtained payment of the sum of Rs. 1,322-4-0 in execution of a money-decree which he held against Mahtab Singh and Balwant Singh. On the 20th June, 1877, the appellant in execution of his decree of the 18th April, 1876, brought to sale the one-third share of Naubat Singh in mauza Darni and became the purchaser of that share for the sum of Rs. 2,600, the amount due under the decree being Rs. 5,004. On the 20th July, 1877, the appellant in execution of a money-decree against Mahtab Singh brought to sale the $2\frac{1}{2}$ biswa share belonging to Mahtab Singh in mauza Atwa, and although the property was knocked down to one Daya Ram was himself registered as the purchaser.

The respondent Naubat Singh filed the suit now before the Court in appeal, praying that the sum due by him under the mortgages of the 16th March, 1870, and the decree of the 18th April, 1876, may be ascertained, and that on payment of the amount so ascertained the sale of his one-third share in mauza Darni may be set aside and the share declared redeemed.

The Subordinate Judge held that on the facts above stated the sale could not be set aside and dismissed the suit. The District

1879

 BHAGIRAT
 v.
 NAUBAT
 SINGH.

1879

SHAGIRATH
v.
NAUBAT
SINGH.

Judge has reversed the decree of the Court of first instance, and decreed that on payment of the respondent's share of the decree of the 18th April, 1876, which by the way is not ascertained in the judgment, nor in the decree, the sale of the respondent's one-third share in Darni shall be set aside and the mortgage-debt redeemed.

We are compelled to hold that the sale of the one-third share of Naubat Singh cannot be set aside. If the respondent could have shown that there were grounds on which the sale should not have taken place, he should have resisted the order for sale, but in fact there were no grounds. He could not have shown that there was nothing due from him on the mortgages to which he was a party jointly with Mahtab Singh and Balwant Singh without any specification of their several liabilities. He might perhaps have called upon the Court executing the decree to have declared the amount outstanding on the decree reduced by the sum of Rs. 1,322-4-0, and had he brought into Court the amount found due the Court would have set aside the order for sale. The respondent would in that case also have been at liberty to make the owner of the $2\frac{1}{2}$ biswa share of Atwa contribute to the payment of any sum paid by him in excess of his own share of the mortgage-debt for which that property was pledged together with mauza Darni.

The respondent's one-third share of Darni was, however, sold and realised Rs. 2,600, and if it be shown that the proportionate share of the appellant's liability on the two mortgages does not amount to so much, he is entitled to recover one moiety of the excess paid on account of the mortgage for Rs. 1,600 as a contribution from mauza Atwa. It appears that the debts of Rs. 600 and Rs. 1,600 respectively amounted, with interest, &c., at the time the decree was executed, to Rs. 5,961-10-5. The debt of Rs. 600 was then swollen to Rs. 1,625-14-5 $\frac{1}{2}$ $\frac{6}{8}$, and the debt of Rs. 1,600 to Rs. 4,335-11-11 $\frac{1}{4}$ $\frac{6}{8}$. The respondent's one-third share of the liability of Rs. 1,625-14-5 $\frac{1}{2}$ $\frac{6}{8}$ amounted to Rs. 541-15-5 $\frac{2}{4}$ $\frac{6}{8}$; the shares of his co-debtors to Rs. 1,083-14-11 $\frac{1}{2}$ $\frac{6}{8}$. The respondent's share of the liability for Rs. 4,335-11-11 $\frac{1}{4}$ $\frac{6}{8}$ amounted to Rs. 1,445-3-11 $\frac{5}{8}$ $\frac{6}{8}$. After applying the Rs. 2,600 realised by the sale of the respondent's share to the discharge of these liabilities, it will be seen that a balance of Rs. 2,058-0-6 $\frac{1}{4}$ remains, after discharging

Rs. 541-15-5 $\frac{2}{3}$ his liability under the mortgage for Rs. 600; and after discharging from this balance Rs. 1,445-3-11 $\frac{5}{6}$, his liability under the mortgage for Rs. 1,600, a surplus of Rs. 612-12-6 $\frac{2}{3}$; he has a right to claim contribution from mauza Atwa to the extent of one moiety of this amount, *viz*, Rs. 306-6-3 $\frac{1}{6}$. Although then we must reverse the decree of the Court below setting aside the sale, the respondent is entitled to a declaration that Rs. 306-6-3 $\frac{1}{6}$ are due as a contribution from mauza Atwa, and to interest on that sum from the date of sale at the rate of 12 per cent. per annum; and in order to avoid future litigation we consider it not improper to order in this suit that, in the event of that sum with interest to the date of payment not being paid within three months from the date of the decree, the respondent shall be at liberty to recover it by the sale of the 2 $\frac{1}{2}$ biswa share in Atwa or so much thereof as may be necessary to satisfy the debt. We order that the respondent bear his own costs and pay two-thirds of the costs of the appellant in all Courts, the costs so awarded are to be set off against so much of the amount declared due to the respondent under the decree.

1879

BHAGIRATI
v.
NAUBAT
SINGH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie, and Mr. Justice Oldfield.

1879
January 31

GOSHAIN GIRDHARIJI (DEFENDANT) v. DURGA DEVI (PLAINTIFF).*

Arbitration—Act XVIII of 1873 (N.-W. P. Rent Act) — Act XIX of 1873 (N.-W. P. Land Revenue Act).

Under the general law parties to suits may, if they are so minded, before issue joined, refer the matters in dispute between them to arbitration, and after issue joined, with the leave of the Court.

Act XVIII of 1873 does not prohibit the parties to the suits mentioned therein from referring the matters in dispute between them in such suits to arbitration.

Where therefore the parties to a suit under that Act agreed to refer the matters in dispute between them to arbitration, after issues had been framed and evidence recorded, and applied to the Court to sanction such reference, *held* (STUART, C. J., dissenting) that the Court was competent to grant such sanction, and on receiving the award to act on it.

THIS was an appeal to the High Court heard by a Division Bench composed of Stuart, C. J., and Spankie, J., which was referred

* Second Appeal, No. 595 of 1878, from a decree of H. G. Keene, Esq., Judge of Agra, dated the 8th March, 1878, affirming a decree of Pandit Debi Prasad, Assistant Collector of Muttra, dated the 23rd November, 1877.