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RAM SAHAI
2,
KEHWAL
SINGH.

ment Revenue, the market-value of the property would be about Rs. 6,000, calculating it at fifteen years' purchase, while the price paid by the defendants was very much less.

From these facts I deduce these conclusions:—First, that the decree of the 24th December, 1868, was a personal decree, passed against the father of the present plaintiffs, for a liability which was immoral; secondly, that the decree was never intended to render the sons liable thereto; thirdly, that the sale, which took place in consequence of that decree in 1873, was a sale professing to convey neither more nor less than the right, title and interest of the judgment-debtor, the father; fourthly, that the present defendants-appellants purchased the property at that sale, knowing full well that they were purchasing the right, title and interest of the father, and no more.

As to the other point, whether the form of the decree was right in decreeing possession of the whole, I need only read out the following from the judgment of their Lordships of the Privy Council:—"According to the judgment of their Lordships in *Deendyal's* case, the decree which ought properly to have been made, would have been that the plaintiff, the first respondent, should recover possession of the whole of the property, with a declaration that the appellant, as purchaser at the execution sale, had acquired the share and interest of Shib Perakash Misser, and was entitled to take proceedings to have it ascertained by partition."—*Hurdey Narain Sahu v. Ruder Perakash Misser* (1). I concur in dismissing the appeal with costs.

Appeal dismissed.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

BIR BHADDAR SEWAK PANDE (DEFENDANT), v. SARJU PRASAD
(PLAINTIFF).*

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June 3.

Principal and agent—Right of person dealing with agent personally liable—Suit and judgment recovered against agent—Subsequent suit against principal barred—Act IX of 1872 (Contract Act), s. 233.

The obligee under a hypothecation bond brought a suit thereon against one who upon the face of the instrument, contracted as obligor, but whom, when the

* First Appeal No. 213 of 1885 from a decree of Maulvi Shah Ahmad-ulla Subordinate Judge of Gorakhpur, dated the 9th September, 1885.

(1) L. R., 11 I. A. 26; J. L. R., 10 Calc. 637,

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As it was instituted, the plaintiff knew to have acted as agent in the transaction for a third person. Having obtained a decree, he satisfied it in part by attachment of a sum of money, and next caused the hypothecated property to be sold, and purchased it himself. Upon attempting to obtain possession he was successfully resisted by the principal debtor under the hypothecation bond, on the ground that the latter was the real owner of the property, and that the decree-holder had derived no title thereto from his judgment-debtor. He then sued the principal debtor to recover the balance remaining due upon the bond, after giving credit for the amount recovered by attachment in the suit against the agent.

Held that the plaintiff having elected to hold the agent responsible upon the contract, and having obtained judgment and decree against him and written up full satisfaction of the decree, could not afterwards maintain a suit against the principal in respect of the same subject-matter. *Priestly v. Fernie* (1) referred to.

THE facts of this case are for the most part stated in the judgments of the Court. They may be shortly summarised as follows. The plaintiff, Sarju Prasad, on the 3rd December, 1871, advanced to one Nandan Tiwari, whom he knew to be acting as agent for Bir Bhaddar Sewak Pando, a sum of Rs. 9,000 secured by hypothecation of five villages which Nandan Tiwari had purchased for his principal in execution of a decree obtained against the latter by Mewa Lal. Subsequently the plaintiff sued Nandan Tiwari to enforce the hypothecation, and, Nandan Tiwari having confessed judgment, obtained a decree, in execution whereof the five villages were sold, and were purchased by the plaintiff, decree-holder, himself. Upon attempting to take possession of the villages, he was resisted by Bir Bhaddar Sewak Pando, who claimed to be the real purchaser at the sale in execution of Mewa Lal's decree; and he then brought a suit to recover possession upon the basis of the title which he had derived from Nandan Tiwari, and upon the allegation that Nandan Tiwari, and not Bir Bhaddar, was the real purchaser. That suit was dismissed by the High Court on appeal; and the plaintiff then instituted the present suit against Bir Bhaddar to recover the balance due upon the hypothecation-bond, giving credit for a sum which had been realized in execution of his decree against Nandan Tiwari, apart from the sale of the five villages.

The hypothecation bond of the 3rd December, 1871, was in the following terms:—

"I, Nandan Tiwari, son of Mehgi Tiwari, resident of mauza Basuli, tappa Kuswansi, pargana Bhuapara, zila Gorakhpur, do hereby declare, as I, the exe-

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cutant, have purchased at auction, on 20th November, 1871, the share of Bir Bhaddar Sewak Pande, Musammat Janki Pandain, Satnarain Sewak Pande, judgment-debtors, situate in mauza Dhara Buzurg and Milayan Khurd and Buzurg, tappa Kuswansi, pargana Bhuapara, and mauza Kewalchuck, tappa Rajdhani, pargana Haveli Gorakhpur, and manzas Karunpur and Mundera, tappa Nagwan Bangur, pargana Silhat, which were sold in the execution of the decree of Mewa Lal Pathak and others, decree-holders, for Rs. 12,325, and have paid Rs. 3,031-4-0 as earnest money on the day of sale. Now we have borrowed Rs. 9,000 of the Company's coin, half of which is Rs. 4,500, from Babu Sarju Prasad, banker, son of Babu Rupchand, banker, resident and zamindar of mohalla Alinagar, in the city of Gorakhpur, for the payment of the balance of the sale consideration, and in lieu of it have mortgaged and hypothecated the said purchased share of the villages, i. e., 4 annas and 1 pie share of mauza Dhara Buzurg; a 5 annas share of mauza Malalun Khurd and Buzurg, tappa Kuswansi, pargana Bhuapara, a 6 annas share of mauza Kewalchuck, tappa Rajdhani, pargana Haveli Gorakhpur, and a 4 annas share in each of the mauzas Karunpur and Mundera, tappa Nagwan Tikar, pargana Silhat, together with all the rights appertaining thereto. I do hereby promise and give in writing, that I shall pay the said principal money with interest thereon at the rate of Rs. 1-7-0 per cent. per mensem within six months. Whatever amount on account of interest shall become due up to the date of payment of any amount shall be paid first, and the surplus will go towards the principal, and all payments shall be endorsed on this bond. If I should produce a separate receipt or allege payment on any other ground than the entry of payment endorsed on this bond, then they shall be void; should I fail to pay the whole amount or any portion of it within the fixed period the said creditor shall be competent to realize the amount due to him from the mortgaged shares of the villages, and other moveable and immovable properties as well as from the person of me, the mortgagor, and I shall make no objection in respect of it. As long as I shall not pay the whole amount of principal and interest and take back this bond, I shall not transfer the mortgaged and hypothecated shares of the villages in any way, by way of sale, mortgage or gift, &c., if I do so, the transfer shall be null and void. I also covenant that even if a suit is instituted in Court by the mortgagee, I shall continue to pay the interest at the rate of Rs. 1-7-0 promised by me up to the date of payment, without any objection. The Court of justice shall be competent to award the same against me. If any danger shall appear to the said shares of the mortgaged villages purchased by me at auction, the mortgagee shall be competent to realize the principal and interest from me the executant, and from my property, by means of legal proceedings without waiting for the expiry of the stipulated period, and I, the mortgagor, shall make no objection. I have, therefore, duly executed this mortgage deed, that it may be of use in time of need. Dated the 3rd December, 1871, corresponding with Aghau Badi 6th, 1279 fasli, mohalla Alinagar, at the shop of the creditor."

The Court of first instance Subordinate Judge of Gorakhpur) decreed the claim. The defendant appealed to the High Court.

Mr. G. T. Spankie (with him Munshi Sukh Ram, Munshi Ram Prasad, and Maulvi Mehdi Hasan), for the appellant.—This

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case is governed by s. 233 of the Contract Act. Nandan Tiwari could not deny his liability under the hypothecation bond of the 3rd December, 1871, because by the terms of that bond he made himself a party to the contract, and he could not give oral evidence to vary the effect of the written agreement by showing that he was not liable: Evidence Act, s. 92, *Higgins v. Senior* (1) *Soo-pramonian Setty v. Heilgers* (2). The plaintiff was therefore competent in the first instance to hold either Nandan Tiwari or the appellant or both together liable; but having made his election to sue Nandan Tiwari alone, and having pursued that suit to judgment, he cannot now proceed against the appellant, even though the judgment is not satisfied: *Priestly v. Fernie* (3), *Kendall v. Hamilton*, per Cairns, L. C. (4), and the notes to *Thompson v. Davenport* (5) in Smith's Leading Cases.

The Hon. T. Conlan and Munshi Hanuman Prasad, for the respondent.

STRAIGHT, J.—In order to render intelligible the conclusions at which I have arrived with regard to this appeal, it is of importance very narrowly to scan the terms of the plaint, and by the light of the previous litigation between the parties and the facts therein stated, to see what precisely is the form of the suit brought by the plaintiff-respondent to which this appeal relates. The facts, as set out in the plaint, are as follows:—

One Mewa Lal held a decree of the 7th December, 1864, against three persons, viz., Bir Bhaddar Sewak Pande, Musammat Janki Pandain, and Sat Narain Sewak Pande, and in execution of that decree the zamindari properties of the judgment-debtors were advertized for sale to be held on the 20th November, 1871. Two days before the advertized date Bir Bhaddar Sewak Pande, the first of the above-mentioned judgment-debtors, came to the plaintiff in the present suit, and borrowed from him a sum of Rs. 5,000, for the purpose, as he said, of discharging the decree of Mewa Lal, and as security for that advance, he made a hypothecation bond in favour of the plaintiff, charging his zamindari interest in six villages, promising to pay the amount in six months, and undertaking to pay.

(1) 8 M. & W. 824.

(4) L. R., 4 App. Cas. at p. 514.

(2) I. L. R., 5 Calc. 71.

(5) 9 B. & C. 78.

(3) 3 H. & C. 977; 34 L. J. Exch. 172.

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interest at Re. 1-7 per cent. per mensem, or Rs. 15 per cent. per annum. On the 20th November, 1871, the sale advertized in execution of the decree of Mewa Lal took place, and the six villages, his interest in which Bir Bhaddar had already mortgaged, were sold as the property of all the judgment-debtors. One of the villages was purchased by Mewa Lal for Rs. 8,500, and the other five villages, with which we are alone concerned in the present case, were purchased by Nandan Tiwari for Rs. 12,325. How Nandan Tiwari obtained the money was this. He had apparently got sufficient to pay the earnest-money required by law to be paid in the Court at the time of sale probably out of the Rs. 5,000 lent to Bir Bhaddar, but there remained a sum of Rs. 9,000, the balance which had to be paid into Court to satisfy the amount in full at which the villages had been bought. According to the statement of the plaintiff as now made in his plaint, "Nandan Tiwari was an agent, mukhtar, friend or well-wisher of Bir Bhaddar Sewak Pande, and after the aforesaid sale, at the request and desire of Bir Bhaddar Sewak Pande aforesaid, the plaintiff lent a further sum of Rs. 9,000 for the payment of the purchase-money, obtaining a hypothecation bond from Nandan Tiwari aforesaid, in whose name the property had been purchased at auction. The rate of interest agreed upon was Re. 1-7 per cent., and the money was to be repaid within six months as shown by the registered bond dated 3rd December, 1871, which is forthcoming. The plaintiff was assured that the money borrowed was taken on security of the property, and that the execution of the bond in the name of Nandan Tiwari was necessary as a matter of form."

With regard to this paragraph in the plaint it is clear that Nandan Tiwari was, upon the face of the proceedings, the purchaser; and it is further to be taken, because the document speaks for itself, viz., the document of the 3rd December, 1871, that he was the obligor upon the face of that instrument in favour of the plaintiff, and that he was, as a purchaser of the five villages, hypothecating them to the plaintiff for the amount of the advance made to him. It must be further taken as a fact in the cause, because it is indisputable that the fact is so, that the plaintiff was well aware that though upon the face of it Nandan Tiwari was the agent for Bir Bhaddar in the transaction, Bir Bhaddar was the principal.

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borrower, and that the transaction was conducted by Nandan Tiwari for and on his behalf as his agent. It appears that after the purchase by Nandan Tiwari, under the circumstances I have stated, one or two suits were brought by members of the family of Bir Bhaddar, who had not been parties to the decree of Mewa Lal, and they recovered from Nandan, the auction-purchaser of the five villages sold, to the extent of their share or shares therein, with the result that the sum of Rs. 6,136-8-0 had to be refunded to Nandan, and was held by the Court to his credit in respect of the execution sale at which he had purchased. Babu Sarju Prasad, the present plaintiff, on the 12th February, 1871, brought a suit against Nandan Tiwari on the bond of the 3rd December, 1871, and he claimed under that, for principal and interest due, a sum of Rs. 12,514, and he obtained a decree against Nandan for that amount, by enforcement of the hypothecation of the five villages contained in the bond, on 28th March, 1874. Almost immediately after he had obtained that decree, he made an application for the attachment of the Rs. 6,136-8-0 which had been refunded to Nandan, and on the 3rd May, 1874, he took that particular sum of money out of Court, so that his decree upon the bond of the 3rd December, 1871, was *pro tanto* satisfied, and satisfaction to that extent was entered up. Having so far satisfied his decree, which left a balance of some Rs. 6,000 and odd, he proceeded to enforce it by sale of the hypothecated villages, and on the 20th August, 1874, he purchased those villages for the sum of Rs. 8,320; that is to say, he paid something in excess of the balance of the judgment-debt due, with the consequence that such excess went into the pocket of Nandan Tiwari, the judgment-debtor.

Then came the difficulties of the plaintiff. He applied for mutation of names, and he sought to obtain actual possession of the properties that he had purchased. He was then resisted by Bir Bhaddar and Sat Narain upon the ground that Bir Bhaddar was the real purchaser of the five villages at the execution sale of the 20th November, 1871, and that Nandan Tiwari was a mere *ismfarzi*. The opposition on the part of Bir Bhaddar was successful, and we may take it that the plaintiff has never obtained possession of the villages which he bought on the 20th August, 1874. In consequence of the opposition that had been thrown in his way by Bir

Bhaddar, the plaintiff, upon the 28th May, 1880, brought a suit against Bir Bhaddar and Sat Narain for possession of the villages he had bought for Rs. 8,320, and of course the title upon that occasion he was constrained to rely upon, was the title which he had acquired through Nandan Tiwari, and it was obviously necessary, for the purposes of that suit as brought, for him to establish that Nandan was in fact the real purchaser of the property, and that by reason of that circumstance he had acquired a proprietary title thereto. That suit ultimately ended in an appeal in this Court, and this Court held that, upon the evidence of the plaintiff himself given in that case, it was obvious that he knew perfectly well that Nandan was a mere agent in the transaction, that he was not the real purchaser at all, but that Bir Bhaddar was the real purchaser; and accordingly this Court held that the plaintiff's suit failed, and accordingly dismissed it.

Now the plaintiff comes into Court, and it is not very easy to understand what is the precise nature of the suit that he brings. Perhaps the most convenient way of presenting it is to read the relief sought. The 11th paragraph of the plaint recites:—"That under the bond, dated 3rd December, 1871, after deducting the sums realized, Rs. 7,518-3-0 principal and Rs. 4,818-0-6 interest, total Rs. 12,336-3-6, are due to the plaintiff as detailed at foot. As Bir Bhaddar Sewak Pande himself borrowed the money, though the second bond was taken at his desire and request in the name of Nandan Tiwari, and as the amount of both the bonds was advanced on the security of the property, which eventually, by a decree of the Court, has, by admitting the objection of Bir Bhaddar Sewak Pande, been declared to be Bir Bhaddar's property, he (Bir Bhaddar) cannot escape the liability to pay the debt. The property which he has acquired is chargeable with the debt due to the plaintiff by reason of its hypothecation in the two bonds and the conduct of the said defendant, and also because he (Bir Bhaddar Sewak Pande), defendant, has obtained it with the help of the money advanced by the plaintiff. Bir Bhaddar Sewak Pande failed to pay the money notwithstanding repeated oral demands and the notice given by means of a registered letter, dated 24th December, 1883, in which he was asked to pay the money. The cause of action as against Bir Bhaddar Sewak Pande arose on

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the date of the decision of the High Court. The plaintiff therefore asks for the following reliefs :—1. That Rs. 7,518-3-0 principal and Rs. 4,818-0-6 interest, total Rs. 12,336-3-6, be awarded to the plaintiff from Bir Bhaddar Sewak Pande, defendant, with future interest to the date of payment. 2. That the sums mentioned above may be decreed against Bir Bhaddar Sewak Pande aforesaid personally, and also against the property hypothecated in the bond. And then it goes on to set out what the amount is, and the interest is calculated, at the rate of 8 annas per cent, from the 29th March to the 3rd May, 1874, and then Rs. 6,136-8-0, which was realized on the 3rd May, 1874, is deducted, leaving a balance of Rs. 7,518-3-0, and then interest is calculated on it from the 4th May, 1874 to the 9th January, 1885, at 8 annas per cent: total Rs. 12,336-3-6.

Now, it is obvious from what I have said that the only security which the plaintiff had for the advance made by him for the purpose of the purchase of the 20th November, 1871, was the bond executed in his favour by Nandan Tiwari upon the 3rd December, 1871. It was only under that instrument that any hypothecation was made or subsisted. I have said that Nandan Tiwari was treated as an agent, in the transaction, for and on behalf of Bir Bhaddar Sewak Pande, and I have also said that the plaintiff was well aware that he was not the principal in the transaction, but that the principal was Bir Bhaddar. That being so, what was the course he ought to have adopted, and what is the course in law he should have adopted in order properly to protect himself? I believe this to be a sound principle of law, that if a person enters into a contract with another, believing him to be the principal in the transaction, though in fact that other is acting as an agent, but that he subsequently discovers who the real principal is, even though he may first have given credit to the party who subsequently turns out to be an agent, he may nevertheless, upon discovering who the principal is, substitute him as his debtor. I believe it also to be the rule of law that in a case like the present, where the agent and the principal were perfectly well known to the plaintiff, he might have made one or the other or both of them responsible. But I understand it to be equally clear that when once the creditor has elected, as the plaintiff did elect in the

present case, to hold the agent as responsible upon the contract, to take him into Court, and having obtained judgment and decree against him, to execute such decree and write up satisfaction thereof, it is not competent afterwards for him to maintain a suit against the principal in respect of the same subject-matter. My authority for this proposition is to be found in the case of *Priestly v. Fernie* (1), and it is based upon the principle which is discussed at large in the notes to *Thompson v. Davenport* (2). In the present case it is to be noted that the plaintiff gives as his cause of action the decision of this Court in the suit which he brought against Bir Bhaddar and Sat Narain for possession under the title which he asserted he had acquired by his purchase at the sale in execution of the decree against Nandan Tiwari. But as I have said before, the only document of title with which he had to bring the property to sale was the bond executed by Nandan Tiwari. If he had chosen, when he put that instrument in suit in the first instance, to include Bir Bhaddar as a defendant, I think it would have been perfectly competent for him to show that Bir Bhaddar was the real principal in the transaction, and that Nandan Tiwari was merely an agent. But he did not do that; he chose to confine his proceedings solely and entirely to Nandan Tiwari, and to treat Nandan Tiwari as the party who was responsible to him upon that document. Having done that, and having not only obtained a decree, but having written up full satisfaction of that decree, it seems to me that that bond of Nandan Tiwari, which was the sole document entitling him to enforce hypothecation, has been merged in that decree, and as that decree was a decree against Nandan Tiwari alone, he can, out of that decree and out of that hypothecation which was merged in that decree, have no right whatever to come into Court and ask the relief which he does in the present case.

Indeed it is to be observed that the plaintiff in the plaint, treating the bond as partly satisfied in execution of the decree of Nandan Tiwari, namely, to the extent of Rs. 6,136-8-0, and giving credit for that amount obtained from Nandan Tiwari, comes in now and asks for the balance, with the interest calculated at a totally

(1) 3 H. & C. 977; 34 L. J. (2) 9 B. & C. 78; Smith's L. C.,

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distinct and different rate from that mentioned in the bond, and asks to bring the property to sale for such balance and altered interest. But I am unaware of any legal ground upon which, under the circumstances, such a claim can be sustained. No doubt, at first sight, it did strike one as somewhat inequitable that Bir Bhaddar should hold the property which he had purchased with the plaintiff's money, but the plaintiff has no one but himself to blame for having elected to bring his suit against Nandan Tiwari and to treat him as his debtor.

For the reason stated I am of opinion that the suit was unmaintainable, and the Subordinate Judge's decision being reversed, the appeal is decreed with costs, and the suit of the plaintiff will stand dismissed with costs.

TYRRELL, J.—I concur.

Appeal allowed.

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June 10.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.

BANWARI DAS (PLAINTIFF) v. MUHAMMAD MASHIAT AND OTHERS
(DEFENDANTS).*

Practice—Suit on mortgage by mortgagee purchasing part of the property ismfarzi—Suit dismissed as brought with liberty to bring fresh suit—Non-suit—Civil Procedure Code, s. 373—Bond—Breach—Interest—Penalty—Act IX of 1872 (Contract Act), s. 74—Estoppel—Mortgage—Prior incumbrancer bidding at auction sale in execution of decree and not announcing his incumbrance—Sale by first mortgagee in execution of decree upon second mortgage held by him—Interest acquired by purchaser at such sale—Sale of portions of mortgaged property—Mortgagee not compelled to proceed first against unsold portions—Enforcement of mortgage against purchaser not having obtained possession.

Where a suit for enforcement of hypothecation against immoveable property was dismissed "in the form in which it was brought," and "with permission to bring a fresh suit," on the ground that the plaintiff, by purchasing a part, had put it out of his power to sue for relief against the whole, of the hypothecated property,—*held* that the decree being in effect one of non-suit, which no Court in India had power to make, and not being made under s. 373 of the Civil Procedure Code, and the plaint not having been returned or rejected under Chapter V of the Code, the decision must be set aside. *Watson v. The Collector of Rajshahye* (1) and *Kudrat v. Dinu* (2) referred to.

A bond by which immoveable property was hypothecated provided for interest at 13½ per cent. and contained a condition that if the principal with interest

* First Appeal, No. 101 of 1886, from a decree of Maulvi Zain-ul-abidin, Subordinate Judge of Moradabad, dated the 9th March, 1886.

(1) 13 Moo. I. A. 160. (2) *Ante*, p. 153.