

tion was taken in the Court of first instance. I am therefore of opinion that neither of these Privy Council rulings governs this case so as to preclude the judgment-debtor from contesting the validity of the auction-sale.

Dealing now with the fourth question in the case, I have already said that in delivering my judgment in *Jasoda v. Mathura Das* (1), I was inclined to hold that a "material" irregularity, as distinguished from a simple irregularity, would vitiate a sale without proof of "substantial injury" within the meaning of the second paragraph of s. 311. of the Code. The learned Pandit has argued that this view is opposed to the *dicta* of the Lords of the Privy Council in *Girdhari Singh v. Hardeo Narain Singh* (2) and in *Maenaghten v. Mahabir Pershad Singh* (3), and I confess that there may be much force in this contention. But it is not necessary in this case to go further into the matter, because, as I have already shown, the effect of the Full Bench ruling in *Mahadeo Dubey v. Bhola Nath Dicit* (4) requires that in this case the sale of the 1st February, 1887, must be held to be void for want of a valid attachment.

This view renders the decision of the fifth point in the case unnecessary, because the absence of attachment is in itself sufficient to set aside the sale without any inquiry as to substantial injury being sustained by the judgment-debtor. For these reasons I would decree this appeal, and, reversing the order of the lower appellate Court, set aside the auction-sale of the 1st February, 1887, with costs in both Courts.

BRODHURST, J.—I concur.

Appeal decreed.

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

SALONI AND ANOTHER (DEFENDANTS) v. HAR LAL (PLAINTIFF)*

Act XVII of 1886, s. 8—Decree made in British India—Suit on Judgment in Native territory—Cession of territory to British Government pending suit—Civil Procedure Code, s. 13.

Prior to the cession of the town of Jhānsi to the British Government plaintiff had instituted a suit in the Subah's Court in the Gwalior State on a judgment

* First Appeal No. 72 of 1888, from an order of E. Ward, Esq., Commissioner of Jhānsi, dated the 30th August, 1867.

(1) L. R., 3 I. A., 280.

(3) I. L. R., 9, All., 511.

(2) I. L. R., 9, Calc. 656.

(4) I. L. R., 5, All., 86.

1888

RAM CHAND
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of the British Court in Jhānsi district. After the cession, the suit was made over for trial to the Court of the Assistant Commissioner of the Jhānsi district. The suit was dismissed by the first Court as barred by s. 13 of the Code of Civil Procedure, but remanded by the lower appellate Court for trial on the merits.

Held, that the recital in part II of Act XVII of 1886 shows that it was intended that suits pending in the Courts of the Gwalior State prior to the cession of the town of Jhānsi to the British Government should be continued in the courts of the Jhānsi district after the cession thereof; therefore the present suit, which if it had been originally instituted in a court of British India, could not have been maintained, being an action on a judgment of a court of British India, was a good and maintainable action in the Court where it was instituted, and is to be deemed to be a properly instituted suit to which in other respects the law of the Courts of British India may now be applied.

King v. Hoare (1), referred to as illustrating the distinction between an original cause of action and cause of action founded upon a judgment recovered on the original cause of action.

Prior to the cession of the town and fort of Jhānsi to the British Government in full sovereignty by His Highness the Mahārāja Scindia, the father of the plaintiff had obtained a decree for Rs. 2,959-12-6 with costs against the father of the defendant from the Court of the Assistant Commissioner of Jhānsi presided over by Mr. McLean. After partial satisfaction of the decree within the Jhānsi district, the plaintiff on the 11th of December, 1885, brought his suit for the unpaid balance of the decree in the Subah's Court in the Gwalior State, and the suit was pending in that Court when by Act XVII of 1886 the town of Jhānsi came under the jurisdiction of the Courts in the Jhānsi district.

On the 1st of February, 1887, the suit was made over by the Deputy Commissioner of Jhānsi to the Court of the Assistant Commissioner of Jhānsi and that officer dismissed the suit; remarking "the suit having already been decided by Mr. McLean, is evidently barred by s. 13, Act XIV of 1882."

On appeal to the Commissioner of Jhānsi, that officer holding that the cause of action in the suit decided by Mr. McLean was not the same as that which led to the present suit, reversed the order of the lower Court, and remanded the cause for trial on the merits.

On appeal against this order of remand it was again contended that s. 13 of the Code of Civil Procedure barred the suit.

(1) 13, M. & W., 504, S. C. 14 L. J. Ex. 29.

Messrs. *Khushwakt Rai* and *Malcolmson*, for the appellants.

Mr. *Amir-ud-din*, for the respondent.

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EDGE, C. J., and TYRRELL, J.—Prior to the cession of the town of Jhānsi and the lands ceded therewith to the British Government, the plaintiff had obtained a judgment in the Assistant Commissioner's Court of Jhānsi, that is, in one of the Courts in British India. That decree was for 3,000 odd rupees. After obtaining that decree and before the cession of the territory, he brought his action against the same defendants in the territory of Gwalior on the decree obtained in British India. *Prima facie* that was a perfectly good action. Whilst the suit in Gwalior was pending and undetermined, the territory, in which was the Gwalior Court before which that suit was pending, was ceded to the British Government. The question is whether the action which was pending in Gwalior can, under s. 8 of the Act XVII of 1886, be continued in what is now part of British India. The first Court thought that s. 13 of the Code of Civil Procedure applied. The Commissioner of Jhānsi, sitting as a Court of appeal, correctly held that s. 13 did not apply. The cause of action was not the same. The action which is now pending in the Court was, so far as the Court in Gwalior was concerned, brought on the then foreign judgment or decree, and that action was the only course which was left open to the plaintiff to enforce in Gwalior the judgment which he had obtained in British India. The recital in Part II of the Act shows that it was intended that suits which were pending in the Courts of His Highness the Mahārāja Scindia should be continued in the Courts of the Jhānsi district. The only difficulty we have had was to ascertain what was the meaning of the words in s. 8, "but otherwise in accordance with the law and procedure of British Indian Courts." Although this action, if it had been originally brought in a Court in British India, could not have been maintained, being an action on a judgment of a Court in British India, still it was a good and maintainable action in the Court in which it was instituted and was pending at the time of the cession of the territory. We think it must be deemed to be a properly instituted suit to which in other respects the law of the Courts of British India may now be applied,

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The distinction which the Commissioner of Jhānsi has very properly drawn between the original cause of action in and the cause of action in this suit, is illustrated in the judgment in *King v. Hoare* (1).

The appeal is dismissed with costs.

Appeal dismissed.

1886
May 4.

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

GAJADHAR AND OTHERS (DEPENDANTS) v. MUL CHAND AND OTHERS
(PLAINTIFFS).*

Mortgage—Sale of equity of redemption—Suit by mortgagee for sale of mortgaged property—Purchaser not a party to suit—Sale of mortgaged property in execution of decree obtained by mortgagee—What passed—Right of purchaser of equity of redemption—Redemption.

On the 21st December, 1871, three of the defendants in this suit mortgaged four groves to *H*. In 1872 the plaintiffs obtained a money-decree against one *D*, and in August, 1872, in execution of that decree, sold the said groves and at the sale purchased them and also two mills which were not in dispute in this suit. The decree against *D* has been found to have the same effect as if it were had and obtained against all the mortgagors. Of this sale *H* had notice, in fact he opposed it. Subsequently *H*, the mortgagee, sued the mortgagors on their mortgage, and obtained a decree on it, and under the decree brought the said groves to sale in 1877, and purchased them himself. In May, 1880, *H* sold the groves to two of the defendants. The plaintiffs, who were not parties to the suit which resulted in the decree under which the groves were sold in 1877, instituted this suit for possession of the groves.

Held, that notwithstanding the sale of 1872, what was sold under the decree of 1877 was the right, title and interest of the mortgagors, as they existed at the date of the mortgage of 21st December, 1871, with which would go the rights and interests of the mortgagee, and although at a sale under a decree for sale by a mortgagee the right, title and interest of the mortgagor which is sold is his right, title and interest at the date of the mortgage, and any right, title and interest he may have acquired between the date of the mortgage and of the sale, still any puisne incumbrancer or purchaser from the mortgagor prior to the date of the mortgagee's decree and who was not a party to the suit in which the mortgagee obtained his decree, would have the right to redeem the property which the mortgagor would have had but for the decree. This view is consistent with the principles of equity and recognised by the Transfer of Property Act.

* Second Appeal, No. 1651, of 1886, from a decree of J. Deas, Esqr., District Judge of Jaunpur, dated the 23rd of June, 1886, confirming a decree of Muhammad Nasarullah Khan, Subordinate Judge of Jaunpur, dated the 1st December, 1884.