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The *Junior Government Pleader* (Babu *Dwarka Nath Banari*) and Pandit *Ajudhia Nath*, for the appellant.

Munshis *Hanuman Prasad* and *Kashi Prasad*, for the respondents.

The Court (OLDFIELD and BRODHURST, JJ.) delivered the following judgment:—

OLDFIELD, J.—The plaintiffs are some of several co-mortgagors, and sue to redeem the entire property mortgaged, on the ground that the mortgage-debt has been satisfied out of the usufruct. The Courts below have decreed the claim. The only point taken in appeal by the mortgagee in this appeal, and by one of the co-mortgagors who had been made a party to the suit as a defendant, is that the plaintiffs can only obtain possession of their shares of the property.

It appears to us that this contention has force. The debt having been satisfied from the usufruct, the plaintiffs can only claim their own shares, and the Court below should determine the extent of the shares after making the other co-mortgagors parties.

The case is remanded in order that the issue be tried. Ten days will be allowed for objections.

*Issues remitted.*

*Before Mr. Justice Oldfield and Mr. Justice Mahmood.*

SHAHI RAM (PLAINTIFF) *v.* SHIB LAL (DEFENDANT). \*

*Suit for refund of proceeds of execution-sale—Small Cause Court Suit—Mortgage—First and second mortgagees—Registered and unregistered mortgages—Act III. of 1877 (Registration Act), s. 50—Civil Procedure Code, s. 295.*

S and L held mortgage-bonds executed in their favour by the same person. S's bond was dated the 16th June, 1882, and was registered, the registration being compulsory. L's bond was of prior date, the 30th December, 1880, and was not registered, the registration being optional. Both instituted suits on their bonds against the obligor, and obtained decrees for sale of the property, the decrees being passed on the same day. The property was attached in execution of both decrees on the 14th August 1882. The sale-proceeds were divided by the Court executing the decrees equally between the parties by an order dated the 1st May, 1883, notwithstanding that S claimed the whole on the ground that he was an incumbrancer under a decree passed on a registered instrument, and therefore entitled

\* Second Appeal No. 343 of 1884, from a decree of J. L. Denniston Esq., Officiating District Judge of Moradabad, dated the 9th January, 1884, affirming a decree of Maulvi Muhammad Ezid Bakhsh, Munsif of Moradabad City, dated the 31st August, 1883.

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to priority. S, being dissatisfied with this order, brought a suit to recover from L the moiety of the sale-proceeds paid to him.

*Held* that the suit being one to compel the defendant to refund assets of an execution-sale which he was not entitled to receive, and to set aside the order of the Court executing the decree, which directed the payment of the assets to him, was expressly allowed to be brought under the provisions of the penultimate paragraph of s. 295 of the Civil Procedure Code, and could not be regarded as a suit of the nature cognizable in a Court of Small Causes.

*Held* also that the registered bond of the plaintiff took effect as regards the property comprised in it against the defendant's unregistered bond, under s. 50 of the Registration Act (III of 1877), which gave priority to the incumbrance created by the former bond over the incumbrance created by the latter, and this priority was not affected by the subsequent decrees obtained on the bonds, which only gave effect to the respective rights under the bonds.

The meaning of s. 295 of the Civil Procedure Code is that when immoveable property is sold in execution of decrees ordering its sale for the discharge of incumbrances, the sale-proceeds are to be applied in satisfaction of incumbrances according to their priority.

THE plaintiff and the defendant in this suit were simple mortgagees of the same property, the defendant being the prior mortgagee. The plaintiff's deed of mortgage, dated the 16th June, 1882, was registered, the registration being compulsory. The defendant's deed, dated the 30th December, 1880, was not registered, its registration being optional. Both parties instituted suits for the sale of the mortgaged property, and on the same day obtained decrees for its sale. The plaintiff applied on the 9th August, 1882, for the attachment and sale of the property, and the defendant made a similar application on the 12th August. The property was attached in execution of both decrees on the 14th August. On the 28th February, 1883, the property was sold in execution of both decrees. The sale-proceeds were divided by the Court executing the decrees equally between the parties by an order dated the 1st May, 1883, notwithstanding that the plaintiff claimed the whole on the ground that he was an incumbrancer under a decree passed on a registered instrument and therefore entitled to priority. The plaintiff being dissatisfied with this order, brought the present suit to recover from the defendant the moiety of the sale-proceeds paid to him, amounting to Rs. 52-8. The Court of first instance held that, after decrees had been obtained on the deeds of mortgage, the question of priority with reference to registration and non-registration of the deeds was no longer relevant, and dismissed the suit.

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On appeal by the plaintiff, the lower appellate Court affirmed the decree of the first Court, observing as follows:—"The case of *Parshadi Lal v. Khushal Rai* (1) is decisive. The appeal is dismissed with costs." The plaintiff appealed to the High Court, contending that as both the mortgage-deeds were executed after Act III of 1877 came into force, the lower Courts had improperly refused to go behind the decrees.

Babu *Ratan Chand*, for the appellant.

Pandit *Bishambar Nath*, for the respondent.

The Court (OLDFIELD and MAHMOOD, JJ.) delivered the following judgment:—

OLDFIELD, J. (After stating the facts continued):—A preliminary objection has been taken that no appeal lies, as the suit is of the nature of one cognizable by a Court of Small Causes. This objection fails. The suit is brought to compel defendant to refund assets of an execution-sale which he was not entitled to receive, and to set aside the order of the Court executing the decree, which directed the payment of the assets to him. This is a suit expressly allowed to be brought in a Civil Court under the provisions of the penultimate paragraph of s. 295, and cannot be regarded as one of those cognizable by a Court of Small Causes.

With regard to the appeal, it appears that the plaintiff and the defendant hold mortgage-bonds executed in their favour by the same person. The plaintiff's bond is dated the 16th June, 1882, and is registered, the registration being compulsory. The defendant's is of prior date, the 30th December, 1880, but unregistered, the registration being optional.

Both instituted suits on their bonds against the obligor, and obtained decrees for sale of the property mortgaged, the decrees being made on the same day. The plaintiff took out execution, and applied for attachment and sale of the property on the 9th August, 1882, and the defendant did likewise on the 12th August, and attachment was made of the property on the 14th August, 1882, apparently on both applications.

The property was sold in satisfaction of both decrees on the 28th February, 1883, and bought by plaintiff, who deposited the sale-price;

and he claims the right to the assets of the sale to satisfy his decree before any can be taken by the defendant, on the ground that his incumbrance has preference over defendant's under his registered bond, under the provisions of s. 50 of the present Registration Act, which governs the deeds in this case.

Now there is no doubt in my mind that the registered bond of the plaintiff takes effect as regards the property comprised in it against the defendant's unregistered bond under s. 50. This gives priority to the incumbrance created over the incumbrance created by defendant's bond; and this priority is not affected by the subsequent decrees obtained on the bonds, which only give effect to the respective rights under the bonds.

We have then here attachments and a sale of property in execution of two decrees, which ordered the sale of the property for the discharge of incumbrances thereon—a state of things which is provided for by s. 295, Civil Procedure Code, which contemplates the application of the sale-proceeds according to priority of incumbrances. The 3rd proviso to s. 295 is as follows:—"When immoveable property is sold in execution of a decree ordering its sale for the discharge of an incumbrance thereon, the proceeds of sale shall be applied—*first*, in defraying the expenses of the sale; *secondly*, in discharging the interest and principal money due on the incumbrance; *thirdly*, in discharging the interest and principal moneys due on subsequent incumbrances (if any); and *fourthly*, rateably among the holders of decrees for money against the judgment-debtor, who have, prior to the sale of the said property, applied to the Court which made the decree ordering such sale for execution of such decrees, and have not obtained satisfaction thereof." The meaning of the section is obvious, that when immoveable property is sold in execution of decrees ordering its sale for the discharge of incumbrances, the sale-proceeds are to be applied in satisfaction of incumbrances according to their priority. On this view the plaintiff is entitled to have the money due on his incumbrance first discharged, and the appeal prevails, and the decrees of the lower Courts are set aside, and the claim is decreed with all costs.

*Appeal allowed.*

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