

1896

KANHAIYA
LAL
v.
MUNNI.

Provinces of Bengal and to the towns of Bombay and Madras. From the fact that the Probate and Administration Act, 1881, contains no provision similar to that contained in section 187 of the Indian Succession Act, it must be presumed that, save where the Hindu Wills Act, 1870, is in force, it is not obligatory on a person claiming under the will of a Hindu to obtain probate of the will before instituting his claim. This view was adopted in the case of *Krishna Kinkur Roy v. Panchuram Mundul* (1) and a similar view was taken by this Court in *Thakurain v. Ram Charan* (2). We are accordingly of opinion that the plaintiff was not precluded from maintaining her suit by reason of her not having obtained probate of the will of her father. No other question was raised before us. The defendants' allegation as to the family and the property being joint was negatived by the evidence of Balram, defendant. In our judgment the decree of the Court below was right. We dismiss this appeal with costs.

Appeal dismissed.

Before Mr. Justice Burkitt.

BHAGWAN SINGH AND OTHERS (OBJECTORS) v. UMMAT-UL-HASNAIN
AND OTHERS (DECREE-HOLDERS)*

Civil Procedure Code, Section 583—Application for refund of money paid by a successful pre-emptor, the decree for pre-emption having been upset on appeal—Interest.

A plaintiff in a pre-emption suit obtained a decree and paid into Court the pre-emptive price as stated in that decree, and the money was drawn out of Court by the vendor. Subsequently the decree was reversed on appeal, and the plaintiff then applied under section 583 of the Code of Civil Procedure for a refund of the money paid into Court as above described with interest. *Held*, that the pre-emptor was entitled to a refund of the money together with interest up to date of repayment. *Rogers v. The Comptoir D'Escompte de Paris* (3), followed. *Jaswant Singh v. Dip Singh* (4), referred to. *Hatti Prasad v. Chattarpal Dubey* (5), dissented from.

THE facts of this case are thus stated in the judgment of the first Court (Subordinate Judge of Gházipur).

* First Appeal No. 181 of 1894, from a decree of Babu Kishore Lal, Subordinate Judge of Gházipur, dated the 26th June 1894.

(1) 1. L. R., 17 Calc., 272.

(3) L. R., 3 I. A., 475.

(2) Weekly Notes, 1895, p. 87.

(4) I. L. R., 7 All., 432.

(5) Weekly Notes, 1888, p. 287.

“Syed Muhammad Husain Khan, who is now represented by Musammat Ummat-ul-Hasnain, Musammat Ashraf-un-nissa Begam and Musammat Razia Begam, obtained a pre-emption decree from this Court on the 10th of September 1889. As directed by the decree, they deposited Rs. 6,500 in Court on the 20th of December 1889. A part of this money was paid to the judgment-debtors. The decree of this Court was set aside by the High Court on the 8th of April 1891. The decree-holders now apply under section 583 of the Code of Civil Procedure for recovery of Rs. 6,096-5-0 as principal and Rs. 2,520 as interest on the same at 12 per cent. per annum. The judgment-debtors state that as the decree of the High Court does not order restitution of the money paid by the decree-holders as pre-emptors, the latter cannot recover it in the execution department; that the decree-holders are not entitled to recover any interest, and that the accounts given in the application for execution are not correct.”

The Court of first instance found generally in favour of the applicants and gave them a decree for repayment of the money claimed, with interest at 6 per cent. per annum from the date of payment into Court to the date of the decree of the High Court in appeal.

The judgment-debtors objectors appealed to the High Court, and the decree-holders filed an objection under section 561 of the Code of Civil Procedure that they were entitled to interest up to the date of payment.

Mr. *Amir-ud-din* for the appellants.

Munshi *Ram Prasad* and Pandit *Sundar Lal* for the respondents.

BURKITT, J.—This is an appeal in execution proceedings. It appears that the original suit was one for pre-emption in which the pre-emptor was successful and obtained a decree for pre-emption, conditional on his paying in the sum of Rs. 6,500 to the credit of the defendants by a certain date. That money was paid in, and has been drawn out of Court by the defendants. Subsequently the pre-emption decree was reversed, and the plaintiff was declared not

1896

 BHAGWAN
SINGH
v.
UMMAT-UL
HASNAIN.

1896

BHAGWAN
SINGH
v.
UMMAT-UL
HASNAIN.

entitled to pre-empt the property. The present proceedings have been taken under section 583 of the Code of Civil Procedure for restitution of the amount paid by the defeated pre-emptor and drawn out of Court by the opposite party.

There was a question as to whether the proceedings could be taken under section 583, and one of the grounds of this appeal touches that question. It has not, however, been pressed. The other point is as to whether the present appellant, the defeated pre-emptor, is entitled to interest on the money which he deposited in Court and which was drawn out by the opposite party. The lower Court has held that he was so entitled. In my opinion that decision is right. The case of *Rogers v. The Comptoir D'Escompte de Paris* (1) is conclusive on that point, and was cited on a former occasion in this Court in the case of *Jaswant Singh v. Dip Singh* (2). It is true that in another case in this Court—*Hatti Prasad v. Chatarpal Dubey* (3)—a single Judge of this Court took a contrary view, but in this conflict of authority I consider that I am bound to follow the authority of their Lordships of the Privy Council. This appeal therefore fails and is dismissed with costs.

I have also to consider an objection under section 561 of the Code of Civil Procedure by the respondents. The contention in that objection is that the respondents are entitled to a larger sum as interest than has been given to them by the Court below. That Court allowed interest only up to the date on which the High Court reversed the decree for pre-emption and refused interest subsequent to that date. The respondents objectors contend that they are entitled to interest up to the date when the money may be actually refunded to them. On the authority of the Privy Council case cited above, I am of opinion that that contention is correct, for it must not be forgotten that the opposite party drew the money out of Court and will have had the use of it until they are compelled to refund it in these execution proceedings. I must therefore allow this objection and direct the lower appellate Court that in

(1) L. R., 3 L. A. 475.

(2) L. L. R., 7 all, 432.

(3) Weekly Notes, 1888, p. 287.

further proceedings in executing this decree interest at the usual rate (6%) is to be allowed to the objectors Ummat-ul-Hasnain and others up to the date of payment in execution. The objectors are entitled to costs.

Appeal dismissed.

FULL BENCH.

1896

BHAGWAN
SINGH
v.
UMMAT-UL
HASNAIN.

1896

February 25.

*Before Sir John Edge, Kt., Chief Justice, Mr Justice Know, Mr. Justice Blair,
Mr. Justice Hanerji, Mr. Justice Burkitt and Mr. Justice Aikman.*

SHIB LAL (PLAINTIFF) v. AZMAT-ULLAH AND OTHERS (DEFENDANTS)*
*Act No. IV of 1882 (Transfer of Property Act), sections 130, 135—Actionable
claim—Assignment of simple mortgage before due date.*

The term "actionable claim" as used in section 130 of Act No. IV of 1882 means a claim in respect of which a cause of action has already matured and which, subject to procedure, may be enforced by suit.

Held that the assignment for value of a simple mortgage before the due date of the mortgage is not a sale of an actionable claim within the meaning of section 135 of Act No. IV of 1882. *Rani v. Ajudhia Prasad* (1) referred to and explained.

THE facts of this case are briefly as follows:—On the 17th of July 1876 one Karim-ullah, the father of some of the defendants to the suit, having borrowed Rs. 2,000 from Baldeo Sahai, husband of one of the other defendants, executed an hypothecation bond in his favour. On the 7th of July 1888 accounts were adjusted between the parties and a fresh bond for Rs. 4,452 was given. This latter bond however was not executed by Karim-ullah, but by one Rustam Khan, under a general power of attorney. The latter of the two bonds was payable in a year from its execution. On the 20th of June 1889 Musammatt Mulia, as heir to Baldeo Sahai, sold to Shib Lal, the present plaintiff, the bond of the 7th July 1888. The plaintiff, on the 12th July 1893, brought his suit on this bond in the Court of the Subordinate Judge of Moradabad. The Subordinate Judge dismissed the suit, holding that the execution of the bond was not proved.

* First Appeal No. 4 of 1894, from a decree of Maulvi Aziz-ul Rahman, Officiating Subordinate Judge of Moradabad, dated the 12th October 1893.

(1) I. L. R., 16 All., 315.