

PRIVY COUNCIL.

P. C.
1901
April 30.
May 1
and 16.

SHANKAR SARUP AND OTHERS (PLAINTIFFS) v. MEJO MAL AND OTHERS
(REPRESENTATIVES OF LALA PHUL CHAND, ORIGINAL DEFENDANT).

[On appeal from the High Court of Judicature at Allahabad.]

*Act No. XV of 1877 (Indian Limitation Act), schedule II, Article 13—
Order in execution of decree—Civil Procedure Code, section 295—Suit to
recover assets wrongly distributed—What are “Proceedings in a suit”
—Priority of mortgages—Intention of parties as to abandonment of
prior security.*

By a bond of the 4th May, 1883, shares in certain villages were hypothecated for Rs. 15,500 to the plaintiffs. On the 30th June, 1883, a bond hypothecating the same shares in the villages was executed by the mortgagor in favour of the defendant. On the 3rd November, 1883, another bond was executed by the mortgagor by which the same shares in the villages were mortgaged to the plaintiffs for Rs. 20,000. The bond of the 3rd November, 1883, recited that Rs. 15,500 were then due on account of the bond of the 4th May, and after stating that interest on that sum and other debts which had been incurred brought the total amount due from the mortgagor up to Rs. 23,000, declared that until repayment of that sum with interest the mortgagor hypothecated the villages which had been mortgaged by the bond of the 4th May, and in addition he also mortgaged certain other shares in the same villages. The defendant obtained a decree on his bond on the 6th March 1884, and the plaintiffs in 1885 obtained a decree for the amount of the debt due under the bond of the 3rd November. In the plaint in the suit in which this decree was made they sued on the bond of the 3rd November only, and not on the bond of the 4th May, and the bond of the 3rd November was alone mentioned in the decree in that suit and in the subsequent orders in execution of the decree. In the application for execution of his decree, however, the defendant admitted that the plaintiffs' mortgage of the 4th May, 1883, was a subsisting and prior charge to his own of the 30th June 1883. In execution of these decrees the villages were sold, and on the 7th February 1888 the Subordinate Judge of Meerut made an order under section 295 of the Civil Procedure Code for distribution of the proceeds of the sale. By this order he held that the defendant was entitled to be paid in preference to the plaintiffs on the ground that their decree rested solely on the bond of the 3rd November, 1883, and not on that of the 4th May, 1883, and that their rights were consequently inferior to those of the defendant under his bond of the 30th June, 1883. The sale-proceeds were accordingly paid to the defendant. In a suit brought by the plaintiffs on the 4th February, 1891, to recover the sale proceeds on the ground of the priority of their hypothecation of the 4th May, 1883, over that of the defendant, they stated that their cause of action arose on the 7th February, 1888, the date of the order under which the sale proceeds had been paid to the defendant. The defence was (a) that the suit being one to set aside the order

*Present:—*LORD HOBHOUSE, LORD MACNAGHTEN, LORD ROBERTSON, SIR
RICHARD COUCH, and SIR FORD NORTH.

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for distribution was barred by Art. 13, Sch. II of the Limitation Act, not having been brought within one year from the date of the order; and (b) that the plaintiffs had by their course of action in suing on the bond of November the 3rd, 1883, relinquished their rights under the bond of the 4th May, 1883, and consequently were not entitled to priority over the defendant's bond of June 1883.

Held that the suit was not one to set aside the order for distribution, nor did that order stand in the way of the suit, which was one to recover proceeds paid to a person who was not entitled to receive them. Such a suit was specially provided for by section 295 of the Code of Civil Procedure, which enables a distribution of the sale proceeds to be made according to what seem at the time to be the rights of the parties without such distribution importing a conclusive adjudication on those rights. The suit was therefore not barred by Art. 13, Sch. II of the Limitation Act.

That article was also inapplicable because the order for distribution was "a proceeding in a suit." *Vishnu Bhikaji Phadke v. Achut Jayannath Ghate* (1) cited with approval.

Held also that in the terms of the bond of the 3rd November, 1883, it did not impair the effect of the bond of the 4th May, 1883, as a subsisting hypothecation. Nor did the fact of the plaintiffs having sued on the later bond and not on the earlier one allow the inference to be drawn that they had relinquished their rights under the earlier bond; by so suing they did nothing to imply, or lead others to believe, that they had abandoned the former hypothecation. The defendant, moreover, in the suit on his own bond had expressly recognised the bond of the 4th May, 1883, as a subsisting and prior hypothecation.

APPEAL from a decree (9th July 1897) of the High Court at Allahabad, reversing a decree of the Subordinate Judge of Meerut (16th April, 1895) in favour of the plaintiffs.

The suit out of which the appeal arose was brought by the present appellants, Damodar Sarup, Shankar Sarup, and Har Sarup, against one Ismail Khan as a *pro forma* defendant and Lala Phul Chand (now represented by the respondents), the object of the suit being to recover from Lala Phul Chand the sum of Rs. 9,942-1-6 principal, and Rs. 1,782-14-6 interest, Rs. 11,725 in all, on account of the sale-proceeds of certain villages which, by an order of Court in execution of certain decrees, had been paid over to him: the question as to whether it was wrongly or rightly so paid in view of the claim of the Sarups to priority in respect of the debt due under a deed of hypothecation, dated the 4th May, 1883 (which was incorporated in a subsequent deed of the 3rd November, 1883), over the lien of Lala Phul Chand under a deed

of the 30th June, 1883, forming the main issue in the suit. The facts giving rise to the suit were as follows :—

The Sarups on the 20th July, 1882, purchased from the three sisters of Ismail Khan a 12-biswa share (3-5ths) in certain villages, Chichora, Aminabad, and Chauki ; and in January, 1883, Ismail Khan, the holder of the remaining 8 biswa share (2-5ths) of the villages, brought a suit against the Sarups and their vendors for pre-emption. This suit was compromised on the terms that the Sarups were to receive Rs. 15,500 from Ismail Khan in consideration of their relinquishing the villages purchased by them. On the 4th May, 1883, Ismail Khan executed a bond in favour of the Sarups, by which he hypothecated the 12-biswa share in each of the villages to secure the payment of the Rs. 15,500 with interest in six months. Subsequently, on the 30th June, 1883, Ismail Khan executed a bond in favour of Lala Phul Chand for Rs. 7,000, and as security hypothecated, amongst other property, the three villages Chichora, Aminabad, and Chauki. Phul Chand sued Ismail Khan on this bond, and on the 6th March, 1884, obtained a decree declaring his lien over the three villages.

On the 3rd November, 1883, Ismail Khan executed another bond in favour of the Sarups and one Lala Sakla Lal, in which, after reciting that Rs. 16,197 were due for principal and interest on the bond of the 4th May, 1883, and that by reason of other debts and advances there was now due Rs. 20,000, he granted a second hypothecation upon the 12-biswa share in Chichora, Aminabad, and Chauki (amongst other villages), and a new hypothecation on his original 8-biswa share in the same villages. The terms of the bond, so far as they were material to the contention in this appeal, were—

“I, Muhammad Ismail Khan, do hereby declare that Rs. 15,500 are due on account of a bond dated the 4th May, 1883, in which the mortgagor's right in respect of 12 biswas in each of the villages” (mentioning eight villages, including Chichora, Aminabad, and Chauki) “was hypothecated, and up to this date Rs. 697-8-0 on account of interest on the said bond, total Rs. 16,197-8-0, are due.” After mentioning other sums due to the Sarups and Sakla Lal the bond continued :—

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"Therefore now, with the consent of the aforesaid obligees, I have executed this bond for Rs. 20,000 (twenty thousand) in favour of Damodar Sarup, Har Sarup, and Shankar Sarup, and Lala Sakla Mal, and I do hereby agree and give it in writing that the above mentioned money, together with interest at 14 annas per cent. per mensem, will be paid on demand. And until repayment of this money I do hereby hypothecate the mortgagor's right in 12 biswas in each of the villages which were hypothecated in the bond for Rs. 15,500. In addition to the above I do also hereby hypothecate the mortgagor's right in 8 biswas in each of the aforesaid villages."

By this bond one moiety of the amount was declared to be due to the Sarups and the other moiety to Sakla Lal.

On the 18th February, 1884, the Sarups filed a suit against Ismail Khan, claiming to have their moiety (Rs. 11,174) realized by sale of the 20-biswa share in the hypothecated villages, and on the 10th February, 1885, a decree was passed as prayed. On the 15th April Sakla Lal assigned his moiety of the amount due under the bond of the 3rd November, 1883, to the Sarups, and on the 4th May they brought a suit against Ismail Khan for realization of this moiety by sale of the 20-biswa share of the villages mortgaged, and obtained a decree on the 20th June, 1885. These two suits were brought on the bond of the 3rd November, and not on that of the 4th May, 1883, and the bond of the 3rd November, 1883, was alone mentioned in the decrees in those suits and in the subsequent orders in execution of the decrees. On the 22nd April Phul Chand applied for execution of his decree of the 6th March, 1884, and in his petition for execution admitted that the bond of the Sarups of the 4th May, 1883, was prior to his claim.

On the 12th June, 1886, an order was made for the sale of Ismail Khan's villages in execution of, amongst others, Phul Chand's decree of the 6th March, 1884, and the Sarups' two decrees of the 10th February and the 20th June, 1885, and on the 20th October, 1887, the three villages of Chichora, Aminabad, and Chauki were sold in satisfaction of these decrees. On the 7th February, 1888, the Subordinate Judge of Meerut held a proceeding, in which the parties to the present appeal and others were represented, to decide how the sale proceeds should be distributed under the above decrees, and his order in that proceeding was that Rs. 6,328 out of the sale proceeds of a 12-biswa share of the village

Chichora, Rs. 2,690 out of those of the 12-biswa share of the village Aminabad, Rs. 924-1-6 out of those of the 12-biswa share of the village Chauki, in all Rs. 9,942-1-6, should be paid to the defendant Phul Chand for the reason that the whole 20-biswa share of the said three villages had been mortgaged to him by the deed dated the 30th June, 1883, on which the decree of the 6th March, 1881, was based.

Hence this plaint in the suit in which the plaintiffs (the Sarups) alleged that their cause of action arose on the 7th February, 1888, the date on which the order for payment of the said sum of Rs. 9,942-1-6 to the defendant Phul Chand was passed by the Subordinate Judge. The plaint was filed on the 4th February, 1891. In the plaint the plaintiffs set out the proceedings already mentioned; they stated that the money paid to Phul Chand in respect of his mortgage of the 30th June, 1883, ought to have been paid to them under their mortgage of the 4th May, 1883, which took priority over that of Phul Chand; and they prayed for a decree directing him to refund to them the sums so received with interest.

The defendant Phul Chand in his written statement submitted that the claim was barred by Art. 13, Sch. II of the Limitation Act; that the hypothecation of the 4th May, 1883, did not continue in force after the deed of the 3rd November, 1883, was executed; and that the plaintiffs' hypothecation had no such priority as was claimed. If the deed of the 4th May, 1883, did continue in force, he submitted that he ought to have been made a party to the suit brought to enforce it.

The only issues amongst those settled which were material on this appeal were—

- (1) Is the suit barred by Art. 13, Sch. II of the Limitation Act XV of 1877?
- (2) Whether the hypothecation mentioned in the deed dated the 4th May, 1883, was transferred to the deed dated the 3rd November, 1883, and whether, with reference to it, the debt due to the plaintiffs was prior to that due to the defendant Phul Chand?

On the 29th July, 1891, the Subordinate Judge dismissed the suit on the ground that it was barred by limitation under Art. 13,

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Sch. II of the Limitation Act. On appeal the High Court on the 27th June, 1893, reversed the decision of the Subordinate Judge on this issue, and remanded the case for disposal on the merits.

On the further hearing the Subordinate Judge decreed the suit in favour of the plaintiffs for the sum of Rs. 11,706. In his judgment he said :—

“The bond of the 4th May, 1883, was renewed on the 3rd November, 1883. Looking to the wording of their subsequent bond, it is quite manifest that the prior charge created under the former bond of the 4th May, 1883, was expressly kept subsisting. The second defendant Lala Phul Chand's bond in which the same property is hypothecated is dated the 30th June, 1883, and is executed by the same defendant, Ismail Khan. By virtue of the recital in the plaintiff's deed of the 3rd November, 1883, Lala Phul Chand's deed creates only a puisne incumbrance on that property.”

The defendant, Phul Chand, appealed to the High Court, and a Bench of that Court (KNOX and BURKITT, JJ.) on the 9th July, 1897, made a decree reversing the decree of the Subordinate Judge, and dismissing the plaintiff's suit with costs in all Courts.

The Judges of the High Court in their judgment observed :—

“The present suit is for the recovery of the assets which were paid over to Phul Chand on the ground that although the decree of the respondent was based on a bond subsequent in point of time to that upon which the appellants' decree was based, the incumbrance of the subsequent bond was in reality an incumbrance created by a bond of May, 1883, and therefore prior in point of time to the incumbrance in favour of the appellant and the decree which followed from that incumbrance. There can be no doubt whatever, indeed it is admitted, that the Court which executed the decrees and paid over the assets to Phul Chand had no jurisdiction to act otherwise than it did; but we go further. We have not in the case before us any evidence which established the alleged connection between the bond of November, 1883, and the bond of May, 1883. We were asked to hold that two of the villages, Aminabad and Chauki, had been sold in execution of the decree held by the respondent. This we cannot do, and for this reason that Phul Chand under the decree which he held was entitled to bring to sale and have sold each and every scrap of the property hypothecated in his bond until enough had been realized to satisfy the whole claim covered by his decree. No Court could direct that some of that property should only be sold in that decree and that the rest, or any portion of it, should be sold in satisfaction of any other decree. For these reasons we allow this appeal, set aside the decree of the Court below, and dismiss the respondent's suit with costs in all Courts.”

From this decision the plaintiffs appealed.

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Mr. J. D. Moyné—for the appellants, contended that the intention was quite clear that the hypothecation under the bond of the 4th May, 1883, was not to be extinguished or given up when the bond of the 3rd November, 1883, was executed. The latter bond was based on the former one; the former one was recited in the latter, and was incorporated with it, and the High Court was in error in considering that there was no connection between the two bonds. The appellant's security, therefore, being of a prior date, was entitled to priority over that of Phul Chand.

Mr. G. E. A. Ross—for the respondent. The recital of one bond by the other is not conclusive that the later one was not substituted for the earlier one. The conduct of the parties shows their intention that the former bond was to be considered cancelled or extinguished by the new one. The bond of the 3rd November, 1883, was that sued upon: no suit was brought on the bond of the 4th May, 1883. In the suit brought on the later bond and in the execution proceedings there is no mention of the earlier bond; that is, the later bond was treated as being a perfectly new transaction, and Phul Chand was not made a party for the same reason. The fact that he was not joined in the suit showed that the earlier bond was not being proceeded on; see section 85 of the Transfer of Property Act (IV of 1882). On the question of limitation, the suit is substantially one to set aside the order of the Subordinate Judge in execution, and should have been brought within one year from the date of that order. Not having been so brought it is barred by Art. 13, Sch. II of the Limitation Act. The case of *Gawri Prasad Kundu v. Ram Ratan Sircar* (1) is precisely in point. That case distinguishes the case of *Ram Kishen v. Bhawani Das* (2), and refers to the cases decided under the old law; section 270 of Act VIII of 1859, which corresponds with section 295 of Act No. XIV of 1882, and is in principle the same:—see *Dwarkanath Biswas v. Roy Dhunpat Singh* (3), *Gogaram v. Kartick Chunder Singh* (4), and *Wooma Newgee Burmony v. Ram Buksh Chettangee* (5).

(1) (1886) I. L. R., 13 Cal., 159.

(2) (1876) I. L. R., 1 All., 333.

(3) (1872) 17 W. R., 227.

(4) (1868) B. L. R., Sup., Vol. 1022:
9 W. R., 514.

(5) (1871) 16 W. R., 11.

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Mr. *Mayne* was called on on the question of limitation, and contended that Art. 13 was not applicable. That article expressly only applied to "any proceeding other than a suit." The present proceedings are proceedings in a suit. A similar case was decided in the Bombay High Court—*Vishnu Bhikaji Phadke v. Achut Jagannath Ghate* (1), and it was held that the proceedings were proceedings in a suit, and that it was not necessary to set aside the order under section 295 of the Civil Procedure Code. That section expressly provides for a suit in such a case as this—a suit to recover assets wrongly distributed in execution, not one to set aside the order. The Bombay case refers to a Madras case, *Sivarama v. Subramanya* (2), and to a case decided by the Judicial Committee, *Mangal Pershad Dikhit v. Gria Kant Lahori* (3), as showing what are proceedings in a suit. Art. 13 not being applicable, either Art. 62 or Art. 120 would apply, and under neither of those articles would this suit be barred.

The judgment of their Lordships was delivered by

LORD ROBERTSON.—The competition between the appellants and the present respondents, who are the legal representatives of the original respondent, Lala Phul Chand, deceased, is for moneys realized by the judicial sale of certain villages, and paid over under judicial warrant to Lala Phul Chand. The villages were ordered to be sold in execution of certain decrees, of which one was held by Lala Phul Chand and two by the appellants. Those decrees proceeded upon mortgages; and the question on the merits of the suit is which of the parties had the preferable security.

The three bonds giving rise to the dispute were all validly granted, and will now be stated in chronological order without reference to any distinctive particulars irrelevant to the present controversy. On the 4th May, 1883, the villages (to the extent of certain shares also dealt with in the other two bonds) were hypothecated in favour of the appellants for Rs. 15,500. On the 30th June, 1883, a bond of hypothecation of the same property was executed in favour of Lala Phul Chand for Rs. 7,000. On the 3rd November, 1883, a bond of hypothecation of the same property was executed in favour of persons now represented in interest by the appellants

(1) (1884) I. L. R., 15 Bom., 488. (2) (1885) I. L. R., 9 Mad., 57.
(3) (1881) I. L. R., 8 Calc., 51; L. R., 8 I. A., 123.

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for Rs. 20,000. The terms of this bond require further statement. It begins by declaring that Rs. 15,500 are due on account of the bond of the 4th May, 1883, in which the mortgagor's right was hypothecated. Then it sets out that interest is due and that other debts have been incurred, bringing out a total indebtedness of Rs. 20,000; and until repayment of all this money the borrower hypothecates what had been hypothecated in the bond for Rs. 15,500. In addition to the above he hypothecated certain other shares in the same villages. The interest under this new bond was to be 14 annas per cent. per mensem (the interest under the bond of May having been 12 annas).

In 1885 the appellants obtained decrees for the amount of the debt under the bond of November, 1883, and for enforcement of the hypothecation by sale. (Two decrees were taken, and not one only, merely because the amount of the bond was payable in moieties, but the appellants having come to be in right of both moieties, this introduces none but an apparent complication.) As the respondent's contention on the merits depends mainly on these proceedings, it is necessary to point out that in their plaints the appellants sued on the bond of November, 1883, alone, and not on the bond of May, 1883; and this was the tenor of the decrees obtained on those plaints and also of the orders for execution which followed in due course. Meantime Lala Phul Chand had sued on his bond; and the claims of both parties as well as those of other creditors having matured, an order was made for sale and the sale took place. The sequel of those judicial proceedings was the distribution of the price; and in carrying this out as well as what had preceded, the Subordinate Judge of Meerut was acting under the Civil Procedure Code, 1882, and particularly section 295. On the 7th February, 1888, an order was made for distribution of the price, and in it the Judge held that Lala Phul Chand was entitled to be paid in preference to the appellants on the ground that in their decrees the appellants' rights were rested solely on the bond of November, 1883, and not to any extent on the bond of May, 1883, and accordingly that their rights were inferior to that of Lala Phul Chand under his bond of June 1883. The money was accordingly paid over to Lala Phul Chand.

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The appellants thereafter on the 4th February, 1891, filed the present petition of plaint, the remedy sought being that Lala Phul Chand should be ordered to return to the appellants the proceeds of the sale on the ground of the priority of the hypothecation in their favour made in May, 1883. The answer of the respondents is, *first*, that the suit is time-barred under Art. 13 of the Limitation Act, the suit not having been brought within one year of the order for distribution made by the Subordinate Judge on the 7th February, 1888; and, *second*, that the appellants had lost their right to found on the bond of May, 1883, as conferring on them a priority over Lala Phul Chand's bond of June, 1883. The Subordinate Judge of Meerut held the suit to be barred, and by decree, sealed on the 3rd August, 1891, he dismissed it. On the 27th June, 1893, this decree was set aside by the High Court of the North-West Provinces and the case was remanded. The Subordinate Judge on the 16th April, 1895, gave to the appellants the decree sought for; but this decree was on the 9th July, 1897, set aside by the High Court, who dismissed the suit with costs in all Courts. Against this decision the present appeal has been brought.

The theory of the respondents' plea that the suit is time-barred is that it is truly a suit to set aside the order of the 7th February, 1888, by which the Subordinate Judge ordered payment to Lala Phul Chand of the proceeds of the sale. That the money now sued for is the money so authorized to be paid over is certain. But it is to be observed that the same section of the Civil Procedure Code which authorized the order for payment to Lala Phul Chand authorizes also the present suit by the appellants. The 295th section, while providing that the Judge under whose authority the sale takes place shall distribute the proceeds, provides also that if all or any of such assets be paid to a person not entitled to receive the same, any person so entitled may sue such person to compel him to refund the assets. It seems to their Lordships, therefore, that the present suit is in no sense an action to set aside the order of distribution of the 7th February, 1888, and that that order does not stand in the way of the present suit. The scheme of section 295 is rather to enable the Judge as matter of administration to distribute the price according to what seem at

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the time to be the rights of parties without this distribution importing a conclusive adjudication on those rights, which may be subsequently re-adjusted by a suit such as the present. Their Lordships approve of the decision on this point in *Vishnu Bhikaji Phadke v. Achut Jagannath Ghate* (1), and they concur in the further observation made by the learned Judge in that case that the application of the 13th article is also precluded by the fact that the order for distribution was a step in an execution proceeding, and was therefore made in the suit in which the decree was made which was in process of execution. The order for distribution was thus an order in a suit.

On the merits their Lordships hold that the appellants are entitled to prevail. If the bond of November, 1883, be considered on its own terms, there is no room for the suggestion that it superseded the bond of May so as to impair the effect of that bond as a subsisting hypothecation. The argument of the respondents was rather that the appellants by their suing on the bond of November and not on the bond of May had relinquished their rights under the bond of May. No such inference can legitimately be drawn. The appellants did not need to sue on the bond of May in order to obtain sale for the whole of their debt, that being comprised in the bond of November. But in suing on the bond of November they did nothing to imply, or to lead others to believe, that they abandoned what, apart from abandonment, was a subsisting hypothecation; and in point of fact Lala Phul Chand in the suit on his own bond expressly recognised the bond of May as a subsisting and prior hypothecation.

Their Lordships will humbly advise His Majesty that the decree of the High Court ought to be reversed and the appeal to it ordered to be dismissed with costs and the decree of the Subordinate Judge of the 16th April, 1895, be restored. The respondents will pay the costs of the appeal.

Appeal allowed.

Solicitors for the appellants—Messrs. *T. L. Wilson and Co.*

Solicitors for the respondent—Messrs. *Barrow, Rogers and Nevill.*