

PRIVY COUNCIL.

P. C.
1902
May
1 and 2.
June 6.

SRI GOPAL (PLAINTIFF) v. PIRTHI SINGH (DEFENDANT).

[On appeal from the High Court at Allahabad.]

Res judicata—Civil Procedure Code, section 13, *Explanation II*—Omission to set up mortgage bond as a defence in former suit—Subsequent suit on mortgage bond—Civil Procedure Code, section 43—Relinquishment of part of cause of action.

Where, to a suit by a mortgagee on a mortgage bond of certain property, a prior mortgagee of the same property is made a party and omits to set up his prior charge and claim to have it redeemed, a suit subsequently brought by him for that purpose is barred by explanation II of section 13 of the Civil Procedure Code.

In the same way, if, being a party to a suit on a mortgage prior to his own, he omits to claim his right to redeem such prior mortgage, he cannot afterwards sue for that purpose on the mortgage he has omitted to plead.

Quære—Can a mortgagee who has several mortgages on the same property treat them, with respect to the provisions of section 43 of the Civil Procedure Code, as separate causes of action, or must he bring one suit on all his mortgages?

APPEAL from a decree (10th November, 1897) of the High Court at Allahabad, dismissing an appeal from a decree (12th June 1894) of the District Judge of Aligarh, which had affirmed a decree (12th August, 1893) of the Subordinate Judge of Aligarh dismissing the appellant's suit.

One Maya Ram and his sons Nek Ram, Pirthi Singh and Ram Singh owned a large number of biswas in mauza Manai in the Aligarh district, and the suit arose out of proceedings consequent on a series of mortgage transactions entered into by the three sons after the death of their father. In 1868, 1869 and 1870 they executed mortgages of portions of mauza Manai in favour of one Phul Chand. From 1871 to 1876 five mortgages of portions of the same property were executed by them. Three of these mortgages were in favour of one Ishur Das: on 21st July, 1871, a mortgage of 4 biswas as security for Rs. 1,000; on 7th February, 1874, a mortgage of 4 biswas for Rs. 250, and on 16th July, 1874, a mortgage of 3 biswas 10 biswansis for Rs. 1,500. Nek Ram, Pirthi Singh and Ram Singh also executed on 30th August, 1872, a mortgage of 4 biswas of the same property to Murli

Present—Lords MACNAGHTEN and LINDLEY, SIR FORD NORTH, SIR ANDREW SCOBLE and SIR ARTHUR WILSON.

1902

SRI GOPAL
v.
PIRTHI
SINGH.

Singh and Sarnam Singh as security for Rs. 800; and on 18th August, 1876, a mortgage of $4\frac{1}{2}$ biswas to Bhagwan Das, son of Phul Chand for Rs. 3,811. In this mortgage bond it was stated that the bonds executed in favour of Phul Chand in 1868, 1869 and 1870 had been received back by the mortgagors as being paid off.

Ishur Das died leaving two sons, Sita Ram and Daya Kishan, who, on 11th July, 1883, brought a suit (No. 121 of 1883) on the mortgage of 21st July, 1871, in which, on 3rd September, 1883, they obtained a decree for Rs. 3,565 and for sale in default of payment, and under that decree the $1\frac{1}{4}$ biswa share hypothecated was sold and purchased by the decree-holders. None of the other mortgagees were made parties to that suit.

On 15th August, 1883, Murli Singh and Sarnam Singh brought a suit (No. 142 of 1883) on their mortgage of 30th August, 1872, in which they obtained a decree on 17th December, 1883, for Rs. 1,852 to be enforced by sale against the mortgaged property, and on the sale they became purchasers of the same $1\frac{1}{4}$ biswas of mauza Manai. To this suit also none of the other mortgagees were made parties.

On 27th July, 1888, Daya Kishan having died, Sita Ram and Sri Gopal son of Daya Kishan brought a suit (No. 129 of 1888) for sale on Ishur Das' mortgage of 16th July, 1874, and obtained a decree on 26th September, 1888, in execution of which 1 biswa $7\frac{1}{2}$ biswansis of the property were sold and purchased by Bechai Lal, another son of Phul Chand. None of the other mortgagees were parties to that suit.

Bhagwan Das assigned his mortgage of 18th August 1876 to one Shyam Lal, who sold it to Sri Ram, who, on 18th August, 1888, brought a suit (No. 150 of 1888) to enforce the bond, in which suit on Sri Ram's death his daughter Musammat Janki, the wife of Bechai Lal, was, as her father's assignee by gift, substituted for him as plaintiff. That suit was brought against the mortgagors, against the representatives of Ishur Das, and also against Murli Singh and Sarnam Singh. Janki claimed in that suit that as assignee of Bhagwan Das her bond took precedence over all the bonds created by Nek Ram, Pirthi and Ram Singh in favour of Ishur Das inasmuch as they were all subject to the hypothecations

in favour of Phul Chand which were satisfied by means of Bhagwan's money, but that claim was not allowed. The representatives of Ishur Das pleaded their prior rights under the mortgage of 21st July 1871, but made no mention of their mortgage of 7th February 1874, nor did they raise any question as to their rights under that mortgage. In that suit on 19th December, 1889, Janki obtained a decree for sale subject to her redeeming the mortgages of 21st July, 1871, 30th August, 1872, and 16th July, 1874.

On 24th September, 1888, Murli Singh and Sarnam Singh brought a suit (No. 166 of 1888) under section 92 of the Transfer of Property Act (IV of 1882) against Sita Ram and Sri Gopal, for redemption in respect of the $1\frac{1}{2}$ biswas which they had purchased in execution of the decree of 17th December, 1883, in their suit on the mortgage bond of 30th August, 1872, and on 25th July, 1889, they obtained a decree declaring their right to redeem the land from the prior mortgages on payment of the proportionate amount of the mortgage debt due to Sita Ram and Sri Gopal under the mortgage of 21st July, 1871. In that suit Sita Ram and Sri Gopal did not plead their rights under the mortgage of 7th February, 1874. On 1st May, 1892, when 4 biswas of mauza Manai was about to be sold in satisfaction of the decree in Sri Gopal's suit (No. 121 of 1883) on the bond of 21st July, 1871, on which there was then due Rs. 2,485, Kewal Singh and Ajola (or Rajola) as heirs of Nek Ram sold the property to Bechai Lal for Rs. 6,000, which was to be applied in satisfaction of the debt under that decree, and in part payment of Janki's claim under the bond of 18th August 1876. On the 20th June, 1892, Sri Gopal made the following application to have it notified that the property about to be sold was charged in respect of the bond of 7th February, 1874, as well as with that of 21st July, 1871:—

“A $2\frac{1}{2}$ -biswa share out of 4 biswas in village Mauai, pargana Akrahad, belonging to Nek Ram, deceased, and possessed by his heirs, has been advertised for sale to be held to-day in (satisfaction of) the applicant's decree, and the said property is hypothecated in the decree passed on the basis of the bond, dated 21st July 1871, the amount of which is Rs. 2,374, and in the bond, dated 7th February 1874, executed by the debtor's ancestor for Rs. 250. The amount of the principal and interest of the same is Rs. 2,010. A mention of the said

1902

SRI GOPAL
v.
PIETHI
SINGH.

1902

SRI GOPAL
v.
PIRTHI
SINGH.

decree and bond has been made in the application for execution of decree, but by way of precaution this application is made, praying that the aforesaid debts may be notified at the time of sale.

"This having been presented along with the original bond it is ordered—

"That the notification be made."

The suit (instituted on 12th April, 1893), out of which the present appeal arose was brought on the mortgage bond of 7th February, 1874, by Sri Gopal representative of the original mortgagee Ishur Das against (1) Pirthi Singh; (2) Kewal Singh, son of Nek Ram; (3) Ajola (or Rajola), widow of a brother of Kewal Singh, and (4) Gaura, widow of Ram Singh, as first party, defendants, representing the original mortgagors; and against (5) Bechai Lal, son of Phul Chand; (6) Janki, wife of Bechai Lal; (7) Murli Singh and (8) Sarnam Singh, as second party defendants representing the mortgagees under the other bonds. The plaintiff alleged that the bond of 7th February, 1874, had priority over all charges except that of Murli and Sarnam under their bond of 30th August, 1872, and he prayed (a) for a decree against defendants (1) to (6) for the amount due on the bond of 7th February, 1874, (b) for a decree for redemption against Murli Singh and Sarnam Singh and a reconveyance by them as receiving payment of what was due on their bond of 30th August, 1872, of the $1\frac{1}{4}$ biswas purchased by them; and (c) for a decree for sale of the 4 biswas share hypothecated by the bond sued on.

In answer to the suit Bechai Lal and Janki [defendants (5) and (6)] pleaded that it was barred by section 43 of the Civil Procedure Code because the bond of 7th February, 1874, had not been sued on with the other bonds; and that it was also barred by section 13 of the Code as that bond had not been relied on as a defence in that suit (No. 150 of 1888). Janki also made the same claim as to her bond of 1876 as had been decided against her in her own suit.

Murli Singh and Sarnam Singh [defendants (7) and (8)] relied on section 13 of the Civil Procedure Code as barring the suit. The other defendants did not appear. On 12th August, 1893, the Subordinate Judge dismissed the suit. He held that a person having several mortgages on the same property was bound to sue on all at once, and that the suit was barred by the Civil Procedure Code, section 43. He also held that the plaintiff could and

ought to have set up the bond of 7th February, 1874, as an answer to the suit brought against him by Murli Singh and Sarnam Singh (No. 166 of 1888), and by Janki (No. 150 of 1888), and that his suit was therefore barred by section 13 of the Civil Procedure Code.

Against that decision the plaintiff appealed to the District Judge of Aligarh, who, on 12th June, 1894, affirmed the decision of the Subordinate Judge on both points and dismissed the appeal.

The plaintiff preferred an appeal to the High Court, and a Bench of five Judges (EDGE, C.J. and BLAIR, BANERJI, BURKITT and AIKMAN, JJ.) dismissed his appeal on 10th November, 1897. The judgment of the High Court is reported in I. L. R., 20 All., 110.

On this appeal

Mr. *Mayne* for the appellant contended that the suit was not barred by section 13 of the Civil Procedure Code. The suit brought by Murli Singh and Sarnam Singh (No. 166 of 1888) was brought by them as mortgagees of their bond of 30th August, 1872, to redeem the prior mortgage held by the appellant of 21st July, 1871. It was not a necessary defence to that suit, and it would have been no answer to it, to set up the appellant's mortgage now sued on. The decree obtained by Murli and Sarnam could not, and did not profess to, affect any rights other than those then in question. As to Janki's suit (No. 150 of 1888) the High Court's judgment now under appeal is based on a misapprehension of the nature of that suit. She was not seeking to sell the property subject to any prior mortgage, which was the relief granted to her. She only wanted a declaration that the mortgages of 1868, 1869 and 1870 which her charge of the 18th August, 1876, was executed for the purpose of paying off, were kept alive for the benefit of Bhagwan Das, and that her mortgage of 1876, though later in date than the other mortgages of 1871, 1872 and 1874, therefore created a prior charge on the property. This relief she claimed as against both the appellants' mortgages, and it was rejected against both, the judgment declaring that both mortgages had priority over her's and must be satisfied as a condition precedent to her selling the property on which they

1902

SRI GOPAL
v.
PIRTHI
SINGH.

1902

SRI GOPAL
v.
PIRTHI
SINGH.

were a charge. This should have been stated in the decree; but the judgment, it is submitted, explains the decree. Janki has in fact never paid off the mortgages which, in terms of the decree, she had to do before she could sell the property under it; and her right to execute that decree was barred by limitation before the present suit was brought. It having been unnecessary for the appellant to set up his mortgage of 7th February, 1874, in the former suits, it is submitted that explanation II of section 13 of the Civil Procedure Code does not stand in the way of his present suit.

Mr. *G. E. A. Ross* for the respondents, Bechai Lal and Musammatt Janki was not called upon.

1902, *June 6th*.—The Judgment of their Lordships was delivered by—

SIR FORD NORTH :—

This action relates to certain incumbrances created by Nek Ram, Pirthi Singh and Ram Singh, the owners of several biswas in the mauza Manai in the Aligarh district. One of them and the representatives of the other two are respondents on this appeal, and they are all included in the term “mortgagors”.

The five following incumbrances on that property are material :—

Date of mortgage.	Amount.	Names of mortgagees.
(1) 21st July, 1871 ...	Rs. 1,000	Ishur Das.
(2) 30th August, 1872 ...	800	{ Murli Singh. Sarnam Singh.
(3) 7th February, 1874 ...	250	Ishur Das.
(4) 16th July, 1874 ...	1,500	Ishur Das.
(5) 18th August, 1876 ...	3,811	Bhagwan Das.

In 1883 Sita Ram and Daya Kishan (heirs of Ishur Das then deceased) commenced an action (No. 121 of 1883) on the bond of 21st July, 1871, against the mortgagors only; and on 3rd September, 1883, obtained a decree for payment, and, if necessary, for sale.

In the same year Murli and Sarnam Singh commenced an action (No. 142 of 1883) on the bond of 30th August, 1872, in which action also the mortgagors were the only defendants; and on the 17th December 1883 they obtained a like decree for payment and, if necessary, for sale. Under that decree $1\frac{1}{2}$ biswas of the mortgaged property were sold, and were purchased by Murli and Sarnam Singh.

In July, 1888, Sita Ram and the present appellant Sri Gopal (the son of Daya Kishan, who was then dead) commenced an action (No. 129 of 1888) against the mortgagors only under the charge of 16th July, 1874; and on 26th September, 1888, obtained a decree for payment and sale in default. Part of the mortgaged property was sold in execution of that decree, and was purchased by the respondent Bechai Lal.

The charge of 18th August 1876 in favour of Bhagwan Das was sold by him to Shiam Lal, and by him to Babu Sri Ram, the father of the respondent Musammat Janki; and it was afterwards transferred by him to her by way of gift.

In August, 1888, Sri Ram commenced an action (No. 150 of 1888) to enforce the charge of 18th August, 1876; but having died on the eve of the trial the name of his daughter the respondent Musammat Janki was substituted as plaintiff. The mortgagors, Sita Ram and the appellant, and Murli and Sarnam Singh, were all made defendants in that action. The plaintiff therein sought to establish that charge as having priority over the earlier mortgages above referred to upon the ground that the money thereby secured had been borrowed to pay, and had been applied in paying, certain other charges on the same property of still earlier date, all being prior to 1871; but this claim to priority broke down, the plaintiff having failed to satisfy the Court that the earlier charges had been kept on foot, or that the money had been so applied. The decree gave the plaintiff judgment for payment against the mortgagors; and declared that in default of payment she would be entitled to sell $\frac{1}{2}$ biswa of the land comprised in the mortgage sued on, which was free from all incumbrances; and could also sell the remaining four biswas of the mortgaged land after fully paying and satisfying the amount of the prior debts detailed at the foot of the judgment,

1902

SRI GOPAL

v.

PIETHI
SINGH.

1902

SRI GOPAL

v.

PIETHI
SINGH.

viz., the bond in favour of Murli and Sarnam Singh, dated 30th August, 1872; and the bond in favour of Sita Ram and Sri Gopal dated the 21st July, 1871.

In the month of April, 1893, the appellant Sri Gopal as sole plaintiff (Sita Ram being then dead, and all the securities in favour of Ishur Das being then vested in him alone) brought this present action (No. 67 of 1893) to enforce the bond of 7th February, 1874, against the mortgagors, the respondents Bechai Lal and Musammat Janki, and the respondents Murli and Sarnam Singh, all of whom were made defendants. The defendants Bechai Lal and Musammat Janki pleaded *inter alia* that in the action No. 150 of 1888 the parties represented by the appellant did not set up the bond of 7th February, 1874, and that therefore this action was barred by section 13 of the Code of Civil Procedure; and this view was sustained by the Subordinate Judge of Aligarh in 1893; by the District Judge in 1894; and by the High Court of the North-Western Provinces in 1897. The latter Court said in its judgment:—"In our opinion not only might the representatives of Ishur Das have pleaded their mortgage of the 7th of February, 1874, but they ought to have done so; and if they had done so no decree for sale could have been made without these rights being protected by the decree. They not having done what they might and ought to have done as an answer *pro tanto* to the suit of Sri Ram, we are of opinion that section 13 of the Code of Civil Procedure applies."

The materiality of the mortgage here referred to is evident. If Musammat Janki's claim had succeeded to its full extent she would have established her priority over all the four bonds in question. As it was, she only established her claim subject to the specified securities of Sri Gopal and Murli and Sarnam Singh, which did not include the bond now sued on. The appellant would have been entitled to plead and prove this bond as a bar to any decree being made for sale except subject to that bond. Had he done so, it would have been included in the "details of liens" at the end of the decree, and the right of Musammat Janki would have been expressly subordinated to that charge also. The judgments are clearly right: and the appeal would have been unarguable, but for an ingenious point

raised by the appellant's Counsel. He set up at the bar (notwithstanding the statement in the appellant's case that no facts are in dispute) that all the Judges were mistaken in saying that this bond of February, 1874, was not set up by the appellant: that in fact it was set up, and that the decree was wrong in not dealing with it. But that decree might have been corrected, if not in accordance with the judgment: or appealed against, if both judgment and decree were wrong: and neither of these courses having been adopted their Lordships cannot go behind it. No pleadings in that action are before the Court, except the statement of Sita Ram, which does refer to the "bonds" (without saying what bonds) in his favour. It does indeed appear from the reasons given by the learned Judge that the existence of Sri Gopal's three bonds was within his knowledge; but for some reason the two later bonds were dropped; no issue was directed about either of them, although an issue (2) was directed as to the bond of 21st July, 1871; and the parties were apparently content that they should not be dealt with by the decree. That the matter was not overlooked is also indicated by the form of the appellant's notification of 20th June 1892(1). And all doubt upon the point is removed by paragraph 7 of the plaint in this action, in which the pleader, anticipating the defence that would be set up, endeavours to forestal it by saying:—"Musammât Janki had brought the claim for fear of the amount of the bond dated 21st July, 1871, and a finding was recorded in respect of the same. There was no other question in that case as to the other matters relating to the hypothecation of the plaintiff and his uncle Sita Ram." The appeal therefore fails entirely as to Musammât Janki.

With respect to Bechai Lal, it is difficult to see why he is brought here. The claim for personal payment against him is idle. All that he did was to purchase some of the property which was sold by auction under the decree in the action in which Sita Ram and Sri Gopal were plaintiffs (No. 129 of 1888). According to the conveyance to him this sale was made under the decree in the action No. 121 of 1888; but this is not material. In each of those actions the appellant or his predecessors in

1902

 SRI GOPAL
 v.
 PIETHI
 SINGH.

(1) Ante, page 431.

1902

SRI GOPAL
v.
PIRTHI
SINGH.

title were plaintiffs. In either case as against Bechai Lal the case entirely fails.

Then as to Murli and Sarnam Singh. The former died in 1897; but his representatives are before the Court as respondents.

Their position is somewhat different. Their mortgage of 30th August, 1872, was subject to the appellant's mortgage of 21st July, 1871; but paramount to his mortgages of 7th February and 16th July, 1874. Their decree against the mortgagors of 17th December 1883 (No. 142 of 1883) has been already mentioned: as also has the purchase by them under that decree of $1\frac{1}{2}$ biswas of the mortgaged property. Sita Ram and Daya Kishan, who had already obtained a decree (No. 121 of 1883) against the whole of the property under their prior charge, proceeded thereunder to sell, over the heads of Murli and Sarnam Singh the same $1\frac{1}{2}$ biswas which Murli and Sarnam Singh had purchased; and themselves became the purchasers of that property under their own decree. Thereupon in 1888 Murli and Sarnam Singh commenced an action (No. 166 of 1888) against Sita Ram and Sri Gopal alone: and on 25th July 1889 obtained a decree to the effect that notwithstanding the decree in the prior action, to which they were not parties, they were entitled to redeem the $1\frac{1}{2}$ biswas upon payment of such a proportion of the whole debt due to the defendants on their prior security as the $1\frac{1}{2}$ biswas bore to the whole property comprised in the security of 1871: and this having been paid by Murli and Sarnam Singh into Court a transfer to them of the $1\frac{1}{2}$ biswas was directed. In this action the appellant as owner of the charge of February 1874 might have set up that, though Murli and Sarnam were entitled to redeem his first charge, he by virtue of his second charge of 7th February, 1874, was entitled in turn to redeem them; and if this had been done he could have got then what he asks now, and the necessity for this suit would have been avoided, and the parties would have escaped this shocking multiplication of actions. Three Courts below have taken this view, and their Lordships see no reason to dissent from it.

There are other difficulties in the plaintiff's path to be removed before he could succeed against Murli and Sarnam Singh

in this appeal. Among others section 43 of the Civil Procedure Code was held to be a bar to his suit in the two first Courts. The Court of appeal expressed some doubt whether that was correct. There might have been a nice question to be argued; but the appellant's Counsel did not open it, and did not even read the section to the Committee.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed. The appellant must pay the costs of the respondents Bechai Lal and Musammat Janaki, who alone defended this appeal.

Appeal dismissed.

Solicitors for the appellant—Messrs. *Pyke and Parrott.*

Solicitors for the respondents (5) and (6)—Messrs. *Thomson & Co.*

J. V. W.

REVISIONAL CRIMINAL.

1902

 SRI GOPAL
 v.
 PIRTHI
 SINGH.

1902

 April 29.

Before Mr. Justice Know.

EMPEROR *v.* BAL KISHAN.*

Act (Local) No. 1 of 1900 (N.-W. P. and Oudh Municipalities Act) sections 128(c), 132—Municipal Board, powers of—Bye-law—Bye-law held to be unreasonable and its enforcement refused.

The English law as to the necessity of bye-laws being reasonable is applicable to bye-laws framed in the exercise of their statutory powers by Municipal Boards in India.

The Municipal Board of Naini Tal passed a bye-law under the powers conferred upon it by section 128, clause (c) of Local Act No. I of 1900 to the following effect, namely:—"No coolie, whether bearing loads or not, no servant except in attendance on his master, and no prostitute shall use the upper North Mall" (one of two parallel roads running along the north side of the Naini Tal lake) "at any time."

Held that, as regards the words "no servant, except in attendance on his master", this was under the circumstances an unreasonable bye-law; and the Court declined to give effect to it.

WITHIN the limits of the Naini Tal Municipality were two roads running along the north side of the lake parallel with each other, but at slightly different levels. The upper road was a fairly broad metalled road, on the north side of which were shops and houses; the lower was more of the nature of a foot-path

* Criminal Revision No. 136 of 1902.