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"in writing that the donee may, from the date of execution of "this instrument, take proprietary possession similar to mine over "the gifted property. There has been left no claim right or dis- "pute to me or any of my heirs." This was intended to be and should be construed as an absolute gift. The contention of the appellants in the lower Courts and before their Lordships was, that the gift being invalid as regards Sita Ram was also invalid as regards Mithan. The District Judge and the Judicial Commissioner have both held that it is a valid gift of the whole to Mussammat Mithan. Their Lordships are of this opinion: The gift is to the two donees jointly, and in *Humphrey* v. *Tayleur* (1), Lord Chancellor Hardwicke said: "If an estate is limited to "two jointly, the one capable of taking, the other not, he who "is capable shall take the whole." This principle does not depend upon any peculiarity in English law, and is appplicable to this deed of gift.

The question whether the gift was accompanied by possession was disposed of by their Lordships in the course of the argument, and it is not necessary to say more upon it.

Their Lordships will humbly advise Her Majesty to affirm the decree of the Judicial Commissioner, and to dismiss the appeal.

Appeal dismissed.

Solicitors for the appellants: Messrs. *Young, Jackson & Beard.*

C. B.

P. C.* 1889 *February* 12, 13 *and* 16.

MAHABIR PERSHAD SINGH AND ANOTHER (PLAINTIFFS) *v.* MACNAGHTEN AND ANOTHER (DEFENDANTS).

[On appeal from the High Court at Calcutta.]

Res judicata—Code of Civil Procedure, s. 13—*Omission to bring forward in a prior suit what then would have been a defence—Accounts between mortgagor and mortgagee—Purchase of mortgaged property by the latter at judicial sale, on leave obtained to bid.*

A mortgage between parties who had accounts together, comprised lands which also were leased by the mortgagors to the mortgagees, who in 1878 obtained a decree upon the mortgage, although at the time they owed

* *Present:* LORD WATSON, LORD HOBHOUSE, AND SIR R. COUCH.

(1) Ambler, 138.

to the mortgagors a considerable sum for rents. The mortgagors did not then set up the defence that they were entitled to have a general account taken, and to have the mortgagees' decree limited to such balance as might be found to exist in favour of the latter. But the mortgagors alleged a specific agreement, which they failed to prove, that the rents were to be set off against the mortgage debt; and they also stated their intention to sue separately for the rents due. No deduction was made in the decree upon the mortgage on account of these rents, for which moreover afterwards the mortgagors did obtain a decree. But the mortgagees executed their decree upon the mortgage, notwithstanding objections (which were disallowed in 1882), and having obtained leave to bid at the judicial sale purchased the property. In the present suit, brought by the mortgagors to have the judicial sale set aside, and to have the mortgage debt extinguished, by having set off against it the rents which had already accrued, or might afterwards accrue, and for possession of the lands on the expiry of the lease:

Held, that, although an equity had been raised in favour of the mortgagors, that an account should have been taken and that the rents payable should have been credited against the sums due by them, yet this equity could not be enforced in this suit. The proper occasion for enforcing it would have been in defence of the suit upon the mortgage; the present claim was within the meaning of s. 13 of the Code of Civil Procedure; and the plaintiffs were now barred from insisting on it, *exceptione rei judicatæ*.

Nor could the mortgagees be held to have purchased as trustees for the mortgagees, as suggested for the appellant, the leave granted to bid having put an end to the disability of the mortgagees to purchase for themselves, putting them in the same position as any independent purchaser.

APPEAL from a decree (12th February 1886), affirming a decree (8th May 1884) of the District Judge of Tirhoot.

The suit, out of which this appeal arose, was brought by the proprietors of mouzas forming part of two taluks, Malik Alipur and Jonapur, in the Tirhoot District, which they had mortgaged to the defendants, who had caused the mortgaged villages to be judicially sold, themselves, by leave to bid granted by the Court executing their decree, becoming the purchasers. The question now raised was whether the mortgagors, notwithstanding the decree obtained against them, and the sales in execution, could now have an account taken of the mortgage debt, and have set-off in their favour, and against such debt, rents due to the mortgagors from the mortgagees; or whether, with reference to the law, as explained (Explanation II) under s. 13 of the Code of Civil Procedure, that any matter which might

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and ought to have been made ground of defence in a former suit should be deemed to have been a matter directly and substantially in issue in such suit, precluded the mortgagors from now insisting on their right to set off the rents.

The decree which the mortgagees had obtained, upon the mortgage in the Court of the Subordinate Judge, was dated 18th January 1878, and was affirmed by the High Court on appeal on 22nd May 1879.

The appellant, Mahabir Pershad Singh, and his brother Kumla Pershad Singh (the latter now deceased, and represented by the other appellant, a minor), leased to the proprietors of the Khanpur Indigo Factory, Messrs. E. Macnaghten and R. Olpherts, six bigas, part of their shares in the taluks above-mentioned. Their shares, however, in 1867, were sold at a sale for arrears of revenue. This sale was subsequently set aside by a decree of the High Court, affirmed by Her Majesty in Council, in *Bunwaree Lall Sahoo* v. *Mahabir Pershad Singh* (1).

The relations between the parties are set forth in their Lordships' judgment.

The mortgage on which the decree of 1878 was obtained was executed on the 9th December 1871.

On the 15th September 1873, while Bunwari Lal's appeal was still pending, Mahabir Pershad and his brother executed an ikrarnama, agreeing with Macnaghten and Olpherts to grant them further leases, and to give them other land in a mokarari, should the sale for arrears be set aside. Afterwards, on or about the 21st June 1874, pottahs and kabuliyats were executed between them.

On the 29th June 1877, Macnaghten and Olpherts sued Mahabir Pershad and his brother on the mortgage of 9th October 1871, to recover Rs. 34,516. In that suit the defence was, that an express arrangement had been made, whereby the mortgagees were precluded from recovering, without the taking of accounts between the parties; and an issue was raised whether there had been an agreement between the parties that the factory, taking the usufruct of the mortgaged villages, should liquidate in that way what might be due to it. The Subordinate Judge, in his

(1.) L. R., 1 I. A., 89.

judgment of 18th January 1878, found that the arrangement alleged by the mortgagors had not been proved. He found that an adjustment of accounts between the parties had taken place on 31st December 1873, when the mortgagors were still indebted to the amount for which the mortgage was executed. The High Court affirmed this judgment on 22nd May 1879, observing that it had been proved that, on 31st December 1873, Rs. 25,000 were due on the mortgage, and that the alleged arrangement for rents to be set off had not been proved. The Judges also pointed out that the defendants, in their written statement, declared that the accounts and the sums due to them for rent were to be the subject of another suit, already filed. While that suit on the mortgage was pending, the mortgagors did in fact claim in another suit Rs. 4,475, rent due on a lease executed by Macnaghten and Olpherts on 21st June 1874. This claim was dismissed in the first Court, but on appeal, the High Court decreed the amount on 21st April 1881. Mahabir Pershad also obtained another decree on 30th June 1879 for Rs. 2,829, in a suit against the present respondents on other kabuliyats.

Meanwhile, the mortgagees enforced the decree on the mortgage; and at judicial sales on 15th September and 20th November 1879, the mortgaged property was sold; and the decree-holders, having previously obtained leave to bid, became the auction purchasers for about Rs. 20,000.

Afterwards the mortgagor, Mahabir Pershad Singh, applied, under s. 311 of the Code of Civil Procedure, to have these two sales cancelled, alleging irregularity and inadequacy of price realized at the sales. This application having been rejected on 25th September 1880, the order rejecting it having been upheld by the High Court was maintained by an order of Her Majesty in Council on 24th November 1882 in *Olpherts* v. *Mahabir Pershad Singh* (1).

In the present suit, instituted on the 24th November 1883, the plaint asked, that the sales of 15th September and 20th November 1879 might be declared fraudulent and inoperative as against the plaintiffs, whose position as lessors was not, it

(1) L. R., 10 I. A., 25; I. L. R., 9 Calc., 656, nom. *Macnaghten* v. *Mahabir Pershad Singh*.

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was contended, changed; and that it should be declared that the plaintiffs were entitled to have rent from the defendants in respect of the leases and mokarari, from the time of satisfaction of their decree by setting off the sums due to the plaintiffs from the defendants; and that it should be declared that, after the expiry of the term of the leases, the plaintiffs were entitled to have khas possession; also for such other relief as might seem just.

The suit was dismissed by the District Judge, and on appeal, the following principal question was thus expressed, and disposed of, in the judgment of a Division Bench, composed of Mitter and Norris, JJ.:—

The only ground upon which this appeal has been argued is this, that as on the dates of sale mentioned above, a large amount of money was due from the defendants to the plaintiffs, and as the defendants were the mortgagees, the sale should be declared as null and void, and that an account should be taken between the plaintiffs and the defendants of the moneys due to each other; and if on taking such account anything be found due to the plaintiffs, they should be allowed to sell the mortgaged property for the realization of the same.

The plaintiffs allege, that the amount of money which was receivable by them from the defendants falls into two classes: *First*, the rents of the disputed property which the defendants had in their hands, having been collected by them *for* the plaintiffs, after possession was taken of the property in dispute in accordance with the decree of the High Court, dated 31st January 1871; *second*, the rents due under the ticca pottahs executed in June 1874.

Now, we find that in the suit which was brought by the defendants upon the bond dated 9th October 1871, the plaintiffs, who were the defendants in it, set up in their written statement that the plaintiffs in that suit were not entitled to recover the amounts sued for unless an account were taken of the two classes of money due to them referred to above. In that written statement they based their defence upon this point upon an express contract between the parties.

In the opinion of the Court of First Instance as well as of this Court, which heard the case in regular appeal, this express contract was not established.

As regards the first class, this Court found that on an adjustment of accounts between the parties, which took place on the 31st December 1873, the plaintiffs in this case were found still indebted, to the extent of the money for which the bond of the 9th October 1871 was executed. Therefore, as regards this amount, it is no longer open to the plaintiffs to contend

that anything was due to them from the defendants. The learned Advocate-General contended, that although the express contract upon which the plaintiffs relied in the former litigation was not established in the opinion of the Courts which dealt with it, yet the plaintiffs are not precluded from relying upon the equity which arises upon the establishment of the fact that on the dates of the respective sales, the defendants were indebted to the plaintiffs on account of the rents due upon the lease executed in June 1874. He further argued, that this equity was not pleaded and dealt with by the Court in the former litigation.

We desire to guard ourselves from being understood to say that, in our opinion, any such equity as is put forward by the learned Advocate-General on behalf of the plaintiffs, does really exist, having regard to the facts stated in the plaint. But conceding this point in favour of the plaintiffs, it seems to us that the result of the former litigation precludes them from relying upon it. The suit upon the bond dated 9th October 1871, was brought to recover the money due under it by the sale of the mortgaged premises. In that suit the equity in question, if it really existed, would have been a valid defence. Therefore the decree which was passed in favour of the plaintiffs directing the sale of the mortgaged premises, precludes the plaintiffs from setting it up again in a subsequent litigation.

We are, therefore, of opinion that the ground urged before us in support of the appeal is not valid. We may notice here a decision cited before us in support of this ground of appeal, *Kamini Dasi* v. *Ramlochan Sirkar* (1). In that case, what was sold by the mortgagee was not the mortgaged property but simply the mortgagor's equity of redemption. There is, therefore, this essential difference between the facts of that case and the present, that in the former the mortgagee bought in the equity of redemption, while in the latter, the mortgagee brought a suit to enforce his mortgage lien, obtained a decree declaring his right to sell the mortgaged property in satisfaction of that lien, and after obtaining sanction of the Court, himself became the purchaser of the property brought to sale in execution of that decree.

The result is that this appeal will be dismissed with costs.

On the plaintiffs' appeal, Mr. *R. V. Doyne*, for the appellants, argued that, as the facts showed that, at the time of the sales in 1879 in execution of the decree upon the mortgage, the respondents were indebted to the appellants in respect of rents, and money had and received; it followed that it was inequitable that the respondents should be allowed to bring the mortgaged lands to sale without coming to an account, and also inequitable that they should become the purchasers. It was also argued, that inasmuch

(1) 5 B. L. R., 450.

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as the decision already given on the mortgage had dealt only with an alleged right of set-off under an express agreement, the appellants were not precluded from establishing facts that might disclose a right of set-off. It was not now alleged that there had been any express agreement to that effect, but it was contended that an equity resulted from the relations between the parties to have an account. Moreover, the respondents having themselves become the purchasers at the judicial sales, should be held under the circumstances to have purchased as trustees for the appellants, notwithstanding that they had purchased after obtaining an order giving them leave to bid.

Reference was made to the Transfer of Property Act (IV of 1882), s. 99, and to ss. 13 and 111 of the Code of Civil Procedure. *Kamini Debi* v. *Ramlochan Sircar* (1), and *Neerunjun Mookerjee* v. *Oopendro Narain Deb* (2) were cited.

Mr. *T. H. Cowie, Q.C.*, and Mr. *C. W. Arathoon*, for the respondents, were not called upon.

Their Lordships' judgment was delivered by

LORD WATSON.—In order to trace the circumstances which have given rise to the present litigation, it is necessary to go back to the year 1867; and it will be convenient, for the sake of brevity, to use the terms "Appellants" and "Respondents," as including not only the parties to this appeal but their predecessors in interest. The appellants, members of a joint Hindoo family, were owners of certain shares of 20 mouzas, in taluks Malik Alipur and Jonapur, which were sold, in that year, for arrears of Government revenue, to one Bunwari Lal. An action was brought by them to set aside the sale as irregular, which was dismissed in the District Court; but in January 1871 the High Court gave their decision in favour of the appellants, which was affirmed by this Board in December 1871.

The respondents held six of these mouzas in lease before the sale to Bunwari Lal. They were proprietors of an indigo factory in the neighbourhood, and they gave the appellants pecuniary and other assistance in their suit, in consideration of which the appellants, in April 1871, during the dependence

(1) 5 B. L. R., 450. (2) 10 B. L. R., 60.

of Bunwari Lal's appeal to the Privy Council, executed a mortgage bond, by which they hypothecated their interest in the 20 mouzas to the respondents for Rs. 25,000, with interest at 1 per cent. per mensem, payable in one lump sum by the month of April 1875. The appellants were restored to possession in April 1871, after the judgment of the High Court in their favour. In September 1873, the parties entered into an agreement by which, in consideration of further assistance already given, and to be given them by the respondents, the appellants undertook, in the event of Bunwari Lal's appeal proving unsuccessful, to renew the lease of the six mouzas, to let to the respondents the remaining 14 mouzas under a ticca pottah for 15 years, and to grant them a mokarari lease of 13½ bigas, required by them for the extension of their factory. In February 1874, shortly after the dismissal of Bunwari Lal's appeal, the appellants executed a sunnud, authorizing the respondents to collect the rents of their mouzas for the year ending in September 1874, the respondents accounting to them for their receipts, under deduction of costs and charges. In July 1874, the appellants, in terms of their previous agreement, renewed the lease of the six mouzas, at a rent of Rs. 645, for 15 years, from September 1874, and granted the respondents a ticca pottah, for the same period, of the remaining 14 mouzas, at a yearly rent of Rs. 3,527, subject to future adjustment. They also gave, as stipulated, a mokarari lease of the 13½ bigas.

These transactions between the appellants and respondents, which were by no means complicated, have unfortunately been the occasion of numerous and protracted litigations. The respondents began the strife, in June 1877, by bringing a suit upon their mortgage bond. At that date, they undoubtedly owed to the appellants a considerable sum, for past rents of the 20 mouzas, no part of which had been paid. The appellants did not plead in defence to the suit that, in the circumstances already explained, they were entitled to have a general account taken, and the respondents' decree limited to the balance in their favour. They alleged that there had been a specific agreement (which they failed to prove) to the effect that the rents should be

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set-off against the mortgage debt; and they also stated that it was their intention to institute a separate action for recovery of these rents. The result was that, on their failure to establish the alleged agreement, the Subordinate Judge, in January 1878, gave the respondents a decree, without any deduction on account of rents, which was affirmed by the High Court on the 22nd May 1879. The respondents, in April 1878, sued for execution on the decree of the Subordinate Judge; but in consequence of its being appealed from to the High Court proceedings were stayed. The next step was taken by the appellants, who, in June 1878, raised two actions, one for the rents due in respect of the six and the other for the rents due in respect of the 14 mouzas. In the former of these actions they obtained a decree, and the latter was dismissed by the Subordinate Judge in April 1879, on the ground that the rent payable for the 14 mouzas had never been adjusted in terms of the lease; but the High Court, holding that it lay with the respondents to show what, if any, abatement ought to be made from the rent specified, on the 2nd April 1881 reversed his decision, and gave the appellants a decree for the amount of their claim, which was upwards of Rs. 15,000.

The judgment of the High Court in their mortgage suit having then become final, the respondents, in June 1879, revived the execution proceedings which they had instituted in April 1878. The mortgaged property was exposed for sale on the 15th September and 20th November 1879, when it was purchased in two lots by the respondents, who had obtained leave to bid from the Court, for Rs. 17,000. The regularity of the sale was impeached by the appellants, but their objections were over-ruled by the Subordinate Judge, and after being sustained in part by the High Court, were ultimately disallowed by this Board on the 24th December 1882.

Having thus failed to make good their statutory objections, the appellants, on the 24th November 1883, filed their plaint in the present suit, which prays to have the two judicial sales, of 15th September and 20th November 1879, set aside or treated as nullities; to have the mortgage debt extinguished by setting against it the rents which had already accrued or might afterwards accrue; and for khas possession of the mortgaged property

after the expiry of the respondents' leases in 1889. The prayer was based upon two grounds: The *first*, which attributed the sales to undue influence and oppressive conduct on the part of the respondents, was abandoned in the High Court, and was not insisted on here. The *second* consists in an alleged equity, arising out of the relations of the parties to each other in the years 1871 to 1874, and the transactions between them during that period, to have an account taken, and to have the rents payable by the respondents credited against the sums due by the appellants under the mortgage bond. Their Lordships are disposed to think that the circumstances upon which the appellants rely did raise such an equity in their favour. The mortgage bond, the agreement, followed by the granting of the leases therein stipulated, and the sunnud, were all parts of one complex transaction, the objects of which were to enable the appellants to recover their property from Bunwari Lal, and to secure to the respondents re-payment of moneys which they had advanced, as well as remuneration for services rendered. But, assuming the existence of the equity, the real question in the present appeal is, whether it could be enforced by the appellants, in November 1883, to the effect of annulling the judicial sales of 1879.

Their Lordships entertain no doubt that the proper occasion for enforcing the equity, now pleaded, would have been in defence to the mortgage suit of 1877. That was certainly the suit in which any account to which the appellants were entitled, as in a question with their mortgagees, ought to have been taken. But the appellants not only abstained from putting forward any claim to a general accounting; they declared in their pleadings their intention of bringing a separate action for recovery of the rents, a proceeding which would have been wholly unnecessary if the plea which they urge in this appeal had been put forward and given effect to. The plea is within the meaning of s. 13 of the Civil Procedure Code of 1882, a matter which ought to have been made ground of defence in a former suit between the same parties, and the appellants are therefore barred from insisting on it, *exceptione rei judicatæ*.

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It was argued by Mr. Doyne, upon the authority of a decision by Macpherson, J., *Kamini Debi* v. *Ramlochan Sirkar* (1), that the respondents must be held to have purchased as trustees for the appellants. The same argument, which is not raised in the pleadings, seems to have been addressed to the High Court, who, in their judgment, distinguish between that case and the present, on the ground that in the former, the mortgagee did not purchase the mortgaged property, but the mortgagor's equity of redemption. Their Lordships cannot regard that explanation as satisfactory. It appears to them to be probable that, in the case referred to, the mortgagee had not obtained leave from the Court to purchase. The report does not state that he had; and the reasoning of the learned Judge, and the mass of authorities by which he supports it, have a direct bearing upon the case of a mortgagee purchasing without leave, and in that view of the facts his reasoning is intelligible and logical. Leave to bid puts an end to the disability of the mortgagee, and puts him in the same position as any independent purchaser. If the decision of Macpherson, J., proceeded on the footing that the mortgagee had obtained leave, their Lordships are not prepared to assent to it. On that footing it appears to them that purchase of the equity of redemption by the mortgagee at a judicial sale would have the same effect against the mortgagor as the purchaser of the mortgaged property.

Their Lordships will therefore humbly advise Her Majesty that the judgment appealed from ought to be affirmed, and the appeal dismissed. The appellants must bear the costs of the appeal.

Appeal dismissed.

Solicitors for the appellant: Messrs. *T. L. Wilson & Co.*

Solicitor for the respondents: Mr. *S. G. Stevens.*

C. B.

(1) 5 B. L. R., 450.