

1911

DURGA DAT  
v.  
GITA.

We direct that the parties shall bear their own cost in the lower appellate court and that the appellants shall have their costs of this appeal.

*Appeal decreed.*

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February 6.

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Griffin.*

MAHDI HUSAIN AND ANOTHER (DEPENDANTS) v. SUKH CHAND AND OTHERS (PLAINTIFFS)\*

*Money deposited "in usum jus habentis" improperly withdrawn by a person not entitled to it—Money had and received.*

Where money is deposited in Court *in usum jus habentis*, and it is withdrawn by a person who is declared not to have any right thereto, the money so obtained may properly be held to be received for the use of the person entitled to it. *Litt v. Martindale* (1), referred to.

THE facts of this case are fully stated in the judgement of the court.

Mr. G. W. Dillon (with him Mr. Abdul Rawof), for the appellants.

Dr. Satish Chandra Banerji (with him Babu Surendra Nath Sen), for the respondents.

STANLEY, C. J. and GRIFFIN, J.:—This was a suit for a refund of Rs. 842 paid in satisfaction of a decree under the following circumstances. On the 31st of March, 1883, the plaintiffs mortgaged certain property in favour of one Kallu Mal. Kallu Mal died, leaving his widow, Musammat Gulab Dei and a minor son Har Saran. On the 4th of December, 1897, Musammat Gulab Dei, as mother and guardian of her infant son, transferred the mortgagee rights under the mortgage to Musammat Shibia. Subsequently, on the 18th of March, 1900, Har Saran, who was still a minor, purported to transfer the mortgagee rights in the mortgage to the defendants. The defendants, on the 21st of May, 1900, instituted a suit for sale on foot of the mortgage of 1883 and obtained a decree which was made absolute on the 14th of September, 1901. Musammat Shibia was not a party to these proceedings. On the 5th of November, 1900, Musammat Shibia brought a suit to enforce the mortgage of

\* Second Appeal No. 994 of 1909 from a decree of Louis Stuart, District Judge of Meerut, dated the 27th of July, 1909, confirming a decree of Hanuman Prasad, Third Additional Munsif of Meerut, dated the 21st of April, 1909.

1883, which had been transferred to her by Musammat Gulab Dei on the 4th of December, 1897. She obtained a decree, and in execution of that decree the mortgagee rights under the mortgage of 1883 were sold and purchased by Musammat Shibia. She then sued for sale of the mortgaged property impleading both the defendants and the plaintiffs, and obtained a decree for sale on the 23rd of December, 1903. In order to protect the property from sale under the decree of the 14th of September, 1901, the plaintiffs under protest deposited the amount of the mortgage in court; and they subsequently filed an objection to the execution of the decree of the defendants alleging that no interest in the mortgaged property passed to the defendants under the transfer of the 18th of March, 1900, Har Saran being at the date of the execution of that mortgage a minor. The defendants applied to the Munsif in whose court the money was deposited for payment of it and they alleged that the defendant, Nabi Baksh, had already paid off the amount due to Musammat Shibia under her decree. We find in the order of the court, dated the 14th of March, 1906, the following statement:—"Then it is shown that Nabi Baksh has already paid off the decretal amount of Musammat Shibia." The learned Munsif then observes:—"Under the circumstances I am of opinion that the present decree is capable of execution and the mortgagors cannot derive any advantage from the decree obtained by Musammat Shibia." It is obvious from this that the order for payment of the money was obtained on the faith of the false representation, made by Nabi Baksh that Shibia's decree had been paid off. The order of the Munsif was subsequently affirmed on appeal. In the suit brought by Musammat Shibia on the basis of the bond of the 4th of December, 1897, on appeal to the High Court, it was held on the 27th of June, 1906, that the sale executed by Har Saran in favour of the defendants was absolutely void, and that the defendants had no right whatever in the mortgaged property in dispute. Despite this decree, the defendants, in January, 1907, withdrew from the court of the Munsif the sum which had been deposited by the plaintiffs under protest. The court, however, before making payment, required from the defendants security for the re-payment of the money if it should turn out

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that the defendants were not entitled to it. A security bond by one Wajah-ud-din was executed for this purpose on the 2nd of January, 1907, and by that bond the surety hypothecated certain immovable property. The decree of Musammam Shibia was not paid by Nabi Baksh and has not been satisfied, but is still under execution. The suit out of which this appeal has arisen was brought for the refund of the money improperly drawn from court by the defendants. Both courts have decreed the claim.

This appeal was then preferred and the main ground of appeal is that it is not open to the plaintiff, in view of the decree of the 24th of January, 1901, which has never been set aside, to recover back money obtained in execution of it, and that the matter must be deemed to be *res judicata*. There is no force in this contention. The defendants were parties to the suit brought by Musammam Shibia, and in that suit it was held that the transfer executed by Har Saran on the 18th of March, 1900, was absolutely void. In view of this ruling the defendants were not justified in making an application for and obtaining payment of the money lodged in court under protest. They acted improperly in representing to the court of the Munsif that Musammam Shibia's decree had been paid off by one of them. The money was deposited in court *in usum jus habentis*, and before it was withdrawn this court had declared that the defendants had no right to it. Under these circumstances the defendants were not justified in their action in withdrawing the money. They improperly withdrew money which in justice and equity belonged to the plaintiffs. Money so obtained may properly be held to be received for the use of the person entitled to it; see *Litt v. Martindale* (1). We think, therefore, that the decision of the courts below was perfectly right and dismiss this appeal with costs.

*Appeal dismissed.*