

1916

MUHAMMAD
ABDUL JALIL
v.
BAM DAYAL.

sufficiently shown that there is no basis in fact for the plaintiff's plea on this point, and that such coincidences as were relied upon by him have been sufficiently explained in the evidence given by the defendants.

For the reasons stated we find no force whatsoever in this appeal. We dismiss it accordingly with costs.

Appeal dismissed.

PRIVY COUNCIL.

RADHA KUNWAR (DEFENDANT) *v.* REOTI SINGH (PLAINTIFF.)

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

Appeal to Privy Council—Valuation of appeal—Civil Procedure Code (1908), section 110—Appealable amount subject-matter of appeal—Suit to enforce mortgage—Person made defendant as having adverse claim on the mortgaged property—Appeal on rejection of her claim by High Court.

In a suit to enforce a mortgage for Rs. 2,000, the amount due upon which was Rs. 88,000 the mortgagee (respondent) asked for payment or for a sale of the mortgaged property. Besides the parties who claimed under the mortgagor the appellant who set up an adverse claim to a portion of the mortgaged property and the person through whom she claimed were made defendants and they alone defended the suit. The Subordinate Judge allowed a moiety of her claim, but on appeal the High Court held that she had no title to any of the property. The High Court granted her leave to appeal to His Majesty in Council under section 110 of the Civil Procedure Code, 1908, on the ground that as the mortgage decree imposed on the property a liability for Rs. 88,000 the subject-matter of the appeal was a sum exceeding Rs. 10,000.

Held by the Judicial Committee (on a preliminary objection that the appeal was not maintainable as the subject-matter of it was below the appealable value), that as between the respondent seeking to enforce his mortgage and the appellant it was quite immaterial what the amount of the mortgage was, and that the subject-matter in dispute was not the Rs. 88,000 but simply the value of the property the appellant claimed, which was not shown to be of the amount prescribed by section 110 of the Civil Procedure Code, 1908.

APPEAL No. 46 of 1915 from judgement and decree (12th March, 1912) of the High Court at Allahabad, which varied a judgement and decree (8th June, 1910) of the Subordinate Judge of Aligarh.

* *Present.*—The LORD CHANCELLOR (LORD BUCKMASTER) LORD ATKINSON and Sir JOHN EDGE.

1916
June, 26.

31 M. L. J. 571

The suit out of which this appeal arose was brought by the respondent on the 20th of November, 1909, to recover Rs. 38,495 due on a mortgage bond, dated the 7th of July, 1884, executed by one Mahtab Kunwar in favour of Sobha Kunwar (since deceased), the mother of the present respondent, whereby a 10-biswa share in mauza Mobraipur was hypothecated for Rs. 2,000.

1916

 RADHA
 KUNWAR
 v.
 REOTI SINGH.

The appellant was made a party defendant to the suit as claiming to be owner of a 4 odd biswa share through one Hukum Singh, who, she alleged, had executed a mortgage bond for that portion of the property in suit in her favour. That bond the plaintiff alleged to be fictitious and made without consideration. Hukum Singh and Radha Kunwar alone defended the suit the other defendants, Mahtab Kunwar (the mortgagor), Bhup Kunwar (her transferee) and three grandsons of the original mortgagee (Sobha Kunwar) not appearing.

The interest of the appellant in the suit depended therefore entirely on whether Hukum Singh, through whom she claimed, was the owner of any portion of the mortgaged property. On that question the Subordinate Judge held that a 2 odd biswa share belonged to Hukum Singh, and accordingly, in giving the respondent a mortgage decree, he excepted the 2 odd biswa share from sale under the mortgage as being the share to which the appellant was entitled under her claim.

From that decision both Radha Kunwar and Reoti Singh appealed to the High Court (Sir H. D. GRIFFIN and CHAMIER, JJ.) who held that none of the mortgaged property belonged to Hukum Singh and that the plaintiff was entitled to sell all of it under the mortgage decree. Consequently the appeal of Reoti Singh was allowed and that of Radha Kunwar dismissed.

On the application of Radha Kunwar for leave to appeal to His Majesty in Council Sir HENRY RICHARDS, C.J., and Sir P. C. BANERJI, J., in granting leave after hearing argument on either side said :—

“ This is an application for leave to appeal to His Majesty in Council. The value of the subject-matter of the suit in the court below exceeds Rs. 10,000. This Court reversed the decision of the lower court; and therefore if the value of the subject-matter of the proposed appeal exceeds Rs. 10,000, the

1913

RADHA
KUNWAR
v.
RAGUL SINGH.

case is one which fulfils the requirements of section 110 of the Code of Civil Procedure. It is, however, urged that the value of the subject-matter of the proposed appeal to His Majesty does not exceed Rs. 10,000, and this contention is based on the following facts. The suit was one to recover Rs. 38,000 and odd by enforcement of a mortgage. A part of the property comprised in the mortgage was exempted from liability under the mortgage by the court below. An appeal was preferred to this Court, and it was held that the whole of the mortgaged property was liable to sale in enforcement of the mortgage. It is in respect of this part of the decree of this Court that the applicant seeks to appeal to His Majesty in Council. It is alleged that the value of property, which by the proposed appeal is sought to be exempted from liability under the mortgage and decree passed on it is Rs. 2,000 odd, and this amount must be regarded as the value of the subject-matter of the appeal to His Majesty. We do not agree with this contention. The decree imposes on the property a liability for Rs. 38,000 and odd. Therefore the value of the subject-matter of the appeal to His Majesty is a sum exceeding Rs. 10,000, and the case fulfils the requirements of section 110, and we so certify."

On this appeal—

Sir W. Garth for the appellant.

De Gruyther, K.C., and *B. Dube*, for the respondent.

A preliminary objection was taken that the appeal was not maintainable, inasmuch as the value of the subject-matter of the appeal was less than Rs. 10,000. For the respondent it was contended the appeal related only to the value of the 2 odd biswa claimed by the appellant: that was the only subject-matter in dispute in this appeal. There was no question of law, and therefore no reason for the exercise of the discretion of the High Court to certify the case as "otherwise" fit for appeal. Reference was made to section 110 of the Civil Procedure Code, 1908, and *Banarsi Prasad v. Kashi Krishna Narain* (1), which was a case decided under the Civil Procedure Code, 1882, sections 596, 600.

For the appellant it was contended that the High Court had rightly granted the certificate of leave to appeal. The

(1) (1900) I. L. R., 23 All., 227.

appeal related to the whole subject-matter of the suit. It could not be said that the mortgage debt did not equally affect every portion of the property mortgaged. The 2 odd biswas might if the appeal failed be sold by the mortgagee for the whole of the mortgage debt. The value of the 2 odd biswas claimed by the appellant had not been certified, and the case should therefore be remanded for the determination of the value of the appellant's claim to make it certain whether its amount would maintain the appeal or not.

1916, June 26th :—The judgement of their Lordship was delivered by the LORD CHANCELLOR :—

It is always to be regretted when an appeal is disposed of on a preliminary point, and the parties are compelled, after having incurred considerable expense to leave this Board without a determination of the real merits of their dispute. But in this case their Lordships feel that they have no choice in the matter, and that they are bound to advise His Majesty that the preliminary point raised must prevail.

The facts of this case are these : In 1884 a mortgage was executed of certain property for a sum of Rs. 2,000, with interest at 12 per cent. On the 20th of November, 1909, the persons who were entitled to the benefit of that mortgage took proceedings in order to have it enforced. They claimed that the amount due upon the mortgage was Rs. 38,494, and they asked for an order for payment of that sum against the defendant and a sale of the property. They made, as parties to that suit, not merely the people who claimed under the mortgagors but also certain people who had set up adverse claims to the mortgaged property, among whom the appellant was one. Their Lordships think that this joinder of these parties was irregular, and that it could only tend to confusion.

What followed was this : The present appellant, who claimed through a person named Hukum Singh, said that she was entitled to 4 biswas of the property. That dispute was entirely independent of the mortgage transaction of 1884. Whatever the amount of that mortgage might be, in no circumstances could the appellant have been made responsible for it. If it had been held that her claim was good, the mortgagee would

1916

RADHA
KUNWAR
D.
ROOPI SINGH.

1916

BADHA
KUNWAR
v.
BROTI SINGH.

have completely failed, so far as her share of the estate was concerned : if it had been held that her claim was bad, she could have had no right whatever to redeem the mortgage. The cause, however, proceeded without any objection being taken, and, in the end, on the 8th of June, 1910, a decree was made by the Subordinate Judge in which he declared that the appellant was entitled to one-half of the 4 biswas which had been set up as her original claim. From that decree an appeal was taken to the High Court, and on the 14th of November, 1910, the High Court decided that the appellant had no title at all. The result was that as to one-half there were concurrent findings both of the Subordinate Judge and of the High Court that the appellant had no claim and as to one-half there were differing judgements. The appellant accordingly sought to obtain leave to appeal to His Majesty in Council from the judgement of the High Court, and for that purpose it was essential that she should satisfy the condition of section 110 of the Civil Procedure Code of 1908. That section provides that an appeal can only be allowed in certain cases where the amount or value of the subject matter of the suit in the Court of First Instance was Rs. 10,000, or upwards "and the amount or value of the subject-matter in dispute on appeal to His Majesty in Council must be the same sum or upwards."

Upon the appellant's application for a certificate that the value of the subject-matter exceeded the Rs. 10,000 there appears to have been argument before the High Court and a certificate has been given in her favour. But it is objected that that certificate, on the face of it, proceeds upon a wrong principle, and that this Board ought not to regard it as conclusive of the appellant's right to appeal.

Their Lordships think that the respondent's contention in this respect is correct. The certificate is prefaced by an order in which the High Court state what the reasons were that led them to the conclusion that the subject-matter was above the prescribed limit, and it is quite plain, on an examination of that order, that they were deciding as between two rival contentions. The one that was put forward on behalf of the respondent was that in point of fact the appeal related only to the value of the 2 biswas, while the appellant asserted that it related to the whole subject-

matter of the suit which was Rs. 38,000. This latter argument was enforced by suggesting that if the appellant's case failed the mortgage would operate over the whole of the property and there would be a right left in the mortgagee to sell and dispose of this piece of the estate for the total value of the mortgage debt; that as the mortgage debt affected equally every part of the property subject to the original mortgage, it affected the whole of those 2 biswas, and the subject-matter of the disputes therefore was Rs. 38,000. This contention prevailed before the High Court, and they state in terms that the decree which was the subject of appeal had imposed on the property a liability for Rs. 38,000 and that in consequence the value of the subject-matter of the appeal exceeded the necessary prescribed sum.

Their Lordships think that this was an entire mistake. As between the respondent, who was seeking to enforce his mortgage, and the appellant the subject-matter of the suit was not Rs. 38,000. The subject-matter of the dispute was simply the value of the property which the appellant claimed, and it was quite immaterial for that purpose what the value of the mortgage might be. As has already been pointed out, the appellant could under no circumstances have been made responsible for the amount of the mortgage nor could its extent in any way whatever have in the least degree varied her rights. In truth the confusion has arisen because the cause of action against the appellant, that is to say, the right to obtain a declaration of title against her adverse claims, has been joined with another which was quite distinct, the enforcement of rights under a mortgage.

Their Lordships think that the subject matter of this appeal is nothing but the 2 biswas to which the Subordinate Judge found that the appellant was entitled.

Then Sir *William Garth* urges that in these circumstances, as this question of the value has never been determined by the High Court, the matter ought to go down for the purpose of seeing whether those 2 biswas would support the value of Rs. 10,000 and thus enable an appeal to be maintained. After considering all the arguments upon this point, their Lordships

1916

RADHA
KUNWARv.
RABTI SINGH.

1916

RADHA
KUNWAR
v
BHOOT SINGH.

think that, out of consideration for the parties themselves, no such direction ought to be given. Had it been possible, when the original certificate was applied for, to have established that the value of those 2 biswas exceeded the Rs. 10,000—a perfectly simple and straightforward thing to do—all this difficulty as between the value of the estate and the value of the mortgage would at once have vanished, but it seems impossible to read the judgement of the High Court without seeing that there were two contentions, and only two, before them. Upon the one contention the appellant would have failed, and that was that the subject-matter of the suit related to the 2 biswas, and on the other contention she would have succeeded, and that was that the subject-matter of the suit was affected by the value of the mortgage debts. It was the latter contention which the High Court wrongly adopted.

Their Lordships will therefore humbly advise His Majesty that this objection must succeed, and that this appeal should be dismissed with costs.

Appeal dismissed.

Solicitor for the appellant : *Douglas Grant.*

Solicitors for the respondent : *Barrow, Rogers and Nevill.*

J. V. W.

AHMAD RAZA AND OTHERS (DEFENDANTS) v. ABID HUSAIN AND OTHERS
(PLAINTIFFS).

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

Evidence—Secondary evidence—Certified copy of petition of compromise made in 1857—Record of proceedings destroyed in the Mutiny—Evidence to establish mortgage in suit for redemption of mortgage not made in writing—Stamp—Bengal Regulation, X of 1829—Objection that certified copy is insufficiently stamped—Petition treated as document creating mortgage.

In a suit for the redemption of a usufructuary mortgage alleged to have been created in 1857, the document on which the plaintiffs relied to establish the mortgage was a certified copy of a petition of compromise filed in Court on 1st of April, 1857. The record of the proceedings was admittedly destroyed in the mutiny of that year. The document, which was admitted in evidence by the Subordinate Judge, recited the terms on which the dispute was settled amongst them being the agreement relating to the mortgage, and an endorsement on it, after reciting that "the pleaders for the parties filed the compromise in the presence of their respective clients, and verified and admitted all the

* *Present.*—Lord SHAW, Lord PARMOUR and Mr. AMBER ALLI.