1881

AHADUR v. WAB JAN.

been broken in consequence of the mortgagees having purchased the rights of some of the mortgagors, and that a suit by one of the mortgagors for possession of his share was properly maintainable, the value of the subject-matter of the suit was the value of that portion of the mortgagee's rights which the plaintiff alleged had been redeemed. Even had it been held that the property charged by the mortgage of 1816 had been further incumbered with the bond of 1824, the amount the plaintiff could have been ordered to pay would not have exceeded the extent of the one-fifth mortgagor's share in his hands, that is to say, a less sum than Rs. 1,000. As between plaintiff and defendants the value of the subject-matter in issue was therefore within the Munsif's jurisdiction, and he rightly entertained and disposed of the suit. We may add that this point has already been made the basis of a considered judgment of this Court—*Gobind Singh* v. *Kallu* (1)—in which previous rulings were considered. We are therefore of opinion that the Judge should have heard the appeal to him, and as he disposed of it upon a preliminary point, we remand the case to him under s. 562 of the Civil Procedure Code for trial on the merits.

Cause remanded.

1881
July 26.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

MAKUND AND OTHERS (DEFENDANTS) *v.* BAHORI LAL (PLAINTIFF).*

Right to begin—Burden of proof—Irregularity not affecting merits—Powers of appellate Court—Act X of 1877 *(Civil Procedure Code), s.* 578.

The defendants in a suit on a bond admitted the execution of the bond, but denied that they had received, as the bond recited they had at the time of its execution, the consideration for it. The Court of first instance instead of calling on the defendants to establish the fact that they had not received the consideration for the bond, as it ought to have done under the circumstances, irregularly allowed the plaintiff to produce witnesses to prove that the consideration for the bond had been paid at the time of its execution. The evidence of these witnesses proved that the consideration of the bond had not been paid at the time of execution, and that, if it had been paid at all, it had been paid at some subsequent time. The plaintiff did not give any further evidence to establish such payment, and the Court of first instance, without calling on the defendants to establish their defence,

* Second Appeal, No. 1259 of 1880, from a decree of G. E. Knox, Esq., Judge of Bánda, dated the 26th August, 1880, reversing a decree of Pandit Ram Narain, Munsif of Hamírpur, dated the 15th July, 1880.

(1) I. L. R., 2 All. 778.

1881

MAKUN v. BAHORI L.

dismissed the suit. The lower appellate Court held that the defendants should have been required to begin under the circumstances, and reversed the decree of the Court of first instance, and gave the plaintiff a decree.

Held that, although the plaintiff ought not to have begun, yet as he had done so, and his witnesses had proved that the consideration for the bond had not been paid as admitted in the bond, a new case was opened up, in which the *onus* was shifted back to the plaintiff to establish that he had, not at the time alleged in the bond, but at some subsequent time, paid to the defendants the consideration for the bond. Also that it was doubtful, having regard to the provisons of s. 578 of Act X of 1877, whether it was competent for the lower appellate Court to reverse the decision of the Court of first instance; but even if it were, the lower appellate Court should not have ignored what had taken place, but should have dealt with the case in appeal in the shape it came before it.

THE plaintiff in this suit claimed Rs. 85, principal, and Rs. 38-13-0, interest, total Rs. 123-13-0, on a bond dated the 28th August, 1878, purporting to be executed by the father of the defendants. This bond recited that the obligor had received the consideration for it. The defendants admitted that their father had executed the bond, but denied that he had received any consideration for it, alleging that the plaintiff had promised at the time and place of execution of the bond to pay the consideration to the obligor when the latter returned to his village, but that he had not done so. The plaintiff called the two marginal witnesses to the bond and a third person to prove that the obligor had received the consideration at the time of execution of the bond. These witnesses deposed that the money was not paid to the obligor at the time of execution, and one of them further deposed that the plaintiff had promised to pay the obligor the money at his home, but that he had not done so. The defendants did not produce any evidence in support of their defence to the suit. The Court of first instance, having regard to the evidence of the plaintiff's witnesses, held that "the plaintiff's claim was not proved even from the evidence of his own witnesses," and dismissed it. On appeal by the plaintiff the lower appellate Court held that the party to begin in a case of this nature was the defendant, and that the burden of proof in this case lay on the defendants, and they had not discharged it, and it gave the plaintiff a decree for the amount claimed by him.

On second appeal by the defendants it was contended on their behalf that, under the circumstances, the burden of proving that the

1881

MAKUND v. HORI LAL.

consideration for the bond had been paid lay on the plaintiff, and as he had failed to prove this fact, the Court of first instance had properly dismissed his suit.

Babu *Jogindro Nath Chaudhri*, for the appellants.

Pandit *Bishambhar Nath*, for the respondent.

The judgment of the Court (STRAIGHT, J., and TYRRELL, J.,) was delivered by

STRAIGHT, J.—The plaintiff-respondent sued in the Munsif's Court to recover Rs. 123-13-0, principal and interest, due upon a bond dated 28th August, 1878, by enforcement of lien against 94 bighas 16 biswas hypothecated. The defendants-appellants admitted the execution of the instrument, but denied that they had received any consideration, and the *onus* was therefore upon them to establish their plea, and they should have been called upon to begin. It seems, however, that the Munsif did not adopt this course, and the pleader of the plaintiff proceeded to call witnesses in support of his client's case, mainly, we presume, for the purpose of meeting the defence set up on the other side. Two of the marginal witnesses and one other person deposed that the money recited in the bond as having been paid was not paid either at the time of or before its execution, but that, on the contrary, the plaintiff promised it should be paid upon the return of the parties to the village. The effect of this evidence therefore was to negative the conclusive presumption otherwise to be drawn from the terms of the bond, that the consideration had been satisfied by the obligee at or before execution, and to indicate a payment of it at some other time. The plaintiff's pleader, apparently disconcerted by his own witnesses thus playing him false, did not bring forward any further proof to establish any such payment, and without calling upon the defendants to substantiate their plea, the Munsif dismissed the claim. The Judge, in appeal, holding that the defendants should have been required to begin, reversed this decision, and decreed in favour of the plaintiff. The somewhat startling effect of this judgment is that, though there is uncontradicted evidence to be found in the record that the presumption of payment to be inferred from the terms of the bond, which would primarily have thrown the

1881

MAKUND v. BAHORI LA

onus upon the defendants, was negatived, yet the Judge has acted as if such presumption were in full force. No doubt the Munsif permitted an irregularity of procedure in allowing the plaintiff's pleader to begin, but having done so, and the witnesses having proved that the consideration had not been paid as admitted by defendants in the bond, a new case was opened up, in which the *onus* was shifted back to the plaintiff to establish that he had, not at the time alleged in the bond, but at some subsequent date, paid to the defendants the money alleged to have been lent. Having failed to do this, his suit was properly dismissed by the Munsif. We much doubt whether, having regard to the terms of s. 578 of the Civil Procedure, it was competent for the Judge to reverse the decision of the first Court, but even if it was, he should not have ignored what had taken place there, and should have dealt with the case in appeal in the shape it came to him. We cannot maintain his decision. The plaintiff was rightly held by the Munsif to have failed to prove his case, and the Judge should not have discarded the evidence of the three witnesses called on his behalf. The appeal must therefore be decreed with costs, the decision of the lower appellate Court reversed, and that of the Munsif restored.

Appeal allowed.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

1881
May 30.

HIRA (PLAINTIFF) *v.* UNAS ALI KHAN (DEFENDANT).*

Pre-emption—Act X of 1877 *(Civil Procedure Code), s.* 310.

The requirements of s. 310 of Act X of 1877 are not satisfied by the co-sharer preferring his claim to the right of pre-emption before the property is knocked down, and offering to pay a sum equal to that bid by the highest bidder. That section contemplates a distinct bid by the co-sharer in the ordinary manner of offering bids. *Tej Singh* v. *Gobind Singh* (1) followed.

A SHARE of certain undivided immoveable property was put up for sale in execution of a decree, and was knocked down to the plaintiff in this suit. Immediately before the hammer fell to the plaintiff's bid, the defendant in this suit, a co-sharer of such share,

* Second Appeal, No. 1291 of 1880, from a decree of W. Dutheil, Esq., Judge of Shâhjahânpur, dated the 3rd September, 1880, reversing a decree of Said Muhammad Munsif of West Budaun, dated the 20th July, 1880.

(1) I. L. R. 2 All. 850.