

1935

PEOPLES BANK
OF NORTHERN
INDIA
v.

HARGOPAL.

GOLDSTREAM J.

executable against the estate of Har Gopal in the possession of his sons.

JAI LAL J.—I agree.

P. S.

Appeal accepted as against Har Gopal's estate.

LETTERS PATENT APPEAL.

Before Addison and Din Mohammad JJ.

SEWA SINGH (PLAINTIFF) Appellant

versus

MILKHA SINGH AND OTHERS (DEFENDANTS)

Respondents.

Letters Patent Appeal No.4 of 1935.

Mortgage — unpaid balance of consideration — whether recoverable by suit for specific performance — and whether can be attached in execution of a decree against the mortgagor.

Held, that a suit for specific performance of a contract to advance money on a mortgage is incompetent (though the mortgagor has a remedy in a suit for damages) and any unpaid balance of the mortgage consideration cannot, therefore, be attached in execution of a decree against the mortgagor.

Phul Chand v. Chand Mal (1), *Yadavindra Bhatta v. Shrinivasa Babu* (2), *Sheikh Galim v. Sadarjan Bibi* (3), *Sheopati Singh v. Jagdeo Singh* (4), and *Allah Ditta v. Nazar Din* (5), relied upon.

Imam Din v. Dittu (6), and *Thakar Singh v. Jagat Singh* (7), not approved.

Letters Patent Appeal from the decree passed by Rangil Lal J. in C. A. No. 1106 of 1934, on 22nd October, 1934, affirming that of Mr. S. L. Sale, District Judge, Amritsar, dated 26th April, 1934 (who reversed that of Lala Ram Rattan, Subordinate

(1) (1908) I. L. R. 30 All. 252. (4) (1930) I. L. R. 52 All. 761.

(2) (1924) I. L. R. 47 Mad. 698. (5) 53 P. R. 1916 (F.B.).

(3) (1916) I. L. R. 43 Cal. 59. (6) (1924) 78 I. C. 445.

(7) (1932) 140 I. C. 495.

Judge, 2nd Class, Tarn Taran, dated 28th May, 1932), dismissing the plaintiff's suit.

1935

SEWA SING
v.

MILKHA SING

DURGA DAS, for Appellant.

ACHHRU RAM, for Respondents.

ADDISON J.—This is a case of a mortgage where part of the consideration was left in the hands of the mortgagees to redeem a mortgage of other land of the mortgagor in favour of a third person. The mortgage appears to be the usual anomalous mortgage with possession, interest being set off against the right to receive the income. A fourth party obtained a decree against the mortgagor and in execution of that decree has attached the balance left with the mortgagees to redeem the land mortgaged with the third party. This balance is Rs.2,000 and the mortgage was effected some eight years before the present suit. The mortgagees preferred objections to the effect that this unpaid amount could not be attached in their hands. Their objections were dismissed and they instituted the present suit under Order XXI, Rule 63, Civil Procedure Code, for a declaration that this unpaid amount was not liable to attachment and sale. The trial Court decreed the suit. The District Judge on appeal reversed this decision and an appeal to this Court was dismissed by a Single Judge against whose decision this Letters Patent Appeal has been preferred.

ADDISON J

It was held in *Phul Chand v. Chand Mal* (1), that where money promised as a loan by a mortgagee is not advanced in full, the mortgagor is only entitled to recover, if anything, damages for non-payment of the balance : he cannot sue for specific performance of the

1935

HEWA SINGH
v.
LAKHA SINGH
ADDISON J.

agreement to lend the full sum promised, and the non-payment of a portion of the loan does not constitute a debt which can be the subject of attachment and sale under the Code of Civil Procedure. This was a decision by Sir John Stanley and Sir William Burkitt. Another Division Bench of the Allahabad High Court held in *Sheopati Singh v. Jagdeo Singh* (1), that although a mere contract to lend money cannot be specifically enforced, the case of a usufructuary mortgage must stand on a different footing, particularly when possession has been delivered and the stipulation is that the profits are to be set off against the interest. For this reason a suit by the mortgagor to recover from the usufructuary mortgagee the money for which the mortgage was made and possession delivered was not really one for the specific performance of a mere contract to lend money, but to compel the defendant to perform his part of the contract. It was said that the mortgage in *Phul Chand v. Chand Mal* (2), was not a possessory mortgage, though this is not clear from the report itself.

A Single Bench of this Court, without discussion took the view in *Imam Din v. Dittu* (3), that a suit was maintainable by the mortgagor to recover the unpaid balance of the mortgage money from the mortgagee. Another Judge of this Court, sitting alone, held in *Thakar Singh v. Jagat Singh* (4), that where money was reserved with the mortgagee in trust for payment to the creditors of the mortgagor a suit by the mortgagor to recover the money so reserved, on default of payment, was maintainable and that no question of specific performance of the contract to lend money

(1) (1930) I. L. R. 52 All. 761.

(3) (1924) 78 I. C. 445.

(2) (1908) I. L. R. 30 All. 252.

(4) (1932) 140 I. C. 495.

arose. This was a case where possession of the mortgaged property had not been given and it was said that the learned Judges who decided *Sheopati Singh v. Jagdeo Singh* (1), did not lay down that the giving of possession by the mortgagor to the mortgagee was a condition precedent to enable the former to institute a suit for the recovery of the mortgage money. With all respect that does seem to be the distinction the learned Judges made in that case. Another Single Bench of this Court followed *Thakar Singh v. Jagat Singh* (2), in Civil Appeal 1577 of 1933.

On the other hand, the Madras High Court has in *Yadarendra Bhatta v. Shrinirasa Babu* (3), laid down that a suit to enforce an agreement to lend money on a mortgage is not maintainable, though it is open to the mortgagor to sue the mortgagee for damages for the breach of the agreement to lend money. It was further held that an assignee from a mortgagor of a part of the consideration due for a mortgage, which was not paid by the mortgagee, was not entitled to recover it in a suit against the mortgagee and in this judgment *Anakaran Kasmi v. Saidamadath Avoulla* (4), *Aiyar v. Sheikh Dacood Rowther* (5) and *Sheikh Galim v. Sadarjan Bibi* (6), were followed.

A Division Bench of the Calcutta High Court held in *Sheikh Galim v. Sadarjan Bibi* (6), that a suit for specific performance of a contract to lend or borrow money on a mortgage was not maintainable. Certain English cases are cited there which clearly lay down this principle and suggest that the proper remedy is an action for damages.

A Full Bench of the Punjab Chief Court held in *Allah Ditta v. Nazar Din* (7), that a mortgage was

1935

S. N. SINGH
C.
M. S. SINGH
ADDISON J.

(1) (1932) I. L. R. 52 All. 761.

(4) (1878) I. L. R. 2 Mad. 79.

(2) (1932) 140 I. C. 495.

(5) (1918) 34 Mad. L. J. 342.

(3) (1924) I. L. R. 47 Mad. 698.

(6) (1916) I. L. R. 43 Cal. 59.

(7) 53 P. R. 1916 (F.B.).

1935

LEWA SINGH
 v.
 ELKHA SINGH.
 ADDISON J.

complete not when the consideration for it was paid, but when the mortgage contract was entered into, regardless of whether and when the consideration was paid or made good. It was further held that a mortgage, of which the whole consideration had not been paid, was valid to the extent of the money advanced. Similarly, a sale is complete when entered into, though the seller retains a lien on the property sold to the extent of the unpaid purchase money.

Apart from the Single Bench decisions of this Court, the weight of authority is towards the view that a suit for specific performance of a contract to advance money on a mortgage is incompetent and that any unpaid balance of the mortgage consideration cannot be attached in execution of a decree. The Master of the Rolls (Sir John Romilly) said that "it certainly is new to me that this Court has ever entertained jurisdiction in a case where the only personal obligation created is that one person says, if you lend me the money I shall repay it and give you good security and the terms are settled between them. The Court has said, that the reason for compelling specific performance of a contract is because the remedy at law is inadequate or defective. But by what possibility can it be said that the remedy here is inadequate or defective? It is a simple money demand; the plaintiff says, I have sustained pecuniary loss by my money remaining idle, and by my not getting so good an investment for it as you contracted to give me. This is a mere matter of calculation, and a jury would easily assess the amount of the damage which the plaintiff has sustained." Similarly, attempts to compel a man to borrow money were held incompetent.

In my judgment, the correct view is that such a contract cannot be specifically enforced, though the

mortgagor has a remedy in a suit for damages. It follows that the so-called debt attached in this case could not be validly attached.

I would accept this appeal, set aside the decisions of the District Judge and the Single Bench of this Court and restore the judgment of the trial Court decreeing the claim. The appellants will have their costs of this Letters Patent Appeal and of the trial Court and parties will bear their own costs before the District Judge and the Single Bench.

DIN MOHAMMAD J.—I agree.

P. S.

1935
SEWA SINGH
v.
MILKHA SINGH
ADDISON J.

DIN
MOHAMMAD J.

Appeal accepted.

APPELLATE CIVIL.

Before Dalip Singh and Bhide JJ.

KRISHAN LAL-RAM LAL (PLAINTIFF) Appellant,
versus
K. S. ABDUL GHAFUR KHAN (DEFENDANT)
Respondent.

1935
April 17.

Civil Appeal No. 2293 of 1934.

Indian Partnership Act, IX of 1932, section 69 (2) : Suit by an unregistered firm on a pronote executed by defendant before the Act came into force — whether maintainable — section 74 : whether applicable to 'right to institute a suit' — Stay of suit for plaintiff firm to get registered — whether can be allowed under the Act — Pronote payable at specified place — not presented till after Partnership Act came into force — Negotiable Instruments Act, XXVI of 1881, section 64.

Held, that in the absence of any provision to the contrary the provisions of the Negotiable Instruments Act must be held to be subject to those of the Indian Partnership Act when a negotiable instrument is executed by, or in favour of, a firm.

Held also, that the word 'right' in clause (a) of section 74 of the Indian Partnership Act does not include a 'right to institute a suit,' but must be taken in the sense of a substantive right, as e.g. a right to, or in, some property.