

APPELLATE CIVIL.

Before Mr. Justice Barlee and Mr. Justice Macklin.

GURUSHANTAPPA SHANKERAPPA UMBARJE (ORIGINAL JUDGMENT-DEBTOR),
APPELLANT *v.* NAGAPPA BANDAPPA KADADI (ORIGINAL JUDGMENT-
CREDITOR), RESPONDENT.*

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August 25

Civil Procedure Code (Act V of 1908), s. 49, O. XXI, rr. 18, 29—Equitable set-off—Partition decree between brothers—One brother assigning his interest to stranger—Execution—Other brother claiming a set-off in respect of his decretal claim.

In a partition suit between three brothers R S and G, certain property was awarded to G and the two brothers R and S obtained a decree for about Rs. 30,000 against him. The decree was made in December, 1925. R and S did not relinquish G's share and G sued them for rent and mesne profits and obtained a decree for Rs. 15,000 and odd. The suit went on from 1926 to 1934. In 1929, whilst the suit was pending, R and S assigned their rights to recover Rs. 30,000 from G to one N. In 1933 N filed a darkhast. G asked for set-off of the amount which he was claiming against R and S, though he had not then obtained a decree. The execution matter was not decided till August 1934, by which time G had obtained a decree. The Subordinate Judge rejected G's claim to a set-off and the decree was confirmed in appeal to the High Court. In appeal under the Letters Patent,

Held, that G was entitled to an equitable set-off, as the Court would have granted G a stay in 1929 under O. XXI, r. 29 of the Civil Procedure Code, 1908, had his brothers R and S sought to execute their decree without allowing him time to obtain a decree in his suit, and the assignee took the decree subject to G's equitable right to have the execution stayed and it was incumbent on him to enquire whether G's claims under it had been satisfied, as both the decrees arose out of one transaction, viz., the partition suit.

Kristo Ramani Dasse v. Kedar Nath Chakravarti⁽¹⁾ and *Hazari Ram Marwari v. Rai Bahadur Bansidhar Dhamdhania*,⁽²⁾ referred to.

APPEAL under the Letters Patent against the decision of Wassoodew J. in First Appeal No. 280 of 1934 preferred against the decision of R. G. Karkhanis, First Class Subordinate Judge at Sholapur.

Proceedings in execution.

In 1923, a partition suit was filed between three brothers Revanshiddappa, Shidramappa, Gurushantappa. In that suit an award decree was passed on December 14, 1925,

* Appeal No. 42 of 1936 under the Letters Patent.

⁽¹⁾ (1889) 16 Cal. 610.

⁽²⁾ (1936) L. R. 64 I. A. 67, s. c. 16 Pat. 127, s. c. 39 Bom. L. R. 369, r. c.

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by which it was provided that Gurushantappa do pay Rs. 27,940 to his brothers Revanshiddappa and Shidramappa and that Gurushantappa should get certain immoveable property of the family for his share. Revanshiddappa and Shidramappa did not relinquish Gurushantappa's share. He, therefore, filed a suit in 1926 against Revanshiddappa and Shidramappa to recover possession of the property and for mesne profits. The suit proceeded from 1926 to 1934 and a decree for Rs. 15,249 was passed in Gurushantappa's favour on January 8, 1934.

In the meantime in 1929 Revanshiddappa and Shidramappa assigned their rights to recover Rs. 27,940 from Gurushantappa to one Nagappa. On September 27, 1933, the assignee filed a Darkhast. In November 1933 Gurushantappa submitted his written statement contending, *inter alia*, that the assignment was collusive and that a set-off should be allowed for the claim in the decree which was likely to be passed in his suit which was pending and of which the assignee had notice.

The Subordinate Judge rejected Gurushantappa's claim to a set-off on the ground that the judgment-debtor's equity was not in existence at the date when the application for execution was made and that the assignee had no notice "of the would be right of set-off".

Against the order, Gurushantappa appealed to the High Court. The appeal was heard by Wassoodew J. who dismissed the same giving reasons as follows:—

WASSOODEW J. On December 14, 1925, one Revanshiddappa and another Shidramappa obtained a decree on an award against the appellant Gurushantappa for Rs. 27,940. On August 6, 1929, the decree-holders assigned the decree to the respondent Nagappa Bandappa Kadadi in consideration of a claim by the latter against them. Prior to that assignment, the appellant Gurushantappa in 1926 had filed a suit to recover a sum of money against

the assignors. Whilst that suit was pending, on September 27, 1933, the assignee applied in execution of the decree. Notice of that execution was given to the judgment-debtor-appellant, and in November, 1933, he submitted his defence, contending therein *inter alia* that the assignment was collusive, and that set-off should be allowed for the claim in the decree which was likely to be passed in the pending suit, of which the assignee had notice. That suit was decided in favour of the appellant, and a decree for Rs. 15,249 was passed in his favour on January 8, 1934. At that time, the assigned decree was not executed, and the judgment-debtor applied for a set-off in respect of his decree. That application was refused by the Court below on the ground that the judgment-debtor's equity was not in existence at the date when the application for execution was made, and that the assignee had no notice "of the would-be right of set-off". Against that order, Gurushantappa has appealed.

The question which arises for determination is whether the decree obtained by the appellant against the assignors in the suit which was pending at the date of the assignment and which had ripened into a decree before the assigned decree was executed, can be set-off against the claim under the assigned decree. That question has to be decided by reference to the provisions of s. 49 of the Civil Procedure Code. According to that section "every transferee of a decree shall hold the same subject to the equities (if any) which the judgment-debtor might have enforced against the original decree-holder". Reading that section, without reference to authority, it seems to me that its language is susceptible of the construction that the assignee will hold the decree assigned, subject to the equities (existing) if any, which the judgment-debtor (at the date of the assignment) might have enforced against the original decree-holder. It seems to me that the words "equities (if any)" are referable not to the future or possible equities but

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equities which existed when the assignment took place. Comparing those provisions with the analogous provisions of s. 132 of the Transfer of Property Act, which deals with the liability of a transferee of an actionable claim, there is considerable difference in the language used. It appears that a transferee of an actionable claim is not placed on the same footing as an assignee of a decree.

The contention which the learned counsel has pressed in regard to the interpretation of s. 49 is that the assignee stands in no better position than the assignor, and as the latter would have been obliged to yield to the claim of set-off of the appellant if the decree were not assigned, the assignee cannot resist the claim. In short, the argument proceeds on the basis that the expression "subject to the equities (if any)" is not confined to the equity existing at the time of the assignment. Reference has been made to *Monmohan Karmokar v. Dwarka Nath Karmokar*⁽¹⁾ to show that it is not necessary that the assignee should have notice of the claim of the judgment-debtor. The direct authority on the point relied upon for the appellant is *Kristo Ramani Dassee v. Kedar Nath Chakravarti*.⁽²⁾ In that case, the decree-holder after the decree was partially satisfied executed an assignment thereof in favour of a third party. Prior to the date of the assignment, the judgment-debtor instituted a suit against the assignor as well as the assignee, and ultimately obtained a decree against both of them. Upon a question arising whether the judgment-debtor was entitled to set-off his decree against the unexecuted portion of the decree which had been assigned, it was observed as follows (p. 622):—"A right to set-off the amount of one decree against another was repeatedly referred to, as an equity affecting the latter decree, in the decisions of this Court prior to the Code of 1877, which for the first time enacted section 233. In whatever mode that equitable right could be

⁽¹⁾ (1910) 12 Cal. L. J. 312.⁽²⁾ (1889) 16 Cal. 619.

made to operate as against the holder of the decree, we think it must be allowed to operate against his assignee with notice of the existence of the pending suit." When the decree of the judgment-debtor was passed against the assignee as well as the assignors, there could be no question that the judgment-debtor's claim to set-off could be enforced against the assignee under Order XXI, r. 18, of the Code. But it seems that the judgment proceeded as if that aspect of the case did not affect the merits of the contention of the assignee that a set-off could not be claimed against him. Their Lordships examined the relevant provisions of the Code to hold that the assignee was liable, because when the assignment was made he knew perfectly well of the existence of the suit. If I may say so, with extreme respect, I am unable to follow, upon the statement of facts, the reasoning why notice of the pending suit affected the assignee's obligation, unless it was recognised that all the incidents of equitable rights attached to the assignment of a decree.

In a later judgment of the same Court in *Nagendra Nath Roy v. Haran Chandra Adhikary*,⁽¹⁾ which is a judgment of a division bench, the case of *Kristo Ramani Dassee v. Kedar Nath Chakravarti*⁽²⁾ was referred to, but the ratio was not examined for application to the facts of that case, apparently on the erroneous assumption that the illustrations given by Sir Dinshah Mulla in his commentary on s. 49 of the Civil Procedure Code were part of the section, and that the second illustration was taken from that case. However, so far as the actual decision went, it was held that the mere claim for restitution was not an equity, which was available to the judgment-debtor against the assignee. The only point upon which *Kristo Ramani Dassee v. Kedar Nath Chakravarti*⁽²⁾ has been relied upon is that a pending suit is an equity which is available to the judgment-debtor. It seems to me illegitimate to construe the term "equity"

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⁽¹⁾ (1933) 37 Cal. W. N. 758.

⁽²⁾ (1889) 16 Cal. 619.

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in s. 49 as an equity not existing at the time of the assignment; and in my view, a pending suit is not such an equity. The appellant's construction is bound to lead to unfair result. The transferor might defeat the assignee by creating claims after the assignment, either collusively or otherwise. It is true that in certain respects the assignee would be in a better position than the assignor, and that the transferor might fraudulently and collusively defeat the judgment-debtor's claims if future and possible equities were not enforced against the transferee. As against fraudulent and collusive transfers, the law provides a remedy, and I do not think that that should be a ground for incorporating in the section words which are not there.

It has been argued that having regard to the provisions of Order XXI, r. 18, of the Code, the equities could only be adjusted when an application is made to the Court for execution, and that the rule postulates the existence of cross decrees when the claim is made. Now, here, the assigned decree was obtained before the judgment-debtor had filed the suit; and although when the assignment took place, the suit was pending, no decree was passed at the time when the assignee applied for execution. There was no cross decree in existence at the time of the application for execution. If that was the position at the date when the equities had to be adjusted I do not see how it could be altered because subsequent thereto the judgment-debtor had obtained the decree against the assignors. In the case of *Srinivasa v. Venkatarama*⁽¹⁾ the decrees were in existence at the date of the assignment. The case of *Channvi Lal v. Gulzari Lal*⁽²⁾ gives no reasons for holding that an assignee is subject to every claim made against the assignor subsequent to the assignment.

It is difficult to apply the principles underlying the provisions of s. 132 of the Transfer of Property Act to the case of an assignment of a decree in all respects. Even

⁽¹⁾ [1933] A. I. R. Mad. 215.⁽²⁾ [1924] A. I. R. Nag. 46.

under those provisions the future and possible equity could not be enforced against a transferee of an actionable claim.

In my view, the equity which could be enforced against the transferee under s. 49 of the Code is the equity which had already been in existence, and the mere pending suit is not such an equity. Undoubtedly, if it had existed at the date of the assignment, it would be immaterial whether the assignee had no notice of the equity against the transferor. Therefore, I think the lower Court was right in not allowing the claim to set-off, and I therefore dismiss this appeal with costs.

GURUSHANTAPPA appealed under the Letters Patent.

H. C. Coyajee, with *B. G. Rao*, for the appellants.

G. C. O'Gorman, with *B. M. Kolagate*, for the respondent.

BARLEE J. In a partition suit between three brothers Revanshiddappa, Shidramappa and Gurushantappa certain property was awarded to Gurushantappa, and the two others, Revanshidappa and Shidramappa, obtained a decree for about Rs. 30,000 against him. The decree was made in December 1925. Revanshidappa and Shidramappa did not relinquish Gurushantappa's share, and he sued them for rent and mesne profits and obtained a decree for Rs. 15,000 and odd. His suit went on from 1926 to 1934. In 1929, whilst it was pending Revanshiddappa and Shidramappa assigned their rights to recover Rs. 30,000 from him to one Nagappa; and in September 1933, Nagappa filed a darkhast. In reply Gurushantappa asked for a set-off of the amount which he was *claiming against Revanshiddappa and Shidramappa* though he had not then obtained a decree. The execution matter was not decided till August 1934, by which time he had obtained a decree. The Subordinate Judge then rejected his claim to a set-off and he failed in appeal to this Court. He has now filed a Letters Patent appeal and the only question for decision is whether he is entitled to a set-off. Section 49 of the Civil Procedure Code

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provides that every transferee of a decree "shall hold the same subject to the equities if any which the judgment-debtor might have enforced against the original decree-holder." It was contended in the lower Court that, since Gurushantappa has obtained a decree which he could now set-off against the assignors had the partition decree not been assigned, he has a legal right to claim a set-off against the assignee. Mr. Coyajee has pressed this view on us relying on the difference between the wording of s. 49 of the Code and the corresponding section in the Transfer of Property Act, s. 132. But s. 49 quite clearly means that an assignee holds—subject to equities which the judgment-debtor *might have enforced* against his assignor—had the assignor chosen to execute his decree instead of assigning it, and that amounts to saying that he holds subject to equities existing at the date of the assignment. We agree with Wassoodew J. that Gurushantappa must fail if he has nothing but a legal set-off to plead.

We have to see, then, whether Gurushantappa had any equity against the assignors *at the date of the assignment* which he can now set up; and if so whether the assignee has an overriding equity. Mr. Coyajee is claiming something in the nature of an equitable set off, which, according to the cases cited in Mulla in the note in Order VIII, r. 6, has been recognised in India. He has referred us to two cases by way of illustration. In *Kristo Ramani Dasse v. Kedar Nath Chakravarti*⁽¹⁾ the facts were somewhat similar to those in our case. A and B had obtained a decree against K and T. After the decree had been partially satisfied, A and B assigned it to D. Prior to the date of the assignment, K and T had instituted a suit against A, B and D, and ultimately obtained a decree against them. It was held that K and T were entitled to set-off their decree against the unexecuted portion of the decree which had been assigned to D. In the judgment their Lordships relied on s. 243

⁽¹⁾ (1889) 16 Cal. 619.

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of the Civil Procedure Code of 1882, which is now Order XXI, r. 29. It provides that "where a suit is pending in any Court against the holder of a decree of such Court, on the part of the person against whom the decree was passed, the Court may, on such terms as to security or otherwise, as it thinks fit, stay execution of the decree until the pending suit has been decided." And they went on to say that as D had taken an assignment of the decree she must have known perfectly well of the existence of the suit against herself and her assignor, and in consequence that the judgment-debtor had an "equitable right which could be made to operate as against the holder of the decree and against the assignee with notice of the existence of the pending suit." This judgment then recognises an equitable right created or recognised by r. 29 and the possibility of an equity in favour of an assignee.

The second case is the recent Privy Council decision in *Hazari Ram Marwari v. Rai Bahadur Bansidhar Dhandhania*,⁽¹⁾ wherein the judgment-debtors were allowed to set-off against a claim made to execute an assigned decree, a decree which had not been obtained by them till after the assignment, on the ground that the two decrees related to the same transaction, to avoid circuitry of proceedings. Apparently the principle adopted in the High Court of Patna, from which the appeal had been made, was not challenged for there is nothing on the point in the judgment. The judgment-debtors had purchased a share of a village and had discharged two security bonds charged on it. The sale was set aside; the estate holder sought restitution of the land with mesne profits and the purchasers sued for the amount spent by them to discharge the bond. The estate holder or his representatives obtained a decree first and assigned it before the auction-purchasers had obtained their's and the case arose on an

⁽¹⁾ (1936) L. R. 64 I. A. 67, s. c. 16 Pat. 127, s. c. 39 Bom. L. R. 369 p. c.

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application being made for execution by the assignees, since the purchasers sought a set-off.

These cases show that an equitable set-off can be and has been recognised in India ; in fact that the right of a judgment-debtor to ask for a stay under r. 29 is an equity which binds an assignee. In our case it cannot be doubted that the Court would have granted Gurushantappa a stay in 1929 had his brothers sought to execute their decree without allowing him time to obtain a decree in his suit. His claim was no more than that they should be compelled to give full effect to the partition decree by paying him mesne profits in respect of his share which they had wrongfully withheld. Thus both decrees arose out of the one transaction and no Court of equity could have rejected his request.

We agree then with the learned counsel that the assignee took the decree subject to Gurushantappa's equitable right to have execution stayed until his suit had been decided and therefore to set-off his decree. It only remains to decide whether the assignee's ignorance of the facts of the case gives him an overriding equity. It is contended that his ignorance is immaterial ; but a bona fide purchaser for value without notice always obtains consideration in a Court of equity. However, we do not think that his equity is the stronger for if he bought in ignorance it must have been because he neglected to make enquiries. The decree was one which gave rights to Gurushantappa and it was incumbent on the assignee to enquire whether Gurushantappa's claims under it had been satisfied.

For these reasons we allow the appeal with costs throughout.

Appeal allowed.

J. G. R.