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mortgage bond would lie. Both lower Courts have rejected the document which purports to evidence this agreement as inadmissible in evidence for want of registration, and the very subtle arguments which have been advanced by the learned vakil to controvert this conclusion have failed to convince us that this view is incorrect. Obviously the whole object in offering as evidence the document in question was to prove that the mortgage debt had been paid off and the mortgage extinguished by the agreement set out therein, and we fail to understand the argument of the learned vakil that if the result of the agreement was to extinguish the mortgage debt and to convert the lien under the mortgage bond to one under that document, the document was one of which, under the terms of clause (*b*) or (*c*) of section 17 of the Registration Act (III of 1877), registration was not compulsory. We agree with the lower Courts that the registration of the document was necessary under clause (*c*) of section 17 of the Act, and that the document, not having been registered, was inadmissible in evidence. We do not think it necessary to follow further the arguments of the learned vakil in support of the appeal, as we are against him on these points.

We accordingly confirm the judgment and decree of the lower Court and dismiss the appeal with costs.

Appeal dismissed.

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31 C. 95 (=8 C. W. N. 30).

[95] APPELLATE CIVIL.

Before Mr. Justice Banerjee and Mr. Justice Pargiter.

MAGNIRAM *v.* MEHDI HOSSEIN KHAN.*

[2nd and 3rd June, 1903.]

Res judicata—Co-defendants—Civil Procedure Code (Act XIV of 1882), *s.* 13—"*Former suit*"—"*Between the same parties*"—*Judgment—Contribution, right to, as between purchasers of mortgaged properties—Transfer of Property Act (IV of* 1882), *ss.* 56, 81, 82—*Marshalling Inverse Order, Rule of.*

There is nothing in s. 13 of the Code of Civil Procedure to prevent an issue raised and decided as between co-defendants in a former suit from being *res judicata* in a subsequent suit in which they are arrayed as plaintiff and defendant; but the issue raised in the former suit must directly and substantially involve the matter in issue in the subsequent suit.

Cottingham v. *Earl of Shrewsbury* (1), *Ramchandra Narayan* v. *Narayan Mahadev* (2), *Ahmad Ali* v. *Najabat Khan* (3) and *Sheikh Khoorshed Hossein* v. *Nubbee Fatima* (4), followed.

To decide whether a question was determined by the decree in a former suit it is open to the Court to refer to the judgment on which the decree is based.

Kali Krishna Tagore v. *Secretary of State for India* (5) and *Jagatjit Singh* v. *Sarabjit Singh* (6), followed.

When two properties X and Y are mortgaged to secure one debt, and subsequent to the mortgage the property X is purchased by A and then the property Y by B, if the entire mortgage debt is satisfied by the sale to A of the property Y in execution of the mortgage decree, B is entitled to

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* Appeal from Original Decree No. 339 of 1899, against the decree of Hari Krishna Chatterjee, Subordidate Judge of Monghyr, dated July 26, 1899.

(1) (1843) 3 Hare 627.
(2) (1886) I. L. R., 11 Bom., 216.
(3) (1895) I. L. R., 18 All., 65.
(4) (1878) I. L. R. 3 Cal., 551.
(5) (1888) I. L. R. 16 Cal., 173.
(6) (1891) I. L. R. 39 Cal., 159.

contribution against A in proportion to the values of the properties X and Y; and the rule of inverse order does not apply to such a case.

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A claim for contribution is an equitable claim, and in determining the amount, the Court must take an equitable view of all the circumstances and must not give effect to what is only an apparent and not the real state of things.

[(1) Res-judicata between co-defendants. Ref. 36 Cal. 193=5 C. L. J. 611; 5 C. L. J. 653; 13 C. W. N. 217=9 C. L. J. 16=5 M. L. T. 274; 30 I. C. 280=2 L. W. 689; 17 A. L. J. 225=49 I. C 808; 7 I. C. 892, 64 I. C. 603; Foll. 5 M. L. T. 359=1 I. C. 572; Rel. on 31 Mad. 419.

(2) T. P. A., s. 81—Marshalling. Ref 31 Mad. 419=18 M. L. J. 229; 42 All. 836=18 A. L. J. 287=59 I. C. 67; 16 I. C. 80; 35 C. L. J. 173; Dist. 43. All. 593]

APPEAL by the plaintiff, Magniram.

One Sheikh Umed Ali, the ancestor of the defendants 2nd party, was the proprietor of 3 annas 16½ dams of each of four mouzahs, Dighout Titaria, Kunda, Lakhan Dhanaman and Chhatu [96] Dhanaman, pargana Bisthazari, bearing touzi No. 336. On the 15th October 1881, he executed jointly with one Sheikh Vilayet Hossein, a registered mortgage bond in favor of one Radha Singh, one of the *pro forma* defendants 4th party for Rs. 8,000, thereby hypothecating the shares of both the executants, which were equal, in the aforesaid four mouzahs. On the 12th January 1888, Sheikh Umed Ali sold his share in the first two mouzahs aforesaid to Nawab Lutf Ali Khan, the predecessor in interest of the defendants 1st party, for Rs. 11,000. On the 9th July 1888, the share of Sheik Umed Ali in the remaining two mouzahs was sold in execution of a decree and purchased by the plaintiff. The mortgagees defendant obtained a decree on their mortgage, on the 26th April 1892, against the defendants 1st, 2nd and 3rd parties and the plaintiff, directing that the mortgage properties other than those in the possession of the defendants 1st party should be first sold. In execution of that decree, the mortgaged shares of 7 annas 13 dams of the two mouzahs belonging to the plaintiff were put up to sale and purchased by the defendants 1st party on the 23rd May 1893, for Rs. 21,000, which amount satisfied the mortgage debt.

The present suit was instituted by the plaintiff for Rs. 24,999, being the amount of the rateable contribution claimed against the defendants 1st party. It was alleged that at the time of the execution sale, the value of Vilayet Hosein's share in the two properties purchased by the defendants 1st party was *nil*, the said share having been heavily encumbered, and that accordingly the whole of the purchase-money, Rs. 21,000, represented the actual value of the plaintiff's share in the properties sold; that upon a proper apportionment made of the mortgage lien, the respective liens on the properties purchased by the plaintiff and the properties purchased by the defendants 1st party at the sale in execution of the mortgage decree, would amount to Rs. 5,048-14 and Rs. 15,941-2 respectively; and that the plaintiff was accordingly entitled to recover from the defendants 1st party the sum of Rs. 15,941-2 (with a slight deduction) with interest, amounting in all to Rs. 24,999.

The defendants 1st party alone contested the suit. On the merits, they contended that as under the terms of the mortgage decree, the plaintiff's properties alone were made liable for the [97] mortgage debt, and that as it was only when the sale proceeds of these properties were found not to be sufficient to satisfy the decree that the properties of the defendants 1st party were to be sold, the plaintiff was not entitled to contribution; and that the contesting defendant having purchased the

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properties of the plaintiff at a price which was far higher than their real value simply to satisfy the mortgage decree and thereby to save their own properties from sale, they were not liable for contribution in respect of that decree.

The Subordinate Judge held that the mortgage decree virtually involved an order of marshalling under section 81 of the Transfer of Property Act, and as the plaintiff was bound by that decree, he had no claim to contribution under the last clause of section 82 of the Act. He also held that the defendants 1st party having got their properties released at an enormous sacrifice, were not in equity liable again to contribute on account of them. The suit was accordingly dismissed.

Dr. *Rash Behary Ghose*, Babu *Digambar Chatterjee* and Babu *Dwarka Nath Chakravarti* for the appellants.

Babu *Saligram Singh, Maulvi Mahomed Mustafa Khan* and *Maulvi Mahomed Ishfak* for the respondents.

BANERJEE AND PARGITER, JJ. The suit out of which this appeal arises was brought by the plaintiff appellant to recover a certain sum of money by way of contribution from the defendants 1st party. The main allegations upon which the suit is based are shortly these :—That the predecessors in interest of the defendants 2nd party on the 15th of October 1881 mortgaged their share in four properties, Dighout Titaria, Kunda, Lakhan Dhanaman and Chhathu Dhanaman to one of the defendants 4th party for Rs. 8,000 ; that out of the mortgaged properties the first two were purchased on the 12th of January 1888 by the defendants 1st party, and the remaining two properties were purchased by the plaintiff at an execution sale on the 9th of July 1888 ; that subsequently the mortgagee, the defendant 4th party, having obtained a decree on his mortgage on the 26th of April [98] 1892, caused the sale of the last two properties on the 23rd of May 1893, and the defendants 1st party purchased the same for Rs. 21,000, and this sale had the effect of satisfying the entire mortgage debt due to the decree-holder ; that as the sum of Rs. 21,000 realized by the sale of the plaintiff's property went to satisfy the mortgage on all the four properties, it should be held that the mortgage has been satisfied with the plaintiff's money, and the plaintiff is accordingly entitled to contribution from the defendants 1st party, the amount of such contribution being the excess of the amount so paid with money which was the value of his property, over his share of the liability for the mortgage debt ; that the sum of Rs. 21,000 has therefore to be divided in proportion to the values of the two properties purchased by the plaintiff and the two purchased by the defendants 1st party ; and that as these values are about Rs. 7,000 and Rs. 22,000, the sum of Rs. 21,000 being divided in the same proportion will give for the plaintiff's share of the liability a sum of a little over Rs. 5,000, and the plaintiff must be taken to have paid Rs. 15,000 and odd in excess of his share of the mortgage debt which he was really liable to pay ; and accordingly the plaintiff brings this suit to recover that sum together with interest amounting in all to Rs. 24,000.

The defence of the defendant 1st party was, so far as it is necessary to consider it for the purposes of this appeal, to the effect that this suit was not maintainable, as the mortgage decree in execution of which the sale of the plaintiff's mouzahs took place and to which the plaintiff was a party, expressly directed the sale of those mouzahs in the first instance; and that the sum of Rs. 21,000 paid by the defendants 1st party was far in excess of the real value of the property purchased by them, and they

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paid that amount with the object of having the mortgage debt completely satisfied so that the property which they had purchased might not be brought to sale.

The Court below upon these pleadings framed certain issues of which the third is the only one of importance for the purposes of this appeal, and which was in these terms, namely :—

"Whether the plaintiff is entitled to any and what contribution from defendants 1st party ?"

[99] And the learned Subordinate Judge below has answered the questions raised in this issue against the plaintiff, holding in the first place that the decision in the mortgage suit to which the present plaintiff and defendants 1st party were both parties, operated as *res judicata* against the present claim, and further that the claim for contribution was barred by section 82 of the Transfer of Property Act, and, in the second place, he has held that the amount paid by the defendants 1st party for their purchase at the execution sale was much in excess of the value of the properties purchased and that that amount was paid only to pay off the mortgage debt completely ; and the Court below has accordingly dismissed the plaintiff's suit.

Against the decree of the lower Court dismissing the suit, the plaintiff has preferred the present appeal, and the questions raised for our determination in this appeal are :—

(i) Whether the suit is barred by the principle of *res judicata* ;

(ii) Whether section 82 of the Transfer of Property Act can be a bar tc this suit ; in other words, whether there can be marshalling as between purchasers of the mortgaged property, and whether if there can be such marshalling, it would exclude the right of any party to claim contribution ;

(iii) Whether the defendants 1st party who purchased two of the mortgaged properties before the other two were purchased by the plaintiff could claim the right of throwing the whole of the mortgage debt upon the two properties purchased by the plaintiff, or in other words whether the rule known as the rule of "inverse order" should hold good ;

(iv) To what amount, if any, is the plaintiff entitled by way of contribution.

Upon the first point, it is argued by the learned vakil for the plaintiff-appellant, in the first place broadly that there can be no *res judicata* as between co-defendants and that as the present plaintiff and the defendants 1st party were only co-defendants in the mortgage suit and not parties arrayed against one another, even if any question like the one now raised in the present suit had been in issue in the former suit, it could not be treated as *res judicata*, regard being had to the language of section 13 of the **[100]** Code of Civil Procedure, to which alone we must refer as embodying the whole of the law of *res judicata* in this country, as has been held by the Privy Council in the case of *Gokul Mondar* v. *Pudmanand Singh* (1). And in the next place it is contended that even if there can be *res judicata* as between co-defendants, having regard to the questions which might and ought to have been raised in the former suit and were heard and determined, and the questions raised in the present suit, the decision in the former suit cannot operate as *res judicata* in the present suit. We are of opinion that the first branch

(1) (1902) I. L. R. 29 Cal. 707.

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of the appellants' contention is not correct, but that the second is. Section 13 of the Code of Civil Procedure does not preclude the decision upon any issue from operating as *res judicata* merely because the issue is raised as between co-defendants, if the matter involved was directly and substantially in issue in a former suit, and the other necessary conditions are satisfied. It is true, section 13 speaks of the matter having been directly and substantially in issue in a former suit between the same parties, and it is true that from their position, the words "between the same parties" may naturally be taken to qualify the words immediately preceding, *i.e.*, "former suit;" but it would be doing no violence to the language of the section if we hold that the words "between the same parties" qualify not simply the two words immediately preceding namely "former suit," but the whole expression "in issue in a former suit"; in which case the necessary condition as regards the identity of parties will be, not that the former suit must have been one between the same parties arrayed as plaintiff and defendant as the parties to the subsequent suit, but that the issue in the former suit must have been one between the same parties claiming adversely to each other, though they might have been co-defendants in the former suit and are arrayed as plaintiff and defendant in the suit subsequently brought. That there may arise issues for determination as between co-defendants, was pointed out in the case of *Cottingham* v. *Earl of Shrewsbury* (1) and the same view has been taken by the Courts in this country; see the cases of *Ram Chandra Narayan* v. *Narayan Mahadev* (2), **[101]** *Ahmad Ali* v. *Najabat Khan* (3) and *Sheikh Khoorshed Hossein* v. *Nubbee Fatima* (4). Of course the issue raised must directly and substantially involve the matter in issue in the subsequent suit, and if not expressly raised, the matter must be one which, as provided by explanation 2 of section 13 of the Code of Civil Procedure, is such that it might and ought to have been made ground of defence or attack in the former suit. But though the broad contention of appellant must therefore fail, his more limited contention, namely, that the decision in the former suit, that is, the mortgage suit, does not operate as *res judicata* in the present suit, ought to succeed. For the question now raised is, whether the plaintiff is entitled to contribution by reason of the sale of his property having the effect of satisfying the entire mortgage debt. The question which must be taken to have been determined by the decree in the former suit, read with the light of the judgment to which we can refer [see the cases of *Kali Krishna Tagore* v. *The Secretary of State for India* (5) and *Jagatjit Singh* v. *Sarabjit Singh* (6)] was in what order should the mortgaged properties be sold; and the determination of the Court was that the properties other than those purchased by the present defendants 1st party should be sold first; or, in other words, that the properties purchased by the present plaintiff were to be sold first; and so they were. Does that preclude necessarily the determination of the question whether in the event of such sale satisfying the whole of the mortgage debt the plaintiff is or is not entitled to contribution? We are of opinion that this question must be answered in the negative. It was not necessary for the Court in the former suit to determine this question, none of the parties asking the Court in the former suit to determine that question; and as a matter of fact it

(1) (1843) 3 Hare, 627.
(2) (1886) I. L. R. 11 Bom. 126.
(3) (1895) I. L. R. 18 All. 65.
(4) (1878) I. L. R. 3 Cal. 551.
(5) (1888) I. L. R. 16 Cal. 173.
(6) (1891) I. L. R. 19 Cal. 159.

has not been determined either by the decree or by the judgment in the former suit. That being so we must hold that the Court below was wrong in its conclusion that the determination of the present question was barred by the principle of *res judicata*.

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We come now to the second question raised. The rule of marshalling as laid down in the Transfer of Property Act, section [102] 81, is no doubt limited to the case of mortgagees, and does not apply to the case of purchasers of mortgaged properties subject to prior incumbrances. Nor does the rule of marshalling in the case of purchasers as laid down in section 56 of the Act apply to a case between purchaser and purchaser, section 56 being limited in its operation to the case in which the party claiming marshalling is a purchaser and the party against whom it is claimed is the original mortgagor. For the same reason the case of *Lala Dilawar Sahai* v. *Dewan Bolakiram* (1) cited in the argument, in which a claim for marshalling was disallowed, may be distinguished from the present case. Upon reason and principle it is difficult to say why, if marshalling is to be allowed as between two subsequent mortgagees, it should not be allowed as between subsequent purchasers. But though that is so, and though, as has been found by the Court below, the defendants 1st party bought without notice of the prior mortgage in favour of the defendants 4th party, as the plaintiff was a purchaser for value it would not be right to hold that the plaintiff is not entitled to claim contribution if the sale of his property results in the satisfaction of the mortgage debt completely. In saying as we have said above, that the defendants 1st party had no notice of the prior mortgage, all we meant was that they had no express notice; but the mortgage having been registered, if they had made a reasonable enquiry they could have become aware of the existence of the prior mortgage; and, therefore, in point of law they could not claim the position of a purchaser without notice as against the plaintiff who is a subsequent purchaser for value. In our opinion then, if the sale of the plaintiff's property has resulted in the complete satisfaction of the mortgage debt, the plaintiff is entitled to contribution. What the amount of such contribution may be is to be considered under the fourth point we have stated above.

As to the third point the argument is this:—That as when the defendants 1st party purchased their two properties from the mortgagors, the remaining two properties were still in the hands of the mortgagors, the purchasers might well have thought that the mortgage debt would be paid wholly out of the properties still in the hands of the mortgagors; and the plaintiff, a subse- [103] quent purchaser, must be taken to be in the shoes of the mortgagors. And if that is so, the sale at the instance of the prior mortgagee should be, as it has been, in the inverse order of sales to the different purchasers, that property being sold in satisfaction of the mortgage decree first, which was purchased from the mortgagors last.

We are unable to give effect to this contention. Though as between the mortgagor and the purchaser from the mortgagor, property in the hands of the mortgagor should be sold first without giving the mortgagor any claim for contribution, yet when all the properties have passed to the hands of purchasers for value, there is no sufficient reason for holding that later purchasers should not be entitled to contribution as the earlier ones. It appears to us that the rule best in accord with the

(1) (1885) I. L. R. 11 Cal. 258.

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principles of justice, equity and good conscience is to make the mortgaged properties in the hands of different purchasers liable to contribute to the mortgage debt in proportion to their values. And this brings us to the fourth and the last point raised in the cases.

Now, the properties of the plaintiff and those purchased by the defendants 1st party are valued by the plaintiff himself in his own plaint roughly at Rs. 7,000 and Rs. 22,000. There is however one mistake in the plaintiff's estimation of these values which is conceded by the learned vakil for the appellant, and that is, the omission to deduct the road and public works cesses from the gross income. Making that correction, the values of the plaintiff's and the defendant's properties would be, roughly speaking, Rs. 6,000 and odd and Rs. 20,000 and odd. Then the Rs. 21,000, as the petition on page 227 of the Paper Book (Exhibit H) clearly shows, was paid, not because it was the proper value of the property purchased, but because it was necessary to pay that amount to satisfy the mortgage debt completely; and if it satisfied that debt, the sum of Rs. 21,000 must be rateably distributed in proportion of Rs. 6,000 and odd and Rs. 20,000 and odd to determine the respective liabilities of the plaintiff's properties and the defendant's properties. Thus divided, the amounts will be respectively Rs. 5,049-9 and Rs. 15,950-7. Deducting the amount payable for the plaintiff's properties from the value of those properties, that is, Rs. 6,000 and odd, there **[104]** would remain a balance of Rs. 1,521-2, which the plaintiff is entitled to recover from the defendants 1st party. It was argued for the plaintiff-appellant that this was not the correct mode of calculation; that as the plaintiff's properties have fetched Rs. 21,000 at the execution sale, that sum must be taken to be the value of those properties, and the mortgage-debt must be taken to have been satisfied with what was in effect the plaintiff's money. And if that was so, the plaintiff would be entitled to obtain from the defendants 1st party an amount equal to the difference between the amount paid by the plaintiff, that is Rs. 21,000, and the amount for which his property was liable, such liability being determined however, not upon the basis of Rs. 21,000 being the value of the plaintiffs' property, but upon the basis of the actual intrinsic values of the plaintiffs' properties and those of the defendants as given in the plaint. This contention, on the face of it, involves a strange anomaly, namely, that whereas for the purposes of determining the plaintiff's liability Rs. 6,000 or 7,000 should be taken to be the value of the properties, for the purpose of determining his right to recover from the defendants 1st party, the whole of Rs. 21,000 bid at the auction should be taken to be the value of those properties, and that notwithstanding the express declaration by the auction purchaser made before the payment of the whole of the purchase money, in his petition (Exhibit H) that that large amount was paid not because it was the value of the property, but because it was necessary to pay it in order to wipe off the mortgage debt. Moreover, it should be borne in mind that there was no competition at the auction sale, the bids having been raised by sham bidders being brought forward by defendants 1st party for reasons best known to them. That is a fact which is not disputed before us, so that the plaintiff cannot complain that if the defendant 1st party had not made their last bid, the next lower bid by a stranger would have been the value which the properties sold could have been fetched. A claim like the present for contribution is an equitable claim, and in determining the amount of it we must take an equitable

view of all the circumstances attending the case and must not give effect to what is only an apparent and not the real state of things. It is only apparently that Rs. 21,000 paid for the properties at the [105] auction sale would represent the value of those properties as obtained by such sale, the real state of things being, as is manifest, this, that the amount was paid in order to satisfy the mortgage debt so as to prevent any further sale in execution of the mortgage decree. What the plaintiff, therefore, is entitled to recover should be calculated not upon the footing of Rs. 21,000 being the value of those properties, but upon the footing of the properties being of the value mentioned in the plaint after making the correction for road and public work cesses as indicated above, and by treating the mortgage debt as having been paid off by the defendants 1st party in consideration of their having obtained the properties of the plaintiff, the amount due to the plaintiff being the difference between the real value of his properties and the liability which they were under and which has been satisfied by the sale of the property.

A decree will be made in favour of the plaintiff in the manner indicated above; and the parties will recover and bear costs in proportion to their success and failure. The amount recoverable by the plaintift shall bear interest from the date of the execution sale, but having regard to the previous litigation between the parties the rate ought not to be higher than ten per cent.

Appeal allowed in part.

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[106] APPELLATE CIVIL.

Before Mr. Justice Brett and Mr. Justice Geidt.

DACCA LOAN OFFICE COMPANY v. ANANDA CHANDRA ROY.*
[24th June, 1903.]

Company—Winding up of a company—Depositor, application by, to wind up company—Parties—The Indian Companies Act (VI of 1882), s. 131—Creditors and Contributories, application by—Withdrawal of the original petition, effect of—Verification.

When a depositor in a company applies under section 131 of the Indian Companies Act (VI of 1882) for the winding up of the Company, and other creditors and contributories are allowed by the Court to join with him in prosecuting the case, the petition of the depositor should be considered as a joint petition of all the persons allowed to join; and his withdrawal from the case does not operate as a withdrawal of the whole case.

If the original petition be duly signed and verified, the co-petitioners are not debarred from proceeding with the case for omission to verify their petitions.

APPEAL by Aswini Kumar Mukerji, the opposite party.

One Purna Chandra Chakravarti, a depositor in the Dacca Loan Office Company, Limited, applied to the Civil Court under section 131 of the Indian Companies Act (VI of 1882) for the winding up of the company. On the Court giving a notice under section 30 of the Civil Procedure Code, other share-holders, depositors and contributories of the company put in petitions praying to be made parties to the application by Purna Chandra for the winding up of the company; and their prayer was granted. Subsequently, Purna Chandra, having been paid up by

* Appeal from Order No. 375 of 1902, against the order of Dwarkanath Mitter, District Judge of Dacca, dated Sept. 22, 1902.