

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Sri Gopal v. Pirthi Singh and others, from the High Court of Judicature for the North-Western Provinces, Allahabad; delivered the 6th June 1902.*

Present at the Hearing:

LORD MACNAGHTEN.

LORD LINDLEY.

SIR FORD NORTH.

SIR ANDREW SCOBLE.

SIR ARTHUR WILSON.

[*Delivered by Sir Ford North.*]

This action relates to certain incumbrances created by Nek Ram, Pirthi Singh and Ram Singh the owners of several biswals in the Mauza Manai in the Aligarh District. One of them and the representatives of the other two are Respondents on this Appeal, and they are all included in the term "mortgagors."

The five following incumbrances on that property are material:—

Date of Mortgage.	Amount.	Names of Mortgagees.
1. 21st July 1871 -	Rs. 1,000	Eshuar Das.
2. 30th Aug. 1872 -	800	{ Murli Singh. Sarnam Singh.
3. 7th Feb. 1874 -	250	Eshuar Das.
4. 16th July 1874 -	1,500	Eshuar Das.
5. 18th Aug. 1876 -	3,811	Bhagwan Das.

In 1883 Sita Ram and Daya Kishen (heirs of Eshuar Das then deceased) commenced an action

(No. 121 of 1883) on the bond of 21st July 1871 against the mortgagors only ; and on 3rd September 1883 obtained a decree for payment, and if necessary a sale.

In the same year Murli and Sarnam Singh commenced an action (No. 142 of 1883) on the bond of 30th August 1872, in which action also the mortgagors were the only Defendants ; and on the 17th December 1883 they obtained a like decree for payment and if necessary a sale. Under that decree  $1\frac{1}{4}$  biswahs of the mortgaged property were sold, and were purchased by Murli and Sarnam Singh.

In July 1888 Sita Ram and the present Appellant Sri Gopal (the son of Daya Kishen, who was then dead) commenced an action (No. 129 of 1888) against the mortgagors only, under the charge of 16th July 1874 ; and on 26th September 1888 obtained a decree for payment and sale in default. Part of the mortgaged property was sold in execution of that decree, and was purchased by the Respondent Bechai Lal.

The charge of 18th August 1876 in favour of Bhagwan Das was sold by him to Shiam Lal, and by him to Babu Sri Ram, the father of the Respondent Mussammat Janki ; and it was afterwards transferred by him to her by way of gift.

In August 1888 Sri Ram commenced an action (No. 150 of 1888) to enforce the charge of 18th August 1876 ; but having died on the eve of the trial the name of his daughter the Respondent Mussammat Janki was substituted as Plaintiff. The mortgagors ; Sita Ram and the Appellant ; and Murli and Sarnam Singh ; were all made Defendants in that action. The Plaintiff therein sought to establish that charge as having priority over the earlier mortgages above referred to upon the ground that the money thereby secured had been borrowed to pay, and had been applied in paying, certain other charges on the same

property of still earlier date, all being prior to 1871; but this claim to priority broke down, the Plaintiff having failed to satisfy the Court that the earlier charges had been kept on foot, or that the money had been so applied. The decree gave the Plaintiff judgment for payment against the mortgagors; and declared that in default of payment she would be entitled to sell  $\frac{1}{4}$  biswah of the land comprised in the mortgage sued on, which was free from all incumbrances; and could also sell the remaining four biswahs of the mortgaged land after fully paying and satisfying the amount of the prior debts detailed at the foot of the judgment, viz. the bond in favour of Murli and Sarnam Singh, dated 30th August 1872; and the bond in favour of Sita Ram and Sri Gopal dated the 21st of July 1871.

In the month of April 1893 the Appellant Sri Gopal as sole Plaintiff (Sita Ram being then dead, and all the securities in favour of Eshuar Das being then vested in him alone) brought this present action (No. 67 of 1893) to enforce the bond of 7th February 1874, against the mortgagors; the Respondents Bechai Lal and Mussammat Janki; and the Respondents Murli and Sarnam Singh, all of whom were made Defendants. The Defendants Bechai Lal and Mussammat Janki pleaded *inter alia* that in the action No. 150 of 1888 the parties represented by the Appellant did not set up the bond of 7th February 1874, and that therefore this action was barred by Section 13 of the Code of Civil Procedure; and this view was sustained by the Subordinate Judge of Aligarh in 1893; by the District Judge in 1894; and by the High Court of the North-Western Provinces in 1897. The latter Court said in its judgment: "In our opinion not only might the representatives of Ishar Das have pleaded their mortgage of the 7th of February 1874, but they ought to have done so; and if they had done so no decree for

“ sale could have been made without these rights  
 “ being protected by the decree. They not  
 “ having done what they might and ought to  
 “ have done as an answer *pro tanto* to the suit of  
 “ Sri Ram, we are of opinion that Section 13 of  
 “ the Code of Civil Procedure applies.”

The materiality of the mortgage here referred to is evident. If Mussammat Janki's claim had succeeded to its full extent she would have established her priority over all the four bonds in question. As it was she only established her claim subject to the specified securities of Sri Gopal and Murli and Sarnam Singh, which did not include the bond now sued on. The Appellant would have been entitled to plead and prove this bond as a bar to any decree being made for sale except subject to that bond. Had he done so, it would have been included in the “ details of liens ” at the end of the decree, and the right of Mussammat Janki would have been expressly subordinated to that charge also. The judgments are clearly right: and the appeal would have been unarguable, but for an ingenious point raised by the Appellant's Counsel. He set up at the bar (notwithstanding the statement in the Appellant's case that no facts are in dispute) that all the Judges were mistaken in saying that this bond of February 1874 was not set up by the Appellant: that in fact it was set up, and that the decree was wrong in not dealing with it. But that decree might have been corrected, if not in accordance with the judgment: or appealed against, if both judgment and decree were wrong: and neither of these courses having been adopted their Lordships cannot go behind it. No pleadings in that action are before the Court, except the statement of Sita Ram, which does refer to the “ bonds ” (without saying what bonds) in his favour. It does indeed appear from the reasons given by the learned Judge

that the existence of Sri Gopals' three bonds was within his knowledge : but for some reason the two later bonds were dropped ; no issue was directed about either of them although an issue (2) was directed as to the bond of 21st July 1871 ; and the parties were apparently content that they should not be dealt with by the decree. That the matter was not overlooked is also indicated by the form of the Appellant's notification of 20th June 1892, set out at page 35 of the Record. And all doubt upon the point is removed by paragraph 7 of the plaint in this action ; in which the pleader, anticipating the defence that would be set up, endeavours to forestal it by saying " Mussummat " Janki had brought the claim for fear of the " amount of the bond dated 21st July 1871, and " a finding was recorded in respect of the same. " There was no other question in that case as to " the other matters relating to the hypothecation " of the Plaintiff and his uncle Sita Ram." The appeal therefore fails entirely as to Mussamaat Janki.

With respect to Bechai Lal, it is difficult to see why he is brought here. The claim for personal payment against him is idle. All that he did was to purchase some of the property which was sold by auction under the decree in the action in which Sita Ram and Sri Gopal were Plaintiffs (No. 129 of 1888). According to the conveyance to him this sale was made under the decree in the action No. 121 of 1883 : but this is not material. In each of those actions the Appellant or his predecessors in title were Plaintiffs. In either case as against Bechai Lal the case entirely fails.

Then as to Murli and Sarnam Singh. The former died in 1897 : but his representatives are before the Court as Respondents.

Their position is somewhat different. Their mortgage of 30th August 1872 was subject to the Appellant's mortgage of 21st July 1871: but paramount to his mortgages of 7th February and 16th July 1874. Their decree against the mortgagors of 17th December 1883 (No. 142 of 1883) has been already mentioned; as also has the purchase by them under that decree of  $1\frac{1}{4}$  biswas of the mortgaged property. Sita Ram and Daya Kishen, who had already obtained a decree (No. 121 of 1883) against the whole of the property under their prior charge, proceeded thereunder to sell, over the heads of Murli and Sarnam Singh, the same  $1\frac{1}{4}$  biswas which Murli and Sarnam Singh had purchased; and themselves became the purchasers of that property under their own decree. Thereupon in 1888 Murli and Sarnam Singh commenced an action (No. 166 of 1888) against Sita Ram and Sri Gopal alone: and on 25th July 1889 obtained a decree to the effect that notwithstanding the decree in the prior action, to which they were not parties, they were entitled to redeem the  $1\frac{1}{4}$  biswas upon payment of such a proportion of the whole debt due to the Defendants on their prior security as the  $1\frac{1}{4}$  biswas bore to the whole property comprised in the security of 1871: and this having been paid by Murli and Sarnam Singh into Court a transfer to them of the  $1\frac{1}{4}$  biswas was directed. In this action the Appellant as owner of the charge of February 1874 might have set up that, though Murli and Sarnam were entitled to redeem his first charge, he by virtue of his second charge of 7th February 1874 was entitled in turn to redeem them: and if this had been done he could have got then what he asks now, and the necessity for this suit would have been avoided; and the parties would have escaped this shocking multiplication of actions. Three Courts below have taken this

view; and their Lordships see no reason to dissent from it.

There are other difficulties in the Plaintiff's path to be removed before he could succeed against Murli and Sarnam Singh in this Appeal. Among others Section 43 of the Civil Procedure Code was held to be a bar to his suit in the two first Courts. The Court of Appeal expressed some doubt whether that was correct. There might have been a nice question to be argued; but the Appellant's Counsel did not open it, and did not even read the section to the Committee.

Their Lordships will humbly advise His Majesty that the Appeal should be dismissed. The Appellant must pay the costs of the Respondents Bechai Lal and Mussammat Janki who alone defended this Appeal.

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