

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Shankar Sarup and Others v. Lala Phul Chand (since deceased and now represented by Mejo Mal and Others); from the High Court of Judicature for the North-Western Provinces, Allahabad; delivered 16th May 1901.*

Present at the Hearing :

LORD HOBHOUSE.

LORD MACNAGHTEN.

LORD ROBERTSON.

SIR RICHARD COUCH.

SIR FORD NORTH.

[*Delivered by Lord Robertson.*]

The competition between the Appellants and the present Respondents who are the legal representatives of the original Respondent Lala Phul Chand deceased is for moneys realised by the judicial sale of certain villages and paid over under judicial warrant to Lala Phul Chand. The villages were ordered to be sold in execution of certain decrees of which one was held by Lala Phul Chand and two by the Appellants. Those decrees proceeded upon mortgages and the question on the merits of the suit is which of the parties had the preferable security.

The three bonds giving rise to the dispute were all validly granted and will now be stated in chronological order, without reference to any distinctive particulars irrelevant to the present controversy. On 4th May 1883 the villages (to the extent of certain shares also dealt with in the other two bonds) were hypothecated in

favour of the Appellants for Rs. 15,500. On 30th June 1883, a bond of hypothecation of the same property was executed in favour of Lala Phul Chand for Rs. 7,000. On 3rd November 1883 a bond of hypothecation of the same property was executed in favour of persons now represented in interest by the Appellants for Rs. 20,000. The terms of this bond require further statement. It begins by declaring that Rs. 15,500 are due on account of the bond of 4th May 1883 in which the mortgagor's right was hypothecated. Then it sets out that interest is due and that other debts have been incurred, bringing out a total indebtedness of Rs. 20,000; and until repayment of all this money the borrower hypothecates what had been hypothecated in the bond for Rs. 15,500. In addition to the above he hypothecated certain other shares in the same villages. The interest under this new bond was to be 14 annas per cent. per mensem (the interest under the bond of May having been 12 annas).

In 1885 the Appellants obtained decrees for the amount of the debt under the bond of November 1883 and for enforcement of the hypothecation by sale. (Two decrees were taken, and not one only, merely because the amount of the bond was payable in moieties, but the Appellants having come to be in right of both moieties this introduces none but an apparent complication.) As the Respondents' contention on the merits depends mainly on these proceedings it is necessary to point out that in their complaints the Appellants sued on the bond of November 1883 alone, and not on the bond of May 1883; and this was the tenor of the decrees obtained on those complaints and also of the orders for execution which followed in due course. Meantime Lala Phul Chand had sued on his bond; and the claims of both parties as well as those of other creditors having

matured, an order was made for sale and the sale took place. The sequel of those judicial proceedings was the distribution of the price; and in carrying this out as well as what had preceded the Subordinate Judge of Meerut was acting under the Civil Procedure Code 1877 and particularly Section 295. On 7th February 1888 an order was made for distribution of the price, and in it the Judge held that Lala Phul Chand was entitled to be paid in preference to the Appellants, on the ground that in their decrees the Appellants' rights were rested solely on the bond of November 1883 and not to any extent on the bond of May 1883 and accordingly that their rights were inferior to that of Lala Phul Chand under his bond of June 1883. The money was accordingly paid over to Lala Phul Chand.

The Appellants thereafter on 4th February 1891 filed the present petition of plaint, the remedy sought being that Lala Phul Chand should be ordered to return to the Appellants the proceeds of the sale on the ground of the priority of the hypothecation in their favour made in May 1883. The answer of the Respondents is *first* that the suit is time barred under Article 13 of the Limitation Act, the suit not having been brought within one year of the order for distribution made by the Subordinate Judge on 7th February 1888; and *second* that the Appellants had lost their right to found on the bond of May 1883 as conferring on them a priority over Lala Phul Chand's bond of June 1883. The Subordinate Judge of Meerut held the suit to be barred and by Decree sealed on 3rd August 1891 he dismissed it. On 27th June 1893, this decree was set aside by the High Court of the North-West Provinces and the case was remanded. The Subordinate Judge on 16th April 1895 gave to the Appellants the decree sought for; but

this decree was on 9th July 1897 set aside by the High Court who dismissed the suit with costs in all Courts. Against this decision the present appeal has been brought.

The theory of the Respondents' plea that the suit is time barred is that it is truly a suit to set aside the order of 7th February 1888 by which the Subordinate Judge ordered payment to Lala Phul Chand of the proceeds of the sale. That the money now sued for is the money so authorised to be paid over is certain. But it is to be observed that the same section of the Civil Procedure Code which authorised the order for payment to Lala Phul Chand authorises also the present suit by the Appellants. The 295th Section while providing that the Judge under whose authority the sale takes place shall distribute the proceeds provides also that if all or any of such assets be paid to a person not entitled to receive the same, any person so entitled may sue such person to compel him to refund the assets. It seems to their Lordships therefore that the present suit is in no sense an action to set aside the order of distribution of 7th February 1888 and that that order does not stand in the way of the present suit. The scheme of Section 295 is rather to enable the Judge as matter of administration to distribute the price according to what seem at the time to be the rights of parties, without this distribution importing a conclusive adjudication on those rights, which may be subsequently readjusted by a suit such as the present. Their Lordships approve of the decision on this point in *Vishnu Bhikaji Phadke v. Achut Jagannath Ghate* 15 Bombay Series p. 438 and they concur in the further observation made by the learned Judge in that case that the application of the 13th Article is also precluded by the fact that the order for distribution was a step in an execution

proceeding and was therefore made in the suit in which the decree was made which was in process of execution. The order for distribution was thus an order in a suit.

On the merits, their Lordships hold that the Appellants are entitled to prevail. If the bond of November 1883 be considered on its own terms, there is no room for the suggestion that it superseded the bond of May so as to impair the effect of that bond as a subsisting hypothecation. The argument of the Respondents was rather that the Appellants by their suing on the bond of November and not on the bond of May had relinquished their rights under the bond of May. No such inference can legitimately be drawn. The Appellants did not need to sue on the bond of May in order to obtain a sale for the whole of their debt, that being comprised in the bond of November. But in suing on the bond of November they did nothing to imply or to lead others to believe that they abandoned what apart from abandonment was a subsisting hypothecation; and in point of fact Lala Phul Chand in the suit on his own bond expressly recognised the bond of May as a subsisting and prior hypothecation.

Their Lordships will humbly advise His Majesty that the Decree of the High Court ought to be reversed and the Appeal to it ordered to be dismissed with costs and the Decree of the Subordinate Judge of 16th April 1895 be restored. The Respondents will pay the costs of the Appeal.

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