

Privy Council Appeal No. 9 of 1919.

Bengal Appeal No. 52 of 1915.

Radha Kishun - - - - - *Appellant*

v.

Khurshed Hossein and others - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 2ND DECEMBER, 1919.

Present at the Hearing :

LORD SHAW.
SIR JOHN EDGE.
MR. AMEER ALLI.
SIR LAWRENCE JENKINS.

[*Delivered by* SIR LAWRENCE JENKINS.]

The suit out of which this appeal arises is one brought by the appellant, Radha Kishun, for the realisation of his mortgage security by sale, and the only question now remaining for decision is whether the appellant's claim to four villages which form a part of his security is barred by the plea of *res judicata*.

The Additional Subordinate Judge of Mozufferpur and on appeal the High Court of Calcutta have decided adversely to him. He has accordingly preferred this appeal.

There are two groups of contesting respondents who may be conveniently described as the Sheikhs and the Sahus. The Sheikhs claim the two villages called Barnihar and Lachnowta, the Sahus those named Pandharia and Gamharia.

The validity of the Sheikhs' claim to the two villages of Barnihar and Lachnowta is beyond dispute and the High Court's conclusion with regard to them must be upheld.

To the contest as to the other two villages, however, different considerations apply.

By an instrument dated the 13th May, 1892, these villages were mortgaged to Kishun Lal to secure Rs. 40,000.

On the 7th September, 1906, the mortgage and the security were transferred to the appellant by Bakhtaur Mull Abhor on whom they had devolved on Kishun Lal's death. This is the appellant's title, and it is not now disputed except so far as the plea of *res judicata* may be a bar to its successful assertion.

But on the 25th February, 1891, the villages had been transferred by way of usufructuary mortgage to the Sahus, and on the 28th April, 1894, a simple mortgage of them was executed to the same mortgagees.

On the 15th March, 1907, the present suit was instituted by the appellant against the Sahus and others for enforcement of his mortgage.

It was tried in 1909, and as against the Sahus it was dismissed as barred by the plea of *res judicata* on the 12th October, 1909, and this was affirmed on appeal by the High Court on the 24th May, 1915.

The former suit on which this plea is based is Suit No. 100 of 1906. It was brought by the Sahus, and the defendants to it included the mortgagor and Bakhtaur Mull, the present appellant's predecessor in title.

The claim was for recovery of the mortgage-money due on the mortgage-deed of the 28th April, 1894. Reference was made to the zerpeshgi deed of the 25th February, 1891, with a view to safeguarding it.

A decree was passed on the 6th August, 1906, in the absence of the defendants, and it was ordered that "this suit is decreed, and that if the principal with interest as mortgage-bond with costs in Court is paid within six months the mortgaged property be released from mortgage, and in the event of the decretal money not being paid the mortgaged property will be sold subject to former zerpeshgi mortgage-deed." The decree then proceeds to make a personal order for payment against the defendants.

The contention for the Sahus is that as the present appellant did not make his mortgage deed of the 13th May, 1892, a ground of defence in the former suit he is now barred from suing on it.

The rule of *res judicata* is contained in section 11 of the Code of Civil Procedure, 1908, which provides that no Court shall try any suit in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties litigating under the same title in a Court competent to try such subsequent suit, and has been heard and finally decided. Had this been an exhaustive statement of the rule it obviously would not have supported the plea in the facts of this case, and so reliance has been placed on Explanation IV

which provides that any matter which might and ought to have been made ground of defence in such former suit shall be deemed to have been directly and substantially in issue in such suit.

The mortgage-deed of the 13th May, 1892, it is urged, might and ought to have been made a ground of defence in the former Suit No. 100 of 1906, and by the omission the present suit is barred.

The rule is clear ; the controversy is narrowed down to the question whether the facts invite its application.

It becomes necessary, therefore, to see what was the position of Bakhtaur Mull in the former Suit No. 100 of 1906. It was a suit brought by the Sahus to enforce against the mortgagor their mortgage deed of the 24th April, 1894. Bakhtaur Mull was joined as a defendant, but whether any or what relief was sought against him does not appear.

Bakhtaur Mull's mortgage was prior to that on which the Sahus sued, and its validity is now admitted.

The case, therefore, came within the terms of section 96 of the Transfer of Property Act which expressly provides that where property the sale of which is directed is subject to a prior mortgage the Court may, with the consent of the prior mortgagee, order that the property be sold free from the same, giving to such prior mortgagee the same interest in the proceeds of the sale as he had in the property sold. The implication of the section is that without such consent the property could not be so sold.

Bakhtaur Mull's position therefore was that he was a prior mortgagee with a paramount claim outside the controversy of the suit unless his mortgage was impugned. Consequently to sustain the plea of *res judicata* it is incumbent on the Sahus in the circumstances of this case to show that they sought in the former suit to displace Bakhtaur Mull's prior title and postpone it to their own. For this it would have been necessary for the Sahus as plaintiffs in the former suit to allege a distinct case in their plaint in derogation of Bakhtaur Mull's priority.

But from the records of this suit it does not appear that anything of the kind was done, and, as has been observed, of things that do not appear and things that do not exist the reckoning in a court of law is the same.

The Sahus, therefore, have failed to establish the conditions essential to their plea, and they alone are responsible for this defect. The plaint in Suit No. 100, 1906, has not been produced, and this omission is not supplied by the summary of the plaint set out in the extracts from the decree (Exhibit J. 37 c.). That summary still leaves the contents of the plaint a matter of mere conjecture and certainly does not show that Bakhtaur Mull's mortgage was attacked. The decree, too, is open to the same comment. In arriving at this conclusion their Lordships have not overlooked the authorities cited at the Bar, but so far as they are binding on this Board they are clearly distinguishable.

Their Lordships at one time hesitated as to whether it would

not be the better course to afford the Sahus an opportunity of producing the record of the former suit but, on reflection, they felt that they were not entitled to this indulgence. The Sahus have been singularly remiss: the absence of this evidence was not sprung upon them in the argument before this Board; it was made a ground of complaint in the application for leave to appeal, and yet no attempt has been made to meet it.

Nor is this the only defect in their proofs for they have not even shown by any evidence on the record that being decree holders they obtained an order absolute for sale, or the necessary permission of the Court to purchase the property. Moreover, it is not without importance that it is the decree holders who claim to have bought in execution and that they are endeavouring to defeat by their plea a mortgage of which they had notice, and which on their own admission now made was valid and so of necessity paramount to their claim.

Their Lordships, therefore, hold that the plaintiff's claim to the villages of Pandharia and Gamharia cannot be defeated by the plea of *res judicata*, and that it was erroneous to dismiss the suit as against the defendants 37 to 42. They will, therefore, humbly advise His Majesty that the decrees of the High Court and the Additional Subordinate Judge ought to be varied accordingly, and the case remitted to the High Court with directions to modify its decree in accordance with this decision in regard to the two villages of Pandharia and Gamharia, the adjustment of costs consequent thereon, and otherwise as the circumstances of the case may require. There will be no order as to the costs of this appeal.



In the Privy Council.

RADHA KISHUN

o.

KHURSHED HOSSEIN AND OTHERS.

DELIVERED BY SIR LAWRENCE JENKINS.

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