

Privy Council Appeal No. 82 of 1935

Patna Appeal No. 18 of 1935

Hazariram Marwari and others - - - - *Appellants*

v.

Rai Bahadur Bansidhar Dhandhanian and others - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT PATNA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 16TH DECEMBER 1936.

Present at the Hearing:

LORD ROCHE.

SIR SHADI LAL.

SIR GEORGE RANKIN.

[*Delivered by* SIR GEORGE RANKIN.]

The question in this appeal is whether under rules 18 and 20 of Order XXI in the First Schedule to the Civil Procedure Code, there can be a set-off in execution proceedings of two decrees hereunder mentioned. The High Court at Patna have allowed the set-off (6th February, 1933), after the Subordinate Judge of Godda had refused it (11th April, 1931).

The decrees in question are, first, a decree for mesne profits dated 15th January, 1924, of which the present appellants took an assignment on the 12th November, 1925; secondly, a final decree for sale dated 18th December, 1925. Both decrees were transferred to the Court of the Subordinate Judge at Godda for execution.

The history of the matter may be outlined as follows: One, Thakur Barham, was the proprietor of an estate in the Santal Perganas called Patsanda. He borrowed money from certain persons at whose instance in July, 1904, six annas interest in Patsanda was sold in execution of a decree and bought as to two annas by Srimoan, the father of the respondent Kedarnath, as to three annas by the husband of the respondent Teji Bibi, and as to one anna by the respondent Nopechand and his brother Chaturi Ram, since deceased. The first and third of these purchases were made on behalf of the joint Hindu family of the auction purchaser and not on his individual account. Respondents 1 to 16 in this appeal to His Majesty represent all the persons on whose account these purchases were made. Unfortunately there were two six-anna shares in Patsanda belonging to Thakur Barham, one heavily mortgaged and the other com-

paratively free. The former was the interest which had been attached, but the sale certificate was granted in respect of the other, and the auction purchasers went into possession thereof. While so in possession they discharged two security bonds given on 10th November, 1902, by Thakur Barham, charging two annas and one anna respectively of Patsanda in favour of one Gobardhan Das. In 1913 the sale of July, 1904, was set aside as being invalid by reason that the interest sold was not the same as the interest attached (*cf.* L.R. 41 I.A. 38). This gave rise to restitution proceedings under section 144 of the Code which were carried up to this Board (L.R. 49 I.A. 351), where in June, 1922, the auction purchasers were held entitled to set-off the amount of their deposit against the mesne profits, but the High Court at Patna were held to have been right in refusing their claim to set-off the sums paid in discharge of the bonds to Gobardhan Das. After some further litigation the matter was settled by the first of the two decrees now in question—viz., the compromise decree of 15th January, 1924, of which the appellants are assignees. That decree, while binding upon the present respondents No. 1 to 16 so far as regards recovery of $5\frac{1}{2}$ annas share of Patsanda, is nevertheless, so far as mesne profits are concerned, against three only—viz., Kedarnath, Teji Bibi and Nopechand, who are specially described in the cause title as the auction purchasers. The sums decreed amount to Rs.81,398.

Against this decree for mesne profits the High Court have set-off a decree which has resulted from a suit [No. 2 of 1917] brought by members of the families interested in the auction purchase of July, 1904, to recover from the representatives of Thakur Barham and from the interest in Patsanda charged to Gobardhan Das, the sums expended in discharging the two bonds of 10th November, 1902. By his judgment dated 28th February, 1925, the learned Additional Subordinate Judge of Bhagalpur found for the plaintiffs, holding that they had both a right to reimbursement and a charge upon the property, neither right being barred by the Limitation Act. The formal decree of 28th February, 1925, is not before their Lordships, but the final decree dated 18th December, 1925, directs a sum exceeding Rs.86,000 to be realised by sale of the property charged, and this is the decree which has been set off. Respondents 1 to 16 represent all the holders of this decree.

In the High Court of Patna the view taken by Noor J., who gave the judgment (the learned Chief Justice concurring), may be summarised by saying that the two decrees relate to the same transaction and that "the judgment debtors of the one are in substance exactly the decree-holders of the other and *vice versa*" because all the present respondents No. 1 to 16 were in substance and as between themselves auction purchasers whose possession was ultimately set aside. He rejected the contention that rule 20 of

Order XXI applies only when both decrees are mortgage decrees, but considered that a mortgage decree could only be set-off in cases where a personal obligation to repay existed and a remedy by personal decree was still available. He held on the facts that the remedy by personal decree was not in this case barred.

The contention that rule 20 only applies where both decrees are mortgage decrees was repeated before this Board, but their Lordships agree with the High Court in rejecting it. Rule 20 was new in 1908 and was intended to settle, as regards set-off, a conflict of decisions as to whether a mortgage decree was within the description of "decree for the payment of money" or "money decree." There is nothing in the language of the rule and nothing in the reason of the matter to justify the interpretation contended for. In the absence of personal liability on each side, to set-off two mortgage decrees may be just as much or as little inequitable as to set-off a mortgage decree against a decree for money.

The words of rule 20—"decrees for sale in enforcement of a mortgage or charge"—cannot be restricted to personal judgments such as may be given under Order XXXIV, rule 6.

As it was held by the judgment in the suit in which the final decree for sale was passed that the right of the present respondents 1 to 16 to a personal judgment subsisted and was not barred, their Lordships do not find it necessary either to examine this question afresh in these execution proceedings, or to embark upon a discussion of the difficulties that may arise if a mortgage decree be set-off against a money decree in the absence of any personal liability on the part of the mortgagor who holds the money decree. Mr. Dunne for the respondents contested the view taken in the High Court as to personal liability being a condition of set-off, but as this important question does not here arise for decision and calls for careful discussion, their Lordships do not think fit to pronounce upon it. In so saying they do not intend to prejudice the view taken by the High Court. On the contrary they would be slow to give effect to a rule of set-off so as to alter substantive rights or to produce consequences beyond the scope of an intention to avoid circuity of proceedings. Whenever the matter arises for decision the observations of the learned Judge (Noor J.) and his discussion of the authorities (*Nagar Mal v. Ram Chand* 1910 I.L.R. 33 All. 240; *Sheo Shankar v. Chunni Lal* 1916 I.L.R. 38 All. 669; *Burma Oil Company v. Ma Tin* 1929 I.L.R. 7 Rang. 505. Also cf *Venkata Reddi v. T. V. Dorasami Pillai* 1932 I.L.R. 56 Mad. 339) will afford assistance to the Board and to the Courts in India.

The general character of the two decrees concerned does not in their Lordships' view preclude the set-off, but it is necessary to examine their exact form, having regard to the terms of rule 18 of Order XXI. The appellants' decree so far as money is concerned is against three only of the respondents—viz., Kedarnath, Teji Bibi, and Nopechand. The respondents' decree is in favour of some 18 members of the

same family or families. Moreover the respondents' decree is against certain persons called Mandal, purchasers from the representatives of Thakur Barham, as well as against these representatives themselves.

The presence of the Mandals as judgment debtors in the respondents' decree raises no obstacle to set-off and the contrary was not contended by learned counsel for the appellants. The respondents were entitled to execute the decree for the whole amount as against the Barham judgment debtors, and clause 4 of rule 18 with its illustration (d) embodies what has always been the law on this matter (cf. *Hury Doyal v. Din Doyal* 1883 I.L.R. 9 Cal. 479; *Ram Sukh Das v. Tota Ram* 1892 I.L.R. 14 All. 339).

The presence among the holders of the decree for sale in addition to Kedarnath, Teji Bibi, and Nopechand, of other members of their families, affords the only remaining objection to set-off. If X has a decree against A and A and B have a decree against X, it is clear from illustration (b) to rule 18, as well as on principle, that X cannot insist on a set-off. Their Lordships will assume without deciding, that the rights of B make it equally impossible for A alone to claim set-off against X. But if B and A both ask for the set-off must it necessarily be refused? And even if it appears that A incurred the debt to X on behalf of himself and B? Their Lordships think not. It is true that under rules 18 to 20 the set-off of decrees is not a discretionary matter depending upon equitable considerations such as may emerge from the circumstance that both decrees arise out of the same transaction. Whatever they arise from, circuitry of proceedings thereunder can be avoided and should be avoided—this is the principle of the rules. But if an assignee can insist upon set-off as provided by clause 2 of rule 18, then to refuse the application of A and B to have the set-off allowed, would be the height of technicality. There is here no question of any other judgment debt which could obstruct the set-off. B at his own request can be treated as having released his right to A if he comes before the executing Court and asks for this. The circumstance that in so doing he does no more than his duty as between himself and A may under these rules be irrelevant, but it adds an element of reason to his request.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

In the Privy Council.

HAZARIRAM MARWARI AND OTHERS

v.

RAI BAHADUR BANSIDHAR
DHANDHANIA AND OTHERS

DELIVERED BY SIR GEORGE RANKIN

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