

Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of Thakur Shankar Baksh v. Dya Shankar and others, from the Court of the Judicial Commissioner of Oudh; delivered 17th December 1887.

Present :

LORD FITZGERALD.

LORD HOBHOUSE.

SIR BARNES PEACOCK.

SIR RICHARD COUCH.

On the 6th of December 1853 Bhup Singh, the grandfather of the Appellant, describing himself as zamindar and talukdar of Pahu and Golaria, &c., by an agreement of that date, mortgaged three villages in pargana Maurawan, in Oudh, to the Respondent Dya Shankar for three years for Rs. 7,441. 6, the mortgagee to have the profits and produce and being put in possession. And the mortgagor stipulated that he would repay the mortgage money in Khali Fasl, and redeem the mortgaged villages, and, "unless he shall have paid the mortgage money in full to the said mortgagee he shall not redeem the villages; at the time the mortgage money shall be paid up by the declarant (mortgagor) he shall have the mortgaged villages released in Khali Fasl."

On the 6th September 1883 the Appellant brought a suit in the Court of the District Judge of Lucknow against the Respondent to redeem the mortgage. Other persons were made Defendants as having become entitled to a half

share in the right of the mortgagee, but the case may be treated as if Dya Shankar had remained sole mortgagee. The plaint stated the mortgage; that the three years expired on the 6th December 1856, and although the villages were included in the talukdari sanad of Dya Shankar, yet, under the terms of the mortgage deed and Section 6, Act I. of 1869, the Plaintiff was entitled to redeem; that, under Section 83, Act IV. of 1882, the Plaintiff had deposited the mortgage money in Court, but on the 14th of June 1883, the Khali Fasl, the Defendants refused to redeem the property. The written statement of Dya Shankar stated that "on the 23rd of June 1864 Bhup Singh, Plaintiff's ancestor, filed against the Defendant a regular suit for redemption of his property, and continually absented himself; on the death of Bhup Singh, which took place about the end of 1875, the Plaintiff succeeded him, and he also failed to prosecute the case, so much so that on 18th July 1868 the claim was dismissed for want of prosecution, under Section 114, Act VIII. of 1859, in the presence of Defendant and absence of Plaintiff." It was further stated that on 7th August 1868 the Plaintiff filed an application for rehearing, which was rejected on the 13th August; that another application for rehearing was filed on 15th September 1868, which was also rejected on 17th March 1871; that an appeal was then preferred in the Court of the Commissioner, which was also rejected.

The sections of Act VIII. of 1859, which was then in force, applicable to the dismissal of a suit, are 110, 114, and 119. Section 110 provides for the dismissal where neither party appears, and when a suit is dismissed under it the Plaintiff is at liberty to bring a fresh suit, unless precluded by the rules for the limitation of actions, or if within 30 days he

satisfies the Court that there was a sufficient excuse for his non-appearance the Court may issue a fresh summons upon the plaint already filed. Section 114 provides for cases where the Defendant appears and the Plaintiff does not appear, and then "the Court shall pass judgement against the Plaintiff by default unless " the Defendant admits the claim," and it says that when judgement is passed against a Plaintiff by default he shall be precluded from bringing a fresh suit in respect of the same cause of action.

Bhup Singh had, as was alleged, brought a suit in the Settlement Court on the 23rd June 1864, and the order, as it is called, of the 18th July 1868 appears to have been made in consequence of the Financial Commissioner, on the 29th of May 1868, calling the attention of the Settlement Officer to the provision in Act VIII. of 1859, where the Plaintiff does not attend to the process of the Court. The Settlement Officer appears upon that to have given notice to the parties, and the judgement says that "the 18th of June was " fixed for the hearing, on which day Plaintiff " applied for a month's delay, it being the " entering into engagements with tenants, and " the Defendant's agent agreeing to the delay, it " was granted, and this day, the 18th of July, " fixed for the hearing, but Plaintiff is not " present or represented by any accredited " agent." At the foot of the judgement is the word "Decree" and the signature of the Settlement Officer. There is also in the proceedings a paper in a tabular form, signed by the Settlement Officer, which seems to be the record of the decree. In a column headed "Particulars of Case" are the words "Plaintiff's suit for redemption of " entire village Khanpur by right of inheritance " and possession up to 1270 F. dismissed on " default." The words "dismissed on default"

were strongly relied upon before their Lordships as showing that the suit was dismissed under Section 110, but in another column it is stated that the decree was in favour of the Defendants. The proceeding of the Settlement Court is recorded in such a loose way that no certain inference can be drawn from it as to the section under which the decree was made. The matter, however, did not rest there. On the 7th of August 1868 the Plaintiff applied that the suit might be reinstated under Section 110. This application was rejected on the 13th August. On the 15th September 1868 the Plaintiff made an application to set aside the order of the 18th July. The order upon this application was not made until the 17th March 1871. The cause of this delay does not appear. The application was refused by the Settlement Court because it was not made within 30 days after the 18th July. The Plaintiff then appealed to the Commissioner of the Rae Bareli Division, who dismissed the appeal, saying that "the order of 13th August ought to have been appealed." The explanation of this will be found in Section 119. It has been seen that when an order is made under Section 110 there is no appeal; the Plaintiff is at liberty to bring a fresh suit. But Section 119 provides that in all cases of judgement against a Plaintiff by default (that is, cases under Section 114) he may apply within 30 days from the date of the judgement for an order to set it aside, and that in all cases in which the Court shall pass an order under that section for setting aside a judgement the order shall be final, but in all appealable cases in which the Court shall reject the application an appeal shall lie from the order of rejection to the tribunal to which the final decision in the suit would be appealable. Thus the Plaintiff, by appealing against the order of the 17th March 1871, treated the application of 15th September

1868 as an application to set aside an order made under Section 114, and when the Commissioner said that the order of the 13th August ought to have been appealed he must have considered that the order of 18th July 1868 was made under that section. Indeed the objection that it was made under Section 110 does not seem to have been taken in the Lower Courts. No issue was framed by the District Judge distinctly, if at all, raising it, and there is no notice of it in his judgement. The Appellate Court says the suit was dismissed under Section 114, and the whole of the judgement assumes that it was. Their Lordships are satisfied that the dismissal of the suit was under Section 114.

It is, therefore, necessary to decide whether the present suit is for the same cause of action as the former. The plaint in this suit has been stated. The suit in 1864 was begun by a petition to the Settlement Court, which then had the jurisdiction. It stated the claim thus:—"Claim
 " to order proprietary (sub-settlement) right by
 " redemption of mortgage in respect of villages
 " Khanpur, Rajivara, and Sarai Mobarak, which
 " were mortgaged to Defendant on the 4th Rabi-
 " ul-awal 1270 H. in lieu of Rs. 7,441. 6, with
 " stipulation that whenever, after expiry of the
 " period of three years, the mortgagor paid the
 " mortgage money in full, he shall redeem the
 " property. Accordingly he paid Rs. 3,000
 " out of the aforesaid amount on the 7th Ramzan
 " 1273 H. He is ready to pay up the balance,
 " Rs. 4,441. 6, but the Defendant does not act
 " up to the terms of the mortgage deed." The prayer was that the Plaintiff might, on payment of Rs. 4,441. 6 in cash, be put in possession of the mortgaged villages as under proprietor, holding sub-settlement in accordance with the provisions of the rules of the Government on the subject. The proceedings in the Settlement

Court appear to have been in a different form from that now in use in the District Court, viz., plaint and written statement, but no objection has been taken in the Lower Courts that the suit in 1864 was not in proper form, or that it was then necessary to deposit the money. That has been made necessary by a subsequent Act. That in the former suit the Plaintiff asked for sub-proprietary right, and in the latter for the superior proprietary right, does not make any difference as regards the cause of action. It is not as the District Judge thought part of the cause of action. It is the manner in which the redemption of the mortgage was to be given. Various questions have been raised, and very fully argued, before their Lordships in order to show that the cause of action in the two suits is not the same, and that the present suit is for a new cause of action. Their Lordships have fully considered those arguments, and they are unable to come to the conclusion that the causes of action are not the same, and that the judgment of the Additional Judicial Commissioner, who held that the suit was barred under the provisions of Section 114, is wrong. They will, therefore, humbly advise Her Majesty to affirm his judgement, and to dismiss the appeal. The Appellant will pay the costs of it.
