

ORIGINAL CIVIL.

Before Greaves J.

JOGEMAYA DASSI

1918

v.

May 21.

BAIDYANATH PRAMANICK.*

*Mortgage—Attachment—Civil Procedure Code (Act V of 1908)
O. XXXVIII, r. 5.*

The plaintiff in a mortgage suit, after the preliminary decree and before the date appointed for payment into Court, applied for attachment of certain other properties of the defendants on the ground of insufficiency of the mortgaged security :—

Held, that as the plaintiff would ultimately have to apply for a personal decree against the defendants, she had a right to get an attachment under O. XXXVIII, r. 5 of the Civil Procedure Code.

Bishambhar Sakai v. Sukhdevi (1) and *Jaiparkash Narain Singh v. Basanta Kumari Debi* (2) referred to.

THIS was a suit on a mortgage. The Registrar after taking an account under the preliminary decree, appointed the 12th June 1918 as the date for payment.

Subsequent to the mortgage there was a partition amongst the defendants and the mortgaged premises No. 3, Jebb's Lane, was allotted to the defendant Biswanath Pramanick. There were several previous mortgages on No. 3, Jebb's Lane and the plaintiff's case was that the security was not sufficient. As the defendants were about to dispose of their remaining assets, the plaintiff obtained a Rule on the 2nd May 1918 for attachment of certain properties, other than the mortgaged premises, belonging to the defendants.

* Application in Ordinary Original Civil Suit No. 1227 of 1917.

(1) (1894) I. L. R. 16 All. 186. (2) (1912) 15 Ind. Cas. 604.

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Mr. C. C. Ghose, for the defendant, Lokenath Pramanick. The only right under the decree is to bring the property to sale : *Zalim Gir v. Ram Charan Singh* (1).

The mortgaged property must be sold first before the plaintiff can execute the balance of the decree : *Badri Das v. Inayat Khan* (2), *Ram Ranjan Chakravarti v. Indra Narain Dass* (3), *Surja Kumar Karforma v. Pramada Sundaree Debi* (4).

Mr. N. M. Chatterjee, for the defendant, Biswanath Pramanick.

Mr. N. Ghattak, for the plaintiff. I am not asking for a personal decree now. I am asking for an attachment before personal decree. This is an application under O. XXXVIII, r. 5 of the Civil Procedure Code. *Bishambhar Sahai v. Sukhdevi* (5) and *Jaiparkash Narain Singh v. Basanta Kumari Devi* (6) relied upon.

Cur. adv. vult.

GREAVES J. This is an application by the plaintiff for the attachment of certain properties of the defendants. On the 2nd May last, I granted a Rule calling on the defendants to show cause why these properties should not be attached and the Rule now comes on for hearing. On the 28th September 1913 the plaintiff advanced to the defendants the sum of Rs. 6,000 and the defendants thereupon deposited the title deeds of No. 3, Jebb's Lane in this city to secure the sum advanced and interest thereon at 6 per cent. per annum. The defendants agreed to repay the advance together with interest thereon at the rate aforesaid within 6 months from the date of the advance ; default

(1) (1888) I. L. R. 10 All. 629, 632. (4) (1913) 17 C. W. N. 1039.

(2) (1900) I. L. R. 22 All. 404. (5) (1894) I. L. R. 16 All. 186.

(3) (1906) I. L. R. 32 Calc. 890. (6) (1912) 15 Ind. Cas. 604.

was made by the defendants in repaying the advance and, on the 21st November 1914, the plaintiff commenced a suit to recover the money advanced together with interest thereon. On the 28th May 1917 a preliminary mortgage decree was passed in the suit declaring that the plaintiff was entitled to a charge for the sum advanced on $\frac{2}{3}$ of No. 3, Jebb's Lane, and the Registrar was directed to take the usual mortgage account and liberty was given to the plaintiff to apply for a personal decree if the money to arise from a sale was insufficient to pay the amount charged on the property. The Registrar reported on the 21st November 1917 and found that there would be due to the plaintiff on the 11th June 1918 a sum of Rs. 7,696 in respect of the said advance and appointed the 12th June 1918 as the date for the payment into Court by the defendants of the sum of Rs. 7,696 and costs. The premises No. 3, Jebb's Lane formed part of the estate of one Behari Lal Pramanick and this estate was partitioned in suit No. 698 of 1907, and by the return of the Commissioner of Partition appointed in the said suit which was dated the 19th March 1915 and which was confirmed by an order made in the said suit on the 20th June 1916, No. 3, Jebb's Lane was allotted to the defendant Bissonath together with other property and various allotments were made to the other defendants. There are various prior mortgages on No. 3, Jebb's Lane and I am satisfied upon the evidence that upon the realisation of these premises and of other premises rendered liable to the plaintiff's mortgage by virtue of the partition decree, the sum realised will not be nearly sufficient to satisfy the plaintiff's mortgage and that she will ultimately, after realisation of the mortgage premises, have to apply for a personal decree against the defendants. I need not refer in detail to the figures which are set

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forth in the petition and which are not really challenged; indeed it appears from the defendant Bissomath's affidavit that the plaintiff has understated the amounts due on the prior mortgages. Under these circumstances the application is made as the defendants are alleged to be about to dispose of their sole remaining assets, or, I should rather say, realise them by sale with intent to defeat and delay any personal decree that may be passed against them. This is denied, but I think I must hold upon the evidence that the defendants are trying to dispose of their sole remaining assets, although there is really no evidence apart from such inference as I may draw from the circumstances that the object is to defeat and delay creditors.

Now it is well settled by authorities of this Court, which are binding upon me, that until the mortgaged properties are brought to sale, no personal decree can be obtained against the defendants, and it is said on behalf of the defendants that it follows from this that no order for attachment can be made. But the ground of the decisions to which I was referred is the construction which the Courts have put upon Order XXXIV, rule 6 of the Civil Procedure Code read with the other rules of this Order; and I do not see how these decisions can affect the plaintiff's rights under Order XXXVIII, rule 5, if she makes a case thereunder. That this is so, see *Bishambhar Sahai v. Sukhdevi* (1) cited with approval in a decision of the Appellate Side of this Court: *Jaiparkash Narain Singh v. Basanta Kumari Debi* (2) Miscellaneous Civil Appeal No. 42 of 1911.

The result is, that I think I should accede to the prayer of the petition and make the Rule absolute if I am satisfied that the contemplated sale is with intent

(1) (1894) I. L. R. 16 All. 186. (2) (1912) 15 Ind. Cas. 604.

to obstruct or delay the execution of any personal decree that may be passed hereafter. I think, under the circumstances, that having regard to the fact that there are no other properties and the extent of the incumbrances and the involved circumstances of the defendants, that I am justified in inferring this. I accordingly make the Rule absolute with costs.

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Rule absolute.

Attorney for the plaintiff : *N. C. Mandal.*

Attorneys for the defendant, Lokenath Pramanick :
G. N. Dutt & Co.

Attorney for the defendant, Biswanath Pramanick :
M. M. Chatterjee.

ORIGINAL CIVIL.

Before Chaudhuri J.

LAKHIMANI DASSI

v.

DWIJENDRA NATH MUKERJEE.*

1918
 June 20.

Attorney and Client—Bill of costs—High Court Original Side Rules, Ch. XXXVIII, r. 67—Limitation—Summary procedure.

When an application by an attorney for realisation of costs, under the High Court Original Side Rules, Chapter XXXVIII, r. 67, involves an enquiry, it should not be dealt with in a summary manner.

Art. 84 of the Limitation Act (Act IX of 1908) applies to such applications.

Wadia, Gandhi & Co. v. Purshotam Sivji (1), Chand Monee v Santo Monee (2), Abba Haji Ishmail v. Abba Thara (3) referred to.

* Application in Original Civil Suit No. 56 of 1912.

(1) (1907) I. L. R. 32 Rom. 1. (2) (1897) I. L. R. 24 Calc. 707.

(3) (1876) I. L. R. 1 Bom. 253.