

ORIGINAL CIVIL.

Before Panckridge J.

SIMBHU RAM BIRIWALA

v.

GULZARI LAL THAKUR.*

1936

April 22.

Mortgage suit—Necessary party—Judgment-creditor in money suit—Consent-decree—Charge on mortgaged property—Registration of decree—Receiver in execution in money suit—Possession of mortgaged property—Part performance—Interest in the mortgaged property of the judgment-creditor—Code of Civil Procedure (Act V of 1908), O. XXXIV, r. 1—Transfer of Property Act (IV of 1932 amended by XX of 1929), ss. 91(a), 53A—Indian Registration Act (XVI of 1908), s. 17(2) (vi).

A charge upon the judgment-debtor's immovable property, purporting to be created by a consent-decree in a money suit in favour of the judgment-creditor, does not, the decree being unregistered, affect the property, and the judgment-creditor is not a necessary party to a suit for sale upon a previously existing mortgage of the property.

The possession by a receiver in execution of such immovable property is not possession by the judgment-creditor in part performance of the contract contained in such decree within the meaning of s. 53A of the Transfer of Property Act.

The possession of immovable property by a receiver in execution does not create any interest in it in favour of the judgment-creditor so as to make him a necessary party to a suit for sale upon a previously existing mortgage of the property.

Frederick Peacock v. Madan Gopal (1) and *Subramania Chettiar v. Sinnammal* (2) applied.

Gummidelli Anantapadmanabhaswami v. Official Receiver of Secunderabad (3) referred to.

APPLICATION in Chambers.

The relevant facts of the case and arguments of counsel appear sufficiently from the judgment.

M. N. Kanjilal for the applicant.

S. N. Banerjee (Jr.) for the respondent plaintiff.

*Application in Original Suit No. 83 of 1935.

(1) (1902) I. L. R. 29 Cal. 428.

(2) (1930) I. L. R. 53 Mad. 881.

(3) (1933) I. L. R. 56 Mad. 405; I. L. R. 60 I. A. 167.

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PANCKRIDGE J. This is an application by one Onkermull Joshi, who is not a party to the suit, to be made a party thereto with liberty to file a written statement.

The suit is on a mortgage dated September 18, 1929, the sum secured thereby being Rs. 21,975. The plaintiff is the assignee of the original mortgagee, and in the suit he has impleaded certain puisne mortgagees as well as the mortgagors.

The present applicant instituted a money suit against some, at any rate, of the mortgagor defendants in this suit, and a consent decree was made in the money suit on March 5, 1931.

The terms of settlement were that there should be a decree for Rs. 4,000 payable after three years from the date of the decree, and if at the end of that period the defendants had not paid the decretal amount, it was to carry interest from the end of such period until satisfaction. For the purposes of this application the important term of the settlement is term (e) which is as follows :—

The shares of the defendants in the premises No. 3, Munshi Sadaruddin Lane will remain charged for the decretal amount subject to previous encumbrances.

The premises mentioned are covered by the mortgage which the plaintiff in this suit is seeking to enforce.

On December 12, 1935, the present applicant applied for execution of the decree in the suit instituted by him by the appointment of a receiver in execution under s. 51 (a) of the Code of Civil Procedure, 1908. An order was made for the appointment of the Official Receiver who took possession. On March 3, 1936, the plaintiff applied for and obtained an order, as is usual, in a mortgage suit, for the appointment of the Official Receiver as receiver of the mortgaged property. The present applicant claims that he is a necessary party to the present suit who must be

joined under the provisions of O. XXXIV, r. 1 of the Code of Civil Procedure, which enacts that all persons having an interest either in the mortgage security or in the right of redemption shall be joined as parties to any suit relating to the mortgage. The applicant says that he falls within the class contemplated by the rule, because of the provisions of s. 91 of the Transfer of Property Act, 1882, as amended by Act XX of 1929.

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That section provides that besides the mortgagor any of the following persons may redeem or institute a suit for the redemption of the mortgaged property:

91 (a). Any person (other than the mortgagee of the interest sought to be redeemed) who has any interest in, or charge upon, the property mortgaged, or in or upon the right to redeem the same.

The first submission made on behalf of the applicant is that by reason of the consent decree of March 5, 1931, he has a charge upon the property. I am of opinion that whatever his rights may be he cannot claim a charge by reason of the terms of the consent decree, because admittedly the decree has not been registered, and, under s. 17 (2) (vi) of the Indian Registration Act, 1908, although decrees and orders of the Court are exempt from registration, the exemption does not apply to decrees or orders expressed to be made on a compromise and comprising immovable property other than that which is the subject-matter of the suit or proceeding.

It is not argued that the consent decree of March 5, 1931, does not fall within the exception, but Mr. Kanjilal maintains that he is not affected by the failure of his client to have the decree registered, because any difficulties that the want of registration might occasion, are got over by s. 53A of the Transfer of Property Act. I do not think it is necessary to set out that section *in extenso*, and it will be sufficient to observe that it only applies, where the transferee has in part performance of the contract taken possession of the property or any part thereof, or the transferee,

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if already in possession, continues in possession in part performance of the contract, and has done some act in furtherance of the contract. To my mind, a judgment-creditor, who in circumstances like the present has obtained an order for a receiver, in pursuance of which the Court is in possession of property through its receiver, cannot possibly be said to have taken possession of the property in part performance of a contract. In my opinion s. 53A does not assist the applicant in escaping from the difficulties occasioned by his failure to register his decree under the mandatory provisions of s. 17 of the Indian Registration Act.

The matter, however, does not end there, because the applicant argues that even if he has not a charge on the mortgaged property, he has an interest in it or in the right to redeem within the meaning of s. 91(a) of the Transfer of Property Act.

* * * *

It has been held that an attachment creates no charge on immovable property attached: *Frederick Peacock v. Madan Gopal* (1); and this principle appears to me to have been further developed by the Madras High Court in the Full Bench case of *Subramania Chettiar v Sinnammal* (2). There, it was specifically held that an attaching decree-holder had no interest or charge on the immovable property attached, and was therefore not a necessary party within the meaning of O. XXXIV, r. 1 of the Code of Civil Procedure to a suit by the mortgagee. In my opinion that case is a logical development of the principles laid down in previous cases. I should be most reluctant to differ from it, even if it is not technically binding upon me. If an attaching creditor cannot be said to have an interest in the mortgaged property, it is hard to see why the position of a judgment-creditor, who has obtained an order for a receiver in

(1) (1902) I. L. R. 29 Cal. 428.

(2) (1930) I. L. R. 53 Mad. 881.

execution who is holding the property as an officer of the Court, should be more advantageous. As on previous occasions, when questions of this sort have been discussed before me, great stress has been laid by counsel upon certain observations of the Judicial Committee of the Privy Council in *Gummidelli Anantapadmanabhaswami v. Official Receiver of Secunderabad* (1). It is true that there are passages in the concluding portion of the judgment delivered by Lord Thankerton which show that their Lordships were disposed to treat the decisions, which lay down that no lien or charge is created by an attachment, as open to further discussion. But as was pointed out, in the circumstances of that case, it was not necessary to decide the point, and, as far as I am concerned, the Indian decisions must be regarded as authoritative, until the Judicial Committee have seen fit to overrule them. Learned counsel also referred to certain English cases and in particular to *In re Parbola, Limited. Blackburn v. Parbola, Limited* (2) where Warrington J. granted the application of a judgment-creditor who had had a receiver appointed by way of equitable execution to be joined as a party in a mortgage suit. I observe, however, that counsel for the mortgagee plaintiff in that suit expressly disclaimed any objection to the applicant's being made a party, and the only questions raised by him were concerned with the terms upon which the applicant should be permitted to come in.

Mr. Banerjee has drawn my attention to the fact that, under the English statute law, decree-holders who have taken out execution against interests in real property belonging to their judgment-debtors, have rights which have no statutory sanction under the Indian law. The history of the legislation is set out at length by Cozens-Hardy M. R. in *Ashburton v. Nocton* (3). In my opinion, the applicant has not

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(1) (1933) I. L. R. 56 Mad. 405 ; L. R. 60 I.A. 167.

(2) [1909] 2 Ch. 437.

(3) [1915] 1 Ch. 274.

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succeeded in showing that he is a party who ought to have been joined as a defendant, or party whose presence before the Court is necessary in order to enable the Court effectually and completely to adjudicate upon and settle questions involved in the suit. That being so, I have no power to add him as a party under O. I, r. 10(2) of the Code. It follows that this application must be dismissed with costs. Certified for counsel.

Application dismissed.

Attorneys for applicant: *H. C. Banerjee & Company.*

Attorneys for respondent: *P. L. Mullick & Company.*

P.K.D.