

APPELLATE CIVIL.

Before Mukherjea and Latifur Rahman JJ.

AMBICA PROSAD SANYAL

1939

May 5, 8.

v.

SOORAJMULL NAGARMULL.*

Attachment—*Application by mortgagee to have property notified for sale subject to mortgage—Dismissal of application for default—Subsequent suit on mortgage—Indian Limitation Act (IX of 1908), Sch. I, Art. 11—Code of Civil Procedure (Act V of 1908), O. XXI, rr. 62, 63.*

A suit for the enforcement of a mortgage instituted more than a year after an order dismissing the claim preferred by the mortgagee under O. XXI, r. 62, of the Code of Civil Procedure is barred by the law of limitation.

Where, on the application of a mortgagee that the property attached by a decree-holder may be notified for sale subject to his mortgage, an order is passed that the attachment is to continue either subject to or free from his mortgage, the order is one which comes within the purview of O. XXI, r. 62, of the Code of Civil Procedure and, if not set aside by a regular suit commenced under O. XXI, r. 63, the order becomes conclusive and the purchaser or the mortgagee cannot assert any right which that order denies.

Debi Das v. Rup Chand (1) approved of.

Ganesh Krishna Kulkarni v. Damoo Valad Nathu Shimpi (2) distinguished.

Muthiah Chetty v. Palaniappa Chetty (3); *Lakshuman Chettiar v. Parasivan Pillai* (4); *Nawal Kishore v. Khyali Ram* (5) and *Maung Aung My Myint v. Maung Tha Hmat* (6) referred to.

It is immaterial whether the claim was investigated or not; an order of dismissal of a claim for non-prosecution is conclusive and final till a regular suit has been instituted and successfully prosecuted.

Nagendra Lal Chowdhury v. Fani Bhusan Das (7); *Jugal Kishore Marwari v. Ambica Debi* (8); *Satindra Nath Banerjee v. Shiba Prosad Bhakat* (9) and *Abdul Latif Laskar v. Aklu Mia Laskar* (10) relied on.

Umacharan Chatterjee v. Heron Moyee Debi (11) and *Sarat Chandra Bisu v. Tarini Prosad Pal Chowdhry* (12) distinguished.

*Appeal from Appellate Decree, No. 1486 of 1937, against the decree of R. F. Lodge, Additional District Judge of 24 Parganas, dated April 29, 1937, reversing the decree of Shailendra Nath Chatterji, First Munsif of Sealdah, dated Aug. 31, 1936.

(1) (1927) I. L. R. 49 All. 903.

(2) (1916) I. L. R. 41 Bom. 64.

(3) (1921) I. L. R. 45 Mad. 90.

(4) [1920] A. I. R. (Mad.) 936.

(5) (1929) I. L. R. 11 Lah. 369.

(6) (1930) I. L. R. 9 Ran. 367.

(7) (1918) I. L. R. 45 Cal. 785.

(8) (1912) 16 C. W. N. 882.

(9) (1921) 26 C. W. N. 126.

(10) (1934) 39 C. W. N. 457.

(11) (1913) 18 C. W. N. 770.

(12) (1907) I. L. R. 34 Cal. 491.

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APPEAL FROM APPELLATE DECREE by the plaintiff.

The facts of the case and the arguments in the appeal are sufficiently set out in the judgment.

Girija Prasanna Sanyal and *Kiran Chandra Lahiri* for the appellant.

Bireswar Bagchi and *Bireswar Chatterjee* for the respondents.

MUKHERJEA J. This is an appeal on behalf of the plaintiff and the suit was one for enforcement of a mortgage-bond alleged to have been executed by the defendant No. 1, by which certain lands and machinery were hypothecated to secure an advance of Rs. 1,000. The mortgage-bond is dated December 9, 1926. The defendants Nos. 2 and 3 were impleaded as parties to the mortgage suit on the allegation that they had purchased portions of the mortgaged property subsequent to the execution of the mortgage-bond. The defendant No. 1 did not appear and contest the suit and the case was compromised with defendant No. 2. The defendant No. 3, who were the transferees of the machinery comprised in the mortgage, were the only contesting defendant and they contended *inter alia* that the mortgage-deed was without consideration and that the suit was barred by limitation under Art. 11 of the Limitation Act, it being brought more than a year after an adverse decision was passed in a claim petition made by the plaintiff in respect of the machinery under O. XXI, r. 62, of the Code of Civil Procedure.

The trial Court overruled these defences and passed a decree *ex parte* against defendant No. 1 and on contest against defendant No. 3. The suit was also decreed on the basis of the compromise as against defendant No. 2. Against this decree there was an appeal taken by defendant No. 3 alone and the Additional District Judge, who heard the appeal, reversed the decision of the trial Court so far as

defendant No. 3 were concerned and dismissed the plaintiff's suit as against him on the ground that it was barred by limitation under Art. 11 of the Indian Limitation Act. The decree against the other two defendants was kept intact. It is against this decision that the present Second Appeal has been preferred, and the only point for our consideration is whether the suit was barred under Art. 11 of the Limitation Act. It appears that in the year 1933 a creditor, who had obtained a money-decree against defendant No. 1, started an execution-case, in course of which, certain properties, including the machinery which was included in the mortgage, were attached and proclaimed for sale. On November 13, 1933, the plaintiff made an application which was headed as one under O. XXI, r. 62, of the Code of Civil Procedure and he prayed that the machinery, which was one of the items of the property attached by the decree-holder, might be notified for sale subject to the plaintiff's mortgage. This application was rejected on November 14, 1933, on account of the failure of the plaintiff to produce the mortgage-bond which he was asked to produce and the machinery was sold to defendant No. 3 in the execution sale. The present suit which was instituted on April 16, 1935, is admittedly filed more than a year after the date of the order passed on the plaintiff's claim petition. The lower appellate Court was of opinion that it was incumbent upon the plaintiff to institute a suit after the adverse order was passed against him under O. XXI, r. 62, of the Code of Civil Procedure within a year from the date of the order and, as he failed to do that, the summary order passed by the executing Court became final and conclusive and it would not be open to the plaintiff mortgagee to say that he had any subsisting mortgage in respect of the machinery.

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Now the question, as to whether there is a mortgage on an attached property, can be raised in two different ways in execution-proceedings. It may be raised, in the first place, when the Court prepares the

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proclamation of sale under O. XXI, r. 66, of the Code of Civil Procedure and it is the duty of the executing Court acting under that Rule to state as fairly and accurately as possible, after giving notice to the judgment-debtor and the decree-holder, any incumbrance to which the property is liable. At this stage apparently the Court cannot decide the question as to whether the mortgage is a valid and a subsisting mortgage and the information given in the sale-proclamation constitutes a warning to the purchaser who purchases the property subject to all risks which this notice involves. It does not preclude him afterwards from questioning the validity of the mortgage in any subsequent suit or proceeding. Another way of raising this question of the mortgage or charge during the execution-proceedings is by way of an application under the claim sections contained under O. XXI of the Code of Civil Procedure. Order XXI, r. 62, is certainly an enabling provision and when the Court is satisfied that the attached property is subject to a mortgage or charge in favour of some person not in possession, it can direct the continuance of the attachment subject to such mortgage or charge. The order contemplated by this Rule clearly indicates that this is a judicial determination, though in a summary way of the question as to whether there is a valid mortgage or charge existing upon the attached property, and, when the Court passes an order directing the continuance of the attachment subject to such charge, what is put up to sale is nothing more than the equity of redemption which the judgment-debtor has got in the attached property. The decree-holder or the purchaser cannot in such cases dispute the mortgage unless he brings a suit to set aside the summary order under O. XXI, r. 63, of the Code of Civil Procedure. The question is whether the same principle applies when the Court does not pass an order directing the continuance of attachment subject to a mortgage but the mortgagee's application to have such a direction is dismissed or refused. It was held

by the Bombay High Court in the case of *Ganesh Krishna Kulkarni v. Damoq Valad Nathu Shimpi* (1) under the old Code of 1882 that s. 282 (corresponding to O. XXI, r. 62, of the present Code) merely enables the Court to pass an order if it thinks proper that an attachment would continue subject to a lien or a mortgage. But the section does not contemplate an order refusing to acknowledge the mortgage or lien and the Court has no power to direct the continuance of attachment free from such charge. In fact, it was held by the Bombay High Court that the executing Court had no authority to declare a mortgage to be invalid and in such circumstances it could do nothing except to notify the incumbrance under O. XXI, r. 66, of the Code of Civil Procedure. On the other hand, it was pointed out by the Allahabad High Court in the case of *Debi Das v. Rup Chand* (2) that—

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the expression "where the Court is satisfied" would confer jurisdiction on the Court to come to a finding as to the existence of the mortgage. Without such finding of fact it can never be satisfied. Section 282, therefore, in effect provides for two alternative and mutually exclusive orders. One is an order that, as the mortgage exists, the attachment shall be continued subject to it and the other is that *no mortgage shall be deemed to exist*. The latter order, no less than the former, is an order contemplated by r. 63 or old s. 283.

It seems to me that the view taken by the Allahabad High Court is sound. Whether the attachment on the property is directed to continue, either subject to or free from the mortgage or charge, the order is one which comes within the purview of O. XXI, r. 62, of the Code of Civil Procedure, and if it is not set aside by a regular suit commenced under O. XXI, r. 63, the summary order becomes conclusive and the purchaser or the mortgagee cannot assert any right which that order denies. This is supported by the decisions of the other High Courts in India and reference may be made in this connection to the decisions of the Madras, Lahore and Rangoon High Courts, which are to be found in the cases of *Muthiah Chetty v. Palaniappa*

(1) (1916) I. L. R. 41 Bom. 64.

(2) (1927) I. L. R. 49 All 903, 909-10.

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Chetty (1); *Lakshumanan Chettiar v. Parasivan Pillai* (2); *Nawal Kishore v. Khyali Ram* (3) and *Maung Aung My Myint v. Maung Tha Hmat* (4). The decision of the Bombay High Court in the case of *Ganesh Krishna Kulkarni v. Damoo Valad Nathu Shimpi* referred to above can be distinguished not only on the ground that it was a decision under the old Code where the wording of s. 283 was different from that of O. XXI, r. 63, in the present Code but also on the ground that, on the facts actually found in that case the application by the mortgagee was held to come under O. XXI, r. 66, of the Code of Civil Procedure. It may seem somewhat anomalous no doubt that the question affecting the validity of the mortgage should be enquired in a summary manner in course of an execution-proceeding. But the mortgagee is not obliged to prefer any claim at all and I concur with the observations made by the Lahore High Court that if he chooses to take advantage of a summary procedure, he must suffer the disadvantages as well.

Mr. Sanyal who appears for the appellant has not disputed the correctness of the proposition stated above. His contention really is that the Rule of law stated above does not affect his client, and that on two-fold grounds:—

The first is that, as the dismissal of the claim-matter was one for non-prosecution and there was no investigation of the claim on its merits, the necessity of instituting a suit under O. XXI, r. 63, of the Code of Civil Procedure does not arise.

The second ground is that the application made by his client was neither a claim-petition made under O. XXI, r. 58, or under O. XXI, r. 62, of the Code of

(1) (1921) I. L. R. 45 Mad. 90.

(2) [1920] A. I. R. (Mad.) 936.

(3) (1929) I. L. R. 11 Lah. 369.

(4) (1930) I. L. R. 9 Ran. 367.

Civil Procedure. It was a mere application for insertion of an incumbrance in the sale-proclamation under the provisions of O. XXI, r. 66, of the Code of Civil Procedure.

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In support of the first contention Mr. Sanyal has relied amongst others on certain decisions of this Court, which are to be found in the cases of *Uma-charan Chatterjee v. Heron Moyee Debi* (1) and *Sarat Chandra Bisu v. Tarini Prasad Pal Chowdhry* (2). These are decisions under the old Code and it is not disputed that there have been changes introduced in the wording of the relevant sections in the present Code. Order XXI, r. 63, is differently, and much more generally, worded than the corresponding s. 283 in the Code of 1882. It scrupulously omits any reference to the earlier sections as was made under the old Code and provides in the most general manner that, where a claim or an objection is preferred and an order rejecting or allowing the claim is passed, the party against whom the order is made is bound to institute a suit to establish the right which he claims to the property in dispute. There have been corresponding changes in the wording of Art. 11 of the Limitation Act also. In these circumstances, it seems to me that the conclusion is irresistible that, in order to bring a case within the purview of O. XXI, r. 63, of the Code of Civil Procedure, the question as to whether the claim was investigated or not is immaterial and if an adverse order is made against the plaintiff in the claim-proceeding, he is bound to institute a suit under O. XXI, r. 63, of the Code of Civil Procedure, failing which the order becomes conclusive and final. This view has been accepted by this Court in the cases of *Nagendra Lal Chowdhury v. Fani Bhusan Das* (3); *Jugal Kishore Marwari v. Ambica Debi* (4); *Satindra Nath Banerjee v. Shiva Prosad Bhakat* (5) and *Abdul Latif Laskar v. Aklu Mia Laskar* (6). The first

(1) (1913) 18 C. W. N. 770.

(4) (1912) 16 C. W. N. 882.

(2) (1907) I. L. R. 34 Cal. 491.

(5) (1921) 26 C. W. N. 126.

(3) (1918) I. L. R. 45 Cal. 785.

(6) (1934) 39 C. W. N. 457.

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contention of Mr. Sanyal, therefore, must be overruled.

Now, as regards the second point, we have been referred to the petition that was filed by the plaintiff on November 13, 1933. As I have stated above, it was headed as one under O. XXI, r. 62, of the Code of Civil Procedure though that description is not by any means conclusive. The petition sets out the facts that long before the attachment was made by the decree-holder, the judgment-debtor, by a registered deed executed in November, 1933, had mortgaged the machinery to the petitioner to secure an advance of Rs. 1,000 which carried interest at the rate of 24 per cent. per annum. It was stated further that the mortgage money now amounted to Rs. 3,400 and the petitioner prayed that the fact of the property attached being subject to a mortgage might be notified and proclaimed at the time when the sale took place. Mr. Sanyal has argued that really he did not want that the property should be sold subject to the mortgage, but the plain reading of the petition does not lead to any other conclusion. Obviously it was not the time when the sale-proclamation was being prepared and the petitioner also did not make any prayer whatsoever that the sale-proclamation might be amended by mentioning the incumbrance upon the attached property or that a fresh sale-proclamation might be issued and served in the locality. The object of his reciting *in extenso* the fact of the mortgage and the interest it carried seems to me to point to the conclusion that he wanted that the property should be sold subject to the mortgage. This is strengthened by the fact that the petition was headed under O. XXI, r. 66, of the Code of Civil Procedure.

In these circumstances, I concur with the lower appellate Court in holding that it was really a claim-petition made under O. XXI, r. 62, of the Code of Civil Procedure and, as this was dismissed by the

executing Court on November 14, 1933, it was incumbent on the plaintiff to institute a suit within one year from that date. That not having been done, it is not open to him now to put forward his rights as a mortgagee so far as the machinery is concerned.

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The result is that we affirm the decision of the lower appellate Court and dismiss the appeal.

There will be no order as to costs in this appeal.

LATIFUR RAHMAN J. I agree.

Appeal dismissed.

A. C. S.