

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Miller.

1880
May 14.

BOLAKEE LALL (PLAINTIFF) v. THAKOOR PERTAM SINGH
AND OTHERS (DEFENDANTS).*

Suit to enforce Mortgage Lien on property in the possession of a third party—Properties situate in different Districts—Money-Decree—Execution of Decree—Code of Civil Procedure (Act VIII of 1859), s. 12.

A, the mortgagee, under a bond, of properties situated in districts *B* and *C*, sued in the *B* Court on his bond, and obtained a decree for the mortgage-money and interest, with a declaration that the decree should be satisfied by sale of all the mortgaged property. *A* had not obtained the permission of the High Court under s. 12, Act VIII of 1859, which was necessary to enable him to proceed against the property in the *C* district. Having attached and sold all properties comprised in his decree situate within the jurisdiction of the *B* Court, *A*, under a certificate issued by such Court, obtained an order from the *C* Court attaching lands included in his decree situate in that district. *D* intervened, on the ground that he had purchased the same property in execution of another decree of the *C* Court against the same judgment-debtor, and the property was released from attachment. *A* then sued *D* and the mortgagor to enforce his mortgage lien against the property in the *C* district.

Held, that the *B* Court had jurisdiction to give *A* a decree for the amount of the mortgage-money and interest, though it had not power to enforce the decree against the property in the *C* district; that the only effect of the decree was, to change the nature of the original debt, which was a bond-debt, into a judgment-debt for the mortgage-money and interest; and that though *A* could not enforce his lien against the property in the *C* district under the decree of the *B* Court, yet, as that property had been sold to a third person, *D*, he was at liberty to sue *D* to establish his lien for the mortgage-debt and interest.

ONE Bolakee Lall, on the 13th September 1875, obtained, in the Zilla Court of Bhagalpore, against Sheonundun Pershad Singh (defendant No. 2), a decree for the sale of certain properties situate in Bhagalpore and Patna, which properties had been mortgaged to him under a bond dated 7th August 1874. The Bhagalpore properties not being sufficient to satisfy his decree;

* Appeal from Original Decree, No. 41 of 1879, against the decree of Baboo Poresh Nath Banerjee, Subordinate Judge of Patna, dated the 30th of November 1878.

the decree and certificate of the amount obtained by the sale of the Bhagalpore³ properties were sent to the Patna Court, in order that execution might issue against the property situate in the Patna district.

Attachment having issued against these properties, the first defendant intervened, on the ground that he had purchased a four-anna share in the said properties sold in execution of a money-decree obtained by him against Sheonundun on the 17th September 1873. The objection was allowed; and Bolakee Lall, therefore, brought the present suit, on the 4th October 1877, in the Patna Court, against the first and second defendants; to have it declared that his mortgage being prior to the defendant's purchase, he was entitled to have his mortgage enforced as against the four-anna share of the property.

The first defendant contended, that some of the property included in the bond on which the suit was brought being situate in the district of Patna, the plaintiff should, under s. 12 of Act VIII of 1859, have obtained the permission of the High Court to bring his suit in the Bhagalpore Court, and that not having done so, the decree he had obtained could affect only the properties in Bhagalpore, and the properties in Patna were not therefore liable to be sold in execution of that decree.

The second defendant did not appear.

The Judge of Patna held, that the decree obtained in the Bhagalpore Court was invalid as far as it concerned the properties situate in Patna, and could not rank higher than the decree under which the first defendant had purchased the property. He therefore dismissed the suit with costs.

The plaintiff appealed to the High Court.

Baboo *Mohesh Chunder Chowdhry* (with him *Mr. G. Gregory*) for the appellants.

Mr. M. M. Ghose (with him Baboo *Nilmadhub Sein*) for the respondents.

The judgment of the Court (GARTH, C. J., and MITTER, J.) was delivered by

GARTH, C. J.—We are unable in this case to agree with the Court below. The plaintiff was the mortgagee under a bond

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of certain property, part of which was situate in the Bhagalpore District, and part in the Patna District. Upon this bond, he brought a suit against his mortgagor, Sheonundun Pershad, in the Bhagalpore Court, and obtained a decree for the mortgage-money and interest, with a declaration that the decree should be satisfied by sale of the whole mortgaged property.

The permission of the High Court had not been obtained in that suit by the plaintiff to proceed against the Patna property, and the omission appears to have arisen from a mistaken supposition on the part of the Subordinate Judge that it was not necessary to obtain it.

The plaintiff then brought a certificate to the Patna Court from Bhagalpore, and attached the Patna property situate in that district under the decree so obtained.

The present defendant then intervened, upon the ground that he had previously purchased the same property in execution of another decree of the Patna Court against the same judgment-debtor; and at his instance, the property was released from attachment.

The plaintiff then brought this suit to enforce his mortgage lien against the property in the Patna District, upon the ground that his mortgage was prior in date to the defendant's purchase; and consequently that, notwithstanding that purchase, the property was subject to the plaintiff's charge in the hands of the defendant.

There is no doubt that the plaintiff's mortgage was in fact prior in date to the purchase by the defendant; but the Subordinate Judge seems to have considered that, as the permission of the High Court was not obtained in the former suit to proceed against the Patna property, and that as consequently the decree in that Court could not avail the plaintiff to charge that property, his present suit ought also to be dismissed.

But this appears to us to be a mistake. The Bhagalpore Court had jurisdiction, without the permission of the High Court, to give the plaintiff a decree for the amount of the mortgage-money and interest, although it had no power to enforce the decree against the Patna property. So far, therefore, as regards the latter portion of the Bhagalpore Court's judg-

ment, the decree was *ultra vires*; but it was perfectly valid in other respects, and the only effect which it had as regards the money-decree was, that it changed the nature of the original debt, which was a bond-debt, into that of a judgment-debt for the mortgage-money and interest.

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It is true that the plaintiff, for the reason which we have just given, could not enforce his lien against the Patna property under the Bhagalpore decree; but as that property had been sold to a third person, the plaintiff was at liberty to bring his suit against that third person to establish his lien for the mortgage-debt and interest; and this was in fact the only way in which he could enforce it against the Patna property.

It will be found that this view which we take is quite in accordance with the judgment of the Court in the case of *Nadir Hossein v. Pearoo Thovil Darinee* (1), and we think that it does not conflict with the Full Bench judgment in the case of *Syud Emam Momtazooddeen Mahomed v. Rajcoomar Dass* (2), or with the judgment of the Court in *Doss Money Dossee v. Jonmenjoy Mullick* (3), in both which cases it seems to have been taken for granted, that when the mortgaged property has come into the possession of a third person, as it has done in this instance, the mortgagee having obtained a money-decree for the mortgage-debt, has a right to proceed against such third party to enforce his lien upon the mortgaged property.

The decree of the lower Court will therefore be reversed, and the plaintiff will be entitled to enforce his charge for the mortgage-money and interest by sale of the mortgaged property in the possession of the defendant.

The appellant will be entitled to the costs of both Courts.

Appeal allowed.

(1) 14 B. L. R., 425; S. C., 19 W. R., 255. (2) 14 B. L. R., 408.

(3) I. L. R., 3 Cal., 363.