

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Benson,

GOVINDA BHATTA (PLAINTIFF), APPELLANT,

v.

NARAIN BHATTA AND OTHERS (DEFENDANTS), RESPONDENTS.*

1906
March 15.

Transfer of Property Act IV of 1882, ss. 99, 67—Holder of usufructuary mortgage attaching mortgaged property for a decree on an independent claim may sue under s 67 on the mortgage.

Where a usufructuary mortgagee, who had no right to sue for his mortgage amount, obtained a decree against the mortgagor on a claim independent of the mortgage and in execution of such decree attached the interest of the mortgagor in the mortgaged properties:

Held, that he was entitled under the provisions of section 99 of the Transfer of Property Act to bring a suit on his mortgage under section 67 of the Act.

The decree in such a suit should be one for the sale of the property free from the mortgage claim and for the application of the sale-proceeds in satisfaction of the mortgages on the property, the balance if any to be applied towards the claim under attachment.

THE plaintiff held a usufructuary mortgage on the plaint properties of which defendants Nos. 1 to 5 were owners. The plaintiff, in execution of a decree for rent against the defendants, attached the equity of redemption in the plaint lands and instituted this suit under section 99 of the Transfer of Property Act for a declaration that he was entitled to recover his decree amount by sale of the equity of redemption. The Court of First Instance and the lower Appellate Court held that, as he was a usufructuary mortgagee, he could not sue for a sale under section 67 of the Transfer of Property Act and that, as the attachment created no charge on the property he could not bring such a suit under section 100 of the Act. His suit was therefore dismissed.

Plaintiff preferred this second appeal.

K. Narayana Rau for appellant.

V. Ryrn Nambiar for respondents.

JUDGMENT.—We think that the decrees of the Courts below are not correct. The question that is raised in this case has to be

* Second Appeal No. 154 of 1904, presented against the decrees of H. O. D. Harding, Esq., District Judge of South Canara, in Appeal Suit No. 142 of 1902, presented against the decree of M.R.Ey. T. Jeevaji Row, District Munsif of Puttur, in Original Suit No. 508 of 1901.

determined with reference to section 99 of the Transfer of Property Act read with section 67. No doubt if the attachment had been made on account of the mortgage money itself decreed in a suit which was not brought for the sale of the mortgaged property, then the suit would be, and should be one upon the mortgage, under section 67. The present suit, however, is one where the plaintiff has no right to sue upon the mortgage held by him, it being a usufructuary mortgage. The claim which he has to enforce is one which arose independently of the mortgage and in respect of which he has attached the interest of the mortgagor.

As under section 99 he cannot enforce this claim without a further suit for sale, it follows that he is entitled to maintain a suit for that purpose. Having regard to the object of section 99 the decree to be made in such a suit should not be merely for the sale of the equity of redemption, but should be for the sale of the property free from the mortgage claim of the plaintiff, and the sale proceeds should be applied, in the first instance, to the discharge of the mortgages on the property in the order of their priority, and the surplus, if any, towards the satisfaction of the plaintiff's claim under the attachment so far as may be necessary. The cases of *Jadub Lall Shaw Chowdhry v. Madhub Lall Shaw Chowdhry*(1), *Azim-ullah v. Najm-un-Nissa*(2) and *Mahabir Singh v. Saira Bibi*(3) are distinguishable from the present case since in none of them was there a subsisting attachment entitling the plaintiff to sue under section 67. It appears from the District Munsif's judgment that the plaintiff offered to amend his plaint so as to enable the Court to pass the proper decree as indicated above. We think that this should have been allowed.

We, therefore, set aside the decrees of the Courts below and remand the suit to the District Munsif's Court for disposal according to law. If the stamp paid by the plaintiff is not sufficient for the plaint when amended, the extra stamp duty should be levied. Costs in this and in the lower Appellate Court will be costs in the suit.

(1) I.L.R., 21 Cal., 34.

(2) I.L.R., 16 All., 416.

(3) I.L.R., 17 All., 520.