

and what I desire to do in ascertaining the particular state of the market on any day, is not to cast on the Court the duty of gathering rates from contracts and from them to strike for itself the market rate, but I desire to hold that when the Court has the advantage of having in evidence before it, a record of the rates made by a gentleman of intelligence and experience on that day, it should have that advantage, the advantage of having the rates made out in that way, in preference to computing the rate for itself. I therefore admit the quotations.

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Attorney for plaintiff: Messrs. *Barrow & Orr*.

Attorney for defendant: Mr. *C. F. Pittar*.

APPELLATE CIVIL.

Before Mr. Justice McDonell and Mr. Justice Field.

JANOKY BULLUBH SEN (ONE OF THE DEFENDANTS) v. JOHIRUDDIN.
 MAHOMED ABU ALI SOHER CHOWDHRY (PLAINTIFF.)*

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 February 26.

Lien—Sale in execution of Decree—Section 295 (Act XIV of 1882), provisions—Lis pendens—Judicial lien.

Where two mortgagees, in execution of their several decrees, attached the same property, of which a moiety without further specification was respectively mortgaged to each of them, and subsequent to the attachments the property was sold in execution of one of the decrees, *Hold*, that notwithstanding the whole interests of the mortgagor was intended to be sold, the purchaser took one of the moieties subject to the lien of the unsatisfied mortgagee, and that omission or neglect on the part of the Court executing the decree to give specific direction as provided by clause (b) of s. 295 of the Civil Procedure Code did not prejudice the rights of the unsatisfied mortgagee or discharge his encumbrance.

ONE Nusiruddin borrowed two sums of money from the plaintiff and the defendant No. 2 under two separate mortgage bonds executed in their favour on the same date. Both the bonds after enumerating the several zemindaries in the possession of the mortgagor continued in these terms: "A moiety of all the above mentioned zemindaries bearing the above mentioned

* Appeal from Original Decree No. 91 of 1881, against the decree of Baboo Bhugwan Chunder Chuokerbutty, Rai Bahadur, Subordinate Judge of Rungpore, dated the 5th of January 1881.

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sudder jammas, I do mortgage and hypothecate as security for repayment of amount covered by the bond with interest." Among the properties hypothecated was an 8 annas 3 pie 1 kag 9½ tils share of Jote Gokul. The loans not having been repaid, defendant No. 2 brought a suit and obtained a decree on his mortgage bond on the 23rd November 1877, and on the 8th June 1878 attached the mortgagor's interest in Jote Gokul. The plaintiff also obtained a decree on his mortgage bond and attached the same property (Jote Gokul) on the 11th February 1879. After these attachments, and on the 18th March 1879, defendant No. 2, in execution of his decree, brought to sale the mortgagor's interest in Jote Gokul, which was purchased by defendant No. 1. The plaintiff was then about to bring the property again to sale in execution of his decree, whereupon defendant No. 1 objected, on the ground that he had purchased the entire interest of Nusiruddin in Jote Gokul, and that the same or any portion thereof cannot be resold to the prejudice of his rights. The Subordinate Judge summarily allowed the objection, and in consequence the plaintiff instituted the present suit, in order to enforce his lien and bring to sale that moiety of Jote Gokul which was mortgaged to him. The Court of first instance, under all the circumstances of the case, decreed the claim of the plaintiff "to proceed against the mortgaged share of Jote Gokul" in execution of his decree. Thereupon defendant No. 1, the purchaser, appealed to the High Court.

Mr. Pugh, Baboo Mohinee Mohun Roy, Baboo Saroda Churn Mitter and Baboo Mookoond Roy for the appellant.

Mr. M. Ghose and Baboo Kosloodu Kinkur Nath Roy for the respondent.

The arguments sufficiently appear in the judgments of the Court (McDONNELL and FIELD, JJ.)

FIELD, J.—In this case one Nusiruddin Mahomed Chowdhry borrowed, on the 25th Assar 1279, corresponding with the 8th July 1872, two separate sums of Rs. 5,000 each, one from the plaintiff Johiruddin Mahomed Abu Ali Sober Chowdhry, and the other sum from defendant No. 2, Khuja Enayetoolla

Chowdhry; each of these loans was secured by a mortgage of one moiety of the mortgagor's share (consisting of 8 annas 3 pie 1 kag 9½ tils) in Jote Gokul. The loans not having been paid, defendant No. 2 brought a suit upon his mortgage bond, and on the 23rd November 1877 obtained a decree. In execution of this decree, he, on the 8th June 1878, attached the mortgagor's interest in Jote Gokul, and on the 18th March 1879 this interest was brought to sale and purchased by defendant No. 1, who is the appellant before us.

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It has been contended by the learned Counsel for the respondent, that what was sold was not the mortgagor's interest in the whole share which belonged to him, but his interest in a moiety of that share only. We think, however, that upon a true construction of the documents, we must take it that the whole interest was intended to be sold.

The plaintiff also brought a suit upon his mortgage bond, and obtained a decree on the 15th June 1878. In execution of this decree, he attached the same property, Jote Gokul, on the 11th February 1879, that is, after the attachment, but before the sale, in execution of the decree obtained by defendant No. 2. The plaintiff was then about to bring the property again to sale in execution of his decree, whereupon the defendant No. 1 objected, contending that he had purchased the property free of incumbrances, and that it was not competent to the plaintiff to bring it to sale a second time in execution. The Court in which the execution proceedings were pending allowed this objection, and, in consequence, the present suit has been instituted by the plaintiff to enforce his lien and bring to sale, in execution of his mortgage decree, that moiety of Jote Gokul which was mortgaged to him by the bond upon which that decree was obtained.

Two essential questions have been argued before us in this appeal. The *first* question is concerned with the contention unsuccessfully pressed upon the Court below, *viz.*, that the decree which the plaintiff now seeks to execute had been substantially satisfied by reason of an *ijara* arrangement between the plaintiff and the heirs of the mortgagor.

We have heard the evidence upon this point, and we are of opinion that, although there are several matters which create a

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suspicion that the defendant's contention may not be without foundation, yet it is impossible for us, upon the evidence, to say that this contention has been proved. On this point, therefore, we concur in the conclusion at which the Court below has arrived.

The *second* point is a much more difficult one. It is contended that when the property, Jote Gokul, was sold on the 18th March 1879, after the two attachments made under the two decrees to which I have already referred, it must be taken that the property was sold wholly unincumbered, wholly free, that is, not only from the mortgage of defendant No. 2, but also from the mortgage of the plaintiff in the present case, which, as has been stated, bound one moiety of the property. In support of this argument the learned Counsel has relied upon certain cases to which I shall presently advert, and also upon the provisions of s. 295 of the Code of Civil Procedure.

Before dealing with these arguments it will be useful to state two propositions which appear to have been established by decided cases.

The *first* of these propositions is, that the mere taking of a money decree by a mortgagee, so long as that decree is unexecuted, will not destroy his mortgage lien; but that if the mortgagee who has obtained such a decree, proceed to execute it by bringing to sale the mortgaged property, the lien will be gone and the property will pass unincumbered to the purchaser. This proposition is supported by the following cases: *Narsidas Nitrain v. Joglekar* (1); *Hasoon Arva Begum v. Jawadaonnissa Satooda Khandan* (2); the Full Bench case of *Syud Imam Momtazoddin Mohamed v. Haran Chunder Ghose* (3); *Raj Kishore Shaha v. Bhadoo Noshoo* (4); and *Joumenjoy Mullick v. Dossmoney Dosses* (5). In the Full Bench case in 14 B. L. R., 408, and in some other cases it was observed that the rights of third parties are not affected by proceedings in a suit brought by the mortgagee. And this brings us to the second proposition, as to which there

- (1) I. L. R., 4 Bom., 57.
- (2) I. L. R., 4 Calc., 29.
- (3) 14 B. L. R., 408; 23 W. R., 187.
- (4) I. L. R., 7 Calc., 78.
- (5) I. L. R., 7 Calc., 714.

appears to be no doubt, namely, that the purchaser, at an ordinary execution sale of property subject to previous mortgage, buys the property subject to that lien; in other words, buys merely the right of redemption. This proposition is established by the following cases: *Gopal Sahoo v. Gunga Pershad Sahoo* (1); *Lala Joogulkishore Lall v. Bhukha Chowdhry* (2); *Kasimunnissa Bibi v. Hurannissa Bibi* (3); *Kamessur Pershad v. Doulat Ram*. (4) See also Macpherson on Mortgages, pages 97 and 165. It would follow from the second of these propositions, apart from other consideration, that the appellant purchased the moiety of Jote Gokul, which was mortgaged to the plaintiff subject to the plaintiff's lien.

But it is contended that, because the plaintiff attached that moiety, while it was also under attachment in execution of appellant's decree, it must be taken to have been sold free from both incumbrances, and that plaintiff's lien has been transferred by the sale from the property to the purchase money. Before considering the cases relied on in support of this argument, I may observe that the moiety mortgaged to plaintiff was not sold in execution of his decree. It would appear from the first proposition above stated that, in the case of a money decree, it is the sale which has the effect of extinguishing the lien. The only difference between a money decree and a decree for the specific enforcement of the lien (the plaintiff's decree is of the latter description) is that the former creates a judicial lien only from the date of attachment, while the latter creates such lien from the date of the decree. When the mortgagee sues for the specific enforcement of his lien, he is further protected by the principle of *lis pendens* against alienation from the date of instituting his suit. A mortgagee who obtains a decree in such a suit would appear to be a judicially secured creditor holding a stronger position than a mortgagee, who obtains merely a money decree. If the latter does not lose his lien until the property is sold in execution of his own decree, it would seem improbable that the former is in a worse position.

(1) I. L. R., 8 Calc., 531.

(3) 2 B. L. R., App., 8.

(2) 9 W. R., 244.

(4) 19 W. R., 83.

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I now proceed to examine the cases, the first of which is that of *Syud Nudir Hossein v. Baboo Pearoo Thovildarinee* (1). The facts of this case, disencumbered from a good deal of intricacy, appear to be as follows: The respondent, Baboo Pearoo, had purchased at an execution sale the interest belonging to Meer Hossein in a mortgage decree obtained by a person who is called "the Mohunt" throughout the judgment. In other words, the respondent stood in the position of the original mortgagee who had obtained the decree in the Court of the Principal Sudder Amin of Moorshedabad on the 14th April 1864. This decree directed "that the suit be decreed, and that the plaintiff do recover from the defendant the amount of claim with interest." It was not a decree enforcing any mortgage lien against any mortgaged property. The decree was transferred under a certificate for execution into the Dinagapore district, and the property, which formed the subject of the suit in appeal before the High Court, was attached in execution. While that attachment subsisted, one Poran Bebee, who had obtained a decree against the mortgagor, took out execution against the same property and brought it to sale. At the sale the property was purchased by a certain person whom I may call "B." As a matter of fact it was found that "B" had purchased with funds belonging to Mirza Mohamed, and the High Court, on this ground, ultimately held that the respondent was entitled to execute the decree against the property. But the contention with which we have to deal was this. It was urged that the respondent was entitled to execute the decree originally obtained by the Mohunt against the mortgaged property, notwithstanding the sale under Poran Bebee's decree. In other words, it was contended that the sale under that decree did not get rid of any lien that might be supposed to have been created by the Mohunt's decree of the 14th April 1864. Mr. Justice Pontifex, who delivered the judgment, says (at the top of page 259): "I am of opinion that, as the form of mortgage or charge created by the bond of 28th Angrahan 1268 did not vest any estate in the Mohunt, but only established a lien as incident to the money debt, such lien continued

(1) 19 W. R., 255.

an incident of the debt when it passed from a contract debt into a judgment debt, and so continued when such judgment debt was subsequently assigned to Meer Hossein. Otherwise the right to the lien must have remained in the Mohunt." The instrument which created the charge in that case is not now before us, and it is impossible for us to say, therefore, whether the bond creating a lien, such as has been described by Mr. Justice Pontifex, was, in any respect, like the mortgage deed in the present case.

Then, at page 260, Mr. Justice Pontifex says: "Moreover, in the case before us, at the date of the sale to Meer Hossein, the property over which the lien extended had already, in fact, been attached by the Mohunt under the decree of the 14th April 1864. It seems to me clear that an attachment under a money decree on a mortgage bond and the mortgage lien cannot co-exist separately in the property hypothecated, and that such an attachment must be treated, when existing, as an attachment enforcing the lien.

"This attachment existing at the date of Meer Hossein's purchase passed as an incident of the decree purchased by him, and as the property was sold on the 29th April 1865, pending such attachment, the lien was transferred from the property to the purchase monies, and, therefore, the property became thenceforth discharged from the lien."

It has been contended that the learned Judge here intended to lay down, as a general proposition, that when a mortgagee, who has obtained a money decree, proceeds to an attachment, his lien is gone. I think that the remarks of the learned Judge must be read with reference to the peculiar circumstances of the case which was before him. In that case, as has already been pointed out, the decree was not a decree to enforce the mortgage against the property, and I think that this makes a difference between that case and the case which is now before us. I have already pointed out that, as the bond in that case is not before us, we are unable to say what was the nature of that instrument. The facts of that case are not therefore so clearly analogous to the facts of the present case, that any principle there laid down must necessarily apply. The question whether the property was sold in execution of the Mohunt's decree, as well as of that of Foran Bebee,

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does not seem to have been considered. It would appear that the Mohunt or the assignee of his decree applied to have the sale proceeds detained in Court to satisfy his decree, on the ground that he had first attached, and this conduct might well be regarded as an admission that the sale was in execution of his own decree, as well as of that of Poran Bebee, certainly as an admission that the property had been sold free of his incumbrance which was transferred to the sale proceeds. The next case is that of *Raj Chunder Shaha v. Hur Mohun Roy* (1). All I need say about this case is this, that the plaintiff there sought to obtain the sale proceeds. He did not seek to proceed against the mortgaged property itself. By the prayer of his suit he elected to look to the sale proceeds instead of the mortgaged property for the realization of his mortgage loan.

Then we have been referred to the case of *Modhoo Soodun Singh v. Moundee Lall Shahoo* (2). That case also is not in point. At page 375 Mr. Justice Mitter says, referring to the case in 19 W. R.: "In other words, the rule of law laid down is this, that wherever a decree-holder, holding a simple mortgage, attaches the property hypothecated, the sale which follows, whether in the execution of his decree or that of any other person, has the effect of transferring the property hypothecated to the purchaser freed from the mortgage liability. It is not necessary for us in this case to go to that length."

All that need be said about this case is that, assuming the proposition laid down in the case in 19 W. R., 255, to be correctly stated by Mr. Justice Mitter, the Judges did not find it necessary on that occasion to adopt this view.

Then there is the further case of *Gopee Singh v. Kisha Lal* (3). That case also is not in point, for Mr. Justice Markby says: "Whether or not those objections are valid would depend upon the determination of the question, what were the rights that were really brought to sale. Both the plaintiffs and the defendants think that the properties were sold in execution of the plaintiffs' decree alone, and the lower Court has adopted that view. Notwithstanding, that the parties are agreed upon this point, it is

(1) 22 W. R., 98.

(2) 23 W. R., 373.

(3) 25 W. R., 187.

open to us to put our own construction upon the sale proceedings which constitute the only evidence on the record bearing upon this question. These proceedings are two in number, one recorded on the day of the sale and the other on the 25th April 1873, confirming the sale. After perusing these proceedings, we think that the reasonable construction that we ought to put upon them is that all the properties were sold at the instance of all the mortgagees for the satisfaction of their decrees, and, therefore, free from their respective mortgage liens."

In the case now before us the property in dispute was not sold at the instance of both the mortgagees, but at the instance of one of them only; therefore, the facts are not analogous, and it may be said that, having regard to the language used by Mr. Justice Markby, the inference to be drawn is, that if the property had not been sold at the instance of all the mortgagees, it would not have been sold free from their respective mortgage liens.

It appears then to me that the cases which have been relied upon by the learned Counsel do not establish the proposition contended for.

I have then to consider the effect of s. 295 of the Code of Civil Procedure. That section provides for a rateable distribution of the proceeds of an execution sale amongst decree-holders who, prior to the realization of assets by sale or otherwise, have applied to the Court for execution of decrees for money against the same judgment-debtor and have not obtained satisfaction. The section contains the following proviso: "Provided that when any property liable to be sold in execution of a decree is subject to a mortgage or charge, the Court may, with the assent of the mortgagee or incumbrancer, order that the property be sold free from the mortgage or charge, giving to the mortgagee or incumbrancer the same right against the proceeds of the sale as he had against the property sold."

In the case before us the Court did not make any order that the property, Joto Gokul, should be sold free from the plaintiff's incumbrance, nor was there any express direction or notice to purchasers that the property was sold subject to such incumbrance. It is clear then that the Court omitted or neglected to give specific directions upon the subject of the plaintiff's incumbrance

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when the property was sold in execution of the decree of defendant No. 2. Is it reasonable that the plaintiff should be prejudiced by such omission or neglect?

A further proviso to s. 295 is contained in clause (c), which direct that when inmoveable property is sold in execution of a decree ordering its sale for the discharge of an incumbrance thereon, the proceeds of sale shall be applied *first* to defray the expenses of sale; *second* to discharge the interest and principal due on the incumbrance; *third* to discharge the interest and principal due on subsequent incumbrances, if any. This proviso does not appear to have any application, as the moiety of Jote Gokul mortgaged to plaintiff was not sold in execution of any decree ordering its sale for the discharge of any incumbrance thereon.

It was observed, with reference to ss. 270 and 271 of the old Code, Act VIII of 1859, which, to some extent, correspond with s. 295 of the present Code, that the rule of procedure contained therein was not intended to interfere with the substantive rights of the parties. See the cases of *Hasoon Arra Begum v. Jawadoonnissa Satooda Khandan* (1) and of *Raj Chander Shaha v. Hur Mohun Roy* (2). It appears to me that this is a principle which may, with equal propriety, be followed in construing the provisions of s. 295 of the present Code. I take it that this section was intended to afford an additional facility to decree-holders. I think that the Legislature could not have intended, without using express language to effectuate such intention, to take away any rights which belong to persons in the position of mortgagees.

In this view, seeing that no specific direction as to the plaintiff's mortgage was given at the time of the sale under which defendant No. 1 purchased, I think we cannot say that the fact that the plaintiff did not avail himself, as he might have availed himself of the facility afforded by s. 295, now prevents him from maintaining the present suit.

I may add, in conclusion, that if the effect of plaintiff having obtained a decree and then proceeded to attach was to destroy the lien which, if he had obtained no such decree, he undoubtedly could have enforced notwithstanding the auction purchase of the defendant, the plaintiff would be really in a worse position after

(1) I. L. R., 4 Calc., 29.

(2) 22 W. R., 98.

using reasonable diligence to enforce his claim than he would have been if he had lain by and done nothing.

No doubt, as said by Mr. Justice Pontifex in the case in 19 W. R., "an attachment under a money decree on a mortgage bond and the mortgage lien cannot co-exist separately in the property hypothecated and the attachment must be treated as an attachment enforcing the lien." But when this enforcement is not carried on to a sale in execution of the decree under which such attachment was made, it is difficult to understand how the lien is lost. Under clause (b) of s. 295 of the Code of Civil Procedure the Court had a discretionary power to sell, in execution of defendant No. 2's decree, the moiety of Jote Gokul mortgaged to plaintiff free from his mortgage, if he was never asked for his assent; and the Court did not exercise its discretionary power. I do not see how we can now deal with the plaintiff, as if the Court had exercised its discretionary power with his assent.

I am, therefore, of opinion that plaintiff is entitled to enforce his lien against the moiety of the property mortgaged to him, and that this appeal should be dismissed with costs.

McDONELL, J.—I concur in holding that plaintiff is entitled to enforce his lien against the moiety of the property mortgaged to him, and generally for the reason stated by my learned brother.
Appeal dismissed.

Before Mr. Justice Mitter and Mr. Justice Maclean.

SHEO SOHYE ROY AND OTHERS (DEFENDANTS) v. LUCHMESHUR SINGH (PLAINTIFF.)^{*}

1884
March 4.

Limitation (Act XV of 1877), ss. 45, 140, 142—Suit for possession—Dispossession during unexpired ticca by plaintiff's predecessor—Limitation—Expiry of lease.

In a suit brought by the plaintiff in 1880 to recover possession of certain lands from which his predecessor in title had been dispossessed, in which suit the Court of first instance found that the defendant had dispossessed

^{*} Appeal from Appellate Decree No. 52 of 1883, against the decree of A. W. Cochran, Esq., Officiating Judge of Tirhoot, dated 12th of September 1882, reversing the decree of Baboo Koylash Chunder Mukerji, Second Subordinate Judge of that district, dated 23rd of August 1881.

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