1878

GANGA PRASAD v. KUSYARI DIN.

by payment of Rs. 500 in Chait, 1920 Sambat, and he agreed that the balance should be realised by the mortgagee from half the profits of the mauza in his possession *according to the terms of the bond for Rs.* 710, dated the 17th April, 1860, and that, until the realisation of the amounts entered in both bonds as well as of any amount borrowed in future, the mauza should continue in the possession of the mortgagee, and that the mortgagor should have no power to sell, mortgage, nor alienate it. Had this last condition stood alone it may be conceded that it would have been sufficient to constitute a simple mortgage of the estate (1), and the respondent would have been entitled to an order for sale, but the clause must be read with what preceded it, and so read it is to our minds clear that the parties intended to mortgage the profits and not the mauza itself nor any share in it. This construction is favoured by the direction which immediately follows the agreement not to alienate, and which is to the effect that an arrear of revenue which had been defrayed by the mortgagee should be realised from the profits. We must therefore hold that the respondent is not entitled to the relief he seeks in this suit, and reversing so much of the decree of the Court below as decreed the claim in part we must dismiss the suit with costs.

Appeal allowed.

APPELLATE CIVIL.

1878
March 4.

Before Mr. Justice Spankie and Mr. Justice Oldfield.

SUNDAR AND OTHERS (PLAINTIFFS) *v.* KHUMAN SINGH (DEFENDANT).*

Record-of-Rights—Jurisdiction of Civil and Revenue Court—Act XIX of 1873 *(North-Western Provinces Land Revenue Act), ss.* 62, 91, 94, 241.

The Civil Courts are not competent to try suits to alter or amend a record-of-rights, or to give directions in respect of the same, but they are not debarred from entertaining and determining questions of right merely because such questions may have been the subject of entries in the record-of-rights, and because such determination may show that such entries are wrong and need correction. Consequently, a claim in the Civil Court for a declaration of the right to make

* Second Appeal, No. 1375 of 1877, from a decree of R. F Saunders, Esq., Judge of Farukhabad, dated the 7th September, 1877, affirming a decree of Maulvi Muhammad Abdul Basit, Munsif of Chibramau, dated the 24th July, 1877.

(1) See *Raj Kumar Ramgopal Narayan Singh* v. *Ram Dutt Chowdhry*, 5 B. L. R., F. B., 264, S. C, 13 W. R., F. B., 82, where it was held that a bond for the payment of money containing an agreement by the obligor not to alienate certain lands until such money was paid, operated as a mortgage of such lands. See also *Martin* v. *Parsram*, H. C. R., N.-W. P., 1867, p. 124.

1878

SUNDAR v. KHUMAN SINGH.

certain collections of rent and to defray therewith certain village-expenses, though such right had been the subject of an entry in the record-of-rights adverse to the person claiming such right, was held to be maintainable.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court, to which the plaintiffs in the suit appealed against the decree of the lower appellate Court.

Munshi *Hanuman Prasad* and Lala *Har Kishen Das*, for the appellants.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*) and Pandit *Ajudhia Nath*, for the respondent.

The judgment of the Court was delivered by

OLDFIELD, J.—The plaintiffs brought this suit originally for the cancelment of the orders of the Deputy Collector and Settlement Officer relating to the formation of the record-of-rights, over which the Civil Court has no jurisdiction, at the same time asking that they might disburse the village-expenses as before. The Court of first instance rejected the plaint, and the lower appellate Court reversed this order and remanded the case for trial, with an intimation that the plaintiff was at liberty to amend the plaint, and in special appeal this Court did not interfere with this order. The plaint was not amended till the 24th July, and on the same day the Court of first instance decided the case, after directing that the amended plaint should be filed with the record, and after the defendant had filed an answer to the amended plaint, and after evidence had been taken, which, however, was taken before amendment of the plaint. The Court of first instance held that, notwithstanding the amendment of the plaint, the suit was not cognizable by the Civil Court. The plaint as amended is for establishment of the plaintiffs' right as hitherto to make collections of rent from certain cultivators, and to defray the village-expenses themselves on their share of the estate; this right having it appears been interfered with by the Settlement Officer's order, by which the defendant's right was recognised to collect these rents and to take them for defraying village-expenses. The lower appellate Court also held the suit on the amended plaint not to be cognizable. Both Courts seem to consider that in substance there is no difference

in the two plaints in the relief sought, that the object of the amended plaint is substantially to cancel an order of the Settlement Officer affecting the record-of-rights, although not stated in so many words, and that such a suit cannot be entertained under s. 241 of Act XIX of 1873; and the Judge seems further to consider that, inasmuch as the plaintiffs appealed from the Deputy Collector's orders to the Settlement Officer and failed, they are debarred from bringing this suit.

The view which the lower Courts have taken is erroneous. In the order of this Court in special appeal the Court pointed out the distinction which exists between that portion of the plaintiffs' claim in which they ask for the Court's interference with the formation of the record-of-rights, and that portion in which they ask to have declared their right to make certain collections of rent and defray village-expenses themselves.

The law enacts (s. 241) that no Civil Court shall exercise jurisdiction in "the matter" of the "formation of the record-of-rights;" but the matter of the formation of a record is clearly not the same thing as the question of the rights which its entries record. The Civil Court may not alter or amend the record or give directions in respect of it, because the formation and maintenance of the record and correction of errors in it has been made by ss. 62 and 94 of Act XIX of 1873 a matter peculiarly within the province of the Revenue Court. That was the object with which that part of s. 241 above cited was enacted, but it was not intended to debar Civil Courts from entertaining and deciding questions of rights between parties merely because those questions may have been made the subject of entries in the record, and because the decision of the Civil Court may show that they are wrong and need correction. S. 62 and following sections detail what the contents of the record-of-rights shall be, and the principle on which it is to be prepared, and the powers which the Settlement Officer shall exercise in its preparation; and s. 91 goes no further than to declare that "all entries in the record so made and attested shall be presumed to be true until the contrary is proved." To so much weight the entries are entitled by a Civil Court, and s. 241 has been misinterpreted by the lower appellate Court, and was not intended to bar the jurisdiction of the Civil Courts in respect of the determination

1878

SUNDAR v. KHUMAN SINGH.

of questions of right merely by reason of the record-of-rights treating of them. How far the question raised in this suit has been determined in the settlement department, and how far any such determination may be binding, we are not in a position to say, as the case has not been tried at all by the Court of first instance. We reverse the decrees of both Courts and remand the suit to the Court of first instance for retrial. Costs to abide the result.

Cause remanded,

1878
March 4.

APPELLATE CIVIL.

Before Mr. Justice Spankie and Mr. Justice Oldfield.

ZAIB-UN-NISSA (PLAINTIFF) *v.* JAIRAM GIR (DEFENDANT).*

Attachment of Property in Execution of Decree—Private Alienation after such Attachment—Act VIII of 1859 *(Civil Procedure Code), s.* 240.

Where certain immoveable property having been attached, the execution-case was subsequently struck off the file, and the judgment-debtor applied again for attachment of the same property, *held*, looking to the particular circumstances of the case, that a private alienation of the property after the date of such application but before attachment was not void under the provisions of s. 240 of Act VIII of 1859. The principle of the High Court's decision in *Ahmud Hossein Khan* v. *Mahomed Azeem Khan* (1) followed.

* Second Appeal, No. 1458 of 1877, from a decree of H. D. Willock, Esq., Judge of Azamgarh, dated the 2nd August, 1877, affirming a decree of Pandit Har Sahai, Subordinate Judge of Azamgarh, dated the 12th May, 1876

(1) H. C. R., N.-W. P., 1869, p. 51. See also *Jugunnath* v. *Ghasee Ram*, H. C. R., N.-W. P., 1869, p. 32. In this case certain shops had been attached in the execution of a decree and directed to be sold. On the decree-holder applying that, as the judgment-debtor wished to mortgage the shops, they might be exonerated from liability for her decree, the sale was postponed by the Court *sine die*. The shops were subsequently mortgaged. It was held that the attachment must be considered to have been withdrawn, and the mortgage was therefore not invalid.

Striking an execution-proceeding off the file is an act which admits of different interpretations according to the circumstances under which it is done —*Puddomonee Dossee* v. *Roy Muthooranath Chowdhry* 12 B. L. R., P. C., 411. In that case the Privy Council were of opinion that, where a very long time had elapsed between an execution and the date at which it was struck off, it should be presumed that the execution was abandoned and ceased to be operative, unless the circumstances are otherwise explained. In *Da Costa* v. *Kalee Pershad Singh*, 12 W. R. 260, where, after attachment had issued, the decree-holder asked the Court to stay further proceedings for six weeks, praying at the same time that the attachment might be continued, and the Court struck the case off the file for its own convenience, and the decree-holder allowed a year to elapse before taking further proceedings, Loch, J. held, Jackson, J. dissenting, that there was no abandonment of the attachment. It cannot be presumed that an attachment has been abandoned merely because the execution-case has been struck off the file, or because subsequent applications for attachment have been made—*Jhatu Sahu* v. *Ramcharan Lal*, 3 B. L. R. Ap. 68, S. C. 11 W. R. 517; *Mahatab Chand* v. *Surnomoyee Dossee*, 12 B. L. R. 414, note, S. C. 15 W. R. 222. See also *Gholam Habeya* v. *Shama Sundari Kuari*, 3 B. L. R. Ap. 134, S. C. 12 W. R. 142.