

cause, in the course of the trial of the suit, it may be necessary incidentally to decide, for the purposes of the suit, questions relating to mortgaged property held by the defendants in the family domains, the extent of it in their possession, and its profits, in order to make up the accounts of the entire mortgage so as to ascertain if the entire mortgage-debt has been satisfied, and if, therefore, the plaintiff has a right to recover the mortgaged property situated in Mirzapur.

We reverse the decree of the lower appellate Court and remand the case, under s. 351, Act VIII of 1859, for trial on the merits.

Decree reversed and cause remanded.

APPELLATE CIVIL.

1877
January 12.

(Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Spankie).

BALWANT SINGH (DEFENDANT) v. GOKARAN PRASAD (PLAINTIFF).*

Charge against Immoveable property — Auction-purchaser's rights subject to Lease.

An obligee under a bond giving him a charge upon land who sues for and obtains only a money-decree, under which he himself purchases the land, the sale-proceeds being sufficient to discharge the debt, cannot fall back on the collateral security for a debt which no longer exists. *Seemle* that even if the sale-proceeds were not sufficient to discharge the debt, the obligee could not according to the principle laid down in *Khub Chand v. Kalian Das* (1) avail himself of his collateral security to avoid a lease granted by the obligor after the date of the bond.

THE plaintiff sued in 1873 to recover the amount due under a bond dated the 26th June, 1872, by which immoveable property was hypothecated to him, but did not seek to enforce his charge upon the land. In execution of the money-decree thus obtained the plaintiff attached, brought to sale, and became the auction-purchaser of the said property. Between the date of the bond hypothecating the property and the institution of the suit thereon in 1873, the obligor gave a lease of a portion of the said property for a term of years to a third person. The lessee opposed the plaintiff's possessin, and the plaintiff accordingly in 1875 brought the present suit against him and others.

* Regular Appeal, No. 83 of 1876, from a decree of Rai Bhagwan Prasad, Subordinate Judge of Mainpuri, dated the 20th May, 1875.

(1) I. L. R 1 All. 246.

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The Subordinate Judge gave the plaintiff a decree and the lessee appealed to the High Court on the grounds stated in the judgment below.

Pandit *Ajudhia Nath* and Munshi *Hanuman Prasad*, for appellant.

Pandits *Bishambhar Nath* and *Nand Lal*, for respondent.

The judgment of the Court was delivered by

SPANKIE, J.—On the 26th June, 1872, one Daulat executed a bond for Rs. 6,000 in favour of Gokaran Prasad payable by instalments extending over thirty years, and he hypothecated his five biswa share in the village of Bajua as security for the payment of the debt, any transfer being prohibited until the money was repaid. In case of any default in the payment of the instalments, interest at the rate of one per cent. per mensem was payable. If two instalments remained unpaid, the obligee was entitled to recover the entire amount from the obligor and the property hypothecated. On the 12th May, 1873, Paras Ram, lambardar, and Lal Singh, pattidar, sons of the obligor, Daulat, describing themselves as owners of two-thirds out of the five biswa share hypothecated by the said Daulat, leased their two-thirds including sir lands and all other rights for a period of twelve years to Hukam Singh. This lease was registered on the 28th of August, and mutation of names was had in the Revenue Court. In the meantime default had occurred in the payment of instalments under the bond and a suit was instituted by Gokaran Prasad on the 28th October, 1873, for the money due on the bond against them, but he had not sought to enforce his lien against the property, so there was no decree against it. On the 28th August, 1874, the same plaintiff as decree-holder purchased the property, and after taking a receipt for the money due to the decree-holder, the judgment-debtors received the balance of the sale-proceeds, some Rs. 3,000. The plaintiff then found that the lessee under the lease of May, 1873, opposed his possession in respect of a little more than three biswas, six biswansis, thirteen kachwansis, and six nanwansis. He therefore brought this suit making the lessee and lessors defendants in the case. He sues as auction-purchaser and to set aside the lease as having been executed collusively and fraudulently without his knowledge with

the view of depriving him of his right, in spite of the hypothecation made in the bond of 1872. By a subsequent petition the plaintiff was allowed to amend his plaint by the additional prayer that his lien under the bond of June, 1872, might be enforced.

The facts are not denied. The defendant Hukam Singh, the lessee, contends that as the plaintiff did not sue for the enforcement of the lien when he sued for the money due on the bond, the lien had become null and void after the passing of the money-decree, and plaintiff was not competent to sue for the cancellation of the lease which had been executed in good faith and for legal consideration. The defendant obtained possession prior to the purchase of plaintiff, with whose knowledge the lease was made and mutation of names effected under it, he being a co-partner and sharer in the estate. The suit had been instituted by collusion between plaintiff and the lessors.

The lessors do not appear to have defended the suit. The Subordinate Judge in a brief decision held that the plaintiff's omission to claim the enforcement of the lien was no bar to his present claim, and that the lease had been collusively executed by the lessors and lessee, that it was a transfer and therefore an alienation prohibited by the conditions of the bond and must be set aside.

Substantially the pleas in appeal on the part of the defendant are the same as those urged in the Court below.

The decree of the Subordinate Judge cannot we think be maintained. It has been held by this Court (1) that "nothing passes to the auction-purchaser at a sale in execution of a decree but the right, title, and interest of the judgment-debtor at the time of the sale." The case cited is not precisely similar to the one before us, but the principle is the same. It was also ruled that when the holder of a simple mortgage-bond obtained only a money-decree on the bond, in execution of which the property hypothecated in the bond was brought to sale and was purchased by him, he could not resist a claim to foreclose a second mortgage of the property created prior to its attachment and sale in execution of his decree, and further it was held that the holder of a money-decree in the particular case could not avail himself of a condition against alienation contained

(1) In *Khub Chand v. Kalian Das*, I. L. R., 1 All. 240.

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in his bond to resist the foreclosure. Here, too, the principle would seem to apply. But in the case now before us the auction-purchaser was the decree-holder and the sale-proceeds were sufficient to discharge the debt and give a considerable surplus to the judgment-debtors. Under these circumstances we fail to perceive how the auction-purchaser can fall back upon the collateral security for a debt which no longer exists. But apart from this if the lease of May, 1873, was prohibited by the hypothecation and conditions of the bond, then plaintiff might have proceeded against the property so hypothecated when he first instituted his suit, and possibly might have impleaded the lessee successfully. He omitted to do so, and his debt having been satisfied, it seems that he has no title as auction-purchaser to question the lease. It was made before he had brought his suit and registered openly; mutation of names was had under it. It is not denied that the plaintiff is a co-partner and sharer in the estate. The lease is for twelve years only and for a portion only of the property hypothecated. There was no attachment of the property when the lease was made. It was for the plaintiff to have established that the lease was fraudulently prepared and executed with a view to injure him. This we do not find that he has been successful in proving. He has not lost the property. He is the proprietor of it. It has not been so alienated as to jeopardise his proprietary rights. He has got under his auction purchase all the rights that his judgment-debtor possessed, subject, however, to the lease which has placed the management of two-thirds of the five biswa share in the hands of a lessee for twelve years. But as pointed out above he could not fail to have been aware of the transaction, and yet deliberately he omitted to sue to enforce his lien, if he could do so, against the lessee, when he brought his claim for the money due under the bond. He has no one to blame but himself, and having satisfied his debt by the purchase of the property, it is too late now to say that the lease was an infringement of the hypothecation of the bond.

We decree the appeal, and reverse the decree of the Subordinate Judge, and dismiss the suit with costs.

Appeal allowed.