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Although we are of opinion that we should not enforce the contract in this case by decreeing the plaintiff's claim for Rs. 25,000, we are also of opinion that we should give, as we now do, the plaintiff a decree for the amount actually advanced with simple interest at the rate of 20 per cent. per annum from the date of the bond, that is to say, from the 10th December, 1878, to the date of this decree with proportionate costs of suit and of the plaintiff's appeal, and with interest at the rate of 6 per cent. per annum on the amount of such advance, interest, and costs, from the date of this decree until payment. The defendant's appeal is dismissed with costs and the plaintiff's appeal is allowed to the extent above indicated with proportionate costs. We have allowed interest at the rate of 20 per cent. per annum as that is not an unusual rate in these Provinces where there is no security or but a doubtful security.

Appeal allowed in part.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.

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 July 10.

JANGI NATH AND OTHERS (PLAINTIFFS) v. PHUNDO AND ANOTHER (DEFENDANTS).*

Civil Procedure Code, ss. 244, 283—Decree against mortgagor for mortgage money and directing sale of mortgaged property as against him and a third party—Attachment of other property in possession of third party as that of the mortgagor—Claim by third party to ownership of such property—Suit by decree-holder to establish mortgagor's right to property.

In a suit upon a hypothecation bond a third party was made defendant, as she claimed the hypothecated property. The mortgagee obtained a decree for recovery of the amount of the bond, and for enforcement of the mortgage. In execution of the decree the debt not being satisfied by sale of the mortgaged property, the decree-holder, caused certain other immoveable property in the possession of the third party to be attached. She objected to the attachment on the ground that this property was her own, and was not liable to sale in execution of the decree. The objection was allowed, and the decree-holder then sued for a declaration that the property belonged to the mortgagor judgment-debtor, and was liable to attachment and sale in execution of the decree.

* First Appeal No. 85 of 1886 from a decree of Maulvi Muhammad Said Khan, Subordinate Judge of Agra, dated the 14th November, 1885.

Held that as no claim in the former suit was made against the objector personally or in a representative character, but, as regards her, the only claim was virtually for a declaration that she was not entitled to the hypothecated property, the decree affected her only so far as it negatived her alleged interest in that property, and, so far as it was sought to be enforced against other property, she was a stranger to that suit, and her objection must be taken to have been decided under ss. 278 and 280 of the Civil Procedure Code, and the present suit was rightly brought under s. 283 and was not barred by s. 244. *Kameshwar Pershad v. Run Bahadur Singh* (1) referred to. *Mulmantri v. Ashfaq Ahmad* (2) and *Nimba Harishet v. Sitaram Paraji* (3) distinguished.

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The facts of this case were as follows. On the 13th February, 1876, Bhika Mal, styling himself son of Dwarka Das and proprietor of the firm of Dwarka Das Bhika Mal, executed an instrument in favour of Babu Baijnath, whereby he promised to pay Rs. 15,000 to the latter, and mortgaged certain immoveable property as security for the payment of the money. In July, 1882, Baijnath brought a suit on this instrument against Bhika Mal, styling him the "adopted son" of Dwarka Das, and against Musammat Phundo, widow of Dwarka Das. In this suit Baijnath claimed to recover the money due under the instrument from Bhika Mal personally, and by the sale of the mortgaged property, "by enforcement of lien as against both defendants." He stated in the plaint in this suit, with reference to Musammat Phundo, as follows:—"As the defendant No. 2 now declares herself proprietor of the whole property, she has also been impleaded, although she has no right to the property, and defendant No. 1 (Bhika Mal) is the owner of the property and of the share of Dwarka Das, because he was his own brother and was adopted by him, and he is a proprietor by right of inheritance."

The plaintiff's contention in this suit was that Bhika Mal, step-brother of Dwarka Das, was his adopted son and sole heir, and had inherited the mortgaged property from Dwarka Das. Musammat Phundo contended that Bhika Mal was not the adopted son of Dwarka Das; that the mortgaged property was the separate property of her husband, to which she had succeeded, and that Bhika

(1) I. L. R., 12 Calc., 458.

(2) I. L. R., 9 All., 605.

(3) I. L. R., 9 Bom., 458.

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Mal had no authority to mortgage the property, and it was not liable to the plaintiff Baijnath's claim. On the 17th January, 1883, Baijnath obtained a decree in this suit for the recovery of the money claimed from Bhika Mal, and for enforcement of the mortgage contained in the instrument of the 13th February, 1876.

The mortgaged property having been sold, and the mortgage-debt not being satisfied, Baijnath caused certain immoveable property in the possession of Musammat Phundo to be attached in the execution of the decree as the property of Bhika Mal. Musammat Phundo objected to the attachment, alleging that she had inherited the property from her deceased husband, Dwarka Das, and it was not liable to be attached and sold in execution of Baijnath's decree against Bhika Mal. This objection was allowed by the Court executing the decree on the 13th March, 1885. In May, 1885, Baijnath brought the present suit against Musammat Phundo and Bhika Mal, in which he claimed a declaration that the property belonged to Bhika Mal, and was liable to attachment and sale in execution of his decree.

The Court of first instance (Subordinate Judge of Agra) held that the suit was barred by the provisions of s. 244 of the Civil Procedure Code, and dismissed it.

The representatives of Baijnath, who had died, preferred this appeal.

Mr. *C. H. Hill* and Pandit *Sundar Lal*, for the appellants.

Mr. *Dwarka Nath Banerji* and Babu *Jogindro Nath Chaudhri*, for the respondents.

EDGE, C. J.—In this action the plaintiff claims a declaration that the property alleged by Musammat Phundo to be her own property is liable to attachment and sale under a decree obtained by the plaintiff in a previous action. In the previous action the plaintiff sued one Bhika Mal on a hypothecation bond, claiming, among other things, enforcement of lien by sale. Musammat Phundo was made a party to that action as a defendant because she

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claimed the hypothecated property. The main issue in that action was whether the hypothecated property was Bhika Mal's. The decree in that action was against Bhika Mal personally and for sale of the property hypothecated. In that action a decree was given against Bhika Mal personally, and Musammat Phundo was interested simply and solely in respect of her claim to the hypothecated property, and she was made a defendant solely to prevent her disputing the plaintiff's right to sell the property. The hypothecated property was sold under the decree in that action, and thereupon the plaintiff proceeded to attach and sell the property involved in this action, alleging that the property was the property of Bhika Mal. The property in question formed no part of the hypothecated property affected by the first decree. Musammat Phundo objected in the execution department. Her objection was allowed, and the property was released from attachment. On that the present action was brought. The Court below dismissed the claim on the ground that s. 244, Civil Procedure Code, applied.

It is argued before us on behalf of the respondent that, as Musammat Phundo was a party to the previous suit, the question here was one which arose between the parties to the suit in which the decree was passed, and related to the execution or satisfaction of the decree, within the meaning of s. 244, Civil Procedure Code. Now that decree, as I have said, affected Musammat Phundo or any interest of hers only so far as it negatived her alleged interest in the hypothecated property. In that action no claim was made against her personally or in a representative capacity. The only claim, so far as she was concerned, was what amounted to a claim for a declaration that she was not entitled to the hypothecated property.

I am consequently of opinion that so far as the decree was sought to be enforced against property other than the hypothecated property, Musammat Phundo was a stranger to the action, and her objection is to be looked at as having been decided under ss. 278 and 280, Civil Procedure Code. The present action was therefore rightly brought under s. 283, Civil Procedure Code.

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I think the decision in *Kameshwar Pershad v. Run Bahadur Singh* (1) is based on a correct view of the law and supports the view which I take. The case cited by the respondent, *Mulmantri v. Ashfaq Ahmad* (2), and the case of *Nimba Harishet v. Sitaram Paraji* (3) are clearly distinguishable.

The appeal will be allowed, and the case will come on at a latter date. All the records of which Mr. *Chaudhri* and Pandit *Sunder Lal* will give lists to the office will be sent for.

TYRRELL, J.—I concur with the view expressed by the learned Chief Justice. It appears to me that the Court below has taken an erroneous view of the import of the plaintiff's pleadings in the former case. It is true that in that case the plaintiff said, "As the defendant No. 2 now declares herself proprietor of the whole property, she has also been impleaded, although she has no right to the property, and defendant No. 1 is the owner of the property and of the share of Dwarka Das, because he was his own brother, and was also adopted by him, and he is a proprietor by right of inheritance." These words, no doubt, seem to refer to the whole of the property of the firm of Dwarka Das Bhika Mal, but it is obvious, on a closer inquiry, that the plaintiff's meaning was that Musammat Phundo's pretensions were such as to raise a question of right on her part in hypothecated property which was the sole subject of that suit, and therefore that she was interested in the issue to be raised in respect of that hypothecated property and it only.

When the appeal came on again for hearing, the Court (EDGE, C J., and TYRRELL, J.) remanded the case for re-trial.

Cause remanded.

(1) I. L. R., 12 Calc., 458. (2) I. L. R., 9 All., 605.

(3) I. L. R., 9 Bom., 458.