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March 4.

Before Mr. Justice Oldfield and Mr. Justice Mahmood.

RAGHUBAR DAYAL (DEFENDANT) v. ILAHI BAKHISH AND
ANOTHER (PLAINTIFFS)*

Execution of decree—Decree for sale of mortgaged property and for costs—Attachment and sale of other property for whole amount of decree—Suit to set aside execution-sale—Civil Procedure Code, ss. 311, 312—Finality of order in execution-proceedings.

In execution of a decree on a mortgage-bond, for the sale of the mortgaged property, and for the costs of the suit, amounting to Rs. 1,000, certain houses were attached, on the 30th September, 1881, which were not part of the mortgaged property. On an objection raised by the judgment-debtors, that the decree was by its terms executable only against the mortgaged property, the High Court in appeal decided, on the 6th September, 1882, that the houses were not liable to attachment and sale under the decree. In the meantime, on the 15th June, 1882, the houses had been put up for sale, and purchased for Rs. 500, and the sale had been confirmed on the 16th August, 1882. The judgment-debtors brought a suit against the purchaser to set aside the sale, on the ground that the houses were not saleable under the decree.

Held that the decree, in regard to costs, was a decree made personal against the judgment-debtor, and conferred a right upon the decree-holder to take out execution for the recovery of those costs, not only against the property mortgaged in the bond, but also against the person and other property of the judgment-debtor.

Per OLDFIELD, J. (MAHMOOD, J., doubting) that the attachment and sale in execution of the decree were valid, inasmuch as they were made in respect of the costs as well of the principal and interest decreed.

Per MAHMOOD, J., that the suit was maintainable, and was not barred by any plea *in limine*. *Abdul Haya v. Nawab Raj* (1) referred to.

Also *per* MAHMOOD, J., that inasmuch as the adjudication of the 6th September, 1882, was one between the judgment-debtors on the one hand and the decree-holder on the other, and subsequent not only to the sale but to the confirmation of the sale, and inasmuch as the Court was not then called upon to decide anything in relation to the nature of the decree as to costs, the order then passed could not be used against the purchaser.

Also *per* MAHMOOD, J., that it was doubtful whether, the attachment having been made for the whole amount of the decree and not for costs, and no separate proceedings having taken place in respect of the personal decree against the judgment-debtor, the attachment, the notification of sale, and the sale itself, were valid; but that everything that was said against those proceedings constituted matters falling under s. 312 of the Civil Procedure Code, which enables parties to object to confirmation of sale; and that therefore, even assuming that the sale

* Second Appeal No. 477 of 1884, from a decree of Maulvi Muhammad Abdul Qayyum Khan, Subordinate Judge of Bareilly, dated the 4th December, 1883, affirming a decree of Babu Nilmadhab Banarji, Munsif of Mavchi, Bareilly, dated the 25th June, 1883.

and confirmation of sale were subject to the objection of "material irregularity in publishing or conducting" the sale, within the meaning of s. 311, a suit like the present, upon that ground, alone was prohibited by the last part of s. 312.

THE plaintiffs in this suit claimed to set aside an execution-sale. It appeared that on the 24th June, 1880, one Jugal Kishore, represented by the defendant in this suit, obtained a decree against the plaintiffs on a mortgage-bond, for the sale of the mortgaged property, and for the costs of the suit. The decree-holder applied for execution of the decree, by the attachment and sale of two houses, belonging to the plaintiffs, which were not part of the mortgaged property. The houses were attached on the 30th September, 1881. The plaintiffs objected to the attachment on the ground that the decree was, by its terms, executable only against the mortgaged property. This objection was disallowed by an order dated the 29th March, 1882. The plaintiffs appealed from this order to the High Court, which, on the 6th September, 1882, decided that the houses were not liable to attachment and sale under the decree, as it confined the relief to the sale of the mortgaged property. In the meantime, on the 15th June, 1882, the houses had been put up for sale, and had been purchased by the defendant for Rs. 500, and the sale had been confirmed on the 16th August, 1882. The plaintiffs brought the present suit against the defendant to set aside the sale on the ground that the houses were not saleable under the decree.

The Court of first instance gave the plaintiffs a decree, which, on appeal by the defendant, the lower appellate Court affirmed.

In second appeal by the defendant it was contended on his behalf that the sale had been improperly declared invalid, inasmuch as it had taken place in satisfaction not merely of the mortgage-debt, but also of the costs of the suit, for which the decree made the judgment-debtors personally liable.

The *Junior Government Pleader* (Babu Dwarka Nath Banarji), for the appellant.

Munshi Hanuman Prasad and Pandit Bishambar Nath, for the respondents.

OLDFIELD, J. (After stating the facts, continued:—) The appeal must, in my opinion, prevail. The decree-holder's relief under his decree for the recovery of the principal amount of the debt with

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interest, viz, Rs. 11,583-0-9, was confined to its recovery by sale of the property of the judgment-debtors mortgaged in the bond; but the decree further ordered that the costs of the decree-holder, Rs. 1,034-12-0, were to be recovered from the judgment-debtors, and this sum was recoverable from other property besides the mortgaged property. The attachment and sale were made in respect of the costs as well as of the principal and interest decreed, and the objections, therefore, that there was no right under the decree to sell the property in suit, and that the sale is void, in consequence, must fail.

I would on this ground decree the appeal, and set aside the decrees of the lower Courts, and dismiss the suit with all costs.

MAHMOOD, J.--I am of the same opinion, but wish to state briefly the reasons which have brought me to it. The facts have been stated by my learned brother Oldfield, and it is unnecessary for me to refer to them further than is unavoidable for the purpose of elucidating my conclusions. The whole question before us, and indeed the only question raised by the learned Junior Government Pleader on behalf of the appellant, is whether the auction-sale of the 15th June, 1882, conveyed any such title to the present defendant as would preclude such a suit as this. The first point for consideration is the nature of the suit, and it is obvious from the plaint that it is one for declaration of title, and to set aside the sale of 15th June, 1882. Such a suit could only be maintained by showing that the sale was invalid, and hence it is necessary to consider any circumstances rendering the two houses now in suit not subject to the decree in execution of which they were sold. There has been much able argument by the learned Junior Government Pleader upon the question whether the suit is maintainable, and the learned Pandit, on behalf of the respondents, has maintained—what indeed, the Junior Government Pleader conceded—that such a suit would lie under certain circumstances. There are many cases on this subject, referred to in s. 312 of Mr. Justice O’Kinealy’s edition of the Civil Procedure Code, which fully go to maintain this proposition of law; and in particular the Full Bench case of *Abdul Hoya v. Nawab Raj* (1). I have therefore no doubt that the suit would lie, and is not barred by any plea *in limine*. And then a two-fold question

(1) B. L. R. Sup. Vol., 911.

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arises. In the first place, what is the meaning of the decree in execution of which the houses were sold? In interpreting this decree, I must refer to the order of this Court, dated the 6th September, 1882, upon which the lower Courts have relied for the purpose of holding that the decree was limited to such rights of the defendant-judgment-debtor in that suit as existed in the property hypothecated in the bond upon which the decree was passed. It is clear to me that that adjudication, being one between the judgment-debtor on the one hand and the decree-holder on the other, and having been subsequent not only to the sale, but to the confirmation of the sale, cannot be binding upon the auction-purchaser, the present appellant. In the next place, my learned brother Tyrrell and I, who passed the order of the 6th September, 1882, had before us two questions only which were raised in that case on behalf of the appellant-judgment-debtor, and the respondent-decree-holder was wholly unrepresented, and we were not then called upon to decide anything in relation to questions of the nature of the decree as to costs. I am therefore of opinion that that order cannot now be used against the present appellant.

We have now to consider what was the meaning of the decree, and my interpretation of that meaning is the same as that of my learned brother Oldfield, namely, that, in regard to costs, it was a decree made personal against the judgment-debtor: in other words, it conferred a right upon the decree-holder to take out execution for the recovery of those costs, not only against the property hypothecated in the bond which was the basis of the suit, but also against the person and the other property of the judgment-debtor. I limit this observation to the order of the Court in regard to costs. What happened was, that a decree was passed having this double aspect, that it was so executed that not only the hypothecated property but these two houses also were attached, and in execution they were sold for about Rs. 500, the amount of costs being over Rs. 1,000. The question then is, whether such attachment and such proclamation of sale and the sale itself were or were not valid? There can be no doubt that if the decree-holder had taken out execution as to costs against the judgment-debtor in respect of the two houses, that would have been valid; and the only doubtful point is whether, the attachment having been made for the whole amount

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of the decree and not for costs, and no separate proceedings having taken place in respect of the personal decree against the judgment-debtor, the sale was valid, or *ab initio* void, or voidable, or ineffectual to convey any proprietary rights to the auction-purchaser-appellant. Now I am anxious to say that I am not prepared to lay down that the method adopted by the decree-holder was necessarily regular or proper for the purpose of executing a decree of this nature. But all that is said against the attachment, against the notification of sale, and against the sale itself, constitutes matters falling under s. 312 of the Civil Procedure Code, which enables parties to object to confirmation of sale. And therefore, even assuming for the purposes of argument that the sale and the confirmation of sale were subject to the objection of "material irregularity in publishing or conducting" the sale, within the meaning of s. 311, I should still say that a suit like the present, upon that ground alone, is prohibited by the last part of s. 312. Upon these grounds—the only grounds that can be taken on behalf of the plaintiff-respondent—I am of opinion that this suit should have been dismissed. I therefore concur in the order proposed by my learned brother Oldfield.

Appeal allowed.

Before Mr. Justice Oldfield and Mr. Justice Mahmood.

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March 5.

BARI BAHU AND ANOTHER (DEFENDANTS) v. GULAB CHAND (PLAINTIFF.)*

*Mortgage—Annulment of settlement—Fresh settlement—Act XIX of 1873
(Land-Revenue Act), ss. 43, 159, 165.*

A settlement of land belonging to G, and which he had mortgaged, having been annulled under s. 158 of the N.-W. P. Land-Revenue Act (XIX of 1873), the land was farmed by the Collector of the District under s. 159. The revenue having fallen into arrears, the Collector, under the same section, took the land under his own management. Subsequently, under ss. 165 and 43 of the Act, the land was settled with G's wife.

Held that the Court was precluded by the terms of s. 241 (f) of the Revenue Act from entering into the question whether the settlement was legally made by the Collector with the wife of the mortgagor; that she must therefore be taken to represent such rights and interests as the mortgagor possessed; and that consequently the estate was liable in her hands for the mortgage, and the mortgagee was entitled to claim foreclosure against her.

* Second Appeal No. 19 of 1884, from a decree of J. M. C. Steinbelt, Esq., District Judge of Banda, dated the 3rd October, 1883, modifying a decree of Munshi Manmohan Lal, Subordinate Judge of Banda, dated the 6th July, 1883.