

1894
July 24.

*Before Sir John Edge, Kt., Chief Justice, Mr. Justice Knox, Mr. Justice Blair,
Mr. Justice Banerji and Mr. Justice Burkitt.*

SABHAJIT (APPLICANT) v. SRI GOPAL (OPPOSITE PARTY).

Civil Procedure Code ss. 335, 334, 2, 244—Execution of decree—Application by usufructuary mortgagee ejected by auction-purchaser to be restored to possession—Representative of party to suit—Auction purchaser, who is also assignee of decree.

In a suit for sale upon a mortgage the plaintiff having obtained a decree assigned the same, and the assignee brought the property decreed to be sold to sale and purchased it himself and obtained possession. A usufructuary mortgagee of the property who had been a party to the suit and in whose favor the decree was, in so far that it declared his right to continue in possession, applied to be restored to possession and obtained an order in his favor. Thereupon the assignee, auction-purchaser, applied in revision to have the order restoring the usufructuary mortgagee to possession set aside.

Held that the order in question was an order which could properly be made under s. 335 of the Code of Civil Procedure, and being unappealable, an application for revision thereof might lie.

The auction-purchaser, though he happened also to be the assignee of the decree, was not a representative of a party to the suit within the meaning of s. 244, nor was the usufructuary mortgagee a judgment-debtor within the meaning of s. 334 or 335, but he was a person other than a judgment-debtor within the meaning of s. 335.

THE facts of this case were as follows:—

One Kundan Lal brought a suit upon a mortgage for sale of a four-biswa share in a certain village, the defendants to that suit being Sita Ram and Daya Kishan, the predecessors in title of Sri Gopal. The defendants pleaded that they were in possession under two mortgages of the 20th of January 1856 and the 5th of July 1869. The Court of first instance dismissed that suit, but the appellate court decreed the plaintiff's claim subject to the rights of the defendants under their prior mortgages. Kundan Lal having thus obtained his decree for sale, sold the same to Sabhajit, who in execution thereof brought the mortgaged property to sale and purchased it himself and obtained possession. Thereupon Sri Gopal claiming as heir to Sita Ram and Daya Kishan applied to be restored possession of the property mortgaged. The auction-purchaser

Application No. 9 of 1894, for revision of an order of Babu Ganga Saran, Subordinate Judge of Aligarh, dated the 25th November 1893.

resisted this application on the allegation that Sita Ram and Daya Kishan were never in possession as mortgagees, but had obtained possession merely as auction-purchasers under a simple money decree. The Court (Subordinate Judge of Aligarh) found that Sita Ram and Daya Kishan had been in possession as mortgagees, and allowing Sri Gopal's application made an order that he should be reinstated.

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The auction-purchaser thereupon applied to the High Court for revision of the order of the Subordinate Judge above mentioned.

This application coming before a single Judge was by him referred to a Division Bench and thence by Tyrrell and Burkitt, JJ., to the Full Bench.

Mr. *A. H. S. Reid*, for the applicant.

Babu *Jogindro Nath Chaudhri* and *Munshi Gobind Prasad*, for the opposite party.

The judgment of the Court (EDGE, C. J., KNOX, BLAIR, BANERJI and BURKITT, JJ.) was delivered by EDGE, C. J.—

This is an application under s. 622 of Act No. XIV of 1882. The assignee of a decree-holder, plaintiff, brought the property which had been decreed to be sold to sale and purchased it himself. He obtained possession. Thereupon a party to the suit in whose favor the decree was in this sense that it directed that the sale should not affect his interests, which were those of a usufructuary mortgage in possession, applied to the Court executing the decree to put him again in possession and dispossess the auction-purchaser. The Court passed an order reinstating the usufructuary mortgagee in possession, and that is the order which is questioned in this application for revision.

It was objected that this application does not lie, it being contended that the order in question was one made under s. 244 of Act No. XIV of 1882. Another contention in support of the objection was that, if the order was made under s. 335 of Act No. XIV of 1882, the auction-purchaser had a remedy by suit to establish his title to possession.

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On the other side it was contended that the order was one made in fact under s. 335, but one which could not be made in law under that section, it being contended that the usufructuary mortgagee was a person coming within the description of a "judgment-debtor" as that term is used in s. 335. That contention was carried further, and it was argued that, although the Court might have had jurisdiction to make such an order under s. 244, it having in fact made the order under s. 335, this application in revision lay. It was also contended on behalf of the applicant that the Court will exercise its discretion under s. 622, although the appellant had under the last clause of s. 335 a right of suit given to him.

The preliminary objection could not be decided by us without going into the case in order to ascertain under what section this order could lawfully have been made. As to the contention that this was a case to which s. 244 applied, that was supported on two lines of argument. One was that s. 334 was the section which applied in this case, and that on the authority of *Muttia v. Appasami* (1) an order passed on a matter within s. 334 was an order made under s. 244. We need not say whether we agree with or differ from the view of the Madras High Court on that point. Until it is necessary to do so we reserve our right to consider whether an order under s. 334 is an order under s. 244. The other line on which it was contended that s. 244 applied was this:—It was said that the auction-purchaser was, as the assignee of the plaintiff in the suit, a representative of a party to the suit. His opponent, the usufructuary mortgagee undoubtedly was a party to the suit. The usufructuary mortgagee was a party in whose favor a decree, so far as he was concerned, was made. It has been decided by this Court, and it is a matter upon which we are all agreed, that a purchaser at an auction-sale under a decree is not, as such purchaser, a representative of a party or a party to the suit in which the decree was passed, although if such auction-purchaser was a transferee, within the meaning of s. 232 of Act No. XIV of 1882, of the decree, he might be, as such transferee, a representative of a party to the suit for the

(1) I. L. R., 13 Mad. 504.

purpose of s. 244 of that Code. In this particular matter with which we have now to deal the auction-purchaser stands simply in the position of auction-purchaser and does not stand in the position of a plaintiff or a decree-holder. Rightly or wrongly he got into possession and now claims to be put back into possession, not as a decree-holder, for as such he had no right to possession, but as the auction-purchaser at a sale held under the decree. It is a pure accident that the person who was the transferee of the decree of the plaintiff is also the auction-purchaser, and, so far as the auction-purchaser's rights as such are concerned, they must be regarded as if he and the transferee of the decree were two different persons. The decree had been executed. In our opinion the auction-purchaser was not as such in the only position in which he could appear here in this matter either a party or the representative of a party to the suit. The reason why it is not necessary for us to express an opinion as to the decision of the High Court at Madras to which we have referred is that, in our view of the law, the usufructuary mortgagee, although a party to the suit, was not a judgment-debtor within the meaning of s. 334 or s. 335. A judgment-debtor is defined in s. 2 of Act No. XIV of 1882; and this particular mortgagee was not a party against whom either a decree or an order relating to this matter had been passed, and consequently did not come within the description of s. 334, and did come within the description of a party other than a judgment-debtor in s. 335. In our opinion the Court below had jurisdiction to entertain the application of the usufructuary mortgagee and to make the order which it did make under s. 335 of Act No. XIV of 1882.

There is a preliminary objection to this application in revision which has not been taken and which relieves us from the necessity of deciding whether or not any effective suit to have the decree under which the sale was made construed, could, having regard to the circumstances of this case, to the fact that the auction-purchaser as such took such title as he obtained at the sale under the decree and such other title as he had as the transferee of the decree, and to the fact that the usufructuary mortgagee was a party to the decree,

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have been brought by either of these parties against the other under the last clause of s. 335, in relation to the order of the Court the subject of this application, and consequently relieves us from having to decide whether this is a case in which we ought to exercise our discretion by reason of a right of suit being open to the applicant.

The preliminary point is that in no view of this application does it come within s. 622 of Act No. XIV of 1882. The Court below exercised a jurisdiction vested in it. It exercised that jurisdiction lawfully and regularly under the section of the Code applicable to the case. There was no circumstance in this case which brought it within s. 622. It is not necessary to express any opinion as to the merits of this application. We dismiss the application with costs.

Application dismissed

APPELLATE CIVIL.

1895
January 20

Before Mr. Justice Know and Mr. Justice Aikman.

GHURE AND ANOTHER (DEFENDANTS) v. MAN SINGH AND ANOTHER (PLAINTIFFS).*

Pre-emption—Wajib-ul-arz—Partition of village originally one into three separate maháls—New record of village customs framed on partition—Rules of the Board of Revenue of the 13th November 1875—Act No. XIX of 1873 (N.-W. P. Land Revenue Act), s. 257.

Where at the settlement of a village constituting a single mahál a record of rights was framed giving certain pre-emptive rights to the co-sharers in the village, but subsequently the village was divided by perfect partition into three separate maháls, and, in accordance with the rules of the Board of Revenue of the 13th November 1875, issued under s. 257 of Act No. XIX of 1873, a new record of village customs was framed which did not give to the sharers in any one of new maháls any right of pre-emption in respect of land situated in another mahál, it was held that the latter record of village customs was a valid and binding document and no right of pre-emption existed in favor of the co-sharers in any one mahál in respect of land situated in another mahál.

Per. AIKMAN, J.—Where a village, originally one, is divided by perfect partition into two or more maháls, unless at the time of partition a right of pre-emption is specifically reserved by the co-sharers in respect of lands lying outside any given

* First Appeal No. 125 of 1894, from an order of H. G. Pearse, Esq., District Judge of Agra, dated the 29th August 1894.