

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

1896.

SOHAN LAL (JUDGMENT-DEBTOR) v. HARDEO SAHAI (DECREE-HOLDER).*

December 22.

Execution of decree—Civil Procedure Code, Section 396—Powers of Court executing a decree for partition.

Held that a Court has no power under section 396 of the Code of Civil Procedure to order its amn to cause a wall to be built separating portions of property of which partition has been decreed.

The facts of this case sufficiently appear from the judgment of the Court.

Pandit *Sundar Lal*, Pandit *Baldeo Ram Dave* and Babu *Devendro Nath Oldedar*, for the appellant.

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

EDGE, C.J., and BLAIR, J.—Hardeo Sahai brought a suit for partition of houses and shops against Sohan Lal. A decree for partition was made. By direction of the Court the plaintiff prepared two lots. The defendant was allowed to select which of these two lots he would take. The defendant selected one lot: the plaintiff took the other. The amn put the parties in possession of their lots. Thereupon, it appears to us, the suit terminated. There was the decree, and there was execution complete. Afterwards the plaintiff came into Court and asked the Court to direct the amn to build a wall between his lot and the defendant's lot. The Court directed the amn to build a wall. The wall was built. The defendant objected to the jurisdiction of the Court to make any such order, and to the wall as having encroached on his land and as having excluded him from a portion of the land allotted to him. The Court dismissed the objection, and from that order of dismissal this appeal has been brought.

For the defendant appellant it has been contended that the Court had no longer jurisdiction after making its decree and order allotting the portion selected by the defendant to him and the portion left to the plaintiff. He also contended that, even if the jurisdiction of the Court was not then determined, the Court has

* First Appeal, No. 131 of 1896, from a decree of Pandit Rai Indar Narain, Subordinate Judge of Meerut, dated the 8th February 1896.

no jurisdiction to direct a wall to be built, and that its order in that respect was in any event *ultra vires*.

On behalf of the plaintiff respondent it has been contended that the Court has power under section 396 of the Code of Civil Procedure to order a wall to be built, and reliance is placed upon the third paragraph of section 396. It is contended that the "bounds" therein mentioned would include the building of a wall.

We are not aware that the Court has any power in a partition suit to direct an officer of the Court to have a wall built in carrying out the partition. There is nothing in section 396 to suggest that a Court has any such authority. The "metes and bounds" mentioned in the third paragraph of section 396 are merely the measurements and the limits of the shares which may be mentioned in the commissioners' report. "Bounds" there do not mean a wall to be built. If that was the meaning of the words of that section, the wall would have to be built in the report, and when the commissioners differed two walls would have to be built, each in a separate report. It would be inconvenient, if not dangerous to the rights of the parties, that a Court should have power to order its officer to have a wall built in a partition suit. Suppose the officer made a mistake and built a wall on the defendant's land instead of on the plaintiff's, what remedy would there be? What could the defendant do with the wall?— He could not cart it away and put it upon anyone else's land, and the materials would be an obstruction on his own land. He would have no action against the plaintiff, as the wall was not built by the plaintiff, but by the Court aamin under the orders of the Court. The defendant might complain that he did not want the wall and did not see why a wall should be built on his land for the amusement of the plaintiff. He might very reasonably say that, if the plaintiff wanted a wall built between them, the plaintiff was at liberty to build a wall on his own land, so long as he did not interfere with any rights or other easement which the defendant had obtained on partition. It is much safer to leave the person who can be answerable in a suit for trespass, or interference with an easement, to build a wall

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at his own risk than for the Court to instruct its amin to commit what may be an act of trespass.

We allow the objection to this extent that we hold that the Court had no authority to order the amin to build the wall and that its order in that respect was *ultra vires*: to this extent we allow this appeal with costs.

Appeal decreed in part.

Before Mr. Justice Banerji.

1896
December, 22.

CHUNNA LAL (PLAINTIFF) v. ANANDI LAL AND OTHERS (DEFENDANTS).*
Mortgage—Sale of portion of mortgaged property under a decree not on the mortgage—Mortgage not thereby extinguished, but mortgagee bound to take into account the full value of the property so brought to sale.

When a mortgagee holding a mortgage over two distinct properties brings one of them to sale in execution of a decree against the mortgagor not being a decree on his mortgage and purchases such property himself, the whole mortgage is not necessarily thereby extinguished; but, if the mortgagee subsequently seeks to bring the mortgaged property to sale in execution of a decree obtained on his mortgage, he will have to bring into account the full value of the portion of the mortgaged property purchased by him under his former decree. *Sumera Kuar v. Bhagwant Singh* (1) followed, *Ahmad Wali v. Bakar Husain*, (2) and *Ballam Das v. Amar Raj* (3) referred to.

The facts of this case sufficiently appear from the judgment of Banerji, J.

Mr. *Amir-ud-din*, for the appellant.

Pandit *Sundar Lal*, for the respondents.

BANERJI, J.—This was a suit for sale under a mortgage which comprised two items of property, namely, a piece of homestead land and a shop. The mortgagee held a simple decree for money against the mortgagor, in execution of which he caused the land and a two-thirds share in the shop to be sold by auction subject to his mortgage. He himself purchased the land, and the share in the shop was purchased by the defendant No. 5, who subsequently sold it to the defendants Nos. 3 and 4. The remaining one-third

* Second Appeal, No. 977 of 1895, from a decree of Pandit Raj Nath, Subordinate Judge of Moradabad, dated the 10th May 1895, confirming a decree of Babu Bhawani Chandra Chakravati, Munsif of Sambhal, dated the 4th March 1895.

(1) *Weekly Notes*, 1895, p. 1.

(2) *Weekly Notes*, 1883, p. 61.

(3) *L. L. R.*, 12 *All.*, 537.