

formulate a custom by implication from various unconnected clauses of the *wajib-ul-arz*. We cannot find any provision in the *wajib-ul-arz* for the existence of the custom of pre-emption in the *muafi* lands. The case of *Kalyan Mat v. Madan Mohan* (1) was referred to in argument. Strictly speaking that case is the converse of the case before us. It was a case in which a co-sharer in the khalisa mahal sought to pre-empt land in the *muafi*, and it was held that the *wajib-ul-arz* of the khalisa mahal did not effect the *muafi*. We allow this appeal. We set aside the decision of the District Judge with costs; we dismiss the plaintiff's appeal to the District Judge, and we restore the decree of the Court of first instance.

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 NARAIN  
DAS  
v.  
RAM  
SARAN  
DAS.

*Appeal decreed.*

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*Before Mr. Justice Blair and Mr. Justice Aikman.*

ABDUL RASHID (PLAINTIFF) v (GAPPO LAL (DEFENDANT))\*

*Civil Procedure Code, section 276—Alienation of attached property—Alienation valid so long as it does not interfere with any claim enforceable under a subsisting attachment.*

The alienation which section 276 of the Code of Civil Procedure is intended to prevent is an alienation which, if permitted, would defeat claims legally enforceable under the decree in execution of which the property alienated has been attached. Where a private alienation of attached property is made under such circumstances that it in no way interferes with the rights secured by his decree to the attaching decree-holder, section 276 is no bar to such alienation. *Narain Das v. Sheoambar Ahir* (2) and *Anund Loll Dass v. Jullodhur Shaw* (3) referred to.

THE plaintiff in the suit out of which this appeal arises held a mortgage, dated the 21st of March 1889, over a 7 anna share out of the mortgagor's aggregate interest of 10 annas 8 pies in a certain village. The defendant held a mortgage of an earlier date on a 4 anna share out of the same 10 annas 8

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\* Second Appeal No. 219 of 1896 from a decree of V. A. Smith, Esq., District Judge of Gorakhpur, dated the 19th December 1895, reversing a decree of Maulvi Ahmad Ali Khan, Subordinate Judge of Gorakhpur, dated the 28th June 1895.

(1) I. L. R., 17 All., 447.

(2) Weekly Notes, 1897, p. 37.

(3) 14 Moo. I. A., 543.

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pies. The defendant obtained a decree on his mortgage on the 12th of May 1885, for sale of the 4 anna share mortgaged to him. On the 22nd of April he caused to be attached under this decree, not merely the 4 anna share mortgaged to him but the whole 10 anna 8 pic share of the mortgagor. After this attachment, but before any effective means were taken to execute the decree, the plaintiff's mortgage was executed. On the 6th of May 1892 the plaintiff applied to the court executing the defendant's decree to notify the incumbrance created by the plaintiff's mortgage; such notification was ordered, and with such notification the whole of the mortgagor's interest, 10 annas and 8 pics, was sold in execution of the defendant's decree and bought by the defendant himself. The plaintiff then sued to enforce his mortgage of the 21st of March 1889 in respect of the portion of the mortgagor's interest not covered by the defendant's mortgage. The defendant objected that the effect of section 276 of the Code of Civil Procedure was to make the plaintiff's mortgage null and void.

The Court of first instance (Subordinate Judge of Gorakhpur) found that, inasmuch as the money borrowed on the plaintiff's mortgage had been used to pay off a third mortgage prior to that held by the defendant, the plaintiff was entitled to use that mortgage as a shield, and it accordingly decreed the plaintiff's claim in part.

The defendant appealed. The lower appellate Court (District Judge of Gorakhpur) held that it had not been proved that the money borrowed on the mortgage to the plaintiff had in fact been applied to the satisfaction of a third prior mortgage as alleged, and, reversing the decree of the Court of first instance, dismissed the plaintiff's suit. The plaintiff thereupon appealed to the High Court.

Maulvi *Ghulam Mujtaba*, for the appellant.

Munshi *Ram Prasad*, for the respondent.

BLAIR, J.—This second appeal arises out of a suit for sale based on a mortgage, dated the 21st of March 1889. The

mortgagor was possessed of a 10 anna 8 pie share of the mortgaged property. The plaintiff's mortgage was for a 7 anna share out of what was the mortgagor's aggregate interest. An earlier mortgage had been effected upon a 4 anna share of this whole property, and the prior mortgagee, one Gappo Lal, defendant in this suit and respondent here, got his decree for sale on his mortgage on the 12th of May 1885. The decree was in terms limited to the 4 anna share. On the 22nd of April 1886, an attachment under this decree was effected, not of the 4 anna share which formed the subject of the decree, but of the 10 anna 8 pie share, which is the entire holding of the mortgagor. After this attachment and before any effective means were taken to execute the decree, the plaintiff's mortgage was executed. That was the present mortgage on the 7 anna share, so that the interest affected by the two mortgages was a greater interest than the mortgagor possessed. The present plaintiff has disposed of all difficulty on that score, by asking for sale only of what remains of the mortgagor's interest over and above the 4 anna share mortgaged to Gappo Lal. On the 6th of May 1892, the plaintiff, appellant here, applied to the Court executing Gappo Lal's decree to notify the incumbrance created by the mortgage of the 21st of March 1889; and such notification was ordered, and with such notification the whole of the mortgagor's interest, 10 annas and 8 pies, was sold in execution of Gappo Lal's decree, to Gappo Lal himself. The plaintiff now claims to enforce the mortgage of the 21st of March 1889. He is met by the contention that section 276 of the Code of Civil Procedure makes his mortgage null and void. That section was originally framed so as to make a mortgage effected upon attached property absolutely void. But in the Act now in force are appended the material words which seem to us unquestionably words of limitation. They are:—"shall be void as against all claims enforceable under the attachment." We are entirely unable to see that any claim could be enforceable under the attachment which was not a legal claim. This matter

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has been before one member of this Bench, and it has been adjudicated upon in the case of *Narain Das v. Shecambar Ahir* (1). That the interpretation put upon those words is the correct interpretation, this Bench has no doubt whatever. The object of the section thus guarded and limited, was to secure that no private alienation subsequent to attachment should take effect to obstruct the legal claim of the decree-holder in whose interest and at whose instance the attachment had been made. The plaintiff at the hearing in the Court of first instance put forward a further contention which upon a finding of fact has failed. He contended that his mortgage of 1889 was effected to pay off incumbrances prior in date to that of the defendant in this suit. He failed to establish that such prior incumbrances were in fact paid off by his mortgage. He has therefore to depend solely upon the construction to be put on section 276. In our opinion the mortgage of 1889 in no way stands in the way of the execution of Gappo Lal's decree to the extent of his legal claim. Indeed, the position of Gappo Lal seems to us one which upon no ground of equity could be maintained. He bought subject to a notification of lien, and we cannot doubt that the existence of that lien limited the price he paid for the property. He now proposes to retain what he purchased as an incumbered property, and at the price of an incumbered property, as property wholly and entirely unincumbered.

I would allow this appeal, setting aside the decree of the lower appellate Court with costs, and restore the decree of the Court of first instance, and would give the appellant his costs of this appeal.

AIKMAN, J.—I am of the same opinion, and concur in the order proposed. Even when the law stood as it did when Act No. VIII of 1859 was in force, in which Act the section which corresponds to section 276 of the present Code of Civil Procedure, did not contain the concluding words now to be

(1) Weekly Notes, 1897, p. 37.

found in the section "as against all claims enforceable under the attachment," it was held—*vide Anund Loll Doss v. Jullodhar Shaw* (1)—that the object was to make the sale null and void, so far as it might be necessary to secure the execution of the decree. In my opinion the words "enforceable under the attachment," in section 276, must be read as meaning legally enforceable under the attachment; and to see what was legally enforceable under the attachment we must have recourse to the decree. So long as the decree-holder gets what was decreed to him he has got no ground for complaint. No private alienation made during the continuance of the attachment can be allowed to defeat the decree-holder's right, but if those rights are not affected by the alienation there is in my view no bar to any private alienation.

The respondent Gappo Lal had by his decree an indefeasible right to have a 4 anna share of his mortgagor's property sold in execution of his decree, but he had no right to restrain his judgment-debtor from alienating any property, other than that referred to in the decree, so long as the alienation did not prejudice any rights which had been decreed to him.

For these reasons I am of opinion that the appeal must be allowed.

BY THE COURT.—The order of the Court is, that the appeal is allowed, the decree of the lower Court set aside with costs, and the order of the Court of first instance restored. The appellant will have his costs of this appeal.

The time for payment of the mortgage money is extended to the 11th of November 1898.

*Appeal decreed.*

(1) 14 Moo. I. A., 543, at p. 549.

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