

Coomaree Dossee v. Soulaminey Dossee (1). No special circumstances have been alleged or shown to exist in this case, and therefore the plaintiff was not entitled to the mandatory injunction which he prayed for. A case like this is different from a suit in which a mandatory injunction is sought for the removal of buildings erected by one of several co-sharers on joint land. The plaintiff's suit ought to have been dismissed in its entirety. The result is that I allow the appeal with costs, and, setting aside the decree of the lower Appellate Court with costs, restore that of the Court of first instance.

Appeal decreed.

Before Mr. Justice Burditt.

THAKUR PRASAD (PLAINTIFF) v. GAYA SAHU AND OTHERS
(DEFENDANTS).*

Act No. IV of 1882 (Transfer of Property Act) section 52—Transfer pendente lite—Lease of property in respect of which a decree for sale had been made under section 88.

Held that a lease of property made by a judgment-debtor against whom a decree for sale had been made under section 88 of the Transfer of Property Act for sale of that property came within the purview of section 52 of the Transfer of Property Act.

THE facts of this case are as follows:—

The plaintiff Thakur Prasad was the mortgagee of a 4 pie share in a certain village from one Chandi Prasad, under a mortgage executed in April 1885. In January 1892 Thakur Prasad obtained a decree for sale on that mortgage. On the 9th of March 1893 Chandi Prasad, the mortgagor, gave a lease of a portion of the mortgaged property to one Gaya Sahu. On the 20th of September 1893 Thakur Prasad executed his decree for sale, and, having caused the mortgaged property to be sold, purchased it himself. He was, however, unable to get possession of

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* Second Appeal No. 1008 of 1896, from a decree of Babu Nil Madhab Roy, Officiating District Judge of Gorakhpur, dated the 12th September 1896, confirming a decree of Maulvi Ahmad Ali Khan, Munsif of Gorakhpur, dated the 31st March 1896.

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that portion of the property which had been subsequently leased by Chandi Prasad. He accordingly brought a suit for cancellation of the lease and to obtain possession of the property, the subject of the lease.

The Court of first instance (Munsif of Gorakhpur) dismissed the suit. The plaintiff appealed, and the lower appellate Court (District Judge of Gorakhpur) dismissed the appeal. The plaintiff thereupon appealed to the High Court.

Pundit *Sundar Lal*, for the appellant.

Munshi *Ram Prasad*, for the respondents.

BURKITT, J.—From a perusal of the order of the Subordinate Judge it would appear either that the learned Subordinate Judge did not comprehend all the bearings of the case then in appeal before him, or that the appeal was not properly argued before him. I note, however, that the memorandum of appeal which was before the learned Subordinate Judge contained and set forth all the pleas which have now been raised before me to-day. The admitted facts are that in April 1885, one Chandi Prasad mortgaged a four pie share in a certain village to the plaintiff; that on the 19th of January 1892, the plaintiff got a decree for sale of the mortgaged property in a suit on that mortgage; and that on the 20th September 1893, the plaintiff mortgagee purchased the same property and was put in possession by the Court. He was, however, unable to obtain possession of the whole. It appears that on the 9th March 1893, that is to say, more than a year after the plaintiff had obtained a decree for sale of the mortgaged property, Chandi Prasad leased a certain portion of that property to the defendant-respondent. By the present suit the plaintiff appellant seeks to have that lease set aside and to obtain possession of the property the subject of the lease. He also asks for mesne profits. These were the reliefs asked for at the hearing of this appeal. As to the lease, it is contended that it is bad with reference to the provisions of section 52 of the Transfer of Property Act. In my opinion that contention is sound. The lease was executed undoubtedly during the active prosecution of a contentious suit, a suit which

had been commenced by the plaintiff in September 1891, and in which the plaintiff in January 1892 had obtained a decree for sale of the mortgaged property, which included the land leased to the respondents. The transfer under this lease which is for a period of no less than eleven years undoubtedly must affect the rights of the auction purchaser. The auction purchaser certainly in my opinion comes within the wording of section 52 of the Transfer of Property Act as being a party to an order which might be made in the suit. In a somewhat similar case, though no doubt, in a case arising under the Code of Civil Procedure and not under Act IV of 1882,—*Debi Prasad v. Baldeo* (1)—it was held that even an ordinary agricultural lease made during the pendency of an attachment came within the mischief aimed at by section 276 of the Code of Civil Procedure. *A fortiori* it appears to me that a lease of property made by a judgment-debtor against whom a decree had been made under section 88 of the Transfer of Property Act for sale of that property comes within the provisions of section 52 of the latter Act. The lease executed by the judgment-debtor, Chandi Prasad, whatever be its object, cannot but have the effect of, to some extent, defeating the auction purchaser of that property. I am therefore of opinion that the appellant here is entitled to my judgment. I set aside with all costs in those Courts the decrees of both the lower Courts, and, allowing this appeal, I give a decree in the plaintiff's favour for possession of the *sir* lands mentioned in the schedule of his plaint, with the exception of Nos. 716 and 718, of which he is in possession. I further give to the plaintiff a decree for mesne profits to be ascertained in execution up to the date the plaintiff is put in possession under this decree. The plaintiff appellant will recover the costs of this appeal.

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Appeal decreed.

(1) I. L. R., 18 All., 123.