

1900

IN THE  
MATTER OF  
MADHO  
PERSHAD.

and it certainly does not, after the death of the licensee, attach itself in any way to his property or devolve upon his heirs. I do not think Madho Pershad or any man of ripe years who had any connection with the traffic, could have sold the liquor without, at all events, grave doubt as to whether such sale was in violation of the law. I do not think that a fine of Rs. 50 inflicted upon a substantial man can be anything but a very small sentence for an offence which is punishable by four months' imprisonment or fine of one thousand rupees, or with both. I set aside the order of the Magistrate for the sale of the confiscated liquor, and instruct him to reconsider that question with a view to his arriving at a conclusion whether the liquor confiscated and ordered to be sold is the property of Madho Pershad. In that case I see no reason why he should not order attachment and sale of such liquor. If, it is not by devolution or otherwise the property of Madho Pershad, it ought not to be confiscated and sold. Let the papers be returned.

### APPELLATE CIVIL.

1900

July 13.

*Before Mr. Justice Know, Acting Chief Justice, and Mr. Justice Blair.*

RAM CHANDER (DEFENDANT) *v.* KONDO AND OTHERS (PLAINTIFFS).\*

*Civil Procedure Code, sections 13, 244—Transfer of Property Act (No. IV of 1882) sections 88, 89—Decree not in accordance with judgment—Interpretation of decree.*

Where a mortgagee in suing upon his mortgage included in his plaint certain property which was not included in the mortgage deed and this fact was apparently overlooked by the defendant who defended the suit, and where, while the judgment declared "that a decree be given against the hypothecated estate," in the decree the property affected was described as "the property specified in "the plaint."

*Held*, that the decree must be held to mean the hypothecated property mentioned in the plaint, and that neither section 13 nor section 244 of the Code of Civil Procedure concluded the defendant from subsequently suing to recover the property wrongly included in the plaint.

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

Mun-hi Ram Prasad and Pandit Sundar Lal, for the appellants.

\* First Appeal from Order No. 112 of 1899 from an order of Babu Prag Dass, Subordinate Judge of Saharanpur, dated the 10th July 1899.

Pandit *Moti Lal Nehru* for the respondents.

KNOX, ACTING C. J., and BLAIR, J.—The suit out of which this appeal arises has reference to a certain share of property which will in this judgment be referred to hereafter as share *A*. This share *A* is a share in mauza Gummawala, which belonged to Sri Ram, one of three brothers.

Sri Ram's brother, Nagar Mal, held a second share, which will be hereafter styled share *B*. A third brother, Sohan Lal, held a share, which will be described as  $(\frac{c}{1} + \frac{c}{2})$ .

Sohan Lal was succeeded by his son, Shankar Lal. Nagar Mal and Shankar Lal borrowed monies from one Bansilal, and as security mortgaged in his favour share *B* and  $(\frac{c}{1} + \frac{c}{2})$ .

Shankar Lal died and his property passed by succession thus:— $\frac{c}{1}$  to Sri Ram,  $\frac{c}{2}$  to Nagar Mal. In execution of a decree against Nagar Mal,  $\frac{c}{2}$  was sold and purchased by Kondo Mal, one of the respondents to this appeal. Kondo Mal is heir to Sri Ram, and thus held both the shares *A* and  $\frac{c}{2} + \frac{c}{1}$ .

Bansilal, however, brought a suit upon his bond and impleaded only Kondo Mal as the representative of his original mortgagors. Kondo Mal defended the suit, but apparently overlooked the fact that share *A*, or a portion of it, was included among the property sued for. Share *A* is not, and never was, included in the bond upon which Bansilal sued, and was not therefore property over which the bond held by Bansilal and upon which he sued created any charge or lien of any kind.

The judgment which was given in favour of Bansilal ran thus in its concluding clause: "that a decree be given to the plaintiff "for Rs. 10,349-4-6 against the hypothecated estate, except that "portion of it which is in the hands of Murli Lal and Lachmi "Chand—*i.e.*, share *B*." From the concluding words of the judgment and from other passages in it, it is evident that the intention of the Court was to grant a decree over the balance of the property hypothecated, and only that, *viz.*,  $\frac{c}{1} + \frac{c}{2}$ —share *B* being expressly excepted by name.

In the decree the property affected is described as the property specified in the plaint and as modified, to wit, by the

1900

---

RAM  
CHANDER  
v.  
KONDO.

1900

RAM  
CHANDER  
v.  
KONDO.

exception of share *B*. Bansi Lal died and was succeeded by Ram Chander, the present appellant. He applied for an order absolute, and into this order absolute came the order for sale of share *A*, or a portion of it, as well as of share  $\frac{c}{1} + \frac{c}{2}$ . Ram Chander purchased.

Kondo Mal then instituted the suit out of which this appeal has arisen to recover the portion of share *A* which has been sold, on the ground that as it was never hypothecated, it could not have been included in the decree and could not have been sold.

The Court of first instance dismissed the suit on the ground that it was barred by section 13 of the Code of Civil Procedure. Kondo Mal should, in the judgment of the learned Munsif, have raised as part of his defence to the suit that no part of share *A* was ever hypothecated.

The learned Subordinate Judge overruling this decision, has remanded the case for a decision upon the merits, and it is from this order that the present appeal has been brought.

We agree with the learned Subordinate Judge that the Court which heard the first suit never intended to give a decree over any property other than that hypothecated, and that where the decree says "the property specified in the plaint" is meant, and must be held to mean, the hypothecated property mentioned in the plaint. The order absolute under section 89 could not run against any property over and above that against which the decree under section 88 ran. The present suit is concluded neither by section 13 or section 244 of the Code of Civil Procedure. To hold otherwise would not only be an act of injustice, but it would be permitting the plaintiff to take advantage of what he must know to be a piece of sharp practice, more than that, of fraud.

We dismiss this appeal with costs.

*Appeal dismissed.*