

1901
December 5.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt.

CHITTA SINGH (PLAINTIFF) v. DEBI DIN (DEFENDANT).*

Act No. 1 of 1877 (*Specific Relief Act*), Section 42—*Declaratory decree—Burden of proof—Usufructuary mortgagee in possession seeking a declaration that the property is not saleable in execution of a decree on a prior mortgage.*

The plaintiff, a usufructuary mortgagee in possession, came into Court seeking a declaration that the mortgaged property was not saleable in execution of a decree for sale obtained by another mortgagee in a suit on a mortgage prior to his own, on the ground that to this suit the prior mortgagee had not made him a party. *Held* that in such a case the plaintiff had to prove, not only that he had obtained possession as a usufructuary mortgagee and was still in possession, but that his mortgage still subsisted and had not been discharged.

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

Munshi Gulzari Lal, for the appellant.

Munshi Gobind Prasad, for the respondent.

STANLEY, C. J., and BURKITT, J.—This is an appeal from the decree of the Subordinate Judge of Farrukhabad, dismissing the plaintiff's suit. The facts are very simple. The defendant, who was first mortgagee of some property called mauza Piprauli, brought a suit on foot of his mortgage against the mortgagor, and on the 21st of April, 1897, obtained a decree for the sale of the mortgaged property in satisfaction of the mortgage debt.

The plaintiff in the present suit, who, with his brother, is in possession of the mortgaged property, claims that he and his brother are in such possession under, and by virtue of, a usufructuary mortgage, dated the 15th of March, 1889, and made in their favour by the mortgagor subsequent to the date of the defendant's mortgage. The plaintiff and his brother were not made parties to the defendant's suit, and they contend that the omission to make them parties was contrary to the provisions of section 85 of the Transfer of Property Act, and that the defendant is not therefore entitled to have a sale in execution of his decree. The plaintiff has instituted this suit accordingly, and in the prayer to his claim, seeks a declaration that mauza Piprauli is not saleable in execution of the defendant's decree, but no other

* First Appeal No. 251 of 1898, from a decree of Pandit Rai Indar Narain, Subordinate Judge of Fatehgarh, dated the 26th July 1898.

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relief. In his written statement Debi Din alleged, among other things, that the amount of the plaintiff's mortgage has been satisfied by the usufruct, and that the plaintiff has no longer any concern in the mortgaged property.

No evidence was given by the plaintiff in the Court below to prove that his mortgage was subsisting. He contended that the burden of showing that his debt had been paid off lay on the defendant, while the latter maintained that the *onus* of proving that his mortgage was subsisting lay on the plaintiff. The learned Subordinate Judge decided in favour of the defendant's contention and dismissed the suit.

The plaintiff's mortgage was a *sar-i-peshgi* lease, which is in the nature of a usufructuary mortgage. The property was, by the deed of mortgage, granted to him for a term of five years, and the deed provided that the mortgagee should, out of the profits amounting to Rs. 451, pay the Government revenue, and after appropriating the interest on the advance made by him to the mortgagor, should pay the balance to the mortgagor. It was stipulated in the deed that if the mortgagor did not pay off the mortgage debt within the term of five years, the mortgage should continue as a security for the amount remaining due. The term of five years expired on the 15th of March, 1894; but under the last mentioned stipulation the mortgage would continue to be a subsisting security if the mortgage debt has not been satisfied. In our opinion the decision of the learned Subordinate Judge is correct. When a plaintiff seeks from the Court a declaratory decree, it lies upon him to make out his title affirmatively. This is not a case in which a party in possession is defending his title, but one in which a party in possession sets the Court in motion, and seeks a declaration establishing his title against a third party. In such case a plaintiff is in the same position as any other plaintiff and must make out his case. Here the plaintiff had, or ought to have had, the means of satisfying the Court that his mortgage was still subsisting, and if he has failed in doing so, he cannot expect the Court to exercise the discretionary jurisdiction conferred upon it by section 42 of the Specific Relief Act, and to make a declaration, which would be based upon an assumption merely and not upon proved facts, that the property is not

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saleable in execution of a decree which, so far as the evidence before the Court goes, may be a perfectly valid and binding decree. The plaintiff was bound to satisfy the Court that he had an interest in the property, and that by not making him a party to the suit for sale the defendant had failed to comply with section 85 of the Transfer of Property Act.

We think that the learned Subordinate Judge was quite correct in the view which he took, and we must affirm his judgment and dismiss the appeal with costs.

Appeal dismissed.

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Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt.

WAZIR-UN-NISSA (PLAINTIFF) v. ILAHI BAKHSH AND

OTHERS (DEPENDANTS).*

Letters Patent, section 8—Appeal—Presentation of appeal by a person other than an advocate, vakil or attorney of the Court, or a suitor—Presentation by agent of a pardah-nashin woman—Civil Procedure Code, sections 640, 404, 592.

Where an appeal *in forma pauperis* by a pardah-nashin woman, who had sued as a pauper in the Court of first instance, was presented, not by an advocate, vakil or attorney of the Court, nor by the appellant in person, but by her duly authorized agent, it was held that this was a good presentation, section 8 of the Letters Patent notwithstanding. *Shiam Karan v. Raghu-nandan Prasad* (1) distinguished.

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

Pandit *Sundar Lal*, for the appellant.

Pandit *Moti Lal Nehru* (for whom Pandit *Mohan Lal Nehru*), for the respondent.

STANLEY, C. J., and BURKITT, J.—This is an appeal from a decree of the Subordinate Judge of Dehra Dun in a pauper suit, by which he declared the plaintiff entitled to a one-seventh share of her father's estate. In her claim the plaintiff asked for a decree for possession of one-seventh of her father's property, but the learned Judge only gave her a declaratory decree. A preliminary objection has been raised to the hearing of this appeal, on the ground that no proper memorandum of appeal

* First Appeal No 291 of 1898 from a decree of L. Stuart, Esq., Subordinate Judge of Dehra Dun, dated the 20th June 1898.

(1) (1900) I. L. R., 22 All., 331.