

APPELLATE CIVIL.

Before Mr. Justice Blair and Mr. Justice Banerji.

SAT NARAIN AND OTHERS (JUDGMENT-DEBTORS) v. RADHA KISHAN AND OTHERS (DECREE-HOLDERS).*

Act No. IV of 1882 (Transfer of Property Act), sections 88, 89—Mortgage—Order absolute for sale of part of property mortgaged—Appeal from decree—Application for further order for sale of entire property for an amount including interest accrued pending the appeal.

Certain mortgagees in whose favour a decree for sale of the mortgaged property had been passed, obtained an order absolute for sale of a portion of the mortgaged property. The judgment-debtors appealed from the decree for sale, and pending the appeal the amount realizable by sale of the mortgaged property was increased by the accrual of interest. The judgment-debtors' appeal was dismissed. *Held*, that under these circumstances there was no objection to the decree-holders, after the dismissal of the judgment-debtors' appeal, applying for and obtaining a further order absolute for sale of the whole of the mortgaged property for an amount including the interest accrued due subsequently to the passing of the first order.

THIS appeal arose out of an application for a decree absolute for sale under section 89 of the Transfer of Property Act. The decree-holders obtained a decree for sale under section 88 of the Transfer of Property Act on the 22nd of July, 1899. On the 14th of November, 1899, the judgment-debtors appealed against that decree to the High Court. On the 9th of August, 1900, the decree-holders applied for an order absolute for sale, but asking for sale of a part only of the mortgaged property. The decree-holders obtained an order for sale, but apparently, owing to the record being in the High Court, no sale actually took place. On the 9th of April, 1902, the High Court dismissed the appeal of the judgment-debtors and affirmed the decree of the 22nd of July, 1899. Thereafter the decree-holders made a fresh application for an order absolute for sale to the Court executing the decree, and therein asked for the sale of the entire mortgaged property for an amount which included interest accrued during the pendency of the appeal in the High Court. The executing Court granted this application, and thereupon the judgment-debtors appealed to the High Court.

* First Appeal (execution) No. 226 of 1902, from an order of Rai Anant Ram, Subordinate Judge of Ghazipur, dated the 6th September 1902.

Pandit *Moti Lal Nehru*, for the appellants.

Mr. *A. E. Ryves*, for the respondents.

BLAIR and BANERJI, JJ.—The appellants judgment-debtors in this case are persons against whom a decree has been passed upon a mortgage under section 83 of the Transfer of Property Act, and that decree has been followed in ordinary course by an order absolute for the sale of such part of the mortgaged property as may be necessary to satisfy the liability as it stood at the time when such order was passed. The decree for sale under section 83 became the subject of an appeal to the High Court, and after the usual lapse of time that appeal was disposed of by a decree dismissing the appeal and affirming the decree of the lower Court. Thereupon the decree-holders, realizing that from the date of the order absolute to the date of the decree of this Court, which is the only decree to be acted upon, there had been an increase in the amount of interest due, applied to the executing Court for a supplementary order absolute to enable them to sell for that amount as well as for the original debt, and for that purpose they applied for sale, not only of that part of the mortgaged property for the sale of which they had previously obtained an order, but of the whole property. It is that order which is complained of here by the judgment-debtors. In our opinion the complaint is without substance. If the part ordered to be sold under the original order proved to be insufficient to meet the plaintiffs' claim, a further order would have to be applied for for the sale of the other part of the mortgaged property. The order now in question practically does nothing more than this. It is true that in terms it is an order for the sale of the whole property, and it may well be that the sale of the whole property may turn out to be unnecessary in order to satisfy the plaintiffs' claim. But that order does not compel the executing Court to sell the whole of the property; and whether such sale be necessary to satisfy the demand of the decree-holders or not, an executing Court has in this matter a discretion which, as far as we know, it always exercises, that is, to sell only so much of the mortgaged property as is necessary to satisfy the decree, and no more.

1908

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Under these circumstances we think Mr. *Moti Lal's* clients have been in no way prejudiced by the order complained of. We dismiss the appeal with costs.

Appeal dismissed.

1903
January 27.

Before Sir John Stanley, Knight, Chief Justice and Mr. Justice Blair.
DALEL KUNWAR AND ANOTHER (OBJECTORS) v. AMBIKA PARTAP SINGH
(DECREE-HOLDER).*

Hindu Law—Hindu widow—Widow in possession of deceased husband's property ousted by adopted son—Mesne profits—Maintenance—Set-off—Sums expended on funeral ceremonies of late owner.

A Hindu widow who had been for some years in possession of the immovable property of her deceased husband was ousted by a claimant who proved his title as adopted son of the said deceased husband, and a decree for mesne profits was given against the widow. *Held* on appeal in execution of the decree for mesne profits—(1) that in absence of evidence of negligence the decree-holder was entitled only to the rents actually collected; (2) that the widow was entitled to set off her claim for maintenance, which was to be fixed with due regard to the extent of the property and the social position of the widow; and (3) that the widow was entitled to set off such reasonable amounts as might have been expended by her on the funeral ceremonies of her late husband, which the adopted son would otherwise have been bound to perform.

What was a reasonable maintenance and what sum should be allowed in respect of the funeral ceremonies under the circumstances considered. *See—mutty Nittokissorce Dossee v. Jogendra Nauth Mullick* (1) referred to.

THE facts out of which this appeal arose are the following:—Chaudhri Gandharp Singh died possessed of considerable property, the annual nett income of his immovable property amounting to about Rs. 8,000 a year. Upon his death his widow Thakurain Dalel Kunwar took possession of his estate, believing that she was entitled to do so as his widow, he having died childless. She had remained in possession for some years when one Ambika Partap Singh instituted a suit to eject her from the property, alleging that he was the adopted son of Chaudhri Gandharp Singh. The Court of first instance came to the conclusion that the plaintiff had proved the fact of his adoption and passed a decree in his favour for possession and mesne profits. On appeal this decree was upheld, though with some hesitation, by

* First Appeal No. 229 of 1901, from a decree of Pandit Rajnath Sahab, Subordinate Judge of Mainpuri, dated the 4th of June, 1901.

(1) (1878) L. R., 5 I. A., 55.