

Before Mr. Justice Blair and Mr. Justice Banerji.

AHMAD KHAN (DEPONDANT) v. ABDUL RAHMAN KHAN AND OTHERS
(PLAINTIFFS)*.

1904

May 6.

*Civil Procedure Code, section 16(d)—Jurisdiction—Immovable property—
Decree for sale on a mortgage.*

Held that a suit for a declaration that the plaintiffs were the persons in reality beneficially interested in a decree for sale on a mortgage although the decree did not run in their names, was not a suit "for the determination of any other right to or interest in immovable property" within the meaning of section 16(d) of the Code of Civil Procedure, *Abdul Majid v. Muhammad Faiz-ullah* (1) and *Gous Mahomed v. Khawas Ali Khan* (2) referred to.

IN this case one Rahim Khan, on the 30th of January 1882, made a mortgage of certain property in favour of Behari Lal. Behari Lal brought a suit upon the mortgage and obtained a decree on the 24th of March 1894. Subsequently, in 1895, Behari Lal assigned the decree so obtained to one Ahmad Khan. The present suit was brought by the nephews of Ahmad Khan, and in it they alleged that the money lent to Rahim Khan belonged jointly to their father and to Ahmad Khan, that the mortgage was taken in the name of Behari Lal as a *benami* transaction, and that the decree belonged jointly to themselves and Ahmad Khan. They asked for a declaration that the decree was joint property; and they also claimed damages. The Court of first instance (Subordinate Judge of Dehra Dun) gave the plaintiffs a decree for damages. On appeal the lower Appellate Court (District Judge of Saharanpur) varied the decree of the first Court and made a declaratory decree in the plaintiffs' favour to the effect that the plaintiffs "together with Ahmad Khan are the joint owners of the amount of the decree." Against this decree the defendant appealed to the High Court.

Maulvi Ghulam Mujtaba, for the appellant.

Dr. Satish Chandra Banerji, for the respondents.

BLAIR and BANERJI, JJ.—The suit which has given rise to this appeal was brought by the plaintiffs respondents under the following circumstances:—One Rahim Khan made a mortgage of his property on the 30th of January 1882. The

* Second Appeal No. 961 of 1902, from a decree of R. P. Dewhurst, Esq., District Judge of Saharanpur, dated the 9th of July 1902, modifying a decree of W. F. Kirton, Esq., Subordinate Judge of Dehra Dun, dated the 16th of April 1900.

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mortgagee named in the mortgage-deed was Behari Lal, the first defendant. He brought a suit upon the mortgage and obtained a decree on the 24th of March 1894. Subsequently, in 1895, he assigned the decree to the second defendant Ahmad Khan, who is the appellant before us. The plaintiffs allege that the amount lent to Rahim Khan belonged jointly to their father and Ahmad Khan, that the mortgage was taken in the name of Behari Lal as a *benami* transaction, and that the decree obtained on the mortgage belongs jointly to them and Ahmad Khan. They accordingly brought this suit for a declaration that the decree is the joint property of the plaintiffs and Ahmad Khan; they also claimed damages.

The Court of first instance granted them a decree for damages. On appeal the lower Appellate Court varied the decree of the first Court and made a declaratory decree in the plaintiffs' favour to the effect that the plaintiffs "together with Ahmad Khan are the joint owners of the amount of the decree."

Mr. *Ghulam Mujtaba*, who appears on behalf of the appellant, has raised two contentions before us—first, that the suit is one for the determination of a right to or interest in immovable property, within the meaning of clause (d) of section 16 of the Code of Civil Procedure, and that as the property to which the decree in question relates is not situate within the local limits of the jurisdiction of the Court at Dehra Dun, in which the suit was brought, that Court was not competent to entertain the suit, and, secondly, that, assuming the suit not to be one relating to immovable property, the Court had no jurisdiction, having regard to the provisions of clause (c) of section 17 of the Code. As regards the first point, the contention would be valid if the suit be regarded as one for the determination of a right to or interest in immovable property. The plaintiffs ask for a determination of their right to and interest in the decree, which is the subject-matter of the suit. Unless, therefore, the decree can be regarded as immovable property, clause (d) of section 16 of the Code of Civil Procedure can have no application. We are unable to hold that the decree in question, which is a decree for sale upon a mortgage, can itself be regarded as immovable property. Upon this point we have the authority

of the ruling of this Court in *Abdul Majid v. Muhammad Faiz-ullah* (1) and that of the Calcutta High Court in *Gous Mahomed v. Khawas Ali Khan* (2). It is true that a suit for sale upon a mortgage is a suit for the determination of a right to or interest in immovable property, but after a decree has been passed in such a suit, and a right to or interest in immovable property has thus been determined, it would be a straining of language to hold that the decree itself is immovable property. In our judgment, clause (d) of section 16 has no application to the case. Further, the decree in question directed payment of the amount decreed and also the sale of immovable property. In the present case the form in which the Court below has granted relief to the plaintiffs declares their right only to the amount of the decree, *i.e.*, to the money which is recoverable under it. Consequently, so far as the suit is one for a declaration of the plaintiff's right to that part of the decree which awards money, it can in no sense be regarded as a suit relating to immovable property. As regards the second contention, it appears that, as one of the defendants did not reside within the jurisdiction of the Court, the leave of the Court was obtained under clause (c) of section 17, when the suit was brought. It is contended that the leave granted to the plaintiff was of no avail, inasmuch as notice of the application for leave was not served on the defendant. We find nothing in the Code to justify this contention. The leave referred to in the section was to be given when the suit was instituted, and the Court had to be satisfied that there were sufficient reasons for granting it. In this case the Court having been satisfied on the point and granted leave, the suit could be maintained in the Court in which it was brought. Both the pleas urged in this appeal therefore fail. The appeal is accordingly dismissed with costs.

The objections under section 561 of the Code of Civil Procedure are not pressed, and are therefore dismissed with costs.

Appeal dismissed.

(1) (1890) I. L. R., 13 All., 89.

(2) (1896) I. L. R., 23 Cal., 450.

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