

APPELLATE CIVIL.

1903
December 4.*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt.*

BHOLA NATH (PLAINTIFF) v. MUHAMMAD SADIQ (DEFENDANT).*

Act No. IV of 1882 (Transfer of Property Act), section 99—Civil Procedure Code, section 43—Sale of mortgaged property in execution of money decree held by mortgagee—Sale set aside—Subsequent suit for sale on the mortgage.

Where a mortgagee had brought the mortgaged property to sale in execution of a simple money decree held by him against the mortgagor, and such sale was set aside with regards to the provisions of section 99 of the Transfer of Property Act, 1882, it was held that the mortgagee was not debarred from subsequently bringing a suit for sale on his mortgage, notwithstanding section 43 of the Code of Civil Procedure. *Azim-ullah v. Najm-un-nissa* (1) and *Govind Hari Dev v. Parashram Mahadev Joshi* (2), referred to.

THE plaintiff in the suit out of which this appeal arose held two mortgages, dated respectively the 28th of August, 1897, and the 31st of August, 1897, executed by one Ghulam Husain, the predecessor in title of defendant respondent. On the 21st of December, 1897, the plaintiff obtained on the mortgages above referred to a simple money decree, and in execution of that simple money decree he attached the mortgaged property. On the 29th of January, 1900, an application was made for execution and one village was put up for sale on the 20th of July, 1900. The property was sold, but the sale was subsequently set aside as being void under the provisions of section 99 of the Transfer of Property Act. The plaintiff then instituted the present suit, under section 67 of the Transfer of Property Act, for sale of the mortgaged property. The defendant pleaded that the suit was barred by section 43 of the Code of Civil Procedure. The Court of first instance (Munsif of West Budaun) decreed the claim; but on appeal by the defendant the lower appellate Court (District Judge of Shahjahanpur) reversed the decree of the Munsif, holding that section 43 of the Code was a bar to the suit. The plaintiff appealed to the High Court.

* Second Appeal No. 905 of 1901, from a decree of C. D. Steel, Esq., Judge of Shahjahanpur, dated the 6th June, 1901, reversing the decree of Babu Deoki Nandan Lal, Munsif of West Budaun, district Shahjahanpur, dated the 13th December, 1900.

(1) (1894) I. L. R., 16 All., 415. *

(2) (1900) I. L. R., 25 Bom., 161,

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BHOLA NATH
v.
MUHAMMAD
SADIQ.

Pandit *Sundar Lal* (for whom Pandit *Baldeo Ram*), for the appellant.

Mr. *Abdul Raoof*, for the respondent.

STANLEY, C J., and BURKITT, J.—The suit out of which this appeal has arisen was one for the sale of property comprised in two mortgages, dated respectively the 28th of August, 1897, and the 31st of August, 1897, executed by Ghulam Husain, the predecessor in title of the defendant respondent, in favour of the plaintiff Bhola Nath. It appears that Bhola Nath obtained a money decree on foot of his mortgages on the 21st of December, 1897, and in execution of that decree attached the mortgaged property. On the 29th of January, 1900, an application was made for execution, and one village was put up for sale on the 20th of July, 1900, when the property was sold; but the sale was subsequently set aside as being void under the provisions of section 99 of the Transfer of Property Act. Thereupon the plaintiff instituted the present suit for sale of the mortgaged property. He was met by the defence that his suit was barred under the provisions of section 43 of the Code of Civil Procedure. The Court of first instance decreed the claim, but the lower appellate Court reversed that decision, holding that the suit was barred by reason of section 43. Hence the present appeal.

Section 99 of the Transfer of Property Act precludes a mortgagee from bringing the mortgaged property to sale otherwise than by instituting a suit under section 67. But there is a rider to that section which enables the mortgagee to institute such a suit (that is a suit under section 67): "Notwithstanding anything contained in the Code of Civil Procedure, section 43." The effect of this section is that if the mortgagee obtains a simple money decree upon his mortgage he cannot sell property comprised therein without instituting another suit. That other suit must be a suit under section 67, and provision is made for his bringing such suit notwithstanding the provisions of section 43. If authority be required for this, it is to be found in the case of *Azim-ullah v. Najm-un-nissa* (1), in which it was held that a usufructuary mortgagee who had leased the mortgaged premises to his mortgagor could not in execution of a simple money

(1) (1894) I. L. R., 16 All., 415.

decree for rent against the mortgagor attach and sell the mortgaged premises, but must bring a suit as provided by section 67 of Act No. IV of 1882. We may also refer to the case of *Gobind Hari Dev v. Parashram Mahadev Joshi* (1). The learned counsel on behalf of the respondent has admitted that he cannot contest this point, and we think rightly so, having regard to the explicit terms of section 99. We therefore allow the appeal, and, as it has been disposed of upon this preliminary point, we remand the case under the provisions of section 562 of the Code of Civil Procedure to the lower appellate Court with directions to re-admit it under its original number in the register of pending appeals and try it upon the merits. The costs in all Courts will follow the event.

Appeal decreed and cause remanded.

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BEOLA NATH
v.
MURHAMMAD
SADIQ.

1903

December 9.

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

JAMNA PRASAD (DEFENDANT) v. BALMUKAND (PLAINTIFF)*

Act No. XIX of 1873 (N.-W. P. Land Revenue Act), section 113—Partition—Question of title—Parties referred to Civil Court—Revenue Court not empowered to limit the time within which recourse must be had to the Civil Court.

When in the course of partition proceedings under the North-Western Provinces Land Revenue Act, 1873, objections raising a question of title are preferred, and the Revenue Court under section 113 of the Act refers the parties to the Civil Court, the Revenue Court has no power to fix a limit of time within which recourse must be had to the Civil Court.

THE facts of this case are as follows:—

On the 9th of August, 1901, one Balmukand applied under section 108 of Act No. XIX of 1873 for perfect partition of certain property. Jamna Prasad, one of the defendants, objected to the application on the ground that his share, which was described in the partition application as one-fourth only of the property, was in reality one-half. The Assistant Collector before whom Balmukand's application was pending, on this objection being raised, passed an order allowing the parties two months' time to have the question of title decided by a competent Civil Court. This order was passed on the 30th of October,

* First Appeal No. 52 of 1902, from a decree of Babu Jwala Prasad, Assistant Collector of the first class, of Muttra, dated the 1st February, 1902.

(1) (1900) I. L. R., 25 Bom., 161.