

1903

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under section 283 of the Code of Civil Procedure. It cannot be contended that the right of suit given by that section is a personal right of the particular claimant whose objection has been dismissed under section 278. If this were the case, the death of a claimant whose objection had been so dismissed might finally put an end to a claim to valuable property. If a claimant's heir can bring a suit under section 283, I see no reason why a representative in interest like the plaintiff cannot do so. In my judgment the view taken by the learned Judge upon this preliminary point is wrong. I allow the appeal, and, setting aside the decree of the Court below, remand the appeal to that Court, with instructions to re-admit it under its original number in the register, and dispose of it on the merits. Costs here and hitherto will abide the event.

*Appeal decreed and cause remanded.*

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

BARHMA DIN (OPPOSITE PARTY) v. BAJI LAL (PETITIONER).\*

*Civil Procedure Code, section 273—Attachment of decree for foreclosure—*

*Procedure—Execution of decree.*

1903

June 22.

Where, on application to a Court which was not the Court which passed it, a decree for foreclosure was attached by a creditor of the decree-holder, it was held that it was not competent to the Court which passed the decree to follow up the attachment by substituting the name of the attaching creditor in place of that of the decree-holder.

THE facts of this case are as follows :—

Baji Lal held a simple money decree against Barhma Din. Barhma Din and four other persons held a decree for foreclosure against Beni Madho and Musammat Sundar. An application was made by Baji Lal for the attachment of Barhma Din's rights and interests in the decree for foreclosure. This application was granted. Upon this Baji Lal applied to the Court executing the decree for foreclosure asking that this name might be substituted in that decree for the name of his debtor Barhma Din. This application was granted by the executing Court (Subordinate Judge of Cawnpore) and an appeal preferred by

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\* Second Appeal No. 783 of 1901, from an order of H. Dupernax, Esq., District Judge of Cawnpore, dated the 10th of May 1901, confirming an order of Munshi Shiva Sahai, Subordinate Judge of Cawnpore, dated the 11th of December 1900.

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BARHMA  
DIN  
v.  
BAJI LAL.

Barhma Din was dismissed by the District Judge. Barhma Din thereupon appealed to the High Court.

Munshi *Gulzari Lal*, for the appellant.

Dr. *Satish Chandra Banerji* (for whom Munshi *Haribans Sahai*), for the respondent.

STANLEY, C.J., and BURKITT, J.—The order of the learned Subordinate Judge, which has been upheld by the learned District Judge, cannot be supported. The facts of the case are very simple. The respondent, Baji Lal, held a simple money decree against the appellant, Barhma Din. Barhma Din and four other persons held a decree for foreclosure against two persons of the names of Beni Madho and Musammat Sundar. An application was made by Baji Lal for the attachment of Barhma Din's rights and interests in the decree for foreclosure. This application was granted. He thereupon made an application to the Court executing the foreclosure decree to have his name substituted in the foreclosure decree for the name of his debtor, Barhma Din, with a view to executing that decree along with the other decree-holders. This application was granted. The present appeal has been preferred against the order so passed. The section which is applicable to the case is section 273 of the Code of Civil Procedure. The first portion of that section deals with the attachment of decrees for money. The second portion of the section deals with the attachment of other decrees, and under the latter portion of the section the application of Baji Lal for the attachment of his debtor's interest in the foreclosure decree came. Under that section provision is made for the order which alone can be passed when a decree in the nature of a foreclosure decree has been attached. It provides that the attachment shall be made by notice in writing under the hand of the Judge of the Court which passed the decree sought to be executed, to the holder of the decree sought to be attached, prohibiting him from transferring or charging the same in any way, and then proceeds "when such decree has been passed by any other Court, also by sending to such Court a like notice in writing to abstain from executing the decree sought to be attached until such notice is cancelled by the Court from which it was sent." The duty of

the Court in this case, when it received notice of the attachment of the foreclosure decree, was to stay its hand, and in the words of the section "abstain from executing the decree." Instead, however, of doing so, the Court has thought fit to proceed with the execution of the decree, and in the first instance has passed the order which is objected to, substituting the name of Bajī Lal for that of the judgment-debtor, Barhma Din. This proceeding was *ultra vires* and contrary to the express provisions of the section. The appeal must, therefore, be allowed, and the order of the lower Courts set aside with costs in all Courts.

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BARHMA  
DIN  
v.  
BAJĪ LAL.

*Appeal decreed.*

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

ALI JAN (PLAINTIFF) v. MARIAM BIBI (DEFENDANT).\*

*Act No. II of 1882 (Transfer of Property Act), sections 65 (e) and 90—  
Prior and subsequent incumbrancers—Implied covenants binding upon the mortgager.*

1903

June 24.

A puisne mortgagee of property, upon which there existed several prior incumbrances, obtained a decree for sale after redemption of the prior incumbrances. The prior incumbrances were redeemed, and the mortgaged property was put up to sale; but the sum realized by the sale was not sufficient to cover even the amounts due upon the prior incumbrances, not to mention the amount due upon the mortgage in suit.

*Held* that, having regard to section 65 of the Transfer of Property Act, 1882, the puisne mortgagee decree-holder was entitled to a decree under section 90 of the said Act in respect of the deficit due upon the prior incumbrances as well as in respect of the deficit upon his own mortgage.

THE facts of this case are as follows:—One Malik Ali Jan, a puisne mortgagee, obtained a decree for sale on his mortgage subject to the redemption by him of certain prior mortgages. The amount decreed in respect of the mortgage sued upon was Rs. 1,569-4-6 with future interest and costs. The prior mortgages amounted at that time to Rs. 7,668, but in order to pay them off the decree-holder had to pay over Rs. 9,000. The property, when sold, fetched Rs. 6,200. The decree-holder applied for a decree under section 90 of the Transfer of Property Act for the difference between the price realized by the sale of

\* Second Appeal No. 114 of 1902, from an order of W. Tudhall, Esq., District Judge of Gorakhpur, dated the 28th of November 1901, modifying an order of Munshi Anant Prasad, Subordinate Judge of Gorakhpur, dated the 12th of July 1901.