APPELLATE CIVIL.

1906
January 19.

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

UTTAM ISHLOK RAI AND ANOTHER (OPPOSITE PARTIES) *v.* RAM NARAIN RAI AND OTHERS (PETITIONERS).*

Act No. IV of 1882 *(Transfer of Property Act), sections* 90, 100—*Suit to enforce vendor's lien by sale—Determination in that suit of vendee's personal liability — Application for decree under section* 90 — Res judicata.

In a suit for enforcement of a vendor's lien by sale of the property the Court decided that "the defendants cannot, either personally or their other properties, be held liable for any part of the amount claimed. The property sold to them can alone be liable." Subsequently the plaintiffs applied for a decree under section 90 of the Transfer of Property Act, 1882. *Held*, it was within the competence of the Court to determine the personal liability or otherwise of the defendants at the stage at which it decided it, and that the matter so determined was *res judicata* in respect of their subsequent application. *Musahel Zaman Khan* v. *Inayat ullah* (1), *Raj Singh* v. *Parmanand* (2), *Durga Dai* v. *Bhagwat Prasad* (3), *Miller* v. *Digambari Debya* (4) referred to, and it was none the less *res judicata* because the finding as to the personal liability of the defendants was not embodied in the decree. *Jamait-un-nissa v. Lutf-un-nissa* (5) referred to.

ONE Phulman Rai owned a 5-anna 4-pie share in mauza Chhatarpur, which, together with a share in another village, he mortgaged to one Danyar Singh. He also mortgaged certain other property to one Gajraj. In order to pay off these debts he sold the share in Chhatarpur to Uttam Ishlok Rai and Dan Bahadur Rai by two sale-deeds executed on the 2nd of August, 1895. The first sale-deed related to a 3-anna 7-pie share and the amount of consideration was Rs. 5,000. Out of this amount Phulman Rai left Rs. 2,396 in the hands of the purchasers to be paid to Gajraj. The sale-deed provided that if the purchasers omitted to pay Gajraj, and the vendor himself had to pay the amount due to him, the vendor would be entitled to recover that amount with interest and costs. The purchasers made default in payment. Thereupon the vendor, Phulman

* Appeal No. 61 of 1905 under section 10 of the Letters Patent.

(1) (1892) I. L. R., 14 All., 513.
(2) (1889) I. L. R., 11 All., 486.
(3) (1891) I. L. R., 13 All., 356.
(4) Weekly Notes, 1890, p. 142.
(5) (1885) I. L. R., 7 All., 606.

1906

UTTAM ISHLOK RAI v. RAM NARAIN RAI.

Rai, paid off Gajraj and brought a suit against the purchasers for the unpaid balance of the purchase-money with interest thereon, and claimed a charge on the property sold. To this suit Danyar Singh as a mortgagee was made a party. On the 22nd of March, 1900, the Court made a decree to the effect that the plaintiff should first discharge the amount of Danyar Singh's mortgage and then sell the property sold by him for the recovery of the amount so paid as well as of the amount due to him. This decree was affirmed in appeal. Phulman Rai paid off what was due to Danyar Singh, obtained an order for sale under section 89 of the Transfer of Property Act, and caused the property to be sold by auction. The proceeds of this sale having proved insufficient to satisfy the total amount due, the decree-holder next filed a separate suit asking for a decree for the balance under section 90 of the Transfer of Property Act. The first Court (Subordinate Judge of Gorakhpur) disallowed the decree-holder's application, but on appeal the lower appellate Court (District Judge of Gorakhpur) gave the decree-holder the decree prayed for as against the two adult respondents, Uttam Ishlok Rai and Dan Bahadur Rai. The judgment-debtors thereupon appealed to the High Court.

This appeal was heard by Banerji and Richards, JJ., who differed in opinion (*vide* Weekly Notes for 1905, p. 144). The decree followed the judgment of Banerji, J., which upheld the decree of the Court below. From this decree the present appeal was preferred by the defendants-appellants.

Babu *Jogindro Nath Chaudhri* and Mr. *M. L. Agarwala*, for the appellants.

Hon'ble Pandit *Sundar Lal*, for the respondents.

STANLEY, C.J. and BURKITT, J.—From the view which we take of this case it is unnecessary for us to determine the main question which has been discussed before us and upon which our learned brothers Banerji and Richards differed. If it were necessary to determine that question we should have difficulty in resisting the forcible reasoning to be found in the judgment of our brother, Banerji. It appears to us, however, that upon another point the appeal must be allowed. The facts of the case appear in the report of it in the Weekly Notes for

1905, page 144. The original suit was brought by the plaintiff to recover unpaid purchase-money by sale of the purchased property. A number of defences were raised by the defendant and issues knit thereon. Amongst others there was the following issue:—"Whether the plaintiff can realize the whole money he paid to Danyar from the defendant." Danyar was found to be a prior mortgagee of the property, and in the suit the defendants raised the objection that the plaintiff was bound to discharge the amount of Danyar's mortgage before he could sell the property. This contention was allowed, and Danyar was made a party to the suit, and in the decree the plaintiff was ordered to pay the amount due to Danyar and then sell the property for the recovery of the amount so paid as well as of the amount due to himself. The following was the finding in regard to the personal liability of the defendants:—"The defendants 1 and 2 (*i.e* the appellants) cannot either personally or their other properties be held liable for any part of the amount claimed. The property sold to them can alone be liable." This is a clear, unambiguous finding, and no objection was taken in respect of it and the decree passed in favour of the plaintiff was affirmed in appeal. The proceeds of the sale directed under section 89 of the Transfer of Property Act having proved insufficient to satisfy the plaintiff's claim, he instituted the suit out of which this appeal has arisen for a decree under section 90 of the Transfer of Property Act for the balance due to him. This suit was resisted on, amongst others, the ground that the question of the plaintiff's right to recover the money from the vendees personally was decided in the original suit and was *res judicata*. Mr. Justice Banerji did not accede to this contention, holding that no question of the personal liability of the defendant could arise or be determined at the stage of the suit in which a decree under section 88 was passed, and that any decision which might have been given on that question at that stage would not have the effect of *res judicata*. As supporting this view he relied upon the decision in the case of *Musaheb Zaman Khan* v. *Inayat-ullah* (1). Mr. Justice Richards, as he has

(1) (1892 I. L. R., 14 All., 513.

1906

UTTAM ISHLOK RAI v. RAM NARAIN RAI.

informed one of us, did not consider or express any opinion upon this question.

We are unable to agree in the view so taken by our learned brother. In the case upon which he relied, the plaintiff obtained a decree under section 88 of the Act to which we have referred, which was executed under section 89 of the same Act, but the proceeds of the sale proving insufficient to satisfy the debt, the decree-holder applied for the execution of his decree under section 88 against the other property of the judgment-debtor, but that application was rejected. He then applied for a decree under section 90, and to this the judgment-debtor objected that, inasmuch as the decree-holder in his plaint has asked for relief over against non-hypothecated property and that prayer had not been granted, his claim for a decree under section 90 was *res judicata*. It will be observed that the application which was rejected in that case was an application under section 88 and not an application under section 90, and the Court merely held that "the time for making an application under section 90 and for the Court making a decree under that section does not arrive until the remedies under sections 88 and 89 have been exhausted." In the course of their judgment Edge, C.J. and Blair, J. observed:—"In our opinion the more correct way of drawing up a decree in a suit for sale on a mortgage would be to confine the decree for sale, that is, the first decree to be passed to a decree under section 88 against the mortgaged property, and that any subsequent relief to which, after that decree had been executed, it might appear that the plaintiff was entitled, should stand over for a decree under section 90;" and they further say:—"In our opinion, section 13 of the Code of Civil Procedure would not apply to an application under section 90 for a decree, no matter whether the plaintiff had or had not claimed originally in his suit subsequent relief, or whether, if claimed, such subsequent relief had been allowed or disallowed by the Court when making a decree under section 88, the time for adjudicating on the claim for subsequent relief not arriving until the decree under section 88 had been exhausted." We see no reason to disagree with this view, provided that the

question of the liability of a defendant to satisfy a decree other than out of the property the subject-matter of the charge has not been considered and determined at the trial of the original suit; but if this question has already been the subject of determination at the former trial, the rule is in our opinion too broadly stated. In the case of *Musaheb Zaman Khan* v. *Inayat-ullah* (1) the question as to the liability had not been determined. The decree-holder had no doubt in his plaint asked for relief over against non-hypothecated property, but there was no adjudication upon the question, whether or not he was entitled to obtain such relief. Where a party entitled to a charge claims not merely a remedy against the property, the subject-matter of the charge, but also a personal remedy against the owner of that property, it appears to us that it is not merely not premature to decide the question of liability on the hearing of the original suit, but that it may be convenient to do so. It would be premature to pass an order under section 90, but it would not be premature, we think, to determine what is the extent and nature of the liability of the defendant. In the case of *Raj Singh* v. *Parmanand* (2) Sir John Edge, C.J. and Tyrrell, J. held that the decree contemplated by section 90 can be made in a suit in which the decree for sale is passed, and it is not necessary to institute a fresh suit to obtain such a decree, as was done in the case before us. If there be only one suit, it seems to be reasonable that the rights and liabilities of the parties should be determined at the first hearing, which is in reality the hearing of the suit. The remedy provided by section 90 is really ancillary and ought not to require any reconsideration of the rights and liabilities of the parties. In the case of *Durga Dai* v. *Bhagwat Prasad* (3) Straight and Tyrrell, JJ., held that the decree contemplated by section 90 is in fact an order to be obtained in execution of a decree for sale.

If the Court which passed the decree for sale in this case had not determined the question of the personal liability of the defendants-appellants, we do not say that this question could not have been properly decided on the hearing of an

(1) (1892) I. L. R., 14 All., 513. (2) (1889) I. L. R., 11 All., 486.
(3) (1891) I. L. R., 13 All., 356.

1906

UTTAM ISHLOK RAI v. RAM NARAIN RAI.

application under section 90. What we do say is that, that question having been raised before and determined by the Court which passed the decree for sale (as undoubtedly it was in this case, although the issue on the question was not framed with accuracy), and the decision of that Court not having been challenged, it is not open to the plaintiff to raise the question in a suit instituted under section 90. We are supported in this view by the decision of a bench of this Court in the case of *Miller* v. *Digambari Debya* (1). In that case a deed of mortgage of immovable property executed in 1875 contained a covenant, whereby the mortgagor made himself personally liable for payment of the mortgage debt. The mortgagee having become insolvent the official assignee brought a suit in which he prayed, first, for the enforcement of the mortgage by sale of the mortgaged property, and, secondly, in the event of the sale proceeds being insufficient to discharge the debt, for enforcement of the personal covenant. The Court granted the former relief, but refused to grant the latter on the ground of delay in bringing the suit and of hardship to the defendant. On appeal it was held that the plaintiff was entitled to join with his claim for enforcement of the mortgage, the further claim for enforcement of it against the person and other property of the defendant. In the course of his judgment Straight, J., observed :—"In the present case the mortgagee did, as he was entitled to under the mortgage, claim a declaration to the effect that in the event of the sale of the mortgaged property not producing an amount sufficient to pay the mortgage debt, he would be entitled to proceed against the mortgagor in respect of her other property. Having claimed this relief, a question arose in issue between the plaintiff and the defendant on the point, and that question has in fact been determined by the learned Judge, and consequently the plaintiff's suit in that respect must be considered as finally decided. I have no hesitation in saying that if hereafter the plaintiff came and asked a Court to give him the decree mentioned in section 90 of the Transfer of Property Act, he could be successfully met by the plea of *res judicata*. Now it is said for the respondent that because section 88 of the

(1) Weekly Notes, 1890, p. 142.

Transfer of Property Act contemplates a suit for sale, and this being a suit for sale, any other right of the mortgagee is excluded from determination by the Court because he has put it out of the Court's power to determine such right by asking for sale of the mortgaged property. I think the plaintiff was entitled to seek his further relief, and that the relief ought to have been granted to him because it was the outcome of the specific covenant on the part of the mortgagor in the mortgage-deed." Mahmood, J., expressed his concurrence in everything that had fallen from Straight, J. In their judgment in *Musaheb Zaman Khan* v. *Inayat-ullah* (1) Edge, C.J. and Blair, J., do not express disapproval of this decision. In reference to it they say:—"There is nothing to prevent the plaintiff asking for such a relief (that is the further relief); the only question is at what period of the suit has the Court power to grant relief against non-hypothecated property."

It was further contended on behalf of the respondents that the issue and finding upon the question of personal liability was not embodied in the decree and consequently the question was not *res judicata*. The answer to this is to be found in the judgment of the full bench in the case of *Jamait-un-nissa* v. *Lutf-un-nissa* (2), in which it was held that if in the judgment of which the decree is the formal expression, findings have been recorded upon some issues against the party in whose favour the decree is, and that party desires to have formal effect given to these findings by the decree so as to allow of his filing objections thereto under section 561 of the Code or of appealing therefrom under section 540, he must take steps under section 206 to have the decree properly brought into conformity with the judgment, and that, if he fails to take this course, the decree, though in general terms, will stand good as finally deciding the issues raised by the pleadings upon which the ultimate determination of the cause and the decree itself rested. As we have pointed out, the plaintiff-respondent did not challenge the finding upon the question of the personal liability of the defendants-appellants in the original suit. We may further point out that the institution of a separate suit for

(1) (1892) I. L. R., 14 All., 513. (2) (1835) I. L. R., 7 All., 606.

1906

UTTAM ISHLOK RAI v. RAM NARAIN RAI.

the purpose of obtaining the relief claimed by the plaintiff under section 90 was unnecessary and improper. An application under section 90 in the suit only was necessary.

For these reasons we allow the appeal, set aside the decree of the learned Judge of this Court and also the decree of the lower appellate Court, and restore the decree of the Court of first instance with costs in all Courts.

Appeal decreed.

1906
January 23.

CRIMINAL REVISION.

Before Mr. Justice Banerji and Mr. Justice Richards.

EMPEROR *v.* BALDEWA AND ANOTHER.*

Act No. XLV of 1860 (Indian Penal Code), sections 392, 411—Criminal Procedure Code, section 181—Jurisdiction—Robbery committed outside British India—Stolen property brought into British territory.

Two persons, Baldewa, who was not a British subject, and Radhua, who was, were committed to the Court of Session at Jhansi, it being alleged against them that they had committed a robbery in an adjoining Native State and had brought the stolen property into British territory. *Held*, that though neither could be tried by the Sessions Judge of Jhansi for the robbery, Baldewa because he was not a British subject, and Radhua because the certificate required by section 188 of the Code of Criminal Procedure was wanting, yet both might be tried for the offence of retaining stolen property under section 411 of the Indian Penal Code. *King-Emperor* v. *Johri* (1) distinguished. *Queen-Empress* v. *Abdul Latib* (2) followed.

IN this case two persons, Baldewa, who was not a British subject, and Radhua, who was such a subject, were committed to the Court of Session at Jhansi on a charge of robbery. It was alleged against them that they had caused hurt to one Sarupa and so driven him and his father away from a cart, which they proceeded to take away dishonestly together with the bullocks harnessed to it. This was said to have taken place on a road running through a portion of the Native State of Orchha or Tikamgarh. There was evidence on the record to show that Baldewa was arrested in possession of the cart within British territory, and apparently some evidence to a similar effect against Radhua, though in the opinion of the Sessions Judge

* Criminal Reference No. 574 of 1905.

(1) (1901) I. L. R., 23 All., 266. (2) (1885) I. L. R., 10 Bom., 186.