

## APPELLATE CIVIL.

1905  
December 8.

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Knox.*  
 RAM BARAN SINGH AND ANOTHER (PLAINTIFFS) v. GOBIND SINGH  
 (DEFENDANT).\*

*Mortgage—Suit for recovery of mortgage debt—Form of decree in use before the passing of the Transfer of Property Act—Attachment of non-mortgaged property—Effect of such attachment.*

In a suit for recovery of a mortgage debt a decree was passed, before the coming into force of the Transfer of Property Act, 1882, in favour of the plaintiff, declaring the amount due to him and that he had a lien on the property of the mortgagee for the amount so found to be due. In execution of that decree the judgment-creditor attached certain property of the judgment-debtor other than the mortgaged property. This property was in due course sold, and subsequently certain mortgagees who had taken a mortgage thereof pending the attachment sued to have the sale set aside. *Hold* that, owing to the form in which the original decree was passed, the judgment-creditor had full power to attach and bring to sale in execution thereof any property of his judgment-debtor. *Lachmi Dai Koori v. Asman Singh* (1) followed.

THE facts of this case are as follows:—One Sheoraj held a mortgage over the property of Ganga Bishau. Sheoraj put his mortgage into suit, and on the 13th of June, 1881, obtained a decree declaring the amount due to him and that he had a lien on the property of his mortgagor in respect of the amount so found to be due. In execution of that decree Sheoraj attached certain property which was not comprised in his mortgage. The attached property was sold on the 21st of January, 1893. Pending the attachment, namely, on the 25th of September, 1891, the present plaintiffs took a mortgage from the judgment-debtor of part of the attached property, and after sale thereof brought the present suit to set aside the sale upon the ground that the attachment was invalid having regard to the nature and frame of the decree under which the property in suit had been attached and sold. The Court of first instance (Subordinate Judge of Azamgarh) decreed the plaintiffs' claim. The defendant appealed, and the lower appellate Court

\* Second Appeal No. 339 of 1904, from a decree of Mr. Muhammad Ishaq Khan, District Judge of Azamgarh, dated the 12th of February, 1904, reversing a decree of Babu Jai Lal, Subordinate Judge of Azamgarh, dated the 12th of August, 1903.

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(District Judge of Azamgarh) allowed the appeal and dismissed the suit. The plaintiffs thereupon appealed to the High Court.

Mr. *Muhammad Ishaq* and Babu *Surendra Nath Sen*, for the appellants.

Mr. *J. Simeon*, for the respondents.

STANLEY, C.J. and KNOX, J.—The matters which have given rise to this litigation are shortly as follows :—One Sheoraj, mortgagee of the property of one Ganga Bishan, on the 13th of June, 1881, obtained a decree on foot of his mortgage declaring the amount due to him and that he had a lien on the property of his mortgagor in respect of the amount so found to be due. It is to be noticed that this decree was obtained prior to the passing of the Transfer of Property Act. In execution of that decree Sheoraj attached the property which is now in dispute, property which was not comprised in his mortgage, and in execution caused the property to be sold on the 21st of January, 1893. The plaintiffs-appellants pending the attachment, took from the judgment-debtor a mortgage of the property in dispute on the 25th of September, 1891, that is, about two years after the attachment. They instituted the suit which has given rise to this Second Appeal to have it declared that they are entitled to the possession of the property, alleging that the sale which took place in 1893 was not binding upon them, and that as a matter of fact the sale was not a valid sale inasmuch as it was not carried out, as they contend, in order to satisfy a decree enforceable under the attachment. If the decree of 1881 had not been a decree in the general terms which we have mentioned, there might have been force in this contention in view of the provisions of the Transfer of Property Act. But it was obtained prior to the passing of that Act, and, therefore, we think that that Act is not applicable and does not curtail the rights of the decree-holder. We might refer to several cases upon the subject pointing out what the law was prior to the passing of the Transfer of Property Act, but it will be sufficient if we refer to the case of *Luchmi Dai Koori v. Asman Singh* (1). In that case the decree provided generally that the plaintiff should recover the amount due to him with costs and interest, and it also contained a

(1) (1870) I. L. R., 2 Calc., 213.

provision that the decree should be executed against the property specified in the bond. It was held that where a decree is against the mortgagor generally coupled with a declaration of the lien, the decree-holder may proceed either against the person of the mortgagor and his property or against the mortgaged property. Mr. Justice Markby, in delivering the judgment of the Court, observed: "Now we have had the decree read to us, and we consider this to be not such a decree as we know is sometimes made, namely, a decree restricting the parties in the first instance to the sale of the mortgaged property. But it is a decree against the mortgagor generally coupled with what is called a declaration of the lien—a declaration which it is exceedingly common to insert in decrees against mortgagors upon a bond of this nature. The bond also, as has been pointed out by the Advocate-General, was not only a bond pledging the property, but a bond which made the party personally liable for the money. Now upon a decree of that kind we have no hesitation in holding that a person may in law proceed either against the person or against the mortgaged property specified in the decree." We also have had the decree in this case read to us, and we find that it is a decree against the mortgagor generally coupled with what we may term a declaration of the lien. Under these circumstances it appears to us that the claim of the mortgagee was clearly enforceable under that decree, and, therefore, the plaintiffs-appellants who took a mortgage of the property, the subject-matter in dispute in this appeal, during the pendency of the attachment, cannot set up the case which they have endeavoured to support here and have a declaration that the sale carried out in execution of the decree by the defendant-respondent was ineffectual. For these reasons we hold that the conclusion arrived at by the lower appellate Court was correct, and we dismiss the appeal with costs.

*Appeal dismissed.*

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