

Before Mr. Justice Banerji and Mr. Justice Richards.

RAM JAS (JUDGMENT-DEBTOR) v. SHEO PRASAD AND ANOTHER (DECREE-HOLDERS).\*

1905  
August 14.

Act No. IV of 1882 (Transfer of Property Act), sections 88 and 89—Execution of decree—Decree for sale on a mortgage—Civil Procedure Code, section 248—Decree made absolute without notice being served under section 248—Validity of decree.

So long as an order under section 89 making absolute a decree for sale under section 88 of the Transfer of Property Act, 1882, subsists, it is enforceable, and its operation cannot be impugned. If for any reason the order under section 89 is defective, the remedy of the judgment-debtor is to get it set aside in accordance with law; but until it is set aside the decree which it makes absolute is capable of enforcement, and its validity cannot be questioned in execution proceedings. *Oudh Bahari Lal v. Nageshar Lal* (1), *Imam-un-nissa Bibi v. Liakat Husain* (2) and *Sahdeo Pandey v. Ghasiram Gyawal* (3) distinguished.

Query whether non-compliance with the provisions of section 248 of the Code of Civil Procedure is anything more than a mere irregularity? *Tasadduk Rasool Khan v. Ahmad Husain* (4) referred to.

ON the 23rd of August, 1897, a decree under section 88 of the Transfer of Property Act was passed against one Ram Jas as the representative of the original mortgagor. Ram Jas was a minor when the suit was instituted, and was represented in the suit by his mother as guardian *ad litem*. The decree was confirmed on appeal by the High Court on the 11th of January 1900. On the 21st of November, 1902, an application for an order absolute was made, and in that application the judgment-debtor was described as a minor under the guardianship of his mother; but his mother was apparently then dead. Notice of this application was issued under section 248 of the Code of Civil Procedure, but was returned unserved. The Court, however, on the 13th of December, 1902, passed an order absolute under section 89 of the Act. The present application for execution was made on the 6th of September, 1904. On behalf of the judgment-debtor an objection was raised that he was of age when the order absolute was passed, that he was not properly represented in the proceedings under section 89, and that the order absolute was, therefore, not binding upon him, and

\* First Appeal No. 71 of 1905, from a decree of Saiyid Zain-ul-Abdin, Subordinate Judge of Jaunpur, dated the 27th of February 1905.

(1) (1890) I. L. R., 13 All., 278.

(2) (1881) I. L. R., 3 All., 424.

(3) (1893) I. L. R., 21 Calc., 19.

(4) (1893) I. L. R., 21 Calc., 66.

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the decree consequently incapable of execution. The executing Court (Subordinate Judge of Jaunpur) disallowed this objection, and directed execution to proceed. The judgment-debtor thereupon appealed to the High Court.

Pandit *Mohan Lal Nehru*, for the appellant.

Munshi *Kalindi Prasad*, for the respondents.

BANERJI and RICHARDS, JJ.—This appeal arises out of an application for the execution of a decree for sale passed against the appellant under section 88 of the Transfer of Property Act on the 23rd of August, 1897, and subsequently made absolute under section 89 on the 13th of December, 1902. The appellant was a minor at the date of the suit and was made a party to it under the guardianship of his mother. He is the legal representative of the original mortgagor. The decree made by the Court of first instance was affirmed by this Court on the 11th of January, 1900. An application for an order absolute was made on the 21st of November, 1902, and the appellant was described in it as a minor under the guardianship of his mother, who apparently had died before that date. The Court issued a notice under section 248 of the Code of Civil Procedure, but it was not served. The Court, however, made an order making the decree under section 88 of the Transfer of Property Act absolute. The present application was made for the execution of the decree on the 6th of September, 1904. There was a previous application for execution, which was infructuous, but it is not necessary to refer to it in this case.

It is contended on behalf of the appellant that he was of age when the order under section 89 of the Transfer of Property Act was made; that he was not properly represented in the proceedings under that section, and that, as no notice of those proceedings was served upon him, the order absolute is not binding on him, and the decree is incapable of execution. The argument by which this contention is supported is this. According to the ruling of the Full Bench in *Oudh Behari Lal v. Nageshar Lal* (1) proceedings for an order absolute are proceedings in execution; consequently the Court was bound to issue a notice under section 248 of the Code of Civil Procedure;

as such notice was not served on the appellant, judgment-debtor, all proceedings connected with the application for the order absolute were *ab initio* void, and the order itself is, therefore, void. Reliance is placed on the rulings in *Imam-un-nissa Bibi v. Liakat Husain* (1) and *Sahdeo Pandey v. Ghasiram Gyawal* (2). Those were cases in which, after the sale of property in execution of a decree, the judgment-debtor applied to have the sales set aside on the ground that notice of the application for execution had not been issued under the provisions of section 248 of the Code of Civil Procedure, and the sales were set aside, the Court holding that the proceedings in execution were void *ab initio*. It seems to us to be doubtful whether upon the principle of the ruling of the Privy Council in *Tasadduk Rasul Khan v. Ahmad Husain* (3) non-compliance with the requirements of section 248 can be regarded as anything more than a mere irregularity. We think, however, that the rulings cited have no application to the present case, and the contention put forward on behalf of the appellant is not well founded. He was a party to the suit in which the decree under section 88 of the Transfer of Property Act was passed and was fully represented in it. The validity of that decree is not and cannot be questioned by him. The order under section 89 makes that decree, which was a decree *nisi*, absolute. So long as the order absolute subsists it is enforceable and its operation cannot be impugned. If for any reason the order is defective, the remedy of the appellant is, we think, to get it set aside in accordance with law. But until it is set aside the decree which it makes absolute is capable of enforcement and its validity cannot be questioned in execution proceedings. It is conceded by the learned vakil for the appellant that if a decree is passed in a suit in which the defendant was not properly represented or was not served with a summons, the defendant cannot object to the execution of the decree on any of those grounds, so long as the decree stands good. We can see no distinction between a case of this kind and the present case. As the order absolute in this case was passed against the appellant and is a subsisting order, the

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decree-holder is entitled to execute the decree which has been made absolute by that order. The present application for execution having been made within three years of the date of the order absolute, no question of limitation arises. In our judgment the appeal has no force. We accordingly dismiss it with costs.

*Appeal dismissed.*

1905  
*August 17.*

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

CHATARBHUJ (PLAINTIFF) v. LACHMAN SINGH (DEFENDANT).<sup>\*</sup>  
*Act No. IV of 1882 (Transfer of Property Act), section 52—Lis pendens—Contentious suit.*

Where there are several defendants to a suit, the suit does not become "contentious" within the meaning of section 52 of the Transfer of Property Act, 1882, only when all the defendants are served with summonses in the suit, nor can a suit be contentious as regards some of the defendants and not contentious as regards others. *Purotām Saran v. Sanahi Lal* (1) discussed and doubted.

THE facts out of which this appeal arose are as follows:—  
On the 7th of July, 1886, one Narain Singh executed a mortgage of the property now in dispute. Upon that mortgage the mortgagee brought a suit for sale on the 22nd of July, 1898, against the heirs of Narain Singh, and a decree for sale was passed on the 13th of March, 1899, and at the sale held in execution of that decree the plaintiff, Chaturbhuj, purchased the property in September, 1901. In attempting to get possession of the property so purchased the plaintiff was resisted by the defendant, Lachman Singh, who held it as usufructuary mortgagee under a mortgage executed by one Govind Singh, one of the heirs of Narain Singh, on the 13th of August, 1898. Hence the present suit. The defendant supported his title to retain possession under the mortgage of the 13th of August, 1898, upon the plea that inasmuch as in the suit for sale brought by the original mortgagee summons had not been served upon Govind Singh, although service had been effected on other defendants, until after the 13th of August, 1898, the suit so far as he was concerned had not then

<sup>\*</sup> Second Appeal No. 1212 of 1903, from a decree of W. F. Wells, Esq., District Judge of Agra, dated the 19th of September 1903, reversing a decree of Munshi Maharaj Singh, Munsif of Muttra, dated the 24th of June 1903.

(1) (1899) I. L. R., 21 All., 48.