

Before Mr. Justice Tottenham and Mr. Justice Banerjee.

April 5.
1889

BUNSEEDHUR (DEFENDANT) v. SUJAAT ALI AND ANOTHER
(PLAINTIFFS).*

*Decree—Form of decree—Construction of Mortgage bond—Liability
of property other than that Mortgaged.*

Under a mortgage bond, a mortgagor stipulated that, if the money advanced should not be repaid at a fixed date, the mortgaged property might be sold; and that, if the property were sold for arrears of Government revenue or for other causes, the mortgagee might, in such cases, recover the money advanced by execution against the person or other property of the mortgagor.

Held, no sale having taken place under the second stipulation, that the mortgagee could only obtain a decree against the mortgaged properties. *Narotam Dass v. Sheopargash Singh* (1) referred to.

SUIT to recover Rs. 7,346, as principal and interest on an ordinary mortgage bond.

So far as is necessary for the purposes of this report, the facts are as follows :—

The plaintiff sued on a mortgage bond, dated the 6th January 1880, to recover the above-mentioned sum, asking for sale of the properties, the subject of the mortgage, and, if they should be insufficient to meet the amount due, for a decree against the person and other properties of the mortgagor. The mortgage was admitted, the only contention necessary to mention, raised by the defendant, the mortgagor, being, that the plaintiff was not entitled, under the terms of the mortgage, to obtain a decree against the person and other properties of the mortgagor.

The mortgage bond, after reciting that certain sums were due and owing to certain persons, and that the mortgagee had borrowed a certain sum from the mortgagor for the purpose of meeting these liabilities, stated that the mortgagor promised to pay and liquidate the principal amount so borrowed in the month of Jeyt 1291 F. S., and interest amounting to Rs. 45 per month in the month of Assin, year by year; that if such

* Appeal from Original Decree, No. 59 of 1888, against the decree of Babu Grish Chunder Chowdhry, Subordinate Judge of Patna, dated the 12th December 1887.

interest was not paid then, the mortgagee should be at liberty to recover the same by suit; that until repayment of such principal and interest, the mortgagor pledged and mortgaged certain properties; that if ever the mortgaged property should be sold by auction for arrears of Government revenue or any other reason, then the mortgagees, their heirs or representatives might recover the loan, principal and interest, in any manner they might consider feasible, either from the person or other movcable or immoveable property of the mortgagor; and that if the principal was not paid by Jeyt 1291 F. S., then the mortgagee might institute a suit to recover from the mortgaged property.

1889
 BUNSER-
 DEUR
 v.
 SUJAAT ALI.

The Subordinate Judge (after stating that it was contended before him that, inasmuch as the bond did not contain any stipulation for the recovery of the money from the person and mortgaged properties of the mortgagor, except in the case of an auction sale of the mortgaged properties, and provided for its recovery in other cases from the mortgaged property, therefore, the plaintiffs have no right to recover the money from the person or other properties of the mortgagor, save as above mentioned) was of opinion that the plaintiff had a right to recover either from the mortgaged properties, the person of the mortgagor, or his other properties; and that if the parties had intended such a state of things as contended for by the mortgagor, the mortgage bond would have contained a proviso to that effect; but, no such proviso being in existence, he gave the plaintiff a money decree for the principal and interest due, to be paid within six months, and, in default of such payment, for sale of the mortgaged properties, and, on their proving to be insufficient, the plaintiff to be at liberty to recover the balance from the person and other properties of the mortgagor.

The defendant appealed to the High Court on, amongst other grounds, the ground that the plaintiff was not entitled to a decree against the person or other properties of the mortgagor save in the event of the unmortgaged property being sold as in the bond provided for.

Mr. Das, Moulvi Mahomed Yusuf and Babu Durga Mohun Das for the appellants,

1889

Mr. *Amir Ali* and Moulvi *Serajul Islam* for the respondents.

BUNSER-
DHUR
v.

SUJAAT ALI,

Mr. *Das*, on the question of the mortgagor's right to a personal decree, referred to *Narotam Dass v. Sheopargash Singh* (1).

Mr. *Amir Ali* (on this point) contended that it was a vicious principle to attempt to construe one document by another which was not before the Court and which was not even fully set forth in the report. The personal liability of the borrower arose from the transaction independently of the loan which was created by the contract. Unless it distinctly appeared that the mortgagor had abandoned the right to proceed against the person, the Court should not take away that right.

The judgment of the Court (TOTTENHAM and BANERJEE, JJ.) was delivered by

TOTTENHAM, J.—This is an appeal against a decree made by the lower Court upon a mortgage bond. The decree is made in favour of the plaintiff for the sum claimed, with costs and interest. The decree provides that should the defendant No. 1 fail to pay up the amount of the decree within six months from the date thereof, the mortgaged properties shall be sold; and if they be insufficient to satisfy the decree, then the plaintiffs shall be at liberty to recover the balance from the person or other property of the defendant No. 1.

The defendant No. 1 has appealed against this decree upon various grounds. There is no dispute as to the execution of the bond, but it is contended, on his behalf, that the Court was wrong in making the debtor or his other property liable for the debt; for it is contended that the mortgage bond itself limits the plaintiffs' means of relief to the mortgaged property, excepting in the event of the mortgaged property having been sold by auction on account of arrears of Government revenue or for any other reason.

The main point in this appeal is, that the lower Court has misconstrued the mortgage bond and has wrongly made the defendant personally liable for the amount as well as other property not covered by the mortgage.

We have given our best attention to the document and the arguments advanced on both sides by learned counsel. The lower Court, while admitting that certain clauses of the deed do support the contention of the defendant, was on the whole of opinion that the intention of the parties was not in accordance with that contention. The Subordinate Judge says: "The bond in suit is an ordinary mortgage bond taken by creditors in this country to secure their money. It contains, as usual, a promise to re-pay and a hypothecation of property in the form of a security. The holder of such a bond has ordinarily the right to recover his money either from the mortgaged property or from the person or other properties of the mortgagor. That right, I think, is not taken away by covenant, which merely provides that the mortgagees will be at liberty to recover their money from the person and other properties of the mortgagor if the mortgaged properties are sold for arrears of revenue, and also to recover it from the mortgaged properties if the mortgagor fails to re-pay the money within the time fixed. These clauses do not lay down that, in the latter case, the mortgagee will not be at liberty to recover any portion of the money from the person and unmortgaged properties of the mortgagor even if the mortgaged properties be insufficient. The bond does not make any provision for such a contingency."

1889

BUNSEER-
DHUR
v.

SUJAAT ALI.

Our attention has also been drawn to s. 90 of the Transfer of Property Act, which provides that, in the event of the sale of the mortgaged property not satisfying the decree given upon the bond, a decree may issue against the person and other property of the debtor. We think, however, that the case brought to our notice, *Narotam Dass v. Sheopargash Singh* (1) being a judgment of the Judicial Committee of the Privy Council, in a case, which, as reported, seems extremely similar to this, compels us to take a view different from that of the lower Court. In that case a Taluqdar in Oudh had executed a deed by which he hypothecated his taluq as security for a debt of Rs. 4,103. The deed also contained a promise that he would re-pay the principal with interest within a term of two years. The Privy Council held that this was a mortgage of the

(1) I. L. R., 10 Calc., 740.

1889
 BUNSEE-
 DHUR
 v.
 SUJAAT ALI.

estate and nothing else ; that there was no personal contract on the part of the debtor to pay the debt out of his personal estate ; that it was a mere contract to pay out of the hypothecated estate, and as the hypothecation for other reasons was invalid the plaintiff's suit was dismissed. In the present case, the bond contains very much the same provisions as in that case ; but, if anything, its wording is more strongly in favour of the debtor than it was in that case. Here also we have the promise of the debtor to re-pay and liquidate the principal amount in full in one lump-sum in Jeyt 1291, together with interest to be paid in a lump in each year. If a similar clause in the bond given by Sheopargash Singh in the case cited did not amount to a contract to pay out of his personal estate, we hardly see how it can be held to amount to such a contract in this case. Here, however, there is something more in favour of the judgment-debtor's contention ; provision is made that if the mortgaged property is sold by auction for arrears of Government revenue, or for any other reason, then it shall be competent to the creditors or their heirs to recover the loan, principal and interest, in any manner that may be considered feasible, either from the person or from the moveable and immoveable property of the debtor ; and the last clause of the bond provides that if, according to agreement, the principal cannot be re-paid in 1291 F, then it shall be competent to the Maharajah to recover, by suit, from the mortgaged property, but it is quite silent as to any further relief.

Therefore upon the clauses of the bond and upon consideration of the decision of the Privy Council in the case mentioned, we are of opinion that we must hold that the defendant is not liable in his person and other property to satisfy the decree on the bond.

The result is that the decree of the lower Court will be modified to this extent, that while we maintain the amount of that decree, the means of satisfying it must be limited to the sale of the mortgaged properties.

Decree varied.