

is remanded to the court of first instance through the lower appellate court, with directions to readmit it under its original number in the register and proceed to hear and determine the same according to law. The appellants will have their costs in this court and in the court below. Other costs will abide the result.

Appeal allowed. Cause remanded.

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v.
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COLLECTOR OF
AZAMGARH.

APPELLATE CIVIL.

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February 26.

Before Mr. Justice Karamat Hussain and Mr. Justice Tudball.

BHAGWAN DAS (DEFENDANT) v. RAJ NATH (PLAINTIFF).*

Civil Procedure Code (1882), sections 278, 279, 280, 281—Execution of decree—Attachment—Objection to attachment—Objection dismissed—Suit to recover possession—Jurisdiction.

Held on a construction of sections 278, 279, 280 and 281 of the Code of Civil Procedure, 1882, that an objector may raise an objection to an attachment not only on the ground that he is in possession of the property attached but also on the ground that he has an interest in it, and that, when an executing court disallows the claim of an objector under section 281, the court has jurisdiction to do so notwithstanding the fact that it erroneously does not go into the question of possession but disallows the objection on some other ground.

The facts of this case were as follows :—

One Kishori Lal was the owner of the property in dispute and other property. On the 5th of August, 1888, he made a simple mortgage of all the properties to Nizam-ud-din. After that, he, on the 22nd of December, 1888, mortgaged them to Kirpa Dayal and others, who obtained a decree on their mortgage on the 3rd of July, 1889. The prior mortgagee was no party to this suit. The prior mortgagee, Nizam-un-din, on the 20th of August, 1889, got a decree on his mortgage without impleading the subsequent mortgagee. The latter purchased the property, on the 20th of June, 1891, in execution of his decree and afterwards obtained actual possession. By the consent of the two mortgagees, the sale proceeds were first applied to the satisfaction of the decree on the prior mortgage, but a balance remained unsatisfied. Then, on the 13th of September, 1898, Kirpa Dayal sold the property to one Bhagwan Das, and afterwards Durga Prasad got a portion of the property by pre-emption. Nizam-ud-din then purchased

*Second Appeal No. 504 of 1911, from a decree of H. W. Lyle, District Judge of Agra, dated the 24th of February, 1911, modifying a decree of Shiva Prasad, Subordinate Judge of Agra, dated the 11th of July, 1910

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the property in execution of his decree and obtained formal possession on the 21st of February, 1900. In 1904 the plaintiff, Raj Nath, attached this property, actual possession of which was with Bhagwan Das and Durga Prasad in execution of a simple money decree against Nizam-ud-din. Objections under section 278 of the Civil Procedure Code of 1882 were filed and were disallowed on the 4th of July, 1904. The plaintiff got the property sold and purchased it himself and obtained formal possession on the 9th of October, 1904.

The present suit for actual possession was brought on the 9th of October, 1909.

Mr. *G. W. Dillon*, for the appellant, submitted that the order of the 4th of July, 1904, was not such an order as could be final under section 281 of the Code of Civil Procedure, 1882. It was not an order under that section. It was merely a summary order which did not decide anything on the point of possession. It was not a case of erroneous decision, and the plaintiff's suit could not succeed on the ground that that order was not contested. He cited *Badri Prasad v. Muhammad Yusuf* (1) and *Jugobundhoo Bose v. Sachya Bibee* (2). The latter case is exactly in point, and it was followed and distinguished in *Gooroo Doss Roy v. Sonu Monee Dossia* (3), and *Sreeman'o Hajrath v. Syud Tajooddeen* (4). It was still good law. The present suit was filed 19 years after, and during the whole of that time, the appellant was in possession. The appellant's possession is *quod* mortgagee, and hence he could not be liable for mesne profits. The sale having been made with the consent of the prior mortgagee and the sale proceeds having been applied in satisfaction of his decree, he did not get anything in the subsequent sale. He referred to *Mommohiney Dasse v. Radha Kristo Dass* (5).

Dr. *Tej Bahadur Sapru*, for the respondent, submitted that the objections on which the order of the 4th of July was passed, had been filed under section 278, and a third party need only say that the property was not liable to attachment. The grounds mentioned in section 279 had been made more specific than in section 278. A

(1) (1877) I. L. R., 1 All., 381. (3) (1873) 20 W. R., C. R., 345.

(2) (1871) 8 B. L. R., App., 39: (4) (1874) 21 W. R., C. R., 409.

16 W. R., C.R., 22.

(5) (1902) I. L. R., 29 Calc., 543.

court might be competent to go into the question of possession, but the Legislature never intended that it should go into that question. Having regard to sections 279, 280, it did not follow that a court was bound to go into that question. He cited *Sardhari Lal v. Ambika Pershud* (1) and *Mulkarjun v. Narhari* (2). The court which passed the order had jurisdiction, and even if that order was bad, it was final until set aside. The order might not be correct, but it was an order purporting to be under section 279. The aggrieved party was entitled to bring a suit to set it aside within a year. It was entirely immaterial if the order was erroneous. The conclusiveness of an order did not depend upon its correctness but upon the question whether the court which passed it had jurisdiction.

Mr. G. W. Dillon was heard in reply.

KARAMAT HUSAIN and TUDBALL, JJ.—One Kishori Lal was the owner of the property in dispute and other property. On the 5th of August, 1888, he made a simple mortgage of all those properties in favour of Nizam-ud-din. Subsequently, on the 22nd of December, 1888, he mortgaged them to Kirpa Dayal and others, who obtained a decree on their mortgage, on the 3rd of July, 1889, without impleading the prior mortgagee, Nizam-ud-din. The latter, on the 20th of August, 1882, obtained a decree upon his mortgage without impleading Kirpa Dayal and others. Kirpa Dayal and others executed their decree against the mortgaged property and purchased it on the 20th of June, 1891. They obtained actual possession afterwards. When they applied for the sale of the mortgaged property, Nizam-ud-din put in an application to the effect that he had no objection to the sale of the property, provided the sale proceeds were first applied to the satisfaction of his own decree. The court granted that application, and the whole sale proceeds were applied to the satisfaction of the decree in favour of Nizam-ud-din. A balance, however, remained unsatisfied. Kirpa Dayal, after obtaining actual possession of the property, sold it privately on the 13th of September, 1898, to Bhagwan Das. Durga Prasad succeeded in pre-empting a portion of the property sold by Kirpa Dayal to Bhagwan Das. Nizam-ud-din, on the 22nd of July, 1899, brought the property to sale in execution of his own decree and purchased it himself. He obtained formal possession on the 21st of

(1) (1898) I. L. R., 15 Cal., 521.

(2) (1900) I. L. R., 25 Bom., 337.

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February, 1900. In 1904 the plaintiff, Raj Nath, attached the property, formal possession of which had been obtained by Nizam-ud-din, and the actual possession of which was with Bhagwan Das and Durga Prasad, in execution of a simple money decree against Nizam-ud-din. Bhagwan Das and the representatives of Kirpa Dayal filed objections under section 278 of the Civil Procedure Code of 1882. Those objections were disallowed on the 4th of July, 1904. Durga Prasad took no objections. The plaintiff got the property sold and, purchasing it himself, obtained formal possession on the 19th of October, 1904. He, then, on the 9th of October, 1909, instituted a suit for actual possession of the property against Bhagwan Das and Durga Prasad. The relief sought by him is that the defendants may be ejected from the property and the plaintiff put in proprietary possession thereof, that if the defendants be allowed to redeem, they should pay Rs. 2,250, the amount due to the plaintiff, and that the mesne profits for the past three years may be awarded. The court of first instance gave the plaintiff a decree for possession with mesne profits with the condition that the defendants should be allowed to retain possession of the property, provided they paid Rs. 2,250, without fixing any period for the payment of that sum. Two appeals were preferred from the decree of the first court, one by Durga Prasad and the other by Bhagwan Das. The court of first appeal allowed the appeal of Durga Prasad on the ground that, as he had taken no objection under section 278, he was not bound by section 283 of the Code of Civil Procedure of 1882, and that, as he was in possession of the property as the representative of Kirpa Dayal, the only remedy which the plaintiff as the representative of Nizam-ud-din had against him was a suit for foreclosure, and that, as the suit brought by the plaintiff against Durga Prasad was not a suit for foreclosure, it must stand dismissed. Regarding the appeal of Bhagwan Das, the lower appellate court came to the following conclusion. Bhagwan Das objected under section 278 of Act XIV of 1882. His objection was overruled, and the court came to the conclusion that the property which was in his possession was liable to sale in execution of the decree of Nizam-ud-din and his remedy was, if he was dissatisfied with that order, to have instituted a suit under section 283. As he did not do so, the order of the court, dated the 4th of July, 1904, became final

between him and the plaintiff. The court found that, in this view of the case, Bhagwan Das was the representative of Kirpa Dayal, a puisne mortgagee, and that the plaintiff was the representative of Nizam-ud-din, the prior mortgagee, and that on payment of the money due to Nizam-ud-din, i.e., such part of Rs. 2,250 as was proportionate to the amount of the property in his possession, Bhagwan Das would be entitled to retain possession of the property. The lower appellate court also fixed no period for the payment of the money. It also gave the plaintiff a decree for mesne profits for three years. Bhagwan Das comes to this court in second appeal, and the points argued are, that the order of the 4th of July, 1904, was passed without jurisdiction, and that therefore it may be treated as a nullity, and that the possession of the appellant and his predecessors which began on the 20th of June, 1891, ripened by prescription into ownership and disentitled the plaintiff from succeeding in a suit for possession, and that the order as to mesne profits passed against him (Bhagwan Das) is incorrect. In support of the first contention the learned counsel for the appellant relies upon *Budri Prasad v. Muhammad Yusuf* (1), *Jugobundhoo Bose v. Sichya Bibee* (2), *Monmohiney Dasse v. Radha Kristo Dass* (3), and an unreported ruling of this court in Second Appeal No. 751 of 1874, decided on the 25th of July, 1874. The substance of his argument is that, under sections 278, 279, and 281 of Act XIV of 1882, an executing court has jurisdiction only to determine the question of possession, and that if such court passes an order under section 281 without going into the question of possession, that order is *ultra vires* and without jurisdiction. The learned advocate for the respondent in answer to the point taken by the learned counsel for the appellant says that it is not correct to say that an executing court in dealing with an objection taken to the execution of a decree under the sections of the Code already referred to has no jurisdiction, unless that court goes into the question of the possession of the property held either by the judgment-debtor or the objector. That court, according to the contention of the learned advocate for the respondent, has jurisdiction either to allow or disallow the objection, and if that court does not go into the question of possession, it only does an act which is

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(1) (1876) I. L. R., 1 All., 381. (2) (1871) 8 B. L. R., App., 39.

(3) (1902) I. L. R., 23 Cal., 543.

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wrong, but which is within the jurisdiction of that court. In support of his arguments the learned advocate for the respondent relies on *Sardhari Lal v. Ambika Pershad* (1) and *Malkarjun v. Narhari* (2). He submits that the ruling in 8 B. L. R., App. 39, so far as it lays down that an order under section 246 of the Code of Civil Procedure of 1859, corresponding to section 281 of the Code of 1882, without dealing with the question of possession is a nullity, is not, in view of the rulings of their Lordships of the Privy Council in I. L. R., 15 Calc., 521, and I. L. R., 25 Bom., 337, a correct exposition of the law. Regarding I. L. R., 1 All., 381, he says that it does not lay down that an order passed by an execution court under section 246 of the Code of Civil Procedure of 1859 without dealing with the question of possession is without jurisdiction. We have carefully gone through sections 278, 279, 280 and 281 of the Code of Civil Procedure of 1882, and we have no doubt that an objector may raise an objection to the attachment not only on the ground that he is in possession of it but also on the ground that he has an interest in the property attached, and we have no doubt that having regard to the language of those sections when an executing court disallows the claim of an objector under section 281, the court has jurisdiction to do so notwithstanding the fact that it erroneously does not go into the question of possession but disallows the objection on some other ground. The result of our finding is that the order of 4th July, 1904, is conclusive between the parties, and it cannot now be contended that Nizam-ud-din is not the owner of the property under the sale in execution of his own decree subject, of course, to the equities in favour of the puisne mortgagee, or his representative, who was no party to the suit brought by Nizam-ud-din. The contention of the learned counsel for the appellant that the order as to mesne profits is wrong is, in our opinion, having regard to the circumstances of the case, a valid contention. The plaintiff in this case represents the prior mortgagee, and the defendant is a representative in interest of a puisne mortgagee. That being the relation between the parties, the question of mesne profits cannot arise on any account. As the property in dispute was first sold in execution of a decree obtained by Kirpa Dayal and others with the consent of Nizam-ud-din, and as the sale proceeds were applied to the satisfaction of Nizam-ud-din's own decree, and as only a portion of

(1) (1888) I. L. R., 15 Calc., 521. (2) (1901) I. L. R., 25 Bom., 337.

his decree remained unsatisfied, in equity Nizam-ud-din or the plaintiff, who is the representative in interest of Nizam-ud-din, is entitled to put the property up to sale in accordance with the order passed on the 4th of July, 1904, for the recovery of the balance only to which Nizam-ud-din was entitled. Moreover, the plaintiff as the representative in interest of Nizam-ud-din is entitled only to proceed with the realization of a share of that balance proportionate to the share of the property which remained in the possession of Bhagwan Das after the success of the pre-emption suit by Durga Prasad against him. That being so, it is desirable to have findings on the following two points :—

- (1) What was the balance which remained due to Nizam-ud-din on the 22nd of July, 1899, after the satisfaction of the bulk of his decree from the proceeds of the sale held on the 20th of June, 1891 ?
- (2) What is the proportionate value of the property which remained in the possession of Bhagwan Das after the success of the pre-emption suit by Durga Prasad against him as compared with the value of the entire property mortgaged to Nizam-ud-din on the 5th of August, 1888 ?

The court below will be at liberty to take such additional evidence as the parties may adduce. Ten days will be allowed for objections on return of the findings.

Issues remitted.

Before Mr. Justice Karamat Husain and Mr. Justice Tudball.

JWALA PRASAD (DEFENDANT) v. ACHHEY LAL AND OTHERS (PLAINTIFFS).
 Act No. XV of 1877 (Indian Limitation Act), section 19—Mortgage—Redemption—
 Limitation—Acknowledgement.

Held that an acknowledgement of the title of the mortgagor made by only one of two mortgagees would not avail to save the mortgagor's right to redeem being barred by limitation where the mortgage was a joint mortgage and incapable of being redeemed piecemeal. *Dharma v. Balmakund* (1) followed.

The facts of this case were as follows :—One Kure mortgaged certain property to Sewa Ram and Daya Ram on the 10th of February, 1888, for Rs. 49. The plaintiffs were the purchasers of the

* First Appeal No. 120 of 1911 from an order of Girraj Kishor Das, Judge, Small Cause Court, exercising the powers of a Subordinate Judge of Agra, dated the 11th of August, 1911.

(1) (1896) I. L. R., 18 All, 458.

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