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decision upon the reported case of *Jaipal Kunwar* v. *Indar Bahadur Singh* (1). It is obvious that in that case their Lordships of the Privy Council maintained the decision of the courts in India with considerable reluctance, and carefully guarded themselves against being understood to hold that the execution of a will under such circumstances as the present would afford a cause of action for a declaratory suit on the part of the nearest reversioner. It is certainly not the practice of this Court to encourage such suits, vide *Ram Bhajan and others* v. *Gurcharan* (2). The learned District Judge moreover, while purporting to follow the Privy Council ruling quoted by him, has really departed from the spirit of that ruling by interfering with the decision of the court of first instance. We think that the learned Additional Subordinate Judge was right in refusing to grant the declaration sought by the plaintiff and gave good reason for his decision. We set aside the order of the court below and restore the decree of the court of first instance dismissing the suit. The defendants-appellants will get their costs in this Court and in the lower appellate court.

Appeal decreed.

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April 21.

Before Mr. Justice Chamier and Mr. Justice Piggott.

MUHAMMAD INAMULLAH KHAN (JUDGEMENT-DEBTOR) *v.* NARAIN DAS (DECREE-HOLDER).*

Code of Civil Procedure (1908), *order XXXVIII, rule* 5; *order XXXIX, rule* 1, *section* 94—*Injunction—Malikana dues.*

One M.I., mortgaged *malikana* dues from certain villages to one N, N sued on his mortgage and obtained an order absolute for sale of the property. Later, he obtained an injunction restraining the judgement-debtor from receiving the *malikana* dues. *Held*, that the court below was not justified in either attaching the *malikana* dues or restraining the judgement-debtor by injunction from receiving it inasmuch as all that the decree-holder was entitled to do under his decree, was to have the property sold.

THE facts of this case were as follows :—

One Muhammad Inamullah Khan mortgaged his right to receive what are described as *taluqdari malikana* dues from a number of villages to one Narain Das in the year 1901. Narain Das brought a suit on foot of his mortgage and obtained

*First Appeal No. 185 of 1914, from an order of Shekhar Nath Banerji, Subordinate Judge of Agra, dated the 22nd of August 1914.

(1) (1904) I.L.R., 26 All., 238. (2) (1904) 1 A.L.J.R., 468.

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an order absolute for sale of the property on the 10th of February, 1914. In March of the same year Narain Das applied for sale of the property. Notice was issued to Muhammad Inamullah Khan, who put forward objections. His objections were dismissed and an order was made that the property should be sold. On the 10th of July, 1914, Narain Das applied to the court to issue an injunction to Muhammad Inam-ullah Khan, restraining him from receiving the *malikana* dues. The court *ex parte* made an order as prayed and issued an injunction. Objections were put forward by Muhammad Inamullah Khan, judgement-debtor, which were dismissed and the *ex parte* order of the court was maintained. The judgement-debtor appealed to the High Court against this last mentioned order.

The Hon'ble Mr. *Abdul Raoof*, for the appellant.

Pandit *Shiam Krishna Dar*, for the respondent.

CHAMIER and PIGGOTT, JJ.—This appeal arises out of an order passed in the course of proceedings taken to execute a decree dated November the 23rd, 1911. It appears that in August, 1901, the appellant mortgaged to the respondent his right to receive what are described as *taluqdari malikana* dues from a number of villages. A decree *nisi* for sale of the property was passed in favour of the respondent on November the 23rd, 1911. There was an appeal to this Court, which was dismissed in April, 1913, and an order absolute for sale of the property was passed on February the 10th, 1914. In March of the same year the respondent applied for sale of the property. Notice was issued to the appellant who put forward objections. Those objections were ultimately dismissed and an order was made that the property should be sold. On July the 10th, 1914, the respondent applied to the court to issue an injunction to the appellant restraining him from receiving the *malikana* dues. At first sight it seems to be an application under order XXXIX, rule 1, of the Code of Civil Procedure, but from certain expressions used in the application it may have been an application under order XXXVIII, rule 5, of the Code of Civil Procedure. The court *ex parte* made an order as prayed and issued an injunction. Objections were put forward, which were dismissed and the *ex parte* order of the court was maintained. This is an appeal against the last mentioned order.

As the appellant has a right of appeal whether it was an order of attachment or an order for the issue of injunction, it is unnecessary to consider whether it was passed under order XXXVIII or under order XXXIX of the Code of Civil Procedure. In appeal it is contended that the court had no power either to attach the *malikana* dues or to prevent the appellant by injunction from receiving them. It is contended that all that the respondent is entitled to do under his decree, is to have the property sold. For the respondent it is contended that it is competent to a court to attach property in a case of this kind at all events, where it is clear that in the event of the mortgaged property not realizing sufficient to satisfy the decree, a decree can be passed under order XXXIV, rule 6. We will assume, for the purposes of this appeal, that the property mortgaged will not realize sufficient to satisfy the decree. It appears to us clear that the case does not fall either within order XXXVIII, rule 5, or within order XXXIX, rule 1, of the Code of Civil Procedure. There is no suggestion that the appellant is about to dispose of the whole or any part of his property, or remove it from the jurisdiction of the court, or that any property in dispute is in danger of being wasted, or that the appellant intends to remove his property with a view of defrauding his creditors. All that the appellant in the present case insists upon doing is receiving the income of the property until a sale takes place. In the last resort it is contended that the court was justified in passing the order under appeal either under clause (*c*) or clause (*e*) of section 94 of the Code of Civil Procedure. It is a question whether the clauses referred to are intended to authorise a court to grant injunctions or to make attachments in cases not provided for by the orders or rules. We may assume that it was intended to give the court powers outside the orders and rules in exceptional cases. In the present case we see no reason to take action of an extraordinary character. The order absolute for sale was not passed until February, 1914, and it cannot be said that the appellant has for any great length of time prevented the respondent decree-holder from enforcing his decree. Assuming therefore that section 94 can be construed in the way suggested by the respondent, we are not prepared to hold that the present

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case is covered by that section. It seems to us that the court below was not justified in either attaching the *malikana* dues or restraining the appellant by injunction from receiving them. We allow the appeal and set aside the order of the court below. The respondent will pay the appellant's costs of this appeal. The record should be sent back at once so that further execution may not be delayed.

Appeal allowed.

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April, 26.

Before Justice Sir Pramada Charan Banerji and Mr. Justice Muhammad Rafiq.

JHANDU MAL AND ANOTHER (PLAINTIFFS) *v.* KARAN SINGH AND OTHERS (DEFENDANTS).*

Mortgage—Suit on lost bond—Admission of execution—Plea of payment—How far question of loss material.

In a suit brought on a lost mortgage bond the defendant, a son of the executant, admitted execution but pleaded payment and denied the loss.

Held, that since the defendant admitted execution, it lay on him to prove that the mortgage had been discharged. The question of the loss of the bond was only material for the purpose of determining whether the bond had been discharged and returned.

THE facts of this case were as follows :—

This was a suit brought by the plaintiffs-appellants to enforce a mortgage, dated the 10th of July, 1884, alleged to have been executed by two persons, namely Randhir Singh and Partap Singh.

Randhir Singh is dead and is represented by his son, Karan Singh and his daughter-in-law Musammat Radha, the widow, apparently, of a pre-deceased son. The share of Randhir Singh in the mortgaged property was sold to Chidammi Lal whose minor sons Daya Kishore and Jaikishore are the defendants Nos. 4 and 5. The defendant No. 2 is the mortgagor, Partab Singh, and defendant No. 3, Nahar Singh, is the son of Partab Singh.

Nahar Singh filed a written statement in which he said that his father Partab Singh was of unsound mind and was under the influence of the plaintiffs and that the bond had been discharged by Chidammi (the purchaser of Randhir Singh's property) and had been returned to him. He denied the allegation of loss of the bond made on behalf of the plaintiffs. Partab Singh and

* Second Appeal No. 674 of 1913, from a decree of H. W. Lyle, District Judge of Agra, dated the 11th of March, 1913, confirming a decree of Shekhar Nath Banerji, Second Additional Subordinate Judge of Agra, dated the 24th of February, 1913.