

Before Mr. Justice Gokul Prasad and Mr. Justice Lindsay.

AGEA SULTAN KHAN (DEPENDANT) v. MOHABBAT KHAN AND ANOTHER (PLAINTIFFS) AND BHAGWAN DIN AND ANOTHER (DEPENDANTS),*
Civil Procedure Code (1908), order XXI, rule 66—Sale in execution of simple money decree—Notification of a mortgage in the proclamation of sale—Auction purchaser not precluded from challenging the validity of the mortgage.

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Held that the notification of an incumbrance on the property about to be sold in a proclamation of sale made under order XXI, rule 66, of the Code of Civil Procedure (1908) will not preclude the auction purchaser from subsequently questioning the validity of the incumbrance. In this respect the Code of 1908 has made no difference in the law as it stood under the former Code. *Shib Kunwar Singh v. Sheo Prasad Singh* (1) and *Jairaj Mal v. Radha Kishan* (2) followed.

THE facts of the case sufficiently appear from the judgment of the Court.

Dr. Kailas Nath Katju, for the appellant:—

The principal question in this case is whether the auction purchaser Puran or his representatives, the plaintiffs, can question the incumbrance specified in the sale proclamation. The lower appellate court relied upon *Shib Kunwar Singh v. Sheo Prasad Singh*, (1) and held that the incumbrance could be questioned. But that case was governed by the old Code of Civil Procedure. Order XXI, rule 66, of the present Code of Civil Procedure provides for notice to be given to the decree-holder and the judgment-debtor before the proclamation is drawn up. There was no such provision in the old Code. It was because the proclamation used to be drawn up behind the back of the parties that the judgment-debtor, and his representative the auction-purchaser, were given the right to question the validity of an incumbrance shown in the proclamation. But under the present Code notice is given to the parties so that they may make any objections they like, and under clause (4) of rule 66 the court can make all necessary inquiries before drawing up the proclamation. So the court must be taken to have been satisfied of the existence of the mortgage before showing it in

* Second Appeal No. 1190 of 1918 from a decree of Kshirod Gopal Banerji, Subordinate Judge of Cawnpore, dated the 27th of May, 1918, reversing a decree of Banwari Lal, Munsif of Cawnpore, dated the 18th of March, 1918.

(1) (1906) I. L. R., 28 All., 418.

(2) (1913) I. L. R., 35 All., 257.

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the proclamation. The provision in sub-clause (e) of clause (2) of rule 66 is intended to let the auction purchaser know everything material for him to know in order to judge of the nature and value of the property, so that he may not have to run unnecessary risks and thus gamble with his money. If, therefore, he purchases the property with notice of a mortgage on it, he purchases it subject to the mortgage. In other words, he purchases only the equity of redemption and cannot deny the *factum* of the mortgage itself.

The only other point I wish to urge is that the court below ought to have found if anything was advanced on the mortgage or not, and if anything was advanced, my client is entitled to get it.

Munshi *Gulzari Lal*, for the respondents:—

To see what passed to the purchaser at the auction sale we must see the sale certificate granted to him. If the court had been satisfied under order XXI, rule 62, that there was a valid mortgage of the property, it would have mentioned it in the sale certificate. This is the meaning of the rulings in *Shib Kunwar Singh v. Sheo Prasad Singh* (1) and *Jairaj Mal v. Radha Kishan* (2).

GORUL PRASAD and LINDSAY, JJ.:—The principal question raised in this appeal is whether a purchaser at auction who has purchased certain property is entitled to dispute the validity of a mortgage which was notified in the sale proclamation prepared under order XXI, rule 66, of the Code of Civil Procedure (Act No. V of 1908). It appears that one Musammat Hingan Bibi was in possession of a certain house. As assignus from one Nurjahan Begam the plaintiffs sued Musammat Hingan for possession of the house, and on the 25th of January, 1917, they obtained a decree for possession of a 10 anna share out of the 16 annas of the house. Costs were also decreed to them to the extent of about Rs. 80. It appears that the plaintiffs took out execution of the decree for costs and in execution thereof they applied for attachment and sale of the remaining 6 anna share of the house. Before, however, the order for attachment could be carried out Musammat

(1) (1906) I. L. R., 28 All., 418. (2) (1918) I. L. R., 35 All., 257.

Hingan Bibi made a usufructuary mortgage of the whole house for Rs. 1,000 in favour of the defendant appellant. It might be mentioned here that Musammat Hingan Bibi had appealed from the decree for possession given by the first court and during the pendency of the appeal the execution proceedings above referred to were taken and the mortgage mentioned above executed. It appears that during the course of the execution proceedings a sale proclamation was prepared under the provisions of order XXI, rule 66, of the Code of Civil Procedure and the mortgage of the 2nd of March, 1917, which had been effected after the application for execution had been made, was also mentioned as a charge for which the property was liable. The property was sold on the 28th of July, 1917, and Puran purchased it. On the 18th of September, 1917, he sold it to the present plaintiffs. The present suit has been brought by them for possession of the house so purchased, on the ground that the defendant appellant has obstructed them in taking actual possession of the house. The first court decreed the plaintiffs' claim unconditionally as to the 10 anna share for which they had got a decree against Musammat Hingan, but as to the remaining 6 anna share which they had purchased at auction it attached a condition to the effect that they must redeem the mortgage for Rs 1,000 in favour of the defendant appellant which had been notified at the time of the sale at which their predecessor in title, Puran, purchased the property. On appeal by the plaintiffs the learned Subordinate Judge modified the decree of the court of first instance by decreeing the plaintiffs' suit unconditionally. The defendant appellant who had taken the mortgage from Hingan on the 2nd of March, 1917, during the continuation of the execution proceedings as mentioned above comes here in second appeal. The first contention raised on his behalf is that, having regard to the provisions of order XXI, rule 66, of the Code of Civil Procedure (Act No. V of 1908), the auction purchaser is precluded from challenging the validity or correctness of the mortgage in his favour. It is contended that there has now been a change in the procedure to be followed in execution proceedings in this

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matter and that the case of *Shib Kunwar Singh v. Sheo Prasad Singh* (1) is no longer good law. The present case is governed by order XXI, rule 66. It corresponds to section 287 of the Code of Civil Procedure of 1882, and the only change which it is necessary to consider for the purpose of deciding the question raised in this appeal is that the words "be drawn up after notice to the decree-holder and the judgment-debtor" have been added. It is contended on the strength of the addition of these words that the proceedings under order XXI, rule 66, are of the same nature as those contemplated by order XXI, rule 62, of the same Code and have the same result. We do not think that the effect of this amendment has in any way altered the result or the nature of the inquiry under section 287 of the old Code of Civil Procedure. The words here, as they stand, are not the same as in rule 62 of the same order. In rule 62 it is expressly laid down that where the court is satisfied that the property is subject to a mortgage or charge . . . then certain consequences follow. In rule 66 there are no words like these from which it might be inferred that the court has satisfied itself that such a mortgage or charge exists. It only amounts to an inquiry which apparently is not to be a very detailed one and we do not see any reason to come to the conclusion that the result of the proceedings under rule 66 which culminate in the sale proclamation is to be conclusive between the parties or binding upon the auction purchaser. During the course of the argument one of us put a question to the learned counsel for the appellant, whether in case notice had been issued to the judgment-debtor and he had taken no objection to the preparation of the sale proclamation, he could in a suit on the mortgage dispute the validity of the mortgage or plead want of consideration. The learned counsel had to concede that the judgment-debtor could do so. We do not see why, if the judgment-debtor could do so, the auction purchaser, who, it is contended, is his representative, could not have done the same thing if the suit had been brought to enforce the mortgage. If that right is conceded to him

(1) (1906) I. L. R., 23 All., 418.

in a suit brought on the basis of the mortgage there seems to be nothing to warrant us in holding that he cannot enforce the same when he is suing for possession of the property which he has purchased at auction. In our opinion the rule of law laid down in *Shib Kunwar Singh v. Sheo Prasad Singh* (1) and *Jairaj Mal v. Radha Kishan* (2) still holds good and there has been no change so far as the Code of Civil Procedure is concerned.

It having been held, then, that the auction purchaser could challenge the validity of the mortgage in the suit, we find that the lower appellate court has rightly entered into the question of the binding nature or otherwise of the mortgage. On this question it has found in favour of the plaintiff. We, therefore, dismiss the appeal with costs.

Appeal dismissed.

Before Mr. Justice Walsh and Mr. Justice Lindsay.

SHADI JAN (PETITIONER) v. WARIS ALI AND OTHERS

(OPPOSITE-PARTIES.) *

Act No. VII of 1889 (*Succession Certificate Act*), section 4—*Muhammadan law*
—*Dower—Husband and wife both dead—Claim by heir of wife against heir of husband for proportionate share of dower debt due by defendant.*

No succession certificate is necessary where the suit is by one of the heirs of the wife to recover from one of the heirs of the husband the proportionate share of the wife's dower the liability to pay which had devolved upon the defendant according to her share by inheritance in the property of the husband. *Ghafur Khan v. Kalandari Begam* (3) distinguished.

THE facts of the case are fully set forth in the judgment of LINDSAY, J.

Mr. Abu Ali, for the appellant :—

In rejecting the application the lower court relied upon the case of *Ghafur Khan v. Kalandari Begam* (3). That case has really no application to the present case. In that case the husband himself from whom the dower debt was due was still alive and was being sued. The debt was, therefore, not split up at the date of the suit. In the present case the original

*First Appeal No. 178 of 1917, from an order of H. E. Holme, District Judge of Bareilly, dated the 24th of August, 1917.

(1) (1906) I. L. R., 28 All., 418. (2) (1913) I. L. R., 35 All., 257.

(3) (1910) I. L. R., 33 All., 327.

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