possession with him of the plots in dispute, but the possession of Shankar Lal and his sons cannot be deemed in law to be the possession of the plaintiff or of his predecessors in title. The admission of Sada Sheo Lal about the possession of Shankar Lal's sons can therefore be of no avail to the plaintiff. Shankar Lal, as already stated, was the judgment-debtor in the decree held by the Maharaja. Notwithstanding the sale of his share he and his sons continued in possession of the plots. Their possession was adverse to that of the Maharaja and of his successors in title, and it would be absurd to give to the Maharaja or to his successors in title including the plaintiff the benefit of possession on the part of Shankar Lal and his sons, which was adverse to them from the very outset. If the plaintiff had impleaded Shankar Lal's sons in the present suit and if the latter had pleaded adverse possession there could have been no answer to that plea, and it is impossible to appreciate how by omitting to implead Shankar Lal's sons the plaintiff can insist on the possession of Shankar Lal's sons being deemed to be equivalent to his own possession.

For the reasons given above we hold that the suit was time-barred and we dismiss this appeal with costs.

Before Sir Lal Gopal Mukerji, Acting Chief Justice, and Mr. Justice Rachhpal Singh

1932
November, 10

MUHAMMAD SHAFIQ AHMAD AND ANOTHER (JUDGMENT-DEBTORS) *v.* RAM KATORI AND ANOTHER (DECREE-HOLDERS) *

Civil Procedure Code, order XXXVIII, rule 5—Attachment before judgment—Suit for sale on mortgage—Application for attachment made after the preliminary decree for sale but before the final decree—Application maintainable.

The language of order XXXVIII, rule 5 of the Civil Procedure Code is very wide and an application for attachment

* First Appeal No. 176 of 1931, from an order of Pran Nath Agha, Additional Subordinate Judge of Moradabad, dated the 15th of September, 1931.

1932

MUHAMMAD SHAFIQ AHMAD v. RAM KATORI

before judgment can be made by a mortgagee decree-holder after the passing of the preliminary decree for sale and before the final decree, on the ground that the mortgaged property has much depreciated in value and that the defendant mortgagor is about to dispose of or remove his other property, so as to defeat the decree under order XXXIV, rule 6, which may ultimately be passed in the suit.

Mr. *Panna Lal*, for the appellants.

Mr. *Vishwa Mitra*, for the respondent.

MUKERJI, A. C. J., and RACHHPAL SINGH, J. :—This is an appeal against an order directing the attachment before judgment of certain properties of the defendants who are the appellants before us.

It appears that the respondents obtained a preliminary decree for sale against the appellants on the 24th of February, 1931. After the expiry of the usual six months' time allowed for payment, on the 27th of August, 1931, the respondents made an application for the passing of the final decree. Ten days later, on the 7th of September, 1931, the plaintiffs applied for attachment before judgment of the property of the defendants. An affidavit was filed along with the application. The application was based on the ground that the property mortgaged had deteriorated in value and was likely to deteriorate in value further owing to the remission of rents on the part of the Government. The application further stated that it was feared that the defendants who had already encumbered some of their properties would dispose of or encumber their remaining property in order to avoid the payment of the decretal amount that would remain unpaid and unsatisfied even after the sale of the mortgaged property. The defendants contested this application but the learned Judge passed a two-line order to the following effect: "Let a temporary attachment go, but property fetching an annual profit of Rs.800 and no more will be attached." It was a very vague order to pass, but we are told by the learned counsel for the respondents that it has been rectified by the court

on obtaining a list of the properties, together with a statement of the land revenue paid by them. Ultimately only such properties have been attached which pay a total revenue of Rs.800 a year.

The learned counsel for the appellants has put forward two arguments before us. One is that at the stage at which the application for attachment before judgment was made no application was maintainable in law; and the second is that on the merits this was not a case in which an order for attachment before judgment could be made.

On the first point we are of opinion that the contention is not sound. The language of order XXXVIII, rule 5, is very wide and does embrace a case like this. In this very case, supposing the facts alleged are true, and in similar cases, it can certainly not be open to the judgment-debtor to sell off his entire property in order that he might defeat the decree for money that may be passed against him under order XXXIV, rule 6 of the Civil Procedure Code. The learned counsel has cited before us the case of *Muhammad Inamullah Khan* v. *Narain Das* (1). That case was decided on its own facts and their Lordships clearly state the reasons why they thought that order XXXVIII, rule 5, had no application. They state: "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 . . ." This case, therefore, is no authority for the proposition that at the stage already described an application like the one made by the respondents could not be entertained.

On the merits we find that the application was based on an affidavit filed by one Dal Chand. In paragraph 4 Dal Chand says: "I solemnly affirm and state that this is quite *possible* that the judgment-debtors would transfer their remaining *khalis* property to some other persons so that the petitioners may not be able to realise

(1) (1915) I.L.R., 37 All., 423.

1932

MUHAMMAD SHAFIQ AHMAD v. RAM KATORI

the remaining amount of decree and that they may be put to considerable loss." This certainly is not a ground described in order XXXVIII, rule 5, and no order of attachment before judgment could be based on such a state of facts.

On behalf of the respondents we have been told that the order passed by the learned Judge was in the nature of an *ad interim* order made with a view to securing the property before further investigation could be made in the case. The learned counsel for the parties are agreed that the order appealed against may be allowed to stand for the present but the case may be sent back to the court below for an investigation into the application, on proper evidence. We accept this suggestion on the part of counsel and send the case back with the direction that the learned Judge would take up the application of the 7th of September, 1931, and adjudicate on it after giving the parties an opportunity to adduce such evidence, by way of affidavit or otherwise, as they may be advised to produce. We direct accordingly.

Before Sir Lal Gopal Mukerji, Acting Chief Justice, and Mr. Justice Rachhpal Singh

1932
November, 14.

RAJENDRA BEHARI LAL (JUDGMENT-DEBTOR) *v.* GULZARI LAL AND OTHERS (DECREE-HOLDERS)*

Civil Procedure Code, order XXI, rules 54, 67 *and* 90—*Application for setting aside execution sale—Sale not proclaimed by beat of drum—Material irregularity.*

The law requires that an impending execution sale should be proclaimed by beat of drum or other customary mode, and failure to do so is a material irregularity. The addition of the words, "so far as may be", in order XXI, rule 67 of the Civil Procedure Code, 1908, does not make any change in the law in this respect in cases where it is possible to have a sale proclaimed by beat of drum.

Mr. *Gopi Nath Kunzru*, for the appellant.

* First Appeal No. 47 of 1932, from an order of Ram Saran Das, Subordinate Judge of Aligarh, dated the 16th of February, 1932.