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IN THE MATTER OF THE PETITION OF SHEO DIAL v. PRAG DAT MISR.

upon the special language of the document involved in the suit before the Court; and Garth, C. J., remarked that "it was doubtful whether, having regard to the terms of the loan, the defendant was personally liable for the money, and whether the only remedy of the plaintiff was not against the mortgaged property." But in the present case the bond creates a personal as divisible from a property obligation, and the loan can be separated from the hypothecation. The suit was simply for the money-debt and not for enforcement of lien, and the bond was not tendered in evidence for the purpose of proving a "transaction affecting property," but in order to establish that the loan had been made. The Judge should therefore dispose of the case upon the merits, and the case should be remanded for that purpose. Costs of the application to be costs in the cause. I may add that after discussion the pleader for the opposite party abandoned his contention, contrary to the view I have expressed as untenable.

PEARSON, J.—I concur in the opinion expressed by Mr. Justice Straight, and would remand the case to the lower appellate Court for fresh disposal, with a direction that the costs of this application be costs in the cause.

Case remanded.

APPELLATE CIVIL.

1880
August 16.

Before Mr. Justice Pearson and Mr. Justice Straight.

MANNU LAL (DEFENDANT) *v.* HARSUKH DAS (PLAINTIFF).*

Attachment in execution of decree—Suit to establish right.

B caused certain immoveable property to be attached in the execution of a decree. *M* objected to the attachment, claiming to be in possession of such property on his own account. The investigation of such claim which followed under s. 246 of Act VIII of 1859 took place as between *B*, the decree-holder, and *M*, *N*, the judgment-debtor, not being a party to it except in name. *M's* objection was allowed in May, 1871, but no suit was brought either by *B* or *N* to establish *N's* right to such property. *H* subsequently obtained a decree against *N* in 1877, and in

* Second Appeal, No. 267 of 1880, from a decree of H. A. Harrison, Esq., Judge of Mirzapur, dated the 10th January, 1880, reversing a decree of Kazi Wajeh-ul-lah Khan, Subordinate Judge of Mirzapur, dated the 30th June, 1879.

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MANNU LAL v. HARSUKH DAS.

execution thereof caused such property to be attached. *M* objected to the attachment and his objection was allowed in April, 1878. In March, 1879, *H* sued *M* for a declaration that a moiety of such property belonged to *N* and to have the order removing the attachment cancelled. *Held* that *N*'s right to a moiety of such property was not extinguished because he had not sued to establish it within one year of the making of the order of May, 1871, in the execution-proceedings of *B*, and *H* was competent to sue to establish such right.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court.

Messrs. *Conlan*, *Colvin*, *Howard*, and *Dillon*, and Munshi *Hanuman Prasad*, for the appellant.

Pandits *Ajudhia Nath* and *Nand Lal*, and Lala *Jokhu Lal*, for the respondent.

The judgment of the Court (PEARSON, J., and STRAIGHT, J.,) so far as it is material to the purposes of this report, was as follows:—

STRAIGHT, J.—This is a suit brought by the plaintiff-respondent to have one Baij Nath, his judgment-debtor, declared the owner of one-half of an orchard situate in the village of Basahi, zila Mirzapur, by cancelment of an order passed in the execution department on the 5th of April, 1878. The Court of first instance dismissed the claim, but the Judge upon appeal decreed it, and the defendant Mannu Lal now appeals to this Court. The following are the material facts for consideration. In the year 1871, one Bandhu Bai, a banker of Mirzapur, having obtained a decree against Baij Nath, attached the garden now in question, but upon objection made by the present defendant-appellant Mannu Lal under s. 246, Act VIII of 1859, it was released. Upon reference to the proceedings in execution, it does not appear that Baij Nath, the judgment-debtor, was, except in name, a party to them, nor does it appear that he was summoned as provided by s. 246. The contest seems to have been solely between the decree-holder and the objector, who alleged himself to be in possession of the garden and in enjoyment of its fruits and produce. This possession the Subordinate Judge found to be established, and he accordingly allowed the objection, but no suit was brought either by Bandhu Bai or Baij Nath to establish the right of the latter to half the garden. The present

plaintiff, Harsukh Das, obtained a decree at Calcutta against Baij Nath in June, 1877, and on the 28th January, 1878, it was transferred to Mirzapur for execution. The garden was again attached, and thereupon, as before, Mannu Lal objected, and on the 5th April, 1878, his objection was allowed, and the attachment was removed. Hence the present suit was instituted on the 26th of March, 1879. The substantial point taken for the appellant is that, as no suit was brought by Baij Nath to establish his right to half the garden within one year from the passing of the order of the 12th May, 1871, in the execution proceedings of Bandhu Bai, his right is lost and his remedy is gone, and the plaintiff therefore cannot now come into Court and seek to establish a title which has lapsed and is extinguished. Whatever weight this contention might have had if Baij Nath had actually been a party to the proceedings between Bandhu Bai and Munna Lal in execution, which ended in the order of 12th May, 1871, we cannot, when he was not a party to the proceedings, hold that the order of the Subordinate Judge was "given against him" in the sense of s. 246 of Act VIII of 1859. The questions investigated and decided as between the objector and the decree-holder were whether Mannu Lal was in possession of the garden and in enjoyment of the fruit and produce thereof, for and on his own account, and whether Baij Nath directly or indirectly had any interest in it available for execution of the decree. If Baij Nath had no such interest, then the Subordinate Judge was right in releasing the attachment; if he had, Bandhu Bai might have brought a suit and established his right. No doubt, in the sense that the order releasing the property reduced the means of Baij Nath to satisfy the decree of Bandhu Bai, and left it in force against him for a larger sum, it may be said that the order was given against him as well as against the decree-holder, but as he was not formally made a party to the proceeding, as he might have been, if the provisions of s. 246 had been followed, we cannot hold him bound by the order, nor do we think it was incumbent upon him to bring a suit to establish his right, or that, having failed to do so, any interest he may have had must be taken to have lapsed. We are therefore of opinion that it is competent for the plaintiff-respondent to seek a declaration of Baij Nath's right to half the garden, and that the appellant's objection to the suit should not prevail.