

unfettered by any judgment of a court of equal or superior jurisdiction, we are bound now to overrule that decision.

In this case there was not in my opinion a "departure" by the gomasta, Panna Lall, within the terms of the statute, and I also agree that even if there had been, there is nothing to connect such an act with the master Dhunput, so as to make him liable for the consequences of the conduct of his servant and gomasta. So far from departing, Dhunput hurried down to Calcutta to meet his creditors, and except that he was unable to provide sufficient funds and there was consequently a stoppage of business, there was nothing at least up to Dhunput's arrival which would amount to an act of insolvency. There was nothing done by Dhunput with intent to delay or defeat creditors. All that can be attributed to Dhunput is the stoppage of business from his not providing sufficient funds, and I agree that this is not an act of insolvency within the section.

1893

In re
DHUNPUT
SINGH.

Appeal allowed.

Attorney for the appellant: Baboo *Bhupendro Nath Bose.*

Attorney for the respondents (the adjudicating creditor and the Official Assignee): *Mr. M. Camell.*

C. B.

APPELLATE CIVIL.

Before Mr. Justice O'Kenealy and Mr Justice Ameer Ali.

KASINATH DAS AND OTHERS (PLAINTIFFS) *v.* SADASIV PATNAIK
AND OTHERS (DEFENDANTS).*

1893
April 17.

Attachment—Civil Procedure Code (Act XIV of 1882), ss. 53, 274, clause (c)—Rights of purchaser of mortgage bond at sale in execution of decree—Amendment of plaint.

Where a person at an execution sale purchases a mortgage bond under which certain immoveable property is given as collateral security for an advance, the fact that he has not attached under section 274 of the Code will not affect his right to have the collateral security enforced by the sale of the properties mortgaged.

* Appeal from Original Decree No. 290 of 1891, against the decree of Baboo Boloram Mullick, Subordinate Judge of Cuttack, dated 29th of June 1891.

1893
 KASINATH
 DAS
 v.
 SADASIV
 PATNAIK.

ON the 27th August 1878, the defendants 1 and 5, and the father of the defendants 2, 3 and 4, executed a mortgage bond for Rs. 6,000 in favour of one Bhagawan Sahu, ancestor of defendant No. 6, under which certain immoveable property was hypothecated as collateral security for the debt.

Bhagawan Sahu himself died indebted to one Bishnath Dass; and on the death of Bishnath, his representatives (the present plaintiffs) brought a suit against the representatives of Bhagawan Sahu, defendant No. 6, and one Moyna Bibee, since deceased, and in execution of a decree obtained in such suit on 19th November 1890, attached and in execution sale purchased the bond executed in favour of Bhagawan Sahu for Rs. 670.

On the 22nd December 1890, the present plaintiffs, the representatives of Bishnath Dass, brought this suit against the defendants 1, 2, 3, 4 and 5, making defendant No. 6 and Moyna Bibee the representatives of Bhagawan *pro forma* defendants, to enforce the mortgage bond of the 27th August 1878; stating in their plaint that they relinquished all interest due under the bond, and praying that in default of payment of the amount of the principal due under the bond, the defendants might be deprived of their right of redemption. There was, however, no prayer for the sale of the mortgaged properties.

The defendants filed written statements which, however, it is unnecessary to refer to owing to the view taken of the case by the Court below. At the hearing, the plaintiffs asked leave to amend their plaint by adding a prayer for sale of the mortgaged properties. This the Subordinate Judge refused to allow them to do, stating that under section 67 (a) of the Transfer of Property Act, the plaintiffs were bound to sue for the sale of the mortgaged properties, and that, not having done so, the plaint should have been rejected; and he, on the ground "that the plaintiffs had asked for a relief to which under the terms of the mortgage they were not entitled," held that their suit must fail. He also dismissed the suit on a further ground, *viz.*, that the plaintiffs having acquired, by their purchase of the 19th November 1890, the mortgagee's right, which was an interest in immoveable property, should have attached the bond under section 274 of the Civil Procedure Code, and not having so attached, they were, on

the authority of the rulings in *Srinath Dutta v. Gopal Chundra Mitra* (1), *Appasami v. Scott* (2), *Sami Ayyar v. Krishnasami* (3), and *Bhawani Kuar v. Gulab Rai* (4) [preferring the view taken in these cases to that taken in *Debendra Kumar Mandel v. Rup Lall Dass* (5)], not entitled to maintain the suit.

1893
KASINATH
DAS
v.
SADASIV
PATNAIK.

The plaintiffs appealed to the High Court.

Mr. *Twidale*, Baboo *Umakali Mukerjee*, and Baboo *Manmotho Nath Mitra* for the appellants.

Baboo *Karuna Sindhu Mookerjee* for the respondents.

For the appellants it was contended that the amendment of the plaint should have been allowed, as the amendment would not have affected the character of the suit; and that no attachment under section 274 was necessary, having regard to the case of *Debendra Kumar Mandel v. Rup Lall Dass* (5), which should be followed in Bengal.

For the respondents it was contended that as there was no attachment under section 274, the immoveable property mortgaged as collateral security was not affected by the sale, reference being made to the cases mentioned by the Subordinate Judge.

The judgment of the Court (O'KINEALY and AMBER ALI, JJ.) was as follows :—

This appeal arises out of a suit brought by the plaintiffs under the following circumstances :—The defendants 1 and 5 and the father of the defendants 2 to 4 had, on the 27th of August 1878, executed a mortgage bond for Rs. 6,000 in favour of one Bhagawan Sahu, since deceased, by which various immoveable properties were hypothecated as a collateral security for the debt. Bhagawan was himself indebted to one Bishnath. Upon Bhagawan's death, the plaintiffs, who represent Bishnath, brought a suit against his (Bhagawan's) representatives (defendant 6 and one Moyna Bibee, since deceased), and in execution of their decree on the 19th of November 1890 purchased the bond held by Bhagawan. They

(1) I. L. R., 9 Calc., 511.

(3) I. L. R., 10 Mad., 169.

(2) I. L. R., 9 Mad., 5.

(4) I. L. R., 1 All., 348.

(5) I. L. R., 12 Calc., 546.

1893
 KASINATH
 DAS
 v.
 SADASIV
 PATNAIK.

now seek to enforce the bond in question. In paragraph 6 of the
 plaint they state as follows:—

“Although a large sum would be due to us if calculation is made of the principal and interest of the money covered by the bond in suit, still there being no likelihood of the whole amount being realized from the mortgaged property, we have relinquished the claim for interest and brought this suit for only the principal Rs. 6,000.”

And they pray:—

“(Ka). That it may be ordered by the Court that the debtor-defendants do on a day to be fixed by the Court pay the said amount of principal, and in default thereof they be deprived of their right of redemption.”

“(Kha). That whatever interest may be due from the institution of suit until the date of realization of the said money under the terms of the bond, be awarded (to us).” “(Ga) That the costs of this suit be ordered to be awarded to us.”

Having regard to the nature of the bond and the statements above referred to, the object of the suit was clearly to realize the amount secured by the enforcement of the bond according to law.

The defendants in their written statements raised various questions of law and fact, but these have not been gone into as the suit has been dismissed on two grounds, one of which certainly is of a somewhat peculiar character. The Subordinate Judge thinks that the plaintiffs ought to have prayed for the sale of the mortgaged properties, and as they did not do so, their suit must fail. As a matter of fact the plaintiff in the course of the trial prayed for the amendment of the prayer, but the Judge, relying on section 54, clause (c) of the Civil Procedure Code, rejected the petition. It seems to us that the Subordinate Judge has acted on an erroneous view of the law. Section 53, clause (c), distinctly provides that an amendment, so long as it does not alter the character of the suit, may be allowed at any time before judgment. The restriction is only as to the nature of the suit; the law prohibits any such amendment as would change the fundamental character of the suit; for example, a plaint cannot be so amended as to convert a claim based on contract into an action on tort. But an alteration in the relief does not alter the character of a suit.

In the present case it does not appear that any such amendment was necessary, for the relief which the plaintiffs sought and to

which, in law, they were entitled, if the facts at issue were established, is sufficiently indicated in the statements in the plaint already set out. Section 54 has nothing to do with the question: it refers to the rejection of a plaint in case it does not fulfil certain conditions. But those elements are not present here, nor was the plaint rejected under section 54. As we have said above, in our opinion the Subordinate Judge was in error in disallowing the petition for amendment. The second ground on which the suit has been disallowed may be summarized as follows:—The Subordinate Judge thinks that as the plaintiffs claim to have acquired, by their purchase of the 19th of November 1890, the mortgagee's right, which is an interest in immoveable property, and as the mortgage bond was not attached under section 274 of the Civil Procedure Code, the plaintiffs' suit must fail.

The point in question was directly raised and decided in the case of *Debendra Kumar Mandel v. Rup Lall Dass* (1), where it was held that an attachment under section 274 was not necessary to make the sale of a mortgage bond carry the lien as well as the debt. The Subordinate Judge has relied, however, on the case of *Srinath Dutt v. Gopal Chundra Mittra* (2) and certain cases of the Madras and Allahabad High Courts. The Calcutta case referred to does not go further than this, that non-compliance with the provisions of section 274 in the case of a mortgage bond was an irregularity sufficient to justify the sale being set aside. As their Lordships of the Judicial Committee have often laid down, if the Court has jurisdiction, a mere irregularity will not affect the rights of the parties. But Baboo Karuna Sindhu Mookerjee argues that failure to attach under section 274 is more than an irregularity; that in fact it relates to the sale and conveys no right whatsoever to the purchaser in the collateral security. No doubt the Madras and Allahabad High Courts have gone to that extent. But, as at present advised, we are not disposed to take a different view of the law from that taken in *Debendra Kumar Mandel v. Rup Lall Dass* (1).

The question, however, remains, What was sold? in other words, was it the bond or was it the debt? The endorsement on the back

1893

KASINATH
DAS
v.
SADASIV
PATNAIK.

(1) I. L. R., 12 Calc., 546.

(2) I. L. R., 9 Calc., 511.

1893
 KASINATH
 DAS
 v.
 SADASY
 PATNAIK.

of the bond, dated the 6th of December 1890, furnishes little or no indication, and the question can only be answered by a reference to the execution proceedings which culminated in the sale of the 19th of November 1890. If the bond was sold, we think, following the case of *Debendra Kumar Mandel v. Rup Lal Dass* (1), the non-attachment under section 274 would not affect the right of the plaintiffs to have the collateral security enforced by the sale of the properties hypothecated. The order of the Subordinate Judge is accordingly set aside and the case remitted to him to be dealt with according to law. Costs to abide the result.

Appeal allowed.

T. A. P.

Before Mr. Justice Tottenham and Mr. Justice Ameer Ali.

1893
 March 3.

MOHIUDDIN AND ANOTHER (DEFENDANTS) v. SAYIDUDDIN
alias NAWAB MEAN AND ANOTHER (PLAINTIFFS).*

Right of suit—Civil Procedure Code (Act XIV of 1882), ss. 30, 539—Religious endowments—Removal of sajjadanashin—Contentious and non-contentious cases—Act XX of 1863—Mahomedan law—Rule that remuneration of mutwalli should not exceed one-tenth of income of endowment—Sajjadanashin, position of.

Section 539 of the Code of Civil Procedure applies both to contentious and non-contentious cases.

The decision of Best and Weir, JJ., in *Subbaya v. Krishna* (2) approved.

The interest required to enable a person to sue under that section must be an existing one, and not a mere contingency: the mere possibility of an interest or the mere possibility of succession to the managership of the properties concerning which the suit is brought is not sufficient to give a right to sue.

The right of worship of each worshipper in a Mahomedan mosque or religious endowment is an independent right wholly irrespective of the right of the other worshippers, and, therefore, non-compliance by a worshipper with the provisions of section 30 of the Code of Civil Procedure does not affect a suit for the removal of a trustee of a Mahomedan endowment.

* Appeal from Original Decree No. 193, of 1891, against the decree of J. G. Charles, Esq., District Judge of Shahabad, dated the 8th June 1891.

(1) I. L. R., 12 Cal., 546.

(2) I. L. R., 14 Mad., 186.