

MISCELLANEOUS CIVIL

Before Sir C. M. King, Knight, Chief Judge and
Mr. Justice H. G. Smith

1935
August, 28

THAKUR MAZBUT SINGH AND ANOTHER (APPLICANTS-APPELLANTS) v. MUSAMMAT INDRANI AND OTHERS (OPPOSITE-PARTY-RESPONDENTS).*

Civil Procedure Code (Act V of 1908), order XXXIV, rules 4 and 5 and order XXIII, rule 3—Mortgage—Subrogation, suit for—Attachment by judgment-creditor of plaintiff's rights in subrogation suit—Attachment of preliminary decree also made—Preliminary decree altered in appeal—Payment to attaching creditor out of Court—Certification by decree-holder—Preliminary decree is satisfied and cannot be made final—Certification of payment amounts to adjustment of suit—Death of judgment-debtor—Execution proceedings—Substitution of heirs, whether necessary.

A person brought a suit for subrogation praying that certain property be made liable for the money paid by him to redeem some prior mortgages but during the pendency of the suit a judgment-creditor of his attached the right which he was claiming in that suit and after the suit was decreed the judgment-creditor by way of safeguard took out a second attachment and attached the preliminary decree passed which was subsequently altered on appeal. *Held*, that the payment made to the attaching creditor satisfied the preliminary decree which could not be made final in favour of the decree-holder under order XXXIV, rule 5, C. P. C. and that the judgment-creditor was entitled to rely on the first attachment.

Payment made out of Court of the mortgage money due on a preliminary decree passed under order XXXIV, rule 4 if certified by the decree-holder, can be treated as an adjustment of the suit under order XXIII, rule 3, C. P. C. Where payment is actually made in Court and it is noted to have been made in the presence of the presiding Judge, there is very little distinction between such a payment made "in" Court and a payment made "into" Court as required by order XXXIV, rule 5, C. P. C. *Jogendra Prasad Narain Singh v. Gauri*

*Miscellaneous Appeal No. 26 of 1934, against the decree of Pandit Pradyumna Krishna Kaul, Subordinate Judge of Sitapur, dated the 14th of April, 1934.

Shankar Prasad Saha (1), followed. *Durga Devi v. Nand Lal* (2), dissented from.

Where a decree-holder attaches a decree, held by his judgment-debtor and in the course of the execution proceedings the judgment-debtor dies, *held*, that there is no necessity for having the names of his legal representative substituted.

Mr. *K. N. Tandon*, for the appellants.

Mr. *Hyder Husain*, for the respondents.

KING, C.J. and SMITH, J.:—This appeal arises out of an application for preparation of a final decree under order XXXIV, rule 5 of the Code of Civil Procedure. The Court below dismissed the application on the ground that the preliminary decree under order XXXIV, rule 4 had been satisfied.

The facts of the case are complicated and have been fully set forth in the order of the Court below. For the purpose of this appeal it is not necessary to repeat the facts at length. Bhupat Singh brought a suit on the 6th of December, 1929, against Musammat Indrani and Bimla Prasad for subrogation, praying that certain property in the hands of Musammat Indrani be made liable for payment of the sum of money which he had paid to redeem certain prior mortgages made by that lady's predecessors. Bimla Prasad was impleaded as being an attaching creditor. It appears that Bimla Prasad actually purchased the property during the pendency of this suit. One Mr. N. K. Banerjee, a judgment-creditor of Bhupat Singh, attached the right of Bhupat Singh which the latter was seeking to enforce in the suit. This attachment was made on the 19th of March, 1930, during the pendency of Bhupat Singh's suit. When the suit was decreed Mr. N. K. Banerjee, by way of additional precaution or safeguard, took out a second attachment and attached the decree which had been passed in favour of Bhupat Singh. It was ordered by the Court that Mr. N. K. Banerjee be made holder of the decree of the case No. 153 of 1929 (Bhupat Singh

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(1) (1917) 2 Pat. L.J., 533.

(2) (1932) A.I.R., Lah., 233.

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v. Musammat Indrani). Bimla Prasad filed an appeal against a portion of the decree, and his appeal succeeded in the Chief Court with the result that the sum of money in satisfaction of which the property in suit was to be sold was substantially reduced. In other respects the decree of the trial Court was unchanged, but the Chief Court set aside the whole decree and passed a fresh decree. On the 24th of November, 1932, Mr. N. K. Banerjee certified to the Court satisfaction of the decretal amount due to Bhupat Singh under the decree passed in the case No. 153. The money was actually paid by Bimla Prasad, a judgment-debtor under the decree in suit No. 153, and the money was paid to Mr. N. K. Banerjee as being entitled to the rights of the decree-holder Bhupat Singh. In consequence of this certificate of satisfaction of the decree the Court ordered that the case be filed. Subsequently the heirs of Bhupat Singh came forward with an application that the preliminary decree passed in suit No. 153 in favour of Bhupat Singh be made final under order XXXIV, rule 5 of the Code of Civil Procedure. As we have already stated, the Court below refused this application on the ground that the preliminary decree had been satisfied.

It has been argued for the appellant firstly that Mr. N. K. Banerjee had no right to take the money from Bimla Prasad in satisfaction of the decree passed in favour of Bhupat Singh because he attached only the decree of the trial Court in suit No. 153; but that decree was set aside by the order of the Chief Court, and in any case the decree of the trial Court was superseded by the decree of the Chief Court, and the decree of the latter Court was not attached.

The general proposition must be conceded that the decree of the trial Court is merged in, or superseded by, the decree passed by the appellate Court, but it is argued for the respondent that the validity of the attachment of the decree itself is not of any great

importance in this case. The respondent relied not so much on the attachment of the decree, which was made on the 31st of May, 1930, as on the previous attachment of the rights of Bhupat Singh in the property, or the debts due to him, which attachment was made on the 19th of March, 1930, during the pendency of the suit. It is argued for the respondent that the subsequent attachment of the decree itself was unnecessary, and was only made as a matter of extra precaution or safeguard, but whether it was valid or invalid Mr. N. K. Banerjee was entitled to rely upon the previous attachment made on the 19th of March, 1930, which justified him in claiming the benefit of any decree passed in favour of Bhupat Singh on the basis of the rights or debts which had been attached. We think that this contention is sound, and it is immaterial for the purpose of this case whether the attachment of the decree itself was valid or invalid.

It has further been argued that under order XXXIV, rule 5 payment of the mortgage money must be made into Court, and payment out of Court is ineffective for the purpose of satisfying the preliminary decree made under order XXXIV, rule 4. In support of this contention a decision in *Musammatt Durga Devi v. Nand Lal* (1) has been cited. This ruling does, no doubt, support the appellants' contention. The Court took the view that order XXI, rule 2 applies only to execution proceedings, and a preliminary decree cannot be satisfied by payment out of Court. In the present case we think that as the payment was actually made in Court by Bimla Prasad to Mr. N. K. Banerjee and it was noted to have been made in the presence of the presiding Judge, there is very little distinction between such a payment made "in" Court and a payment made "into" Court. The distinction is a very technical one, and there is certainly no substantial defect in the procedure even if payment into Court is absolutely necessary for the purpose of satisfying a preliminary decree.

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We are not, however, satisfied that a preliminary decree cannot be satisfied by a payment made out of Court. The decision of the Patna High Court in *Jogendra Prasad Narain Singh v. Gauri Shankar Prasad Saha* (1), takes the view that payment of the mortgage money due on a preliminary decree made out of Court, if certified by the decree-holder, can be treated as an adjustment of the suit under order XXIII, rule 3. The point raised for the appellant is in any case of a very technical nature, and we prefer to follow the views of the Patna High Court.

It has also been argued that when Bimla Frasad paid the money to Mr. N. K. Banerjee Bhupat Singh was dead, and the heirs of Bhupat Singh had not been impleaded as his legal representatives under the decree held by Mr. N. K. Banerjee against Musammat Indrani and Bhupat Singh. It is argued that in such circumstances the payment made by Bimla Prasad to the attaching creditor of Bhupat Singh cannot be treated as a valid payment in execution of the decree. We think there is no force in this contention. The decree in favour of Mr. N. K. Banerjee had already been passed before Bhupat Singh's death, and if he died in the course of the execution proceedings there was no necessity for having the names of his legal representatives substituted. Mr. N. K. Banerjee was not executing his decree, and if he were executing it it would only be necessary for him to proceed against the legal representatives after due notice had been given to them.

The last point raised by the appellant is that no notice was issued to Bimla Prasad, the defendant in Bhupat Singh's suit, when the attachment of the decree was made by Mr. N. K. Banerjee in May, 1930. It is pointed out that under order XXI, rule 53, clause (6) it is necessary that notice should be sent to the judgment-debtor. There is nothing on the record to show

(1) (1917) 2 Pat. L.J., 533.

that any notice was sent to Bimla Prasad. We do not think that the heirs of Bhupat Singh are entitled to raise any objection of the invalidity of the attachment on the ground that no notice was sent to Bimla Prasad. In any case we have already pointed out that the validity of this attachment of the decree is not a matter of vital importance in this appeal, as the attachment relied upon is the previous attachment made on the 19th of March, 1930.

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We accordingly dismiss the appeal with costs.

Appeal dismissed.

APPELLATE CIVIL

Before Mr. Justice Bisheshwar Nath Srivastava

SURAJ PRASAD AND OTHERS (DEFENDANTS-APPELLANTS) v.
PANDIT SHANKER DAYAL (PLAINTIFF-RESPONDENT)*

1935
October 9

Oudh Rent Act (XXII of 1886), section 108(16)—Co-sharer selling his entire share reserving to himself some plots bila lagani—Vendor, whether proprietor or under-proprietor of plots reserved—Vendee, whether can sue him for arrears of revenue as a co-sharer.

Where a co-sharer sells his entire share with all the rights appurtenant thereto reserving to himself certain plots to be held 'bila lagani' and there is nothing in the context to justify the construction of the word *lagani* as meaning revenue, the rights reserved by the vendor in the excepted plots of land are those of an under-proprietor and not that of a full proprietor and the relationship between the vendor and vendee is not that of co-sharers, and a suit by the purchaser under section 108, clause (16) of the Oudh Rent Act for arrears of revenue is not maintainable. *Jadunandan Prasad v. Brij Bhukhan* (1), and *Tajammul Husain v. Raunak Ali* (2), referred to.

The entries in the revenue records are by no means conclusive. They only raise a presumption which is open to rebuttal.

*Second Rent Appeal No. 14 of 1934, against the decree of Mr. K. N. Wanchoo, I.C.S., District Judge of Rae Bareilly, dated the 21st of December, 1933, upholding the decree of Babu Sheo Narain Asthana, Assistant Collector, 1st class, of Rae Bareilly, dated the 25th of September, 1933.

(1) (1902) 5 O.C. 70.

(2) (1911) 15 O.C. 25.