APPELLATE CIVIL.

Before Bhide and Tapp JJ.

ABDUL AZIZ AND OTHERS (DEFENDANTS) Appellants

versus

THE ALLIANCE BANK OF SIMLA, IN LIQUIDATION (PLAINTIFFS) } Respondents
GHULAM RASUL (DEFENDANT) }

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Feb. 26.

Civil Appeal No. 2031 of 1927.

Civil Procedure Code, Act V of 1908, Order XXI, Rule 63—Suit by mortgagee (who sued and obtained decree on pro-note only) for declaration that mortgaged land was attachable under the decree—whether maintainable in this Province —vide *Order XXXIV, Rule 14 (2).*

The plaintiffs (a Bank), being holders of defendant's promissory note as well as of an equitable mortgage over his property, sued on the basis of the former only and, claiming in the execution proceedings that they were entitled to have their decree satisfied from the mortgaged property on the basis of their mortgage, obtained its attachment. As the equity of redemption had been transferred to a third party who had obtained possession, the mortgaged property was released from attachment and the Bank thereupon instituted the present suit under Order XXI, Rule 63 of the Civil Procedure Code, seeking to establish their rights over the mortgaged property and, having impleaded the transferee of the equity of redemption and subsequent mortgagees, were granted a decree to the effect that plaintiff had a lien on the estate in dispute to the extent of the principal amount of the money decree (excluding costs under it) and that they were entitled to have the estate sold free of all encumbrances to that extent. The defendants did not dispute the factum, validity or priority of the mortgage in plaintiffs' favour and confined themselves to the legal objection that the plaintiffs had not instituted any suit or obtained any decree on the basis of their mortgage—

Held, that under Order XXI, Rule 60 of the Code, the Court is bound to release the property from attachment if

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the property is not in the possession of the judgment-debtor but of some other person who claims it as his own. When, however, the decree-holder institutes a suit under Rule 63 of the Order, then in order to prove that the property belongs to the judgment-debtor and not to the claimant or that the property has been transferred to the claimant subject to the decree-holder's rights, the Court has to go into and adjudicate on the question of title, although the order of the executing Court on the facts as they appeared at the time of attachment may have been perfectly correct.

Held further, that a suit under Order XXI, Rule 63 is of a comprehensive character and the plaintiff can establish therein the claim made by him in the execution proceedings as well as other consequential relief.

And, in view of Order XXXIV, Rule 14 (2) of the Code, the fact that plaintiffs had not instituted any suit or obtained any decree in the ordinary form on the basis of their mortgage was, in this Province at least, not fatal to the claim made in the present suit under Order XXI, Rule 63.

Kishori Mohun Rai v. *Hursook Dass* (1), *Sadu* v. *Ram* (2), and *Basivi Reddi* v. *Ramayya* (3), followed.

Phul Kumari v. *Ghanshyam Misra* (4), and *Krishnappa Chetty* v. *Abdul Khader Sahib* (5), distinguished.

First appeal from the decree of Agha *Muhammad Sultan* Mirza, *Subordinate Judge, 1st Class, Lahore, dated the 31st August 1927, decreeing plaintiffs' claim.*

JAGAN NATH AGGARWAL, MEHR CHAND MAHAJAN and B. P. KHOSLA, for Appellants.

KISHAN DAYAL, MADAN GOPAL, and BHAGWAT DAYAL, for Plaintiffs-Respondents.

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(1) (1886) I.L.R. 12 Cal. 696. (3) (1917) I.L.R. 40 Mad. 773.
(2) (1892) I.L.R. 16 Bom. 608. (4) (1908) I.L.R. 35 Cal. 202 (P.C.).
(5) (1915) I. L. R. 38 Mad. 535.

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BHIDE J.—The material facts of the case which have given rise to this appeal are briefly as follows:—

On the 10th July 1922, *Lala* Kashi Prasad *Thakral* and *Rai Sahib* Mool Chand, two brothers, executed a promissory note in favour of the plaintiffs (the Alliance Bank of Simla) for a sum of Rs. 20,000 and five days later created an equitable mortgage on their property known as the Aville estate for re-payment of the same. On the 10th November 1924 the plaintiffs sued for recovery of the loan with interest and obtained a simple money decree for a sum of Rs. 19,041-6-0. The equitable mortgage referred to above was mentioned in the plaint but no relief was asked in respect of it and none was consequently granted by the decree.

The above mentioned money decree was passed on the 22nd January, 1925. On the 10th November, 1924, however, the mortgagors sold their equity of redemption to M. Abdul Aziz, defendant No. 1. Before that date, but after the date of the equitable mortgage in plaintiffs' favour, the mortgagors had also created further mortgages on the property in favour of defendants Nos. 2 to 4. The factum and validity of sale and the mortgages are not now in dispute. The defendants also do not dispute the factum, validity and priority of the plaintiffs' equitable mortgage of which they had notice.

After obtaining the simple money decree the plaintiffs proceeded to execute it by attachment of the Aville estate, although they had not yet obtained any decree for sale on the basis of the mortgage. Defendants objected and the executing Court, find-

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ing that the property was held by defendant No. 1 in his own right, released it from attachment. The plaintiffs thereupon instituted the present suit under Order XXI, Rule 63 of the Civil Procedure Code claiming the following reliefs:—

(*i*) A declaration that they are entitled to attach and sell the Aville estate free from all encumbrances in execution of their decree to the extent of their decretal amount:

(*ii*) A declaration that defendant No. 1 is personally liable to the extent of the plaintiffs' decretal claim;

(*iii*) An order that the said estate be attached and sold free from all encumbrances in execution of the plaintiffs' decree and that the decree be executed against defendant No. 1 personally, if necessary;

(*iv*) Costs of the suit against all the defendants.

The learned Subordinate Judge has granted a decree to the effect that plaintiffs have a lien on the estate in dispute to the extent of the principal amount of the money decree (excluding costs of it) and that they are entitled to have the estate sold free of all encumbrances to that extent. The plaintiffs were also awarded full costs as against defendants Nos. 1 to 3. From this decree defendants Nos. 1 to 3 have appealed, and the plaintiffs-respondents have filed cross-objections.

The appellants' position in this appeal briefly is that a suit under Order XXI, Rule 63 Civil Procedure Code is practically in the nature of an appeal or a review of the summary decision in the execution proceedings, and that the only point which can be decided in this suit is whether the judgment-debtors

had or had not any saleable interest in the property in dispute at the date of attachment and that the judgment-debtors having admittedly parted with the property before that date, the suit should have been dismissed. They contend further that the proper remedy of the plaintiff would perhaps have been a suit for sale on the basis of their equitable mortgage (if such a suit be now competent after the money-decree) and that the questions as regards the liability of the property in the hands of defendant No. 1 and the order of priority of the different mortgages which could be properly raised in a suit for sale on the basis of the equitable mortgage cannot be gone into in the present suit.

As regards the scope of a suit under Order XXI, Rule 63, Civil Procedure Code, the learned counsel for the appellant has referred to *Phul Kumari* v. *Ghanshyam Misra* (1), and *Krishnappa Chetty* v. *Abdul Khader Sahib* (2). But I do not think these rulings establish the proposition which he is contending for. A suit under Order XXI, Rule 63, Civil Procedure Code, is no doubt in the nature of an appeal in so far as it is the only remedy prescribed against an order granting or rejecting a claim petition under the preceding rules of that Order. But it would not be correct to say that the suit is confined to the question whether the order in the execution proceedings was correct Under Order XXI, Rule 60, Civil Procedure Code, *e.g.* the Court is bound to release the property from attachment if the property is not in the possession of the judgment-debtor but of some other person who claims it as his own. If, however, the decree-holders institute a suit under Order

(1) (1908) I.L.R. 35 Cal. 202 (P.C.). (2) (1915) I.L.R. 38 Mad. 535.

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XXI, Rule 63, in order to prove that the property belongs to the judgment-debtor and not to the claimant or that the property has been transferred to the claimant subject to the decree-holder's rights, the Court has to go into and adjudicate on the question of title, although the order of the executing Court, on the facts as they appeared at the time of attachment, may have been perfectly correct. It cannot, therefore, be said that the questions in a suit under Order XXI, Rule 63, Civil Procedure Code, are precisely the same as those in the summary investigation under Order XXI, Rules 58-62, as they would be in an ordinary appeal from or a review of a lower Court's decision. There is ample authority for the proposition that a suit under Order XXI, Rule 63, is of a comprehensive character and the plaintiff can not only establish therein the claim made by him in the execution proceedings but also ask for other consequential reliefs (see *Kishore Mohun Rai* v. *Hursook Dass* (1), *Sadu* v. *Ram* (2), and *Basiri Reddi* v. *Ramayya* (3). In the present instance, the plaintiffs claimed in the execution proceedings on the basis of their equitable mortgage (*vide* last column of their application) that they were entitled to have their decree satisfied from the mortgaged property. In the present suit they seek to establish that very right (as they were bound to do under Order XXI, Rule 63, Civil Procedure Code) making defendants Nos. 1 to 4, who contested the claim, parties to the suit. It was open to the defendants to dispute the plaintiffs' claim in the present suit on any grounds they liked, just as they might have done in a suit for sale. It

(1) (1886) I. L. R. 12 Cal. 696. (2) (1892) I. L. R. 16 Bom. 608.
(3) (1917) I. L. R. 40 Mad. 733.

is not shown that defendants were precluded by law from putting forward in this case any pleas which they could have urged in a suit for sale. This suit, though not one for 'sale' in form, is in substance of the same character. It was urged that the mortgagors are not parties to this suit, but they had admittedly parted with their interest in this property and it is difficult to see how the non-joinder of these persons has prejudiced the appellants. In the present suit, the defendant-appellants have not disputed the factum or validity or priority of the mortgage in plaintiffs' favour and have only confined themselves to the technical objection that the plaintiffs have not so far instituted any suit or obtained any decree on the basis of their mortgage. But this fact, in itself, does not seem to be fatal to plaintiffs' claim, at least in this Province, as will appear from the provisions of sub-rule 2 of Order XXXIV, Rule 14, Civil Procedure Code.

It was urged on behalf of the appellants that it would be a very anomalous position if it were held that a mortgagee who obtains a simple money-decree is at liberty to attach and sell the mortgaged property in the hands of third persons in execution proceedings without taking the trouble to obtain any decree on the basis of the mortgage. But I do not think the decision in the present case involves any anomaly. The property being in the possession of defendant No. 1 the execution Court rightly released it from attachment. If now the plaintiffs will be entitled to attach and sell the property, it will be not on the basis of the money-decree, but on account of the decree which they have been able to obtain in the present suit as against the defendants Nos. 1 to 4. The money-decree was not binding on the appellants or on the property in suit, but the present decree is. The plaintiffs have in fact, hardly gained anything by obtaining a simple money-

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decree for they had to institute the present suit instead of a suit for sale. They would have been spared all this litigation if they had originally sued for a decree for sale of the mortgaged property, impleading all the transferees.

It was urged in the end that a sale of the equity of redemption is prejudicial to the mortgagor in certain respects and it was to prevent this mischief that section 99 of the Transfer of Property Act was originally enacted. This may be so, but in re-enacting the provisions of that section with certain modifications in Rule 14 of Order XXXIV of the Civil Procedure Code, the Legislature has thought fit to exclude specifically from its operation those Provinces to which the Transfer of Property Act does not apply. In these circumstances, it is unnecessary to discuss certain rulings which were cited with reference to the state of the law before the enactment of section 99 of the Transfer of Property Act and the effect of the sale of the equity of redemption in execution proceedings. For, in view of the provisions of Order XXXIV, Rule 14 (2) it seems clear that in this Province at any rate, as the Transfer of Property Act is not in force, a decree for sale is not a necessary preliminary to the sale of the equity of redemption at the instance of the mortgagee in all circumstances.

As the learned Senior Subordinate Judge has pointed out, it is, of course, open to defendant No. 1 to avoid the sale of the property in execution proceedings by paying up the plaintiff's encumbrances. He paid only Rs. 1,000 to the vendors and it was evidently contemplated that he should pay all the encumbrances including the present claim of the plaintiffs (*vide* Exhibit D. I.).

Finally, it was urged that the pleaders' costs allowed in this case (Rs. 540) were excessive. The

pleaders' fees were no doubt in the discretion of the Court, but, in the present case the learned Subordinate Judge does not seem to have applied his mind to the question. There was not much contest on the merits in the present case and one of the reliefs claimed by the plaintiffs (*viz.* personal relief against defendant No. 1) was disallowed. I think pleaders' fees need not have been allowed in full. I would reduce the amount of pleaders' fees to Rs. 250 for either side.

As regards the cross-objections of the respondents, the only point urged was that the learned Senior Subordinate Judge should have held that the plaintiffs had a lien on the property in dispute as regards the principal as well as the interest and the costs in the money suit. The learned Senior Subordinate Judge has used the expression '*principal amount of the decree.*' This seems to me to include obviously the principal as well as the interest which was decreed in plaintiffs' favour. As regards the costs of the money suit, I am unable to see why those should be held to be a charge on the mortgaged property. The equitable mortgage was only in respect of the principal and interest due on the promissory note and it was subject to this lien only that the property was apparently transferred to defendant No. 1.

I would accordingly accept the appeal only as regards the pleaders' fees as stated above and dismiss the cross-objections. In view of all the circumstances the defendant-appellants should, I think, pay 9/10th of the costs of the plaintiffs-respondents, while the parties should be left to bear their own costs in respect of the cross-objections.

TAPP J.—I concur.

N. F. E.

Appeal accepted in part only.