1895.

BHOMSHETTI v. UMÁBÁI.

not justified in treating a summons affixed to his door as due service. The summons should be again sent to the defendant's house to be served upon him when the inquiries made show that he is likely to be at home and to be found there. The Civil Procedure Code in the matter of the service of a summons does not take into account the female members of a defendant's family, and does not rely upon the presumption that they will take steps to inform the defendant of what takes place in his absence.

In the present case it appears from the petition of the defendant that he did not hear of the institution of the suit until after the decree had been passed. That fact was not, however, before the Subordinate Judge. The defendant there relied upon the technical insufficiency of the service of the summons, as we think he was justified in doing. Section 108 provides that if the defendant satisfies the Court that the summons was not duly served, it shall pass an order to set aside the decree. There was no evidence before the Subordinate Judge that the defendant knew of the service of the summons before the hearing.

We make the rule absolute, and setting aside the decree, direct the Subordinate Judge to restore the suit to his file and dispose of it on the merits. Costs of this application to be costs in the case.

Rule made absolute and decree set aside.

APPELLATE CIVIL.

Before Chief Justice Farran and Mr. Justice Parsons.

1895. *November* 14.

PARASHRA'M HARLA'L (ORIGINAL PLAINTIFF), APPLICANT, *v.* GOVIND GANESH PORGAUMKAR (ORIGINAL APPLICANT AND ORIGINAL DEFENDANT), OPPONENTS.*

Mortgage—Equity of redemption—Execution—Attachment of equity of redemption—Civil Procedure Code (Act XIV of 1882), Secs. 266 and 274—Transfer of Property Act (IV of 1882), Sec. 60.

The equity of redemption of the mortgagor is immoveable property, and is, as such, liable to be attached and sold in execution of a decree under section 266 of the Civil Procedure Code (Act XIV of 1882). Its attachment can be effected under section 274 of the Code by an order prohibiting the judgment-debtor from dealing with it

* Application No. 146 of 1895 under extraordinary jurisdiction.

in any way and all persons from receiving it, such order being proclaimed and notified as therein directed.

1895.

PARASHRÁM HARLÁL v. GOVIND GANESH.

APPLICATION under the extraordinary jurisdiction of the High Court (section 622 of the Civil Procedure Code, Act XIV of 1882) against the order of Ráo Sáheb D. V. Bhat, Subordinate Judge of Sangamner in the Ahmednagar District, in an execution proceeding.

In execution of a money decree against one Balvant Trimbak the plaintiff attached his shop. Thereupon one Govind Ganesh Porgaumkar applied for the removal of the attachment on the ground that he was in possession of the shop as mortgagee of Balvant. The Subordinate Judge ordered the attachment to be raised, holding that the shop being in Govind's possession as mortgagee, the equity of redemption could not be sold in execution. In his order the Subordinate Judge observed that though it was the practice of his and other Courts to attach and sell an equity of redemption even when the property mortgaged was in the possession of the mortgagee, the practice was wrong according to section 280 of the Civil Procedure Code (Act XIV of 1882).

The plaintiff applied under the extraordinary jurisdiction and obtained a *rule nisi* calling on Govind (the mortgagee) to show cause why the order of the Judge should not be set aside.

Dáji Abáji Khare appeared for plaintiff in support of the rule.

Ghanashám N. Nádkarni appeared for the mortgagee to show cause.

FARRAN, C. J.:—This is an application to set aside an order of the Subordinate Judge raising the attachment on certain immoveable property and (*inter alia*) upon a shop of the judgment-debtor which was in the possession of Govind Ganesh and another as his mortgagees. The Subordinate Judge raised the attachment upon the ground that an equity of redemption in immoveable property in the possession of a mortgagee is not liable to be attached and sold in execution of a decree. For that proposition he relies upon *Kassiráv* v. *Vithaldás*[1], though he admits that it has been long the practice of his and other Courts to attach

(1) 10 Bom. H. C. R., 100.

1895.

PARASHRÁM HARLÁL v. GOVIND GANESH.

and sell the equity of redemption in mortgaged premises under such circumstances.

The equity of redemption in mortgaged premises is immoveable property. "An equity of redemption has always been considered as an estate in the land, for it may be devised, granted or entailed with remainders, and such entail and remainders may be barred by fine and recovery and, therefore, cannot be considered as a mere right only; but such an estate whereof there may be a seisin. The person, therefore, entitled to the equity of redemption is considered as the owner of the land, and a mortgage in fee is considered as personal assets." Per Hardwicke, L. C., in *Casborne* v. *Scarfe*[1] cited in *Heath* v. *Pugh*[2]; *Mahalavu* v. *Kusáji*[3]. As such it is liable to be attached and sold, falling within the scope of section 266 of the Civil Procedure Code (Act XIV of 1882).

The attachment of such property is effected under section 274 of the Code by an order prohibiting the judgment-debtor from transferring or charging the attached property in any way and all other persons from receiving the same from him by purchase, gift, or otherwise, such order being proclaimed and notified as there directed. The property to be attached should, however, be not the mortgaged property itself, but the "equity of redemption" of the mortgagor, or as it is called in section 60 of the Transfer of Property Act "the right of the mortgagor to redeem" the mortgaged premises. This is not vested in the mortgagee, nor does he hold it in trust for the mortgagor. When the right to redeem only is attached, the mortgagee cannot come in and ask to have the attachment raised under section 280 of the Code. It is otherwise when the property itself is attached, as it was in the case of *Kassiráv* v. *Vithaldás*[4] referred to by the Subordinate Judge.

In the present case it was clearly the intention of the attaching creditor to attach, not the property itself, but the equity of redemption of the judgement-debtor therein, though that intention has not been expressed in the most apt way.

(1) 1 Atk., 603.
(2) 6 Q. B. D., 339 at p. 360.
(3) I. L. R., 18 Bom., 739 at p. 745.
(4) 10 Bom. H. C. R., p. 100.

1895.

PARASHRÁM HARIÁL v. GOVIND GANES.

We make the rule absolute, and set aside the order raising the attachment of the shop, and direct that it continue upon the equity of redemption of the judgment-debtor, or the right of the judgment-debtor to redeem the mortgaged premises. The application being in part only successful, the parties will bear their own costs in it.

Rule made absolute and order set aside.

APPELLATE CIVIL.

Before Chief Justice Farran and Mr. Justice Parsons.

1895. *November* 15.

KA'SHI AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* SADA'SHIV SAKHARA'M SHET AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Ejectment—Parties to suit—Right of action—Defendant.

The plaintiff, in an ejectment suit, can make out a legal title to the land, he is entitled to maintain a suit against the person in actual juridical possession of such land for recovery without making the person under whom the latter claims to hold a party to the suit.

Where plaintiffs based their title to the land in dispute on a lease granted by Government giving occupancy right to their predecessor in title, and sued the defendants in ejectment, and the defendants claimed to hold the land under an occupancy title conferred on them by Government subsequent to the plaintiffs' lease, it was held that though Government might have properly been made a party so as to bind it by the decree and prevent future litigation, it was not a necessary party to the suit.

SECOND appeal from the decision of Ráo Bahádur Káshináth B. Maráthe, First Class Subordinate Judge of Ratnágiri with appellate powers, reversing the decree of Ráo Sáheb N. B. Bramhe, Second Class Subordinate Judge of Málvan.

Suit in ejectment. The plaintiffs sued to recover possession of certain *sheri* or Crown land, alleging that their predecessor had obtained it from Government in 1845, and that from him it had devolved on them.

The defendants claimed to hold the land under an order made in 1885 by the Revenue Commissioner, who had given them possession. They contended that the plaintiffs' cause of action, if any, lay against Government, and not against them.

* Second Appeal, No. 89 of 1893.