

agree on this part of the case also with the learned Judges of the High Court, and the cross-appeal fails.

Their Lordships will therefore humbly advise His Majesty that both appeals should be dismissed and the appellants in each case will pay the costs of their appeal.

Appeals dismissed.

1902
MARCH 12,
19 &
APRIL 18.

PRIVY
COUNCIL.

29 C. 513.

Solicitor for the Secretary of State in Council: *The Solicitor, India Office.*

Solicitor for Krishnamoni Gupta: *T. L. Wilson & Co.*

29 C. 537.

APPELLATE CIVIL.

Before Mr. Justice Brett and Mr. Justice Mitra.

LACHMI NARAIN SINGH v. NAND KISHORE LAL DAS.*
[11th, 12th and 19th March, 1902.]

Public Demands Recovery Act (Bengal Act VII of 1880) ss. 2, 7 (1), 8 (b), 10, 10—Agriculturists' Loans Act (XII of 1884) s. 5—Taccavi—What passes at a sale under the Public Demands Recovery Act—Right, title, and interest of the judgment-debtor—Hypothecation of land—Mortgage—Transfer of Property Act (IV of 1882) ss. 67, 99—Act XI of 1853, s. 5—Bengal Act VII of 1868, s. 1—Revenue sale law.

When a property is sold in enforcement of a certificate under Bengal Act VII of 1880, filed by the Collector to recover amount due to the Government for advances made under the Agriculturists' Loans Act, nothing but the judgment-debtor's right, title, and interest in the property at the date of service of the notice under s. 10 of Act VII of 1880 can pass to the purchaser.

[538] Such a sale has not the effect of a sale for arrears of land revenue or of an assignment to the purchaser of the mortgage-interest created in favour of the Government by the bond executed by the judgment-debtor under the Agriculturists' Loans Act.

THE plaintiffs Lachmi Narain Singh and another appealed to the High Court.

The plaintiffs brought the suit on a mortgage bond executed by the Defendant No. 1 on the 7th August 1893 for Rs. 2,500 in favour of the plaintiffs. The properties mortgaged were four in number, being fractional shares of four *towjis*, bearing numbers 713, 4556, 4552 and 1109, respectively, situated in different *pergunnahs* of the Mozufferpore Collectorate. The Defendant No. 1 had previously in September 1889 mortgaged the last of the aforesaid properties to the Secretary of State by a bond to secure an advance from Government under Act XII of 1884. Subsequently, for the debt so secured, a certificate was filed by the Collector under the Public Demands Recovery Act (VII of 1880), and that property was sold in enforcement of the certificate and purchased by the Defendant No. 3 in January 1897.

It was contended by the Defendant No. 3 that his purchase must prevail over the plaintiffs' mortgage, inasmuch as the certificate was for the realisation of advances made by the Government to the Defendant No. 1, secured by a mortgage deed of a date prior to the plaintiffs' mortgage deed. The Subordinate Judge held that the certificate

* Appeal from Appellate Decree No. 381 of 1900, against the decree of A. E. Staley, Esq., District Judge of Tirhoot, dated the 19th of December 1899, modifying the decree of Babu Dipro Das Chatterjee, Subordinate Judge of that district, dated the 3rd of August 1899.

1902
MARCH 11,
12 & 19.
—
APPELLATE
CIVIL.
—
29 C. 537.

filed under the Public Demands Recovery Act had the force of a decree for money only, and the sale under it transferred to the Defendant No. 3 only the right, title, and interest of the judgment-debtor in the property ; and as such certificate and sale took place after the plaintiffs' mortgage-deed the Defendant No. 3 was bound by that mortgage. The Subordinate Judge accordingly passed a decree in the plaintiffs' favour in the usual terms, a certain order, by which the mortgage properties were to be sold, being laid down to secure the interests of the other mortgagees defendants.

On appeal by the Defendant No. 3, the District Judge held, relying upon the case of *Narsidas Jitram v. Joglekar* (1), and the rulings referred to therein, that the prior lien in favour of [539] the Secretary of State passed to the Defendant No. 3 by his purchase under the Public Demands Recovery Act, and modified the decree of the Subordinate Judge as follows: "The result is that the plaintiffs under the decree shall have power to sell the property in question as directed in the decree, except that, if the property be sold, it shall be sold liable to the unsatisfied amount due under the mortgage under Act XII of 1884."

Babu *Umakati Mookerjee* and Babu *Sorashi Charan Mitra* for the appellants.

Babu *Saligram Singh* and Babu *Laeluminarain Singh* for the respondent.

BRETT AND MITRA, JJ. On the 5th September 1889, the Government advanced to Defendant No. 1 (*Raghunandan Sahi*) a certain sum of money as *tuccavi* under the Agriculturists' Loans Act (XII of 1884), and the defendant executed a bond in favour of the Government, hypothecating his *nagali malikana* right to eight annas of taluq Banapur, bearing towji No. 1109, of the Mozufferpore Collectorate. On failure of the defendant to repay the money in time, the Collector of Mozufferpore filed on the 20th April 1894 a certificate for the sum of Rs. 1,733-14-6 under s. 7, sub-section (1) of the Public Demands Recovery Act (Bengal Act VII of 1880). The property covered by the bond was sold under the said certificate on the 29th January 1897, and was purchased by Defendant No. 3, *Nandkishore Lal*, for Rs. 395. The sale was confirmed on the 8th April 1897. There is nothing in the record now to show what amount was actually due to Government on the date of sale, and, if the amount exceeded Rs. 395, when and how the excess was recovered or whether any portion of the debt is still subsisting. The bond itself is not a part of the record.

Before the commencement of the certificate proceedings, Defendant No. 1 had mortgaged to the plaintiff by a bond dated the 7th August 1893, for Rs. 2,500, the property already mortgaged by him by the bond of the 5th September 1889 as also three other properties. Out of the sum thus advanced by the plaintiff, Rs. 1,145-8 was deposited in the Collectorate in part satisfaction of the first mortgage. The present action is based on [540] the bond of the 7th August 1893, Defendant No. 3 being made a party in the suit on the allegation that he has purchased the said property subject to lien in favour of the plaintiff.

The contention of Defendant No. 3 is that the property having been hypothecated by the bond on which the certificate proceedings were based, he is not only the purchaser of the equity of redemption of

(1) (1879) I. L. R. 4 Bom. 57.

Defendant No. 1, but is also the assignee of the mortgage right of the Government, notwithstanding that the sale took place under the Public Demands Recovery Act.

The Subordinate Judge held that the certificate under Act VII (B.C.) of 1880 had the force of a decree for money, and the sale thereunder conveyed only the right, title, and interest of the judgment-debtor, Defendant No. 1, and accordingly he directed that there should be a decree for sale in favour of the plaintiff. On appeal by defendant No. 3, the District Judge has modified that decree. We have not been able to follow exactly the drift of the modification, and the learned Vakeel, who has appeared in support of it, has not attempted to explain it.

The plaintiff has now appealed. It has been contended for him that a sale under a certificate filed under the Public Demands Recovery Act could have no other effect than to convey to the purchaser the right, title, and interest of the judgment-debtor as it existed at the date of attachment, *i.e.*, the date of the service of the certificate under s. 10 of the Act. It has also been contended that, having regard to the provisions of s. 99 of the Transfer of Property Act (IV of 1882), the Government as a mortgagee could not sell the hypothecated property except under a decree passed under that Act, and that therefore the sale to Defendant No. 3 was void, and that at all events the sale could not operate as an assignment of the lien which the Government could have enforced, but did not enforce. For the respondent it has been argued that s. 99 of the Transfer of Property Act cannot affect the statutory right of the Government under the Public Demands Recovery Act; and that, although a sale under a certificate filed under the latter Act ordinarily operates as a conveyance of the right, title, and interest of the judgment-debtor, the proceedings leading to the sale in the present case having been for money recoverable under s. 5 of Act XII of 1884 as arrears of [541] land revenue, and the property having been expressly hypothecated, he, as the purchaser at the auction sale, is entitled to the position of a prior mortgagee with respect to the sum of Rs. 395, which went towards the satisfaction of the mortgage-debt. It has also been suggested that Act VII (B.C.) of 1880 did in express terms reserve to Government the powers conferred by Acts XI of 1859 and VII (B.C.) of 1868, and s. 2 of the Act provided that these Acts should be construed as one, and that the sale therefore had the effect of a sale for arrears of land revenue.

We think these contentions of the learned Vakeel for the respondent are not sound, and that the plaintiff is entitled to a decree for sale on the basis of Defendant No. 3 being merely a purchaser of the equity of redemption of the mortgagor at the date of the service of the certificate under the Public Demands Recovery Act. The purchase by defendant No. 3 did not vest him with the right which the Government had as mortgagee—a right which was either abandoned or extinguished by the sale.

S. 5 of Act XII of 1884 (Agriculturists' Loans Act) provides that every loan made under its provisions with all interests (if any) chargeable thereon, and the costs (if any) incurred in recovering the same shall be recoverable as if they were arrears of land revenue. Such loans were known in the Regulations and the older Act as *tuccavi*. Act XI of 1859 (s. 5), and Act VII (B.C.) of 1868 (s. 1) made reference to *tuccavi* as revenue within the meaning of these Acts and recoverable as such, and it would seem that the Government could have recourse

1902
MARCH 11,
12 & 19.
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APPELLATE
CIVIL
—
29 C. 537.

1902
 MARCH 11,
 12 & 19.
 APPELLATE
 CIVIL.
 29 G. 537.

to those Acts for recovery of *tuccavi* advances. But these Acts, as they now stand after the repeal of some of their sections, provide no machinery for the sale of any immoveable property, except estates and tenures. The Public Demands Recovery Act (Bengal Act VII of (1880), which has now been repealed by Act I (B.C.) of 1895, laid down an easy and simple procedure to be followed by a Collector of land revenue for the recovery of *tuccavi* advances. There is nothing, however, in these Acts which debars the Government from instituting a suit under s. 67 of the Transfer of Property Act (IV of 1882) on a mortgage executed in its favour, such as we have in the present case. The Government could have brought the property hypothecated to sale under that [542] Act in a suit properly framed, making the puisne mortgagee (the plaintiff in the present case) a party, and given to the purchaser the benefit of its own mortgage, or the property free of all incumbrances. But the procedure laid down in that Act appears to be regarded as cumbrous and dilatory by the fiscal authorities. The recourse to the Public Demands Recovery Act must lead to the consequences laid down in it. Every certificate made under the provisions of s. 7 (sub-section 1) of Act VII (B.C.) of 1880 has, as regards the remedies for enforcing the same, the force and effect of a decree of a Civil Court wherein the Secretary of State for India in Council is deemed to be the decree-holder and the person named as debtor is the judgment-debtor. By s. 8, cl. (b) of the Act, the certificate as soon as it becomes absolute has "to all intents and purposes the same force and effect as a final decree of a Civil Court." S. 10 of the Act and Form No. 4, referred to therein, speak of the execution of the certificate in the same manner as if it were a decree of a Civil Court and attachment of the immoveable property of the judgment-debtor under the provisions of s. 274 of the Code of Civil Procedure. Under s. 19 the certificate is enforceable by the ways and means laid down in the Code of Civil Procedure for the enforcement and execution of a decree for money. It seems to us that the attachment and sale under the Public Demands Recovery Act of immoveable property hypothecated to Government are of the same nature and effect as attachment and sale referred to in s. 99 of the Transfer of Property Act. But it is not necessary for us to decide in this case whether the sale held on the 29th January 1897 at the instance of the Secretary of State for India in Council is void, as contended for by Babu Umakali Mookerjee for the appellant. The judgment-debtor (Defendant No. 1) never contested the legality of the sale. All that we decide is that nothing but the judgment-debtor's right, title, and interest in the property at the date of the service of the notice under s. 10 of the Public Demands Recovery Act could and did pass to the purchaser (defendant No. 3). In the view we take we follow *Mahomed Abdul Hai v. Gujraj Sahai* (1) and *Bajinath Sahai v. Ramgut Singh* (2).

[543] The learned Vakeel for the respondent has not referred to any authority directly supporting the proposition that a sale under the Public Demands Recovery Act on a certificate based on a mortgage in favour of the Government has the effect of an assignment of the mortgage-interest to the purchaser. The cases cited by him—*Emam Momtazooddeen Mahomed v. Baj Coomar Dass* (3) and *Narsidas Jitram v. Joglekar* (4)—were decided in 1875 and 1879, respectively. Under the Transfer

(1) (1898) I. L. R. 20 Cal. 826.
 (2) (1896) I. L. R. 23 Cal. 775.

(3) (1875) 14 B. L. R. 408.
 (4) (1879) I. L. R. 4. Bom. 57.

of Property Act, a mortgagee is debarred from selling the property mortgaged except by means of a suit under that Act, and we think that the rule laid down in those cases is no longer law. It seems to us that the Legislature practically adopted the view taken by the High Court of Allahabad in *Khub Chand v. Kalian Das* (1), in which the law as laid down in the Calcutta and Bombay High Courts was dissented from. The Legislature went further and prohibited sales of mortgaged properties under decrees for money at the instance of mortgagees.

The decree made by the lower Appellate Court should, therefore, be set aside and that of the Subordinate Judge restored with costs.

Appeal allowed.

29 C. 543.

ORIGINAL CIVIL.

Before Mr. Justice Ameer Ali.

MONMOHINEY DASSEE v. RADHA KRISTO DASS.* [23rd April, 1902.]

Attachment—Claim—Property attached in possession of and standing in the name of some person other than the judgment-debtor—Civil Procedure Code (Act XIV of 1882) ss. 278, 280.

In an investigation under s. 280 of the Civil Procedure Code the Court has to determine the question of possession merely, and cannot go into the question of title with respect to the property taken in attachment. If the possession of the person holding the property be on his own account, the fact that the judgment-debtor may have a beneficial interest or some title in it cannot be gone into.

[544] *Hamid Bakht Mozumdar v. Buktear Chand Mahto* (2) and *Sheoraj Nandan Singh v. Gopal Suran Singh* (3) followed.

In a summary investigation under the above section the Court cannot hold merely on suspicion that the claim is untenable.

Sreeman Chunder Dey v. Gopaul Chunder Chuckerbutty (4) and *Moonshce Buzloor Raheem v. Shumsoonissa Begum* (5) referred to.

THE plaintiff Monmohiney Dassee obtained a decree against the defendant Radha Kristo Dass, and in execution of that decree attached three pieces of Government securities. Panna Lall Dassee thereupon put in a claim under s. 278 of the Civil Procedure Code, alleging that the securities belonged to her and not to the defendant judgment-debtor. The securities stood in the name of the claimant, and it was proved that she sent one of them to the bank for realizing interest due thereon and entrusted to others to her attorney for sale for the purpose of paying with the proceeds thereof the price of a house which she had negotiated to purchase. Evidence was also adduced to prove that they were purchased with monies belonging to the claimant. On behalf of the decree-holder, it was not shown that, although the securities stood in the name of the claimant, they had in reality been dealt with and enjoyed by the judgment-debtor.

Mr. *Sinha* and Mr. *B. C. Mitter* on behalf of the plaintiff decree-holder.

Mr. *Dunne* and Mr. *Knight* on behalf of the claimant.

* Original Civil Suit No. 893 of 1900.

(1) (1876) I. L. R. 1 All. 240.

(4) (1866) 11 M. I. A. 28.

(2) (1887) I. L. R. 14 Cal. 617.

(5) (1867) 11 M. I. A. 551.

(3) (1891) I. L. R. 18 Cal. 290.