1869

GORACHAND GOSWAMI v. RAGHU MANDAL.

JACKSON, J.—The only ground taken before us in this special appeal is that the lower Appellate Court had no jurisdiction to entertain the appeal, inasmuch as the case had been decided against the defendant *Ex-parte*. This contention is founded upon section 119 of Act VIII. of 1859; but that section will not support the argument. The words of that section are "no appeal shall lie from a judgment passed *Ex-parte* against a defendant who has not appeared." In this case the defendant not merely had appeared, but he had been present at the first hearing of the cause, and was merely absent at the adjourned hearing, that is, when the adjourned hearing commenced; but came into Court before the Moonsiff had actually recorded the judgment, and also his evidence was on the record. The special appeal must be dismissed with costs.

MARKBY, J.—I am of the same opinion.

Before Mr. Justice L. S. Jackson and Mr. Justice Markby

1869
July 26.

CHINTAMANI SEN (PLAINTIFF) *v.* ISWAR CHANDRA AND OTHERS (DEFENDANTS.)*

Act VIII. of 1859, *s.* 246—*Right of one Decree-holder against another.*

Two several judgment-creditors attached certain property which was released upon the claim of a third party, under section 246 of Act VIII. of 1859. One of them sued the successful claimant, and obtained a decree declaring the property in dispute to belong to the judgment-debtor, and thereupon caused the property to be sold, and became the purchaser thereof. Thereupon, an assignee of the other judgment-creditor sued him, alleging an earlier lien, and praying a sale in satisfaction thereof. The defence set up was that at the plaintiff did not come into Court to set aside the order under section 246, within a year from the date thereof, he was barred from bringing the present suit.

Held, that the omission to bring a separate suit for that purpose did not bar him from obtaining a declaration of his prior lien.

Baboo *Gopal Lal Mitter* for appellant.

Baboo *Krishna Sakha Mookerjee* for respondent.

THE facts of the case sufficiently appear in the judgment of

JACKSON, J.—It appears to me that the decision of the lower Appellate Court is erroneous. The suit relates to certain property which belonged originally to one Ala Hafez. This person mortgaged the property in question to Bani Madhab on the 12th Aghran 1268. Immediately afterwards, that is to say, on the 12th Pash, he mortgaged the same property over again to Iswar Chandra, and Iswar Chandra it seems, had no notice of the first mortgage. Both mortgagees brought suits against Ala Hafez and got decrees for the money advanced, respectively, with a declaration that the property was liable to be sold in satisfaction of their decrees, and they both subsequently attached the property.

* Special Appeal, No. 200 of 1869, from a decree of the Subordinate Judge of Beerbhoom, dated the 5th December 1868, affirming a decree of the Moonsiff of that district, dated the 15th of June 1868.

1869

CHINTAMANI SEN v. ISWAR CHANDRA.

Pending the attachment one Dhan Krishna preferred a claim, and that claim was allowed under section 246 of the Code of Civil Procedure. Bani Madhab, who after this sold his rights to the present plaintiff Chintamani, took no steps immediately to get rid of this order. But Iswar Chandra, the other mortgagee, did bring a suit within one year, and got the claim of Dhan Krishna set aside, and established the rights of the judgment-debtor. He then proceeded to have the property sold under his own decree, and he purchased it himself. Bani Madhab's vendee, Chintamani, now brings this suit in his turn against Iswar Chandra, to have it declared that the property may be sold in satisfaction of his earlier lien. This suit has been thrown out by the Courts below not on the ground that, as alleged by Iswar Chandra, the mortgage transaction between Bani Madhab and Ala Hafez was one of a fraudulent character, but on the ground that Bani Madhab by omitting to bring any suit within one year after the allowance of Dhan Krishna's objection, had lost his right of lien upon the property, and was effectually concluded by that order.

It does not seem to me that the terms of section 246 have the effect of completely barring any party against whom an award is given under that section, whatever circumstances may afterwards happen. I do not think that if this property had been attached by several creditors, and all those attachments had been removed in consequence of the claim of Dhan Krishna, it was necessary for each attaching creditor to bring a separate suit; but I think that when one of those creditors brought a suit against the objector, and in that suit set up the right of ownership of the original judgment-debtor, he effectually got rid of the claim of the objector, and left the road open for other parties having a lien upon the property. I think therefore that the present plaintiff, who represents the earlier mortgagee, is not debarred by his omission to bring a separate suit under section 246, but that he is quite competent to maintain his present contention against Iswar Chandra, and to enforce the lien which he had upon that property under the mortgage effected by Ala Hafez. I think therefore that the decision of the Court below must be set aside with costs.

MARKBY, J.—I am of the same opinion.

Before Mr. Justice Norman and Mr. Justice E. Jackson.

HARO DAS AND ANOTHER (PLAINTIFFS) *v.* GOBIND BHUTTACHERJEE AND ANOTHER (DEFENDANTS).* 1869 *Aug.* 12

Act. X. *of* 1859, *s.* 6 *Khodkast Ryot—Right of Occupancy—Abandonment.*

The right of occupancy given in section 6, Act X. of 1859, is a right to occupy and hold the land. When a ryot leaves his home, he ceases to be a Khodkast ryot, and if he refuses to come back and cultivate the land when called upon, the zemindar is at liberty to settle the land with others.

* Special Appeal, No. 691 of 1869, from a decree of the Officiating Judge of Rungpore, dated 23rd December 1868, affirming a decree of the Deputy Collector of that district, dated the 5th September 1868.