

APPELLATE CIVIL.

Before Mr. Justice Ainslie and Mr. Justice R. C. Miller.

HASOON ARRA BEGUM AND ANOTHER (PLAINTIFFS) *v.* JAWADOON-
NISSA SATOODA KHANDAN AND OTHERS (DEFENDANTS).*

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April 5.

*First and Subsequent Mortgages—Rateable Distribution of Sale-Proceeds—
Money-Decree—Lien on Bond—Act VIII of 1859, ss. 270 and 271.*

The fact that a money-decree has been obtained on a bond by which property has been mortgaged, does not destroy the lien on that property.

It is open to a plaintiff to establish his right on the bond, as well as on the decree.

The purport of ss. 270 and 271 of Act VIII of 1859 (with which s. 295 of Act X of 1877 corresponds) is not to alter or limit the rights of parties arising out of a contract, but simply to determine questions between rival decree-holders standing on the same footing, and in respect of whom there is no rule for otherwise determining the mode in which proceeds of property sold in execution shall be distributed.

THE plaintiff in this case was the mortgagee of an indigo factory called Chantaparsa, which, together with five other factories, constituted what was known as the Awa Indigo Concern. In addition to the plaintiff's mortgage there had been two mortgages of the entire concern, one prior, and the other subsequent, to the plaintiff's mortgage of Chantaparsa; and a mortgage of another of the factories belonging to the concern, which was later in date to the plaintiff's mortgage. On the 6th December 1870 the plaintiff obtained a money-decree in the Court of Shahabad upon his mortgage. Decrees by each of the other mortgagees had also been obtained for the recovery of the amounts which they had respectively advanced. The entire concern was subsequently sold in execution of the decree of the first mortgagee, and the sale-proceeds were paid into Court. Twenty-five claimants, including the four mortgagees, applied to participate in these sale-proceeds. On the 6th March 1876 an order was

* Regular Appeal, No. 224 of 1876, against the decree of W. DaCosta, Esq., Subordinate Judge of Zilla Sarun, dated the 3rd May 1876.

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made under s. 271 of Act VIII of 1859 in the execution-proceedings, directing the division of the sale-proceeds between the mortgagees in the following proportions, viz.: the first mortgagee to be paid in full, and the plaintiff and the other two mortgagees to participate rateably to their respective decrees in the balance of the sale-proceeds. The plaintiff thereupon, on the 9th March 1876, instituted the present suit against the heirs of the mortgagor and the two subsequent mortgagees to recover from the balance of the sale-proceeds in Court the full amount of his decree with costs on the ground of his priority of lien. On the same day that the plaintiff filed his plaint, he also applied that an injunction under s. 92 of Act VIII of 1859 might issue to prevent all disbursements of the money in deposit. This application was dismissed, and the money was paid out to the plaintiff and to the third and fourth mortgagees in accordance with the order of the 6th March 1876. The suit came on for hearing in May, and, amongst other issues, was one, the third, as to whether the decree of the Shahabad Court in the plaintiff's favour could have any operative effect on a portion of the mortgaged property which was situate in the district of Sarun. The Subordinate Judge treated this issue as a purely legal one, and decided it against the plaintiff. As regards the remainder of the case he was of opinion that the order of the 6th March 1876 must be taken to be final, and, under the circumstances, dismissed the plaintiff's suit.

The plaintiff appealed to the High Court.

Moulvie *Mahomed Yusuf* and Mr. *M. L. Sandel* for the appellants.—The suit is well brought; the Court below ought to have granted the application for an injunction. It is not necessary to amend the plaint, inasmuch as the payment to the other parties was subsequent to the institution of the plaintiff's suit. The plaintiff is not in the position of a creditor, though the holder of a simple money-decree. He enjoys a lien on the property, the subject of his mortgage.

Baboo *Chunder Madhub Ghose* and *Jadunath Sahoy* for the respondents.

The judgment of the Court was delivered by

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AINSLIE, J.—We think that in the present case there can be no doubt that a suit does lie for the purpose of recovering the money which the plaintiff alleges to have been wrongly paid to the defendants under colour of an order made under s. 271 of Act VIII of 1859. We also think that the fact that the money was paid out of Court after the institution of the suit is one of no importance, although the plaintiff did not put in a petition by way of amendment to the plaint.

It is unnecessary to comment upon the order made by the Subordinate Judge under s. 92 of the Code; but we think it quite clear that this case must now be taken as a suit to recover from the hands of the defendant money paid over to him by the Court during the pendency of the suit.

The third issue has been treated by the Subordinate Judge as one involving only a question of law. This appears to be an error. The question whether the decree of the Shahabad Court could bind the property in the district of Sarun is not purely one of law. It depends on certain facts. The plaintiff was, probably, justified in the first instance in assuming that a decree made by a Court was a valid decree made within the legal exercise of its jurisdiction, and that until that was disputed it was unnecessary for him to be prepared with evidence to establish the jurisdiction of the Court.

The case was set down for final hearing on the 2nd of May 1876, and the written statement of the defendant was then put in. Consequently, until that written statement was filed, the plaintiff had really no notice that it could be at all necessary for him to make enquiries as to the power of the Shahabad Court to deal in any way with this property. Therefore, it seems to me that the Subordinate Judge was over-hasty in disposing of the third issue in the mode in which he did: but this is really not a matter of any particular importance.

A Full Bench decision of this Court—*Emam Momtazooddeen Mahomed v. Rajcoomar Dass* (1)—has determined that the mere fact of a money-decree having been obtained on a bond by which

(1) 14 B. L. R., F. B., 408.

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property is hypothecated does not destroy the lien on that property, and therefore if the plaintiff has any right that right may be established on the bond as well as on the decree.

The main contention for the respondent was, that this was an order made under s. 271, and that as the order for distribution has in fact given to the plaintiff somewhat more than a properly made order for distribution among the twenty-four claimants would have given, there is no right in the plaintiff to sue to set aside that order. I have in a previous case expressed my opinion, and I see no reason now to alter it, that the purport of ss. 270 and 271 of the Procedure Code is not to alter or limit the rights of parties arising out of a contract, but simply to determine questions between rival decree-holders standing before the Court on the same footing, and in respect of whom there is no rule for otherwise determining the mode in which the proceeds of property sold in execution shall be distributed.

The case will, therefore, have to go back to the Court below for enquiry as to the value of the security held by the plaintiff. In determining that value the Subordinate Judge must take into account the value of all the six properties sold in Sunt Lall's execution, and ascertain the proportion that the value of Chantaparsa factory bears to the whole. The plaintiff's security will bear the same proportion to the whole of the surplus sale-proceeds that the value of Chantaparsa factory bears to the value of the six properties.

Costs will follow the result.

Case remanded.