

APPELLATE CIVIL.

Before Mr. Justice Macpherson and Mr. Justice Banerjee.

1893
May 12.

JADUB LALL SHAW CHOWDHRY (PETITIONER) v. MADHUB
LALL SHAW CHOWDHRY AND OTHERS (JUDGMENT-DEBTORS).*

Transfer of Property Act (IV of 1882), ss. 99 and 67—Sale of mortgaged property in execution of money-decree—Sale by mortgagee of mortgaged property to satisfy a claim not arising under the mortgage.

A mortgagee cannot sell the mortgaged property in execution of an ordinary money-decree in satisfaction of a claim not arising under the mortgage. Section 99 of the Transfer of Property Act limits the right of a decree-holder in such a case, and provides that he shall not bring the mortgaged property to sale otherwise than by instituting a suit under s. 67 of that Act.

Quere whether the suit to be instituted under s. 99 is a suit on the mortgage or is one on the charge created by attachment.

THE facts of this case were as follows:—Jadub Lal Shaw Chowdhry brought a suit, No. 482 of 1891, on the Original Side of the High Court against the four defendants, and obtained a decree against them. The decree was sent to Mymensingh for execution, as the defendants' property was situated there, and on 20th February 1892 the plaintiff put in a petition, stating that he would file a list of the defendants' properties, as he did not then know what they were, and prayed for an order to issue against the judgment-debtors, and that, after he had filed a list of the properties, the entire amount of the decretal money, together with interest and costs of the execution, might be realized by attachment and sale of those properties, &c. On 23rd of February 1892 an order was issued on the judgment-debtors to show cause why execution should not be granted. An attachment order was issued on 22nd March 1892. On 9th April a sale proclamation was issued, fixing 20th May 1892 for the sale of the attached properties. All these properties had been mortgaged by the judgment-debtors to

* Appeal from Original Order No. 410 of 1892, against the order of Babu Radha Krishno Sen, Subordinate Judge of Mymensingh, dated the 24th of October 1892.

the decree-holder on 5th March 1889 for Rs. 90,000. On 20th May 1892, at the instance of the decree-holder, the sale was postponed till 28th May. On 28th May, at instance of decree-holder, fresh proclamation was issued for 20th July 1892. One Koylas Chunder Raot brought a suit against these very defendants and the above properties were again attached by the said Koylash Chunder Raot, and on the 20th July an injunction was granted in this suit (Original Suit No. $\frac{2}{3}$ of 1892) staying execution of the former decree, the sale was stopped till further orders, and the case was struck off. The decree holder in the first suit, by appealing to the High Court, had the injunction set aside, and on the 8th September 1892 again prayed for execution of this original decree. The 24th October 1892 was fixed for the sale. On the 24th October 1892 the judgment-debtors put in a petition, objecting to the sale on the ground that, as the properties attached had been mortgaged by them to the decree-holder, his only remedy was to bring a suit for the sale of those properties under s. 67 of the Transfer of Property Act, and quoted s. 99 in support of their objection. The Subordinate Judge allowed the objection, and the case was struck off the file. From this decision the decree-holder appealed to the High Court.

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The *Advocate-General* (Sir Charles Paul), Dr. *Rashbehari Ghose*, *Babu Jogesh Chunder Roy*, and *Babu Madava Nand Bysack* for the appellants.

Mr. Pugh, *Babu Sarodu Churn Mitter*, and *Babu Harendra Narain Mitter* for the respondents.

The arguments considered by the Court for the purpose of this report are set out in the judgment.

The judgment of the Court (MACPHERSON and BANERJEE, JJ.) was as follows:—

The only question that arises in this case is whether a person who holds the mortgage of any property can sell that property in execution of an ordinary money decree in satisfaction of a claim not arising under the mortgage. The Court below has answered the question in the negative, holding that s. 99 of the Transfer of Property Act limits the rights of the decree-holder in such a case, and provides that he shall not bring the mortgaged property

1893 to sale otherwise than by instituting a suit under s. 67 of that Act. It is now contended before us in appeal on behalf of the decree-holder that the order of the Court below is wrong, and that s. 99 of the Transfer of Property Act, though apparently very general in its terms, must receive a limited construction, as otherwise anomalies and injustice would result such as the Legislature could never have intended.

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It is argued that the application of s. 99 should be limited to those cases where the decree sought to be executed by the mortgagee is based on a claim which arises under, or is connected with, the mortgage; and the concluding portion of the section is referred to in support of this view, and it is urged that s. 43 of the Code of Civil Procedure, from the operation of which the suit required to be instituted under s. 67 of the Transfer of Property Act is excepted, can have no application to such a suit, unless the claim on which the decree is based arises out of, or is connected with, the mortgage. This argument assumes that the suit required to be instituted under s. 67 is a suit on the mortgage held by the decree-holder. We shall suppose that this assumption is correct, and examine the soundness of the argument on that supposition.

We do not think that the concluding words of s. 99 can be taken as indicating any limitation of the scope of the section in the manner contended for, when the section is made expressly applicable to decrees for the satisfaction of "*any claim, whether arising under the mortgage or not.*" The concluding portion of the section is intended to except the suit required to be instituted from the operation of s. 43 of the Code of Civil Procedure only in those cases where the last-mentioned section would apply, that is, upon the assumption in the appellant's argument, in cases in which the decree is based on a claim arising under the mortgage. The construction contended for on behalf of the appellant is opposed to the plain meaning of the words of the section quoted above.

Nor are the anomaly and the injustice which it is said would result from the natural construction of the section such as would justify us in putting a forced construction upon it. It has been contended (assuming the suit required by s. 99 to be one on the mortgage) that the decree-holder may not be in a position to institute any suit under s. 67 for years to come, by reason of the

mortgage not falling due; and if the debtor has no other property except that covered by the mortgage, it would be unjust to the decree-holder to prevent him from realizing his just dues, when such realization by the sale of the mortgagor's equity of redemption with him being proclaimed can lead to no harm to any one. One answer to this argument would be this: that the injustice complained of must be confined to a limited class of cases, namely those in which the decree is based upon claims arising from tort, as in cases where it is based upon claims arising from contract, the party who seeks to enforce the claim can always protect himself when entering into the contract. On the other hand, the object intended to be secured by s. 99 appears to be that mortgaged property should not be allowed to be brought to sale by the mortgagee in execution of any money decree held by him, except by a suit under s. 67, to which every other encumbrancer must under s. 85 be a party, and the sale that may be ordered will be free of his encumbrances, and will thus fetch fair value, and will not be likely to be followed by the embarrassing litigation which not unfrequently forms the sequel of the sale of an equity of redemption.

We have hitherto accepted as correct the assumption in the appellants' argument that the suit required by s. 99 to be instituted under s. 67 is a suit on the mortgage.

The language of s. 99 is, however, not very clear, and it was suggested by the learned Counsel for the respondents that the suit therein required to be instituted may be a suit based on the charge created in favour of the decree-holder by the attachment, s. 100 making provisions relating to mortgagee's instituting suits applicable to persons having a charge. If this view is correct, the argument based upon the reference to s. 43 of the Code of Civil Procedure and upon the injustice of delaying decree-holders will lose all its force. But it is not easy to see what object would be gained by such a suit, when the sale to be ordered by it cannot without the consent of the mortgagee, when the mortgage is of a prior date, be free of the mortgage (see s. 99 of the Transfer of Property Act).

It is not necessary, however, to decide in this case whether the suit required to be instituted by s. 99 is a suit on the mortgage, or is one on the charge created by attachment. Neither the one suit nor the other was brought by the present decree-holder.

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1893 The case of *Devendra Nath Sanyal v. Chandra Kishore Munshi* (1) cited for the appellant, is clearly distinguishable from the present one, as that was a case in which the decree sought to be executed was passed before the Transfer of Property Act came into operation, and was a decree authorizing the sale of the mortgaged property and not a mere money decree, such as is sought to be enforced in this case.

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For the foregoing reasons, the construction put by the Court below on s. 99 is, in our opinion, correct, and this appeal must accordingly be dismissed with costs.

Appeal dismissed.

C. S.

FULL BENCH REFERENCE.

Before Sir W. Comer Petheram, Knight, Chief Justice, Mr. Justice Prinsep, Mr. Justice Pigot, Mr. Justice O'Kinealy, and Mr. Justice Ghose.

1893 THE SECRETARY OF STATE FOR INDIA IN COUNCIL (DEFENDANT) *v.* NITYE SINGH AND ANOTHER (PLAINTIFFS).
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SECRETARY OF STATE FOR INDIA IN COUNCIL (DEFENDANT)
v. BAIKUNT NATH PRODHAN (PLAINTIFF)

SECRETARY OF STATE FOR INDIA IN COUNCIL (DEFENDANT)
v. RAM TARUCK DAS (PLAINTIFF)

Bengal Tenancy Act (VIII of 1885), ss. 101, 102—Power of Settlement Officer—Proceedings in preparation of record of rights—Decision as to validity of lakhiraj titles—Power of Revenue Officer to declare land claimed as lakhiraj liable to rent.

Held by the Full Bench (PETHERAM, C.J., and PRINSEP, PIGOT, O'KINEALY, and GHOSE, JJ.):—In preparing a record of rights under s. 102 of the Bengal Tenancy Act, a Revenue Officer is not competent to determine the validity of rent-free titles set up by persons occupying lands within the

* Full Bench reference in appeals from Appellate decrees 538, 539 and 540 of 1891 against the decrees of J. Pratt, Esq., District Judge of zilla Midnapur, dated the 29th. of December 1890, reversing the decrees of Babu Chunder Shekhar Knr, Settlement Officer of Tamluk, dated respectively the 25th, 20th and 29th of March 1890.