

venience the other way. These considerations have been pointed out and insisted on by several learned Judges of great experience in England, and just now by the Chief Justice. I only say that if I were at liberty to enter upon the general question of convenience, I should hesitate much before applying to this country without any qualification the rule laid down in *King v. Hoare* (1). As it is, however, I am bound to follow that decision, and to hold that this being a case governed by the English law, the learned Judge was right in dismissing the suit.

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*Appeal dismissed.*

Attorneys for the appellant: Messrs. *Remfry and Rogers.*

Attorney for the respondent: Baboo *B. M. Doss.*

## APPELLATE CIVIL.

*Before Mr. Justice L. S. Jackson and Mr. Justice Kennedy.*

DOSS MONEY DOSSEE (DEFENDANT) v. JONMENJOY MULLICK  
(PLAINTIFF).\*

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*Jan'y. 11.*

*Res Judicata—Simple Mortgage Bond—Mortgagee's Lien—Money Decree—Mortgagor's Right, Title, and Interest sold—Registration Act—Summary Procedure under—Act XX of 1866, s. 53—Act VIII of 1859, s. 2.*

A having a simple mortgage bond, which was specially registered, obtained a summary decree under the provisions of the Registration Act, and attached the lands under mortgage to him. Prior to A's decree these lands had been attached by other creditors and subsequent to A's decree they were sold to B. After such sale, A, under his attachment, sold the right, title, and interest of the mortgagor which he himself purchased. A now sued the mortgagor and B to enforce his mortgage lien against the mortgaged properties.

*Held* that, according to the decision of *Syud Eman Momtaz-ood-deen Mahomed v. Rajcoomar Dass* (2), the suit should be dismissed.

\* Special Appeal, No. 60 of 1877, against the decree of L. R. Tottenham, Esq., Judge of Zillah Midnapore, dated the 30th August 1876 reversing the decree of Baboo Jadoonath Roy, Subordinate Judge of that district, dated the 21st June 1875.

(1) 13 M. & W., 464, 505.

(2) 14 B. L. R., 408.

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*Quære.*—Whether s. 7 of Act VIII of 1859 would not be an answer to the suit as full relief might have been given in the summary suit?

THE plaintiff had a simple mortgage bond, dated 10th January 1871. The bond was specially registered and charged the lands in suit with other properties. Certain creditors of the mortgagor attached the land under mortgage, and the sale was fixed for 24th February 1871. In the meantime, and on the 21st February 1871, the plaintiff obtained a summary decree under the provisions of the Registration Act (Act XX of 1866), s. 53.

The lands were sold under the creditors' attachment and purchased by the defendant. The plaintiff, on 30th July 1871, sold the right, title, and interest of the mortgagor in the mortgaged land under an attachment issued under his summary decree, and became the purchaser thereof. Being unable to reap the fruit of his purchase owing to the antecedent sale of the defendant, he now sued the mortgagor and the defendant to enforce his lien against the mortgaged properties. The Subordinate Judge dismissed the plaintiff's suit, but on appeal his order was set aside, and a decree passed, declaring that the property in suit was liable to be sold in satisfaction of the plaintiff's decree of the 21st February 1871. The auction-purchaser now appealed.

Baboos *Srinath Dass* and *Bhowany Churn Dutt* for the appellant.

Baboos *Mohini Mohan Roy* and *Rash Behary Ghose* for the respondent.

The judgment of the Court was delivered by

KENNEDY, J.—(after stating the facts as above mentioned, and remarking that it was difficult to believe that the plaintiff, when he obtained his decree, was not aware of the immediate proximity of the sale, or that the course he took was not adopted in reference to that fact, continued as follows):—The present suit is brought against the mortgagor and the first auction-purchaser to enforce the lien created by the mortgage bond against these lands.

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The difficulty in which the plaintiff has been placed is entirely one of his own creation. Instead of suing the mortgagor on his bond, and obtaining a decree declaring his lien and directing the lands to be sold towards satisfaction of it, he adopted a course which ensured the lands being sold so as to realize the smallest price possible. The course is one frequently adopted in Bengal, but this frequency cannot make it less liable to be stigmatized as oppressive if not fraudulent.

However this may be, the question for us now to decide is, whether the present suit can be maintained, and we have come to the conclusion that it cannot; and that the decision of the Full Bench in *Haran Chunder Ghose v. Dinobundhoo Bose* (1) precludes us from giving the relief he sought.

In the second suit, which was before the Full Bench, it appears that the nature of the proceedings must have been precisely the same as those here, for Mr. Justice Jackson says, that in it "the plaintiff sought a fresh decree for the unsatisfied portion of his claim, as well as a declaration of lien as against the alienees. Upon the considerations already stated, I am of opinion that the Munsif, who granted only the latter prayer, was right, and that the Judge, who altered the decree, was wrong." The majority of the Bench, however, did not concur in this opinion, and both cases were dismissed.

We are unable to distinguish that case from the present, and think that we are bound to follow it notwithstanding some observations which were made in the judgment of the majority, which would be inconsistent with the ultimate decision, if they could be construed as the respondent here contends. Possibly, they would apply in cases where the property had been alienated before the institution of summary proceedings by the mortgagee, and this view would reconcile with the Full Bench decision, the ruling of Glover and Mitter, JJ., in *Aruth Soar v. Juggunath Mahapathur* (2), in which it appears that certainly before the decree the mortgaged property had been sold.

Here there being no intervening charge or interest, the plaintiff deliberately elected, for his own reasons, to take a mere

(1) 14 B. L. R., 408; S. C., 23 W. R., 187.

(2) 23 W. R., 461.

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money-decree against the mortgagor. The Full Bench did not think it necessary to decide the question raised under s. 7 of the Procedure Code, and for the same reason we need not now do so; but it is by no means certain that the operation of that section would not in itself be an answer to this suit, as a suit in which full relief could have been given, might, at the time of the summary decree, have been instituted against the mortgagor. We decide nothing about any other remedy which may be open to the mortgagee, but we must restore the judgment of the Subordinate Judge.

*Appeal decreed.*

### FULL BENCH.

*Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice Kemp, Mr. Justice L. S. Jackson, Mr. Justice Markby, and Mr. Justice Ainslie.*

1878  
 Feb. 18.

#### THE EMPRESS v. BAIDANATH DAS.\*

*Offence punishable by Fine and Confiscation—Act XXI of 1856, s. 49—Offences triable in a summary way—Summons Cases—Sentence—Criminal Procedure Code (Act X of 1872), ss. 4, 8, 148, 149, & 222.*

An offence under s. 49 of Act XXI of 1856 can be tried summarily under s. 222 of the Criminal Procedure Code, the confiscation provided by s. 49 being merely a consequence of the conviction, and not forming part of the punishment for the offence.

THE prisoner in this case was charged with the illegal possession of ganja, convicted under s. 49 of Act XXI of 1856, and sentenced by the Joint Magistrate of Rungpore to a fine of Rs. 100, or in default, to rigorous imprisonment for one month. The Sessions Judge referring to the case of *Juddoonath Shaha* (1), was of opinion that the order was illegal, as the Joint Magistrate had no power to try the case summarily or to pass sentence of rigorous imprisonment. He, therefore, referred the case under s. 296, Act X of 1872.

\* Criminal Reference, No. 48 of 1877, by H. Beveridge, Esq., Officiating Sessions Judge of Rungpore, dated the 30th August 1877.

(1) 23 W. R., Cr. Rul., 33.