his mother, they are sapindas of each other. The defendant stands in the same relation to Mukhtab Bahadur as *E* does to *B*. Therefore, the question referred to us should be answered in the affirmative.

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PRIVY COUNCIL.

RAMKRISHNA DAS SURROWJI (PLAINTIFF) *v.* SURFUNNISSA BEGUM AND OTHERS (DEFENDANTS).

P.C.*
1880
Feb. 27 & 28.

[On Appeal from the High Court of Judicature at Fort William in Bengal.]

Attachment before Judgment—Civil Procedure Code (Act VIII of 1859), *s.* 240—*Objection as to non-compliance with requirements of s.* 239—*Burden of Proof—Civil Procedure Code (Act X of* 1877), *ss.* 274, 276.

A suit on a mortgage foreclosed under Reg. XVII of 1806, s. 8, comprising property attached before the date of the mortgage under s. 81 and the following sections of Act VIII of 1859, was brought against the purchaser of the attached property, which had been sold under the decree obtained by the attaching creditor. The defence was, that the mortgage falling within the provisions of s. 240 of the Act was void as against the attaching creditor and those claiming under him. For the mortgagee it was contended, that the attachment could not prevail, it not having been proved affirmatively that the requirements of s. 239 relating to the intimation of the attachment had been complied with.

Held, that this objection to the validity of the attachment could not be raised for the first time on this appeal, even if it was not rather for the mortgagee, seeking to deprive the attaching creditor of his possession, to prove the non-observance of the formalities in question.

Semble.—A re-attachment of property after decree does not imply an abandonment of an attachment obtained before decree.

APPEAL from a decree of a Divisional Bench of the High Court, Bengal (24th November 1876), affirming that of the District Judge of the 24-Pargannas (13th September 1875), and dismissing the suit in which the appellant was plaintiff.

In 1872, the respondent, Richard Hendry, representing, with J. P. Hubbard, the firm of Anderson, Wallace, & Co., who had carried on business in Calcutta as builders, brought a suit in the Court of the Subordinate Judge of the 24-Pargannas

* *Present:*—SIR J. W. COLVILE, SIR B. PEACOCK, and SIR R. P. COLLIER.

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against Surfunnissa Begum, daughter and heir of Munshi Bazlur Rahim, deceased. The suit was to recover money due from her father's estate for building done by the firm, and the plaintiffs caused an attachment before judgment to be issued, under s. 81 of the then Code of Civil Procedure, upon lands and buildings at Sealdah, which had been part of his estate. Six months afterwards, in May 1873, Surfunnissa Begum, and her husband Mahomed Ehayed, executed to the appellant, Ramkrishna Das Surrowji, a mortgage of the same property. In September 1873 Hendry and Hubbard obtained a decree, under which the same land and buildings were attached (the attachment before judgment remaining still in force), in order to a sale to satisfy Rs. 7,000 due under the decree. A postponement by consent took place, and Hendry and Hubbard, in February 1874, not having obeyed an order to provide costs of fresh proclamations of sale, the proceedings in execution of decree were struck off on the 6th of that month. On the 11th of February 1874, Hendry and Hubbard, who had not been aware of the order to provide fresh costs, made their application for the restoration to the file of the execution-proceedings, which was granted. Fresh proclamations of sale were issued, and in May 1874, the right, title, and interest of Surfunnissa and her husband, as representing the deceased proprietor, in the land and buildings in question, were sold in satisfaction of the decree,—Hendry and Hubbard becoming the purchasers.

Meantime, in the previous January of the same year, on the petition of Ramkrishna Das Surrowji, it had been ordered that the mortgage should be notified at the time of the sale. And in February 1874 notice of the foreclosure of the mortgage under Reg. XVII of 1816, s. 8, had been issued, Surfunnissa Begum and her husband not disputing the foreclosure. In 1875 J. P. Hubbard transferred his interest in the purchase at the execution-sale to Richard Hendry, who afterwards obtained possession. The present suit was brought by the mortgagee to obtain possession of the mortgaged land and houses. Surfunnissa Begum and her husband did not appear, the respondent Richard Hendry alone defending the suit, which was, practically, to eject him.

The District Judge of the 24-Pargannas dismissed the suit, holding that the mortgage was invalid. This decision was confirmed by the High Court, which held, that any mortgage, or other alienation of the property, during the time that it was under the attachment issued before judgment, was inoperative and void as against the person at whose instance the attachment issued; that the attachment never had been removed, and the property remained unaffected by this mortgage (so far as the person at whose suit the attachment issued), at the time it was attached and sold in execution of the decree; and that the attachment after decree never was removed at any time, for the striking off the execution case on default of paying *talabana* left the attachment exactly as it was.

Mr. *R. V. Doyne* and Mr. *Herbert Cowell* for the appellant.

Mr. *Cowie*, Q. C., and Mr. *J. Graham* for the respondents.

For the appellant it was argued that the original issue of the attachment had been irregular; and principally, that the attachment had not been shown to have been duly intimated according to the requirements of s. 239. Reference was made to *Indrochunder Baboo* v. *Dunlop* (1).

For the respondents it was argued, that these objections could not now be raised if they were ever tenable. The proof of compliance with the requirements of s. 239 was not upon the purchaser. *Anund Loll Doss* v. *Jullodhar Shaw* (2) and *Bank of Bengal* v. *Nundolall Doss* (3) were cited.

At the conclusion of the arguments their Lordships' judgment was delivered by

SIR J. W. COLVILE.—In this case the appellant sued on a mortgage title, completed, as he alleged, by foreclosure under Reg. XVII of 1806, s. 8, to recover possession of the property in suit from the respondent, who held it as purchaser at an execution-sale in a suit against the mortgagor. The mortgage-deed was in the English form, with a power of sale. Inasmuch as it

(1) 10 W. R., 265; S. C., 1 B. L. R., S. N., 20.

(2) 14 Moore's I. A., 543; S. C., 10 B. L. R., 134.

(3) 12 B. L. R., 509.

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was sought to be enforced in the mofussil, the procedure prescribed by the Regulation has been applied to it as if it were a mere *bye-bil-wafa*, or deed of conditional sale. The suit is the ordinary suit, which, in such cases, the mortgagee, who has foreclosed, is obliged to bring in order to recover possession of the mortgaged premises, with this difference only, *viz.*, that it is brought against the purchaser under the execution-sale as well as against the mortgagor, and that the former is the substantial defendant.

In such a suit the plaintiff has to make out his title to dispossess the other party, and any objection which can be taken either to the original mortgage title, or to the proceedings in foreclosure, may be taken.

The respondent was one of a firm of builders who, in December 1872, sued one Surfunnissa Begum, as the daughter of Munshi Bazlur Rahim, and the representative of his estate by virtue of a certificate under Act XXVII of 1860, for the amount claimed as due to them, for work done partly in the lifetime of Bazlur Rahim and partly after his death. On the 10th of December 1872 they applied for and obtained, under ss. 84 and 85 of the Civil Procedure Code, an attachment before judgment, in order to secure the property. Mr. Doyne took objection to the regularity of the issue of that attachment, complaining that there was no proof of the proceedings which are enjoined by s. 81 and the subsequent sections having been adopted. But in their Lordships' opinion, it must be taken that, as between Surfunnissa Begum and the plaintiffs in this former suit, there was a valid and subsisting attachment at the date of the execution of the mortgage, and that this is virtually admitted by the consent order of the 23rd January 1873, which was made when part of the property which had been attached was released from the attachment on the payment of part of the plaintiffs' demand, and it was arranged that the attachment should continue as to the particular property, which is the subject of this litigation.

In these circumstances Surfunnissa Begum, on the 20th of May 1873, executed the mortgage under which the plaintiff claims; and the principal question raised by this appeal is,

whether that alienation of the property was not, by reason of the attachment, null and void as against the attaching creditors and those deriving title under them. The decree in that suit was made on the 13th of September 1873, and the proceedings in execution began on the 18th of the same month; and it has been suggested on the part of the appellant that, inasmuch as one of these proceedings consisted in an attachment after judgment, it must be presumed that the actual sale in execution proceeded under this subsequent attachment, and that the respondent cannot claim the benefit of the former attachment. Upon this point, the learned Judges of the High Court say:—"The attachment never was removed, and the property remained unaffected by this mortgage (so far as the person at whose suit the attachment issued) at the time it was attached and sold in execution of the decree." Their Lordships must, therefore, assume that, although, where property has been attached before judgment, it is usual to re-attach it after judgment, that proceeding implies no abandonment of the first attachment, which gives the priority of lien. There is no trace here of any express abandonment. If this be so, and there was, as their Lordships think there was, a valid and subsisting attachment at the date of the mortgage, that alienation, unless it can be shown not to fall within the provisions of the 240th section, was null and void as against the attaching creditor and those who claim under him. Hence, the determination of this appeal depends very much upon the point which has been ingeniously raised and argued by the learned counsel for the appellant, and particularly by Mr. Cowell. It is said that s. 240 does not govern the case, for the following reasons:—That section runs thus: "After any attachment shall have been made by actual seizure or by written order as aforesaid, and in the case of an attachment by written order, after it shall have been duly intimated and made known in manner aforesaid, any private alienation of the property attached, whether by sale, gift, or otherwise," and so on, "shall be null and void." It is contended that the words "after it shall have been duly intimated and made known in manner aforesaid" incorporate into the 240th, the provisions of the 239th, section, which says, "in the case of

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lands, houses, or other immoveable property, the written order shall be read aloud at some place on or adjacent to such lands, houses, or other property, and shall be fixed up in some conspicuous part of the Court-house; and when the property is land or any interest in land, the written order shall also be fixed up in the offices of the Collector of the Zilla in which the land may be situated." Their Lordships entertain some doubt whether, under the circumstances of this case, it was not rather for the plaintiff, who was seeking to oust the defendant from possession, to prove the non-observance of the formalities in question, rather than for the defendant, who was in possession, to prove affirmatively that they had been observed. However that may be, they are clearly of opinion that the point raised is one which cannot be taken here upon appeal for the first time. It is one which ought to have been taken in the Court below, and their Lordships can find no trace of its having been so taken. No such trace is to be found in the judgments, or in the evidence, or in the reasons which are stated in the petition presented to the High Court for leave to appeal to Her Majesty in Council. On the contrary, the first of those reasons seems rather to assume the regularity of the attachment, and to suggest that it had ceased to be a valid and subsisting attachment at the time the mortgage was made. It is in these words: "That their Lordships ought to have held that, even if the said property was legally attached before judgment, such attachment had ceased to be a valid and subsisting attachment under s. 85 of the Act." In the case which has been cited—*Indrochunder Baboo* v. *Dunlop* (1) — it is clear from the judgment of Mr. Justice Macpherson, who is one of the Judges who decided the present case, that there it had been positively proved that those proceedings which were enjoined by the Act had not taken place. Their Lordships think this is clearly an objection which ought to have been taken in the Court below, and not raised for the first time here, because it involves a question of fact; and if it had been taken before the High Court and argued, the Judges of that Court might have directed a further inquiry into the matter under the powers which its

(1) 10 W. R., 265; S. C., 1 B. L. R., S. N., 20.

procedure gives them. Upon this record they think the judgment of the High Court was right, and will, therefore, humbly advise Her Majesty to affirm that judgment and to dismiss this appeal. The costs of this appeal will follow the result.

Appeal dismissed.

Solicitors for the appellant: Messrs. *Barrow* and *Rogers.*

Solicitors for the respondent: Messrs. *Wrentmore* and *Swinhoe.*

APPELLATE CIVIL.

Before Mr. Justice Pontifex and Mr. Justice McDonell.

LALJEE SAHOY (PLAINTIFF) *v.* FAKEER CHAND AND OTHERS (DEFENDANTS).*

1880
July 21.

Hindu Law—Mitakshara—Liability of Son to pay Father's Debts.

Under Mitakshara law, according to the rulings of the Judicial Committee, the payment, even in the father's lifetime, of an antecedent debt due by him, is a pious duty on the part of the son, and its discharge is, therefore, such a necessary purpose as to give validity to a sale or mortgage by the father as against his minor sons. Such antecedent debt means a debt antecedent to the transaction,—*viz.*, the sale or mortgage purporting to deal with the property.

In a suit upon a mortgage by the father alone, where the sons are made parties, the decree would be good as against the sons, even though they may have been adult when the debt (assuming it was not for immoral purposes) was incurred, and the whole property would be bound, notwithstanding verse 29, Chap. I, sec. i, and verse 10, Chap. I, sec. vi of the Mitakshara.

In respect of ancestral property the son is equally liable for his father's debts, if not incurred for immoral purposes, as for his own debts. The interest of an adult son, however, could not, ordinarily, be affected by a decree against the father alone.

Where, however, an adult son, although neither an executant of the bond on which the suit was brought, nor a party to such suit, yet was shown to be

*Appeal from Original Decree, No. 179 of 1879, against the decree of Moulvie Mahomed Syed Nurul Hossain, Khan Bahadoor, Subordinate Judge of Shahabad, dated the 31st March 1879.