

1865.
 TIMMARSA
 PURA'NIK
 v.
 BADIYA
 KUPPAGOU-
 DA'.

In this case the appellant has recovered the rent due to him, and, in accordance with the practice of Courts of Equity both in England and America (Story's Equity Jurisprudence, Sec. 1315; Eden on Injunctions, 23), we are of opinion that the respondent ought to be relieved upon payment of all the costs of the suit.

The allegation that the respondent produced a receipt for the rent which the Munsif found was a forgery is not, as it appears from the Judge's statement, supported by the Munsif's finding; and we do not consider that the resisting the claim to rent is alone sufficient to disentitle the respondent to relief.

Although a Court of Law in England cannot give relief, unless the rent and costs are paid, or tendered, before the trial; a Court of Equity may do so, if the proceeding for relief is taken within six months after execution has been had in the suit to recover the land.

We confirm the decree of the court below; but order that all the costs of the suit be borne by the respondent in the special appeal.



June 26.

Special Appeal No. 118 of 1865.

SHIVLA'L BIN KHUBCHAND.....*Appellant.*
 BALVANTRA'V VINA'YAK.....*Respondent.*

Attachment—Suit to raise—Mortgagee.

A and B borrowed money from D, with C as their surety, mortgaging their house to C to secure him from loss; the same house having been previously mortgaged by them to D. C had to pay the debt to D; but the house was attached by E, in execution of a decree against A and B. C sued D and E to raise the attachment: *Held* that the action did not lie.

THIS was a special appeal from the decision of C. Walter, District Judge of Puná, in Appeal Suit No. 390 of 1863, reversing the decree of the Munsif of Puná in Original Suit No. 343 of 1862.

In the original suit Balvantráv sued Shivilál and Dámódhar, alleging: (1) That his bháiband Dhundiráj and Gaupatráv had borrowed money from Dámódhar, with him as

surety; the agreement being that their house should be held by him in mortgage, to be his absolutely if he had to pay the money he was thus surety for, and was not paid other money they owed him personally: this same house Dhundiráj and Ganpatráv had previously mortgaged to Dámodar. (2) That he had to pay the money to Dámodar, who should have made over the house to him; instead of which the defendant, Shivilál, caused it to be attached, in execution of a decree he had got against Dhundiráj and Ganpatráv.

1863.
SHIVLÁL BIN
KHUBCHAND.
v.
BALVANTRÁV
VINA'YAK.

The Munsif held that the plaintiff should have sued Dhundiráj and Ganpatráv to recover the money paid by him as surety; but that the present action would not lie. He, therefore, rejected the claim.

On appeal, the Judge found as follows:—"The parties admitting that the date which the bond No. 23 bears is prior to Shivilál's attachment, that bond, as it constitutes a sale to Balvantráv under conditions, makes his title to the house preferable to that of Shivilál. * * * I, therefore, award his claim, and reverse the decree with costs."

The case was heard before COUCH and WARDEN, JJ.

Shántarám Náráyan (with him *Ganpatráv Bháskar*) for the appellant:—A mortgagee as such has no right to remove the attachment. The appellant's mortgage is registered under Act XIX. of 1843, as appears by the indorsement upon it, and as stated in his answer; but the respondent's is not.

Bhairavanáth Mangesh for the respondent:—The bond passed to the plaintiff is a sale, not a mortgage.

The bond No. 23 was read, and found to contain the words: "I give as mortgage to you."

COUCH, J.:—The plaintiff, who was but a mortgagee, could not institute a suit to raise the attachment; and the Judge was wrong in allowing his claim to have it raised.

We, therefore, reverse the decree of the Judge, and confirm that of the Munsif, which rejected the claim: costs on respondent.

Appeal allowed.