Special Appeal No. 422 *of* 1868.

1868. Nov. 8.

R. S. WAIGANKAR.....*Appellant.*

B. B. WA'DEKAR .....*Respondent.*

Mortgagee—Attachment—Suit by Mortgagee to raise Attachment—Adverse Finding on facts in Court of First Instance—Omission to file Memorandum of Objection to Finding of fact—Civ. Proc. Code, Sec. 348.

A mortgagee claiming title otherwise than from the execution debtor is competent, on behalf of himself and his mortgagor, to sue to raise an attachment on the property of which he is mortgagee.

The court of first instance found against the defendant on a matter of fact, but decreed in his favour on a point of law; and, on appeal by the plaintiff, the defendant omitted to file a memorandum of objections to the adverse finding of fact of the court of first instance. The appellate court, without going into the question of fact, confirmed the decree of the court of first instance on the point of law.

Held that the High Court, in special appeal, could, under these circumstances, give judgment in favour of the plaintiff without a remand.

THIS was a Special Appeal from the decision of F. Lloyd, District Judge of Puṇá, in Appeal Suit No. 56 of 1866, confirming the decree of Krishṇáji Vishṇu Limaye, Principal Ṣadr Amín of Puṇá.

The plaintiff, R. S. Waigankar, in his plaint alleged that a certain house in the City of Puṇá belonged to one S. P. Waidya, who mortgaged it to him in 1831 for Rs. 1,101; that it had been in his possession ever since the date of the mortgage; that the defendant, B. B. Wáḍekar, in execution of a decree obtained by one G. S. Moḍak against one R. T. Phaḍke (who was in no way connected with S. P. Waidya, the mortgagor of the plaintiff) attached the said house. The plaintiff prayed that the attachment might be raised.

The defendant contended that the plaintiff's mortgagor, S. P. Waidya, was a Kárkún of his vendor's judgment debtor, R. T. Phaḍke, and had acted as Phaḍke's agent in the mortgage transaction with the plaintiff.

The Principal Ṣadr Amín found that the house did not belong to Phaḍke, but to S. P. Waidya in his own right; as, however, he considered that, under the various rulings of the Ṣadr and High Courts, a mortgagee could not sue to raise an attachment, he rejected the plaintiff's claim.

The Judge in appeal upheld the Principal Ṣadr Amín's decision, that the suit did not lie, and upon that view of the law confirmed his decree.

The Special Appeal was argued before WARDEN and GIBBS, JJ.

Shántárám Náráyaṇ for the appellant.

Gaṇesh Hari Paṭvardhan and *Vishvanáth Govind Cholkar* for the respondent.

GIBBS, J. :—In this case the lower courts have decided against the original plaintiff, on the ground that he is only a mortgagee in possession, and that, therefore, under the rulings of the late Ṣadr Diváṇi Adálat and the present High Court, he could not sue to raise the attachment. We consider that the lower courts erred in their application of the rulings above alluded to to the present case. The earliest case is S. A. No. 2813, Morris's Selected Decisions, Pt. I., p. 59, in which the point for decision was, whether a mortgagee's right to a field mortgaged to him was subject to the right of another creditor of the mortgagor; and the Court decided that the attachment did not affect the mortgagee, and would not interfere. This case was subsequently quoted in Morris, Pt. I., p. 33, S. A. No. 3833, to show that a mortgagee could not sue to raise an attachment on the mortgaged property in his possession, and has subsequently been adopted in many other cases, but in all of them the question has rested between a mortgagee and one of his own mortgagor's judgment creditors, and not, as in this case, between the mortgagee of a third party, seeking in his mortgagor's interest to raise the attachment, placed under an application by a person who attaches the property, as being that of some person other than the plaintiff's mortgagor. The precedents quoted do not apply, and equity requires a different ruling under such circumstances, otherwise the property of the absent mortgagors might be improperly made away with, if their mortgagees could not come into court to protect it.

In this case the Principal Ṣadr Amín found as a fact that the house in dispute was not the property of the judgment

1868.
R. S. WAIGANKAR v. B. B. WADEKAR.

debtor, against whom the decree sought to be executed was passed, but, by misapplying the decision of the Ṣadr Adálat, refused to give the owner's representatives any remedy, and the District Judge has apparently fallen into the same mistake. There was no appeal by the respondent to the District Judge as to the ownership, and so we can dispose of the case without a remand: and, therefore, reverse the decrees of the Principal Ṣadr Amín and the District Judge, and give a decree in the plaintiff's favour as prayed for, removing the attachment, with all costs.

Decrees reversed.

Special Appeal No. 259 of 1868.

Nov. 11.

NATHUBHA'I PA'NA'CHAND.....*Appellant.*
MULCHAND HIRA'CHAND *et al.* .....*Respondents.*

Hindú Law—Interest exceeding Amount of Principal—Mortgage—Mortgagee in Possession.

The rule of Hindú Law that interest beyond the amount of the principal sum cannot be recovered at any one time applies as well to mortgage transactions as to other loans.

But where the mortgagee enters into possession of the mortgaged property, and in taking the accounts between the mortgagor and mortgagee credit is given to the latter for the rents and profits received by him as against the principal and interest due, the above rule cannot equitably be applied.

THIS was a Special Appeal from the decision of F. D. Melvill, in Appeal Suit No. 4 of 1860.

The plaintiff, Nathubhái, filed a suit in 1856, against the defendants, Mulchand and others, to recover possession of certain mortgaged property, on the ground that the property had passed to him under the terms of the bond, as default had been made in payment of the mortgage debt at the stipulated time.

After several remands, the suit was finally sent down by the High Court to the lower court, to determine what was due to the plaintiff as mortgagee. Three shops had originally been mortgaged to the plaintiff, and he was put in possession of one of them.