APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justie Candy.

BALDEV DHANRUP MA'RVA'DI (ORIGINAL PLAINTIFF), APPELLANT, *v.* RA'MCHANDRA BALVANT KULKARNI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

1893. *November* 29.

Decree—Attachment—Execution—Mortgage-debt—Sale of mortgage-debt in execution of a decree against mortgagee—Sale carrying with it security without attaching mortgaged property—Section 274 of the Civil Procedure Code (Act XIV of 1882).

The sale of a mortgage-debt described as such in execution of a decree carries with it the security without attaching the mortgaged property under section 274 of the Civil Procedure Code (XIV of 1882).

SECOND appeal from the decision of L. G. Fernandez, First Class Subordinate Judge of Násik with Appellate Powers.

The first and second defendants by two mortgage-deeds, each for Rs. 400, mortgaged certain lands to one Pándu Bábshet Váni, who was one of the proprietors of a firm known by the name of Yádo Bayáji Shet. The deeds were dated 8th June, 1882, and purported to be mortgages with possession, but the property was allowed to remain with the mortgagors.

Subsequently to the mortgage one Veni Mádhav obtained a decree against the proprietors of the mortgagee firm and attached the debt due by the mortgagors. The debt was sold at a Court sale held on the 15th March, 1889, and was purchased by plaintiff. The Court sale was duly confirmed.

Subsequently to the attachment of the property by Veni one Ganpatráo Dámodar obtained a decree against three of the proprietors of the mortgagee firm and attached the same mortgage-debt, and although it had been already sold to the plaintiff sold it again to Hari Káshináth, defendant No. 3.

The plaintiff, therefore, brought the present suit against defendants Nos. 1, 2 and 3 (the last being joined to avoid disputes in future) to recover Rs. 987-8 for principal and interest due under the two mortgage-deeds by the sale of the mortgaged property.

* Second Appeal, No. 291 of 1892.

1893.

BALDEV DHANRUP MÁRVÁDI v. RÁMCHANDRA BALVANT KULKARNI.

The Subordinate Judge of Satáná held *(inter alia)* that the plaintiff's right could not be considered as superior to that of defendant No. 3; and that the plaintiff was not entitled to the relief sought.

On appeal the First Class Subordinate Judge, A.P., confirmed the decree of the lower Court with costs, observing in his judgment:—

"In the attachment proceedings under which the plaintiff made his purchase, the debt sold was described as follows:—'Defendants' joint moveable property about Rs. 1,500 due on mortgaged property * * * * *. In this case there is no deed of assignment or certificate of sale: hence one cannot precisely say what was sold. The kárkún's record of the sale or the proclamation for sale does not refer in terms to the security. On the other hand, it is distinctly stated that what was sold was a debt, and in order that there should be no doubt on the point, the meaning of the word 'debt' is further restricted by the words 'moveable property.' A lien on immoveable property cannot be considered as moveable property. The case at Indian Law Reports, 10 Madras, 169, shows that where a lien on immoveable property is intended to be passed by a sale, the attachment should be made under section 274 of the Civil Procedure Code, and a certificate of sale should be obtained, which, if the lien is for above Rs. 100, is compulsorily registrable. To hold otherwise would have the effect of defeating the wholesome provisions of the registration laws."

Plaintiff preferred a second appeal.

Jardine (with *Mahádeo C. Apte*) for the appellant (plaintiff):—The only question in the case is, who bought the debt first; and the Judge has not determined that question. If we bought it first, then it could not be sold over again, and defendant No. 3 by his purchase got nothing. The Judge seems to think that what was sold was moveable property. This is an erroneous view. A debt secured on immoveable property is immoveable property—*Debendra Kumar* v. *Rup Lall*[1].

Dáji Abáji Khare for the respondents (defendants):—The whole question is, what was attached; whether the property that was attached was moveable property or immoveable property. The conduct of the plaintiff shows that what was attached was the debt as moveable property. For the purpose of attaching a mortgage-debt as immoveable property, the procedure laid down by section 274 of the Civil Procedure Code

(1) I. L. R., 12 Calc., 546.

(XIV of 1882) should be followed—*Appasami* v. *Scott*[1]. In such a case there ought to be a certificate of sale—*Hurjivan* v. *Jamsetji*[2].

SARGENT, C.J.:—We agree with the judgment in *Debendra Kumar* v. *Rup Lall*[3] and the remarks of Turner, C. J., in *Appasami* v. *Scott*[4] in holding that the sale of a mortgage-debt described as such in execution of a decree carries with it the security without attaching the mortgaged property under section 274 of the Civil Procedure Code (XIV of 1882). An objection was taken that there should be a certificate of sale, and *Hurjivan* v. *Jamsetji*[2] was referred to; but there a decree was attached and sold, and it was held that what was really attached and sold was not the piece of paper on which the decree was written, but the interest in immoveable property recoverable under the decree. We must, therefore, reverse the decree and send back the case for a decision on the merits. Costs to abide the result,

Decree reversed.

(1) I. L. R., 9 Mad., 5.
(2) I. L. R., 9 Bom., 64.
(3) I. L. R., 12 Calc., 546.
(4) I. L. R., 9 Mad., at p. 7.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Candy.

1893. *December* 20.

MOTIBA'I, WIDOW OF GOVINDJI PREMJI (ORIGINAL OPPONENT), APPELLANT, *v.* KARSANDA'S NA'RA'YANDA'S AND ANOTHER (ORIGINAL APPLICANTS), RESPONDENTS.*

Executor—Section 18 of Act V of 1881—Hindu Wills Act—Indian Succession Act—Acceptance or renunciation of executorship—Probate—Letters of administration with will annexed.

An executrix after being cited as provided by section 16 of Act V of 1881 to accept or renounce her executorship, stated that she was administering the estate, but having applied for a certificate under Act VII of 1889 did not consider it necessary to take out probate.

Held that this was not such an acceptance as is contemplated by section 18 of Act V of 1881, the language of which is the same as that of section 195 of the Indian Succession Act (X of 1865), and that on the executrix declining to prove the will the District Judge was right in granting letters of administration with the will annexed to the sole residuary legatee.

* Appeal, No. 101 of 1893.