

the other hand, it is equally the case that there is no provision in the Criminal Procedure Code which warranted the Subordinate Judge in rejecting or dismissing the application of the Public Prosecutor because of his failure to appear at the time the application was called on for dismissal. The Subordinate Judge was bound to consider the application on its merits, even though the party who made it was not there to help the Court.

After the Subordinate Judge had declined to review his order upon the ground mentioned above, the Public Prosecutor applied to the District Court and the District Court has accordingly accorded sanction. Now, the objection to that is, first, that the District Court has not gone into the details of the application, and, secondly, to give that Court jurisdiction under section 105, clause (c), there ought to have been a sanction given or refused by the Subordinate Judge. Here there was no sanction given or refused by the Subordinate Judge. The only jurisdiction which the District Judge had under the circumstances was to revise the order of the Subordinate Judge dismissing the application as for default.

We think, therefore, that for the reasons we have given, both the order of the District Judge and that of the Subordinate Judge ought to be set aside and the application made to the Subordinate Judge ought to be sent back to him with a direction that he should dispose of it according to law.

R. R.

APPELLATE CIVIL.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batchelor.

NATHUBHAI MOTILAL (ORIGINAL PLAINTIFF), APPELLANT v. BAI UJAM, WIFE OF BHAVANIDAS HARGOVANDAS (ORIGINAL DEFENDANT), RESPONDENT.* 1908
January, 20.

Transfer of Property Act (IV of 1882, sections 67, 99 and 100—Execution of decree—Attachment—Application in execution.

Section 99 of the Transfer of Property Act (IV of 1882) contemplates attachment of property by a judgment creditor (even if he be a mortgagee), and he is entitled to attach the property by an application in execution of the decree.

* Second Appeal No. 605 of 1907.

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The proper time to consider the applicability of section 99 of the Transfer of Property Act is when an application for sale is made an execution.

SECOND APPEAL from the decision of C. E. Palmer, acting District Judge of Broach, reversing the order passed by Manilal H. Vakil, Subordinate Judge of Ankleshvar, in an execution proceeding.

The plaintiff, Nathubhai Motilal, obtained a decree against the defendant, Bai Ujam, for Rs. 930 with respect to the value of certain ornaments, in Suit No. 323 of 1905, in the Court of the Subordinate Judge of Ankleshvar. The decree was passed on the 12th October 1906.

There was another suit between the parties, Suit No. 304 of 1905. Therein the plaintiff, Nuthubhai, obtained a decree against the defendant, Bai Ujam, for Rs. 384. The said decree was passed on the 14th June 1906 and it gave to the plaintiff a lien over the defendant's immoveable property situate at Ankleshvar.

On the 22nd October 1906 the plaintiff presented a darkhast for the execution of his decree in Suit No. 323 of 1905 and prayed for the recovery of the decretal amount from the defendant in person and on her default to pay, by the sale of her immoveable property at Ankleshvar, subject to his lien on it under the decree in Suit No. 304 of 1905, and at Hansot. The Subordinate Judge, on the same day, passed an order directing the defendant to pay the amount and further directed that in case of default defendant's immoveable property be attached and prohibitory orders should issue on the 5th November 1906.

The defendant failed to pay the amount of the decree and her property was consequently ordered to be attached on the 5th November 1906. A proclamation of sale was subsequently issued and the property at Ankleshvar was sold on the 7th January 1907.

The defendant, in the meanwhile, appealed to the District Court against the order passed on the 5th November 1906 and got the confirmation of the sale stopped by obtaining an *ad interim* stay. The District Judge, on appeal, reversed the order of the Subordinate Judge and rejected the darkhast on the following ground:—

It is I think clear from sections 99, 100 and 67 of the Transfer of Property Act that in this case a suit under section 67 of the Transfer of Property Act is necessary and I therefore reverse the Subordinate Judge's order and reject the *darkhast*.

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The plaintiff preferred a second appeal.

Gokuldas K. Parekh for the appellant (plaintiff).

There was no appearance for the respondent (defendant).

JENKINS, C. J.:—This is an appeal from an order passed by the District Court of Broach on the 26th March 1907.

The Acting District Judge described the appeal before him as being from the lower Court's order directing execution to proceed. The order he intended to describe was one of the 22nd October 1906, and that was an order for attachment of property.

The learned Judge reversed this order for attachment and rejected this *darkhast*. The ground of his decision was that he thought sections 99 and 100 and section 67 of the transfer of Property Act made it necessary that a suit should be brought under section 67. It may be a question as to whether or not one of the properties can be regarded as property in relation to which the applicant is a mortgagee within the meaning of section 99 of the Transfer of Property Act. But with that we have no concern at this stage. Even if he be a mortgagee he still is entitled to attach the property. Section 99 contemplates an attachment by him; for it provides that where a mortgagee in execution of a decree for the satisfaction of any claim whether arising under a mortgage or not *attaches* the mortgage property, he shall not be entitled to bring such property to sale otherwise than by instituting a suit under section 67. Therefore the learned Judge of the District Court was wrong in reversing the order for attachment and rejecting the *darkhast*.

When any application is made for bringing the property to sale, then will be the time to consider whether or not section 99 has any application.

The result is that we reverse the decree of the lower appellate Court and restore that of the Subordinate Judge.

The respondent must pay the costs throughout.

Decree reversed.

G. B. R.