

SCOTT, C. J. :—The question that we have to decide is whether in a suit for a declaration and consequential relief the Court must accept the value of the relief stated in the plaint for the purpose both of the Court-fees and jurisdiction.

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We think that the words of section 8 of the Suits Valuation Act VII of 1887 lead to that conclusion; and we find that this was the view taken by the Calcutta High Court in *Hari Sanker Dutt v. Kali Kumar Patra*⁽¹⁾.

We have been pressed by a decision of the Court in *Dayaram v. Gordhandas*⁽²⁾, but that is a case which is clearly distinguishable, because the learned Judges there treated it as a suit in which there was a claim for possession.

We, therefore, make the rule absolute and set aside the order of the lower Court with costs.

Rule made absolute.

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* (1) (1905) 32 Cal. 734.

(2) (1906) 31 Bom. 73.

APPELLATE CIVIL.

Before Chief Justice Scott and Mr. Justice Chandavarkar.

GANESH MORESHWAR JOSHI AND ANOTHER (ORIGINAL DEFENDANTS 3 AND 4), APPELLANTS, v. PURSHOTTAM BALKRISHNA RODE AND OTHERS (ORIGINAL PLAINTIFFS AND DEFENDANTS 5 AND 6).*

1908.

December 1.

Civil Procedure Code (Act XIV of 1882), sections 278, 282, 283 and 287—Money-decree—Execution—Attachment and sale of property mortgaged with possession to a third person—Auction-purchase by judgment-creditor with leave of Court subject to mortgage—Suit by judgment-creditor prior to confirmation of sale and satisfaction of decree for a declaration that the mortgage was fraudulent and without consideration—Purchase—Equity of redemption—Estoppels binding upon judgment-debtor.

Plaintiffs obtained a money-decree against their debtor and in execution attached the debtor's immoveable property which was already mortgaged with possession to a third person. At the auction-sale the plaintiffs themselves purchased the property with the leave of the Court subject to the mortgage.

* Second Appeal No. 186 of 1907.

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Before the sale was confirmed and the decree was satisfied the plaintiffs having brought a suit for a declaration that the mortgage was fraudulent and without consideration it was contended that the plaintiffs were no longer judgment-creditors but purchasers and that what was attached and sold was equity of redemption, therefore, the purchasers could not claim more than they bought.

Held, that, as the suit was brought before the confirmation of the sale and the satisfaction of the decree, the plaintiffs were judgment-creditors and not purchasers.

Held further, that the plaintiffs under their purchase were not purchasers of merely the equity of redemption and were not bound by estoppels which would have bound the judgment-debtor. There is nothing to prevent such a purchaser from benefiting by the clearance of any claim upon the property even if he has himself to sue to procure it. He may alike displace a fraudulent and redeem an honest mortgage.

SECOND appeal from the decision of Gulabdas Laldas, First Class Subordinate Judge of Thána with appellate powers, amending the decree of G. K. Kale, Subordinate Judge of Roha.

The facts of the case were as follows :—

On the 30th November 1899 the plaintiffs Ganesh Balkrishna Rode and his brothers got a money-decree against Vishnu Bapat father of the minor defendants 1 and 2 for the recovery of his money-debt, namely, Rs. 116 and costs. In execution of the decree the property in suit along with the other property of the judgment-debtor was attached in the year 1901. Thereupon defendant 3, Ganesh Moreshwar Joshi, applied to the Court for the removal of the attachment or for an order that the property be sold subject to his mortgage on the ground that the plaintiffs' judgment-debtor had mortgaged the property to him with possession for Rs. 2,000 on the 12th February 1900. On the 15th November 1902 the Court ordered that the attached property should be sold subject to the mortgage lien of defendant 3. The auction-sale took place on the 23rd October 1903 when the property in suit was purchased by plaintiffs with the leave of the Court and the sale was confirmed on the 24th November 1903. In the meanwhile, that is, after the purchase by the plaintiffs but before the sale was confirmed, the plaintiffs brought the present suit on the 13th November 1903 for a declaration that the property in suit was liable to be attached

and sold in execution of his money-decree, the mortgage of defendant 3 being a sham and colourable transaction without consideration. They further prayed that the order directing them to purchase the property subject to defendant 3's mortgage be set aside. Defendant 4 was the undivided brother of defendant 3 and defendants 5 and 6 were mortgagees of some of the properties in suit from defendant 3.

The guardian of defendants 1 and 2, who were minors, stated that he knew nothing about the claim.

Defendants 3 and 4 contended *inter alia* that their mortgage for Rs. 2,000, dated the 12th February 1900, was a genuine transaction accompanied with possession and supported by valuable consideration, that as the mortgage was passed one year before the plaintiffs' attachment it was binding on the plaintiff, that the plaintiffs' allegations were false and malicious, and that the property in dispute was not liable to attachment and sale in execution of the plaintiffs' decree so long as the mortgage was not paid off.

Defendants 5 and 6 did not appear.

The Subordinate Judge found that the mortgage in suit was not a sham transaction and was supported by consideration, that the mortgage was proved, and that the plaintiffs were not entitled to any relief. The suit was therefore dismissed.

The plaintiffs having appealed, the Appellate Court found that the mortgage was a colourable transaction without valuable consideration and that the plaintiffs' purchase at the auction-sale did not amount to an acquiescence on their part in the genuineness of the mortgage and did not estop them from praying for the declarations sought. The following is an extract from the appellate Court's judgment:—

It is, however, clear to my mind that the fact of the plaintiffs having bid at the Court-sale and become purchasers of the plaint property with full knowledge and notice of the retention of the mortgage lien on the foot of exhibit 53 in favour of defendant No. 3 cannot and does not prejudice their right, even though they were the decree-holders at whose instance the property was put up to sale, to challenge the genuineness and *bona fides* of the mortgage.

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The sale of the property subject to the mortgage incumbrance was ordered by the Court in spite of the decree-holders' protest and opposition which were disallowed by the Court after a summary investigation in a miscellaneous proceeding under sections 278 to 281 of the Code of Civil Procedure. The very nature of the inquiry and the frame of the issues to be raised in it make it evident that the order passed does not finally dispose of the questions and the law clearly provides a remedy by way of a regular suit to render it nugatory and ineffectual, if not to revise and reverse it. It is of a temporary nature, and all the important questions regarding the *bond fides*, consideration, validity, etc., of the mortgage can be and are raised for determination in the suit by the dissatisfied party to the miscellaneous proceeding, may the aggrieved party be an intervener or the decree-holder. The order has not the effect of *res judicata* on either side, and it does not seem lawful or equitable to find that because a decree-holder abides by the Court's order for the time being, allows the attached property to be sold subject to a lien and himself purchases it, he has acquiesced in the order and is ever after estopped from impeaching the *bond fides* of want of consideration for the mortgage. The law leaves him open two remedies for getting the questions regarding the mortgage wholly finally tried and adjudicated on—one by a regular suit for a declaration of the nature sought in the present suit, and the other by a suit of redemption, and what would be the use and object of that suit if the party suing were to be held as bound and silenced by the result of the miscellaneous inquiry which from its very character embraces two issues, one about the possession of the property attached and the other as to on whose behalf the possession was held at the time of the attachment? The incidental inquiry into consideration, if one should be at all held, would be a summary and to determine only *prima facie* which of the parties should be compelled to file a regular suit. Such an inquiry therefore and the Court's order in it cannot be binding on a party to the regular suit, and it is therefore that the plaintiffs cannot be held as having acquiesced in the Court's order directing the retention of lien.

They should certainly have shewn diligence and not allowed the execution matter to be pushed on to sale by instituting the suit at an earlier date and obtaining a temporary injunction prohibiting the sale under section 492, Civil Procedure Code, or a stay order in the execution matter itself. It is this supineness on their part that has placed them as purchasers in an awkward position, but it cannot tend to the conclusion that they cannot challenge the mortgage on the grounds of want of consideration and *bond fides*.

The appellate Court therefore passed a decree as follows:—

The question as to what relief could be awarded to the plaintiffs in this suit is not difficult to answer. Though they have succeeded in shewing that the mortgage-deed (exhibit 53) does not evidence a real and *bond fide* transaction they could not but admit that the property attached at their instance, was at the time of its attachment subject to the mortgage of Rs. 1,000 in favour of the

Paranjpes (defendants 5 and 6) by virtue of their deed (exhibit 88). It is not in dispute that on the date of exhibit 53 the whole amount due on the foot of exhibit 88 was Rs. 1,186-1-6.

The Paranjpes have been joined as co-defendants from the beginning and they have not urged that they were entitled to more. On the contrary their deed for Rs. 4,000 (exhibit 91) contains their admission that the sum of their mortgage dues was Rs. 1,186-1-6 and not a pie more.

I therefore grant the appeal and amend the lower Court's decree. The amended decree is that it be declared that the plaint property was subject to a lien of Rs. 1,186-1-6 in favour of defendants 5 and 6 on the date of its attachment by the plaintiffs and that the mortgage of the same by exhibit 53 in favour of defendants 3 and 4 is not binding on them (plaintiffs).

Defendants 3 and 4 preferred a second appeal.

M. B. Chaubal (Government Pleader) and *G. K. Dandekar* for the appellants (defendants 3 and 4).

N. M. Samarth for respondents 1-3 (original plaintiffs).

P. P. Khare for respondents 5 and 6 (defendants 5 and 6).

SCOTT, C. J. :—The plaintiffs obtained a decree for money in the Pen Court against Vishnu Bapat, father of the defendants 1 and 2, and in execution attached *inter alia* the property described in the plaint being an eight-anna share of a *khoti* village. The defendant 3 Ganesh Joshi then applied to the Pen Court for removal of the attachment or for an order that the property be sold subject to his mortgage lien, alleging that Vishnu Bapat the judgment-debtor passed to him a mortgage with possession of the attached property on the 12th February 1900 for Rs. 2,000. The Pen Court upon that application ordered that the property be sold subject to the mortgage. This order was passed on the 15th November 1902.

The property was accordingly put up for sale subject to the mortgage and the plaintiffs with the leave of the Court became the purchasers. On the 13th November 1903 the plaintiffs brought this suit, praying that it may be declared that the deed of mortgage is without consideration and made with intent to defraud the plaintiffs and as hollow and ineffective and that therefore the property is liable to attachment and sale. The

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plaintiffs obtained a decree in the lower appellate Court. Against that decree the defendant brings this second appeal.

It is contended on behalf of the appellant that the suit is not maintainable on the ground, first, that such a suit can only be brought by a person who is still a judgment-creditor and that the plaintiffs whose decree is satisfied are no longer judgment-creditors but only purchasers; and, secondly, that what was attached and sold was an equity of redemption only and that the purchasers cannot claim more than they bought.

As regards the first point it is sufficient to say that the suit was brought by the plaintiffs before the sale had been confirmed, and before the decree had been satisfied and while the plaintiffs were still judgment-creditors.

The latter branch of the argument is based upon a false assumption, for what was attached was the immoveable property believed to be unincumbered and not the equity of redemption. An equity of redemption may be attached and sold (see *Parashram Harlal v. Govind Ganesh*⁽¹⁾) but that was not done in the present case. The claim made to the attached property was upon the investigation under section 278 decided in favour of a person claiming to be mortgagee in possession. Under these circumstances the attached property should have been released under section 280 (see *Kassirav R. Saheb Holkar v. Vithaldas Mangalji*⁽²⁾) and the judgment-creditors should have been left to the suit allowed by section 283. The order passed by the Pen Court was irregular, as section 282 only applies to cases of mortgages or liens created in favour of a person not in possession.

We must therefore discuss this case on the footing of a purchase at the Court-sale of attached property believed to be incumbered, a case contemplated by section 287. The purchaser under these circumstances is not bound by estoppels which would have bound the judgment-debtor. See *Dinndronath Sannial v. Ramkumar Ghose*⁽³⁾; *Lala Parbhu Lal v. Mylne*⁽⁴⁾ and *Bashi Chunder Sen v. Enayet Ali*⁽⁵⁾. There is nothing to prevent

(1) (1895) 21 Bom. 226.

(3) (1881) 7 Cal. 107.

(2) (1873) 10 Bom. H. C. R. 100.

(4) (1887) 11 Cal. 401.

(5) (1892) 20 Cal. 236.

him from benefiting by the clearance of any claim upon the property even if he has himself to sue to procure it. He may alike displace a fraudulent and redeem an honest mortgagee.

The decision of the lower appellate Court was also attacked on the ground that the onus of proof had been wrongly thrown upon the defendant and that the finding that the mortgage was a sham transaction could not therefore stand. I, however, think it is clear that the whole of the evidence was fully discussed and considered by the lower Court. The learned Judge came to the conclusion that the surprising nature of the transaction itself and the suspicious circumstances attending it outweighed the inferences which might be suggested by the evidence of some payments having been made by the defendant to creditors of Vishnu Bapat.

It is a judgment upon a pure question of fact which is binding upon us in second appeal.

I see no reason to interfere with the decree passed by the lower Court. I would therefore confirm it and dismiss the appeal with costs.

CHANDAVARKAR, J.:—I concur.

Decree confirmed.

G. P. R.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

AMRITA RAVJI RAO (ORIGINAL DEFENDANT), APPELLANT, v. SHRIDHAR NARAYAN OKE AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.*

1908.

December 9.

Adverse possession—Adverse possession between tenants-in-common—What constitutes adverse possession—Acts of exclusive possession—Ouster.

The property in dispute belonged jointly to two brothers G. and D. The plaintiffs obtained a decree on a mortgage-bond against D. as manager of the family, and in execution of the decree the property was sold to V. When V. sought to take possession of the property he was obstructed by G, and he had to

* Second Appeal No. 729 of 1907.