

1916.

MADHAVJI
DHARAMSEY
MANU-
FACTURING
Co.
v.
THE
CENTRAL
INDIA
SPINNING,
WEAVING
AND MANU-
FACTURING
Co.

by appellants, and as regards the form of inquiry as to damages it appears to us that it would be neither reasonable nor practicable to restrict the inquiry as suggested. The wide form of inquiry was adopted after argument in *Lever v. Goodwin*⁽¹⁾ and has been rightly applied in the present case.

The appeal must be dismissed with costs.

Solicitors for plaintiffs: Messrs. *Payne & Co.*

Solicitors for defendants: Messrs. *Ardeshir, Hormusji & Co.*

Appeal dismissed.

G. G. N.

APPELLATE CIVIL.

1916.

August 25.

Before Sir Stanley Batchelor, Kt., Acting Chief Justice and Mr. Justice Shah.

GANESH KRISHNA KULKARNI AND ANOTHER (ORIGINAL PLAINTIFFS),
APPELLANTS v. DAMOO VALAD NATHU SHIMPI AND OTHERS (ORIGINAL
DEFENDANTS), RESPONDENTS.*

*Civil Procedure Code (Act XIV of 1882), sections 278, 282, 283 and 287—
Civil Procedure Code (Act V of 1908), Order XXI, Rules 62 and 63—
Attachment of mortgaged property—Application to sell the property subject
to mortgage lien—Property ordered to be sold free of mortgage—Order not
referable to section 283—Suit on mortgage a year after the date of the
order—Limitation Act (IX of 1908), Article 11.*

The property in dispute was attached by the defendant's father under a decree obtained by him in a suit of 1882. The plaintiffs' father in response to a notice from the Court applied to have the property sold subject to his mortgage lien. In 1883 the Court rejected the application and directed that the property should be sold free from the alleged mortgage claim. Thereupon in 1910 the plaintiffs sued to recover the amount due on the mortgage. Both the lower Courts held that the order of 1883 was passed under section 282 of

(1) (1887) 36 Ch. D. 1, 3, 7; 4 R.P.C. 492, 496.

* Second Appeal No. 13 of 1915.

the Civil Procedure Code, 1882, and the same became conclusive under section 283 of the Code and hence the suit was barred under Article 11 of the Limitation Act, 1908.

Held, (1) that the suit was not barred, as from the terms of the application itself it was clear that it must be referred to section 287 and not to section 278 of the Civil Procedure Code, 1882.

(2) That apart from the character of the application, the Court's order of 1883 could not properly be referred to section 283 of the Civil Procedure Code, 1882. With such an order as that section 282 of the Code had no concern.

Durga Prasad v. Mansa Ram (1) followed; *Nemagauda v. Paresha* (2) distinguished.

SECOND appeal against the decision of C. C. Dutt, District Judge of Khandesh, confirming the decree passed by B. G. Tolat, Subordinate Judge at Erändol.

The plaintiffs sued to recover a sum of money due on a mortgage bond dated the 22nd December 1882, by sale of the mortgaged property.

The defendants contended that in a Darkhast No. 458 of 1883, the mortgaged property had been attached at the instance of their father under a decree obtained by him in a suit of 1882; that the plaintiffs' father, by a miscellaneous Application No. 39 of 1883, applied to the Court that the property should be sold subject to his mortgage lien; that the Court rejected the application in June 1883 and ordered that the property should be sold free from the alleged mortgage in favour of the plaintiffs' father; and that the plaintiffs' suit was, therefore, barred under Article 11 of the Limitation Act, 1908.

The Subordinate Judge held that the order rejecting the plaintiffs' father's application was passed under section 282 of the Code of Civil Procedure, 1882, (corresponding with Order XXI, Rule 62 of the Civil Procedure Code, 1908) and as no suit as instituted for the

(1) (1904) 1 All. L. J. 531.

(2) (1897) 22 Bom. 640.

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establishment of right under section 283 of the Code of 1882 (corresponding with Order XXI, Rule 63 of the Code of 1908) within one year from the date of the order as provided in Article 11 of the Limitation Act, 1908, the plaintiffs' present suit was barred by limitation.

The District Court confirmed the decree.

The plaintiffs preferred a second appeal.

P. B. Shingne, for the appellant:—I submit section 283 of the Civil Procedure Code, 1882, cannot apply to the present case. The provision of that section cannot apply to a case in which a Court in execution orders that the property attached be sold *free* from an encumbrance. The section is penal and ought to be construed strictly: see, *Durga Prasad v. Mansa Ram*.⁽¹⁾ The case of *Nemagauda v. Parésha*⁽²⁾ assumed that section 283 applied, and no objection was taken on the score that the section did not apply. The principle on which the case was decided was stated too widely and went beyond the language and scope of section 283. Moreover, the present case falls under section 287 which enacts a rule of administrative and not judicial character: see *Sivagami Achi v. Subrahmaniam Ayyar*.⁽³⁾

S. R. Bakhle, for the respondent:—The view of the lower Courts is correct. The case is governed by section 283 and the case of *Nemagauda v. Parésha*⁽²⁾ cannot be questioned. The principle underlying the case is a well accepted one. The case is not governed by section 287 and in the lower Court this point was given up.

BATCHELOR, Ag. C. J.:—The facts upon which this second appeal has to be decided are these. The plaintiffs

⁽¹⁾ (1904) 1 All. L. J. 531.

⁽²⁾ (1897) 22 Bom. 640.

⁽³⁾ (1903) 127 Mad. 259.

sued to recover a sum of money on a mortgage bond passed on the 22nd December 1882 and their suit has been dismissed as being barred by time. It appears that in a Darkhast No. 458 of 1883, the mortgaged property in dispute had been attached at the instance of the defendants' father under a decree obtained by him in a suit of 1882. By Miscellaneous Application (No. 39 of 1883), the plaintiffs' father applied to the Court that the property should be sold subject to his mortgage lien. But, in June 1883, the Court rejected this application, and ordered that the property should be sold free from the alleged mortgage in favour of the plaintiffs' father. In consequence of this order the defendants met the plaintiffs' present suit with the objection that it was out of time, inasmuch as it was filed more than a year after the date of the Court's order rejecting the plaintiffs' father's application, and that order was, according to the defendants, to be referred to section 283 of the Code of Civil Procedure of 1882, read with Article 11 of the Limitation Act.

Both the lower Courts have acceded to this contention of the defendants, and the question is whether they were right in so doing. We have looked into the proceedings connected with the plaintiffs' father's application (Exhibit 25), and from the terms of the application itself, as well as from the circumstances surrounding its presentation, it is clear that the application must be referred to section 287 of the Code of 1882, and not to section 278. The application in terms professes to be made in response to a notice from the Court inviting the assertion of any claims of right by persons conceiving themselves to possess such claims. It is not questioned that if the application falls under section 287, then the one year's limitation prescribed by Article 11 of the Limitation Act in regard to suits against orders under section 283 is inapplicable

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Furthermore, we are of opinion that, apart from the character of the application itself, the Court's order cannot properly be referred to section 283. In this case, as we have said, the order was that the attachment should proceed free from the lien or mortgage claim. With such an order as that, section 282 seems to us to have no concern. Section 282, as we read it, is an enabling section, empowering the Court to pass a certain specified order on the fulfilment of two specified conditions. The conditions are : (1) that the Court is satisfied that the property is subject to a mortgage or lien in favour of some person not in possession ; and (2) that the Court in its discretion thinks fit to continue the attachment. Where those two conditions are satisfied, then the section empowers the Court to continue the attachment subject to the mortgage or lien. But an order which refuses to acknowledge the mortgage or lien, and directs the continuance of the attachment free from such mortgage or lien is, in our opinion, incapable of being ascribed to this section. That is the view which was accepted by Stanley C. J. and Burkitt J. in *Durga Prasad v. Mansa Ram*,^(a) where the learned Chief Justice says :—“Section 282 only applies to the case where a Court is satisfied that property is subject to a mortgage or lien, and in that case it enables the Court to continue the attachment of that property or to dissolve the attachment as in its discretion it may think fit, but if it do continue the attachment, it must continue it subject to the mortgage or lien which has been established to the satisfaction of the Court.” We entirely agree with this explanation of the purview of section 282, except that we are, with respect, unable to follow the necessity for the words :—“or to dissolve the attachment as in its discretion it may think fit.”

(a) (1904) 1 All. L. J. 531 at p. 536.

Mr. Bakhale for the respondents contended, however, that the point under discussion had been decided in his favour by a ruling of a Bench of this Court in *Nemagauda v. Paresha*⁽¹⁾ and it is true that the law as to the position of an unsuccessful objector or intervenor is at p. 643 of the report stated so broadly that some countenance for Mr. Bakhale's argument may be extracted from the passage. But if the facts of the case be considered in reference to the actual decision, it is, we think, clear that the ruling is of no authority in the circumstances now before us. For the question debated in *Nemagauda v. Paresha*⁽¹⁾ was not whether the party there concerned, namely, the respondent, was or was not barred by an order properly to be ascribed to section 282, but whether the bar imposed by an order under that section was or was not removed by reason of the fact that the appellant-auction-purchaser's suit against the respondent was brought within twelve months from the Court's order ; in other words, for the purposes of that case it was assumed that the respondent was an unsuccessful intervenor or objector under sections 278 to 282. But the point there assumed is exactly the point which in this case falls to be decided. We infer, therefore, that there is nothing in *Nemagauda v. Paresha*⁽¹⁾ to debar us from deciding the present appeal on its merits, and for the reasons which we have given, we think that the lower Courts were wrong in holding that the order made by the Court was an order under section 282. It follows that the appeal must be allowed, the lower appellate Court's decree must be reversed and the suit remanded to be tried on its merits. Costs will be costs in the suit.

Decree reversed.

J. G. R.

⁽¹⁾ (1897) 22 Bom. 640.

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