

(1876) 06 AHC CK 0010
In the Allahabad High Court

Akhe Ram

APPELLANT

Vs

Nand Kishore

RESPONDENT

Date of Decision : 01-06-1876

Acts Referred:

Citation : (1875) ILR (All) 236

Hon'ble Judges : Robert Stuart, C.J;Turner, J;Spankie, J;Pearson, J;Oldfield, J

Bench : Full Bench

Judgement

Robert Stuart, C.J.—My answer to this reference is that a decree passed u/s 53, Act XX of 1860, is and can only be a mere money-decree, and that a sale in execution of such a decree can only give the purchaser the rights and interests of the judgment-debtor in the property hypothecated, and that such purchaser cannot claim in virtue of his lien to defeat a second mortgagee. I hold this opinion so clearly, and it is suggested to my mind so simply and directly by what I consider to be the true meaning of Section 53 of Act XX of 1860, and by the relative position of the two bond-holders, that I think it unnecessary to support it by any argument or by any reference to authorities. The Calcutta and Madras cases referred to at the hearing I do not, in my opinion, apply.

Pearson, J.

2. Section 53, Act XX of 1860, distinctly states the nature of the decree which may be given to a petitioner on production in Court of the obligation and the record of agreement mentioned in the preceding section. He shall be entitled to a decree for any sum not exceeding the sum mentioned in the petition, together with interest at the rate specified (if any) up to the date of the decree. The decree can be only a decree for money; and the purchaser of any Immovable property sold in execution thereof u/s 259, Act VIII of 1859, could only be held to have purchased the right, title and interest of the judgment-debtor in the property sold.

3. In the case out of which the reference has arisen, it appears that the decree

which was given to Mathra Das and Mulchand, u/s 53 of the Act above-named, was in its terms against the property hypothecated in the bond executed by Mr. Gardener in their favour on the 9th December 1867, as well as against him; but I concur in the opinion expressed by the Subordinate Judge that so much of the decree as declares the property liable must be regarded as null and void for want of jurisdiction.

4. The plaintiff in the case purchased the property at auction on the 20th December 1873, subject to the lien which had been created in the defendant's favour by the instrument of the 5th January 1870, and cannot in my opinion derive any benefit from the circumstance that, under the bond of the 9th December, 1867, Mathra Das and Mulchand possessed a lien which would have taken precedence of that possessed by the defendant under the instrument of the 5th January 1870, had it been a question which of the two liens should prevail over the other; but there is no such question. The debt secured by the earliest lien is understood to have been realized by Mathra Das and Mulchand; at all events they are not trying to enforce the lien, if it has not been altogether extinguished with the debt which it was intended to secure. The plaintiff as auction-purchaser of Mr. Gardener's rights and interests could not acquire by the purchase of them the lien which belonged to Mathra Das and Mulchand, nor indeed were those rights and interests, being sold in execution of what must be regarded as a mere money-decree, sold in virtue and pursuance of that lien. He cannot therefore in virtue thereof successfully resist the defendant's claim to enforce his lien under the instrument of the 5th January 1870.

Turner, J.

5. The provisions of Section 53, Act XX of 1866, were intended to apply to personal obligations for the payment of money, and where such an obligation was found combined with an hypothecation of property as collateral security, the creditor was entitled to obtain a summary decree on the personal obligation only. A decree duly passed under the provisions of the Act would be what is known in these provinces as a mere money-decree, and where it appears on the face of the decree that, although it professed to declare the lien, it was passed under the special provisions of Section 53, it could only be held valid as a money-decree, and if the holder of such a decree attached and sold the hypothecated property, for the reasons given in my judgment in *Khub Chand v. Kalian Das* (next case), I am of opinion nothing would pass under the sale but the rights remaining in the judgment-debtor at the time of the sale.

Spankie, J.

6. I would say, in reply to this reference, that with regard to the provisions of Section 53, Act XX of 1866, the decree could only have been for money, and the purchaser at the execution-sale could only acquire the rights and interests of the judgment-debtor remaining at the time of the sale, and could not claim by virtue of the lien to defeat a second mortgagee.

Oldfield, J.

7. A decree made u/s 53, Act XX of 1866, on a bond can properly only be a decree for the recovery of money, and not for enforcing any lien against property hypothecated in the bond; and the general practice under a course of rulings of this Court has been to hold that a purchaser at auction in execution of a mere money-decree acquires merely the rights and interests which the judgment-debtor had at the time of the sale, and cannot benefit by any lien that the decree-holder may have had under the bond. On the principle of stare decisis, I would reply to that effect to this reference.