

(1934) 08 AHC CK 0031
In the Allahabad High Court

Bhairon Awasti

APPELLANT

Vs

Lalta Misir and Others

RESPONDENT

Date of Decision : 10-08-1934

Acts Referred:

Citation : AIR 1934 All 954

Hon'ble Judges : Kendall, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Kendall, J.—This is an application for the revision of an order passed by the Subordinate Judge of Benares on the Small Cause Court side under the Garnishee Rules of the Civil Procedure Code, directing the attachment of a sum of Rs. 200 in the hands of a mortgagee. A deed of possessory mortgage had been executed by the judgment-debtor in favour of the mortgagee, who is the present applicant, for a nominal consideration of Sections 2,000, of which Es.200 were left with the mortgagee for payment to the decree-holder. The mortgagee did not make the payment, and the decree-holder has now proceeded against him under Rule 131,0.21 and the Court has directed the execution be proceed. The mortgagee's objection is made on the ground that the money cannot be attached under the Garnishee orders because it is not either

a debt due to the judgment-debtor (other than a debt secured by a mortgage) or a charge or a negotiable instrument or a debt recoverable only in a revenue Court or moveable property not in the possession of the judgment-debtor

in the words of Rule 131. The trial Court, without discussing the matter at any length, held that the money left with the mortgagee was either a debt or moveable property. I have been referred to a recent decision of a Bench of this Court to show that, in these circumstances, the money should not be held to be a debt. In the case of Khunni Lal v. Bankey Lal 1934 All 449, it was decided that:

The unpaid portion of the mortgage money in the hands of the mortgagee

holding a usufructuary mortgage is not a debt due from the mortgagee to the mortgagor which can be attached by a person who holds a money decree against the mortgagor.

2. The Bench was relying on a former decision of this Court, namely, the case of *Phul Chand v. Chand Mal* 30 All 252, which had held that in such circumstances the mortgagor is only entitled to recover, if anything, damages for non-payment of the balance of the money which the mortgagee had agreed to advance to him, and that he could not sue for specific performance of an agreement to lend the full sum promised, so that the non-payment of a portion of the loan could not constitute a debt which could be subject of attachment or sale under the provisions of the Civil Procedure Code. Against this I have been referred to a decision of a Bench, of which I was a member, in the case of *Sheopati Singh v. Jagdeo Singh* 1931 All 95, the question before the Court then was not whether the money left by the mortgagor in the hands of a usufructuary mortgagee for payment to his creditor was a debt but whether the mortgagor having concluded his part of the contract could sue to recover the balance of his money and the decision undoubtedly was that the mortgagor could recover the amount and was not compelled to wait until he could redeem the mortgage. There is certainly one passage that supports the opposite party's argument, where on p 1145 we have said:

The suit is not really one for the specific performance of a mere contract to lend money, but to compel the defendants to perform their part of the contract when they have obtained delivery of possession of the property.

3. In the circumstances of the case, this is an obiter dictum, and in view of the clear decisions in *Phul Chand v. Chand Mal* 30 All 252 and *Khunni Lal v. Bankey Lal* 1934 All 449, I think it would be wrong to hold that a suit for specific performance would lie. Learned Counsel for the opposite party has rightly pointed out that the Bench in *Sheopati Singh v. Jagdeo Singh* 1931 All 95 drew a distinction between a usufructuary mortgage and "a simple mortgage, and he seeks to infer from this that the present case must be distinguished from the two cases relied on by the applicant because the mortgage concerned is a usufructuary mortgage. The distinction we drew in *Sheopati Singh v. Jagdeo Singh* 1931 All 95, however appears to have been this. There had been a delivery of possession of the property and the contract had been completed and had in fact, become a transfer of property or a conveyance. The mortgagor's suit there, therefore would not really be one for specific performance of a contract because the contract had already been completed so far as the mortgagor was concerned. What remained to be done was for the other party to the contract to make good the consideration. Now, it cannot be argued in face of the authority on the other side that a suit will lie to enforce an agreement to lend money, and the suit will therefore be due to force the mortgagee to compensate the mortgagor for failure to complete his contract, and that the amount of damages to be awarded will be at the discretion of the Court. The distinction between a usufructuary mortgage

and. a simple mortgage is simply this, that in the one case the mortgagor has given consideration by parting with his property, and will therefore be in a position to demand damages whereas in the case of a simple mortgage, it might well be that no consideration had passed from the mortgagor.

4. The balance of authority therefore is clearly in favour of the view that the money left with the mortgagee is not a debt as contemplated in Rule 131, Order 21. But I have still to deal with the question of whether it is to be regarded! as moveable property and therefore capable of attachment. It has been pointed out by Mr. Upadhiya that the notice received by the decree-holder was a notice under Rule 140, Order 21, of -which the opening words we : " whereas it is alleged that a debt of Rs. 200 is due from yon, " and this is wertainly not a notice for the attachment of moveable property which is distinguished in Rule 131 from a debt. However that may be, I am clearly of opinion that this sum of money cannot be held to be move-able property or property at all. It is merely an item in an arithmetical calculation which never had any existence in fact. If it could be shown that a sum of Rs. 2,000 had been handed over to the judgment-debtor by the mortgagee and that the judgment-debtor had then separated a sum of Rs. 200 in silver or in notes find had handed this back to the mortgagee, who had thereafter kept this tram in his possession, it would be possible 1 o hold that this sum was move-able property. That however is not she way in which these transactions are carried out, and I have no doubt that this sum of Rs. 200 has never had siny physical existence, for it was neither banded over by the mortgagee to the judgment-debtor nor handed back by the judgment-debtor to the mortgagee. It is dimply a figure representing the shortage in the consideration paid to the judgment-debtor. For these reasons I hold that the amount cannot be attached under Rule 131, Order 21, Civil P.C. I therefore set aside the order of the executing Court and direct that the objection of the garnishee be allowed and the application of the decree-holder be dismissed with costs in both Courts.