

(1880) 02 CAL CK 0003
In the Calcutta High Court

Ramkrishna Dass Surrowji

APPELLANT

Vs

Surfunnissa Begum and Others

RESPONDENT

Date of Decision : 28-02-1880

Acts Referred:

Citation : (1881) ILR (Cal) 129

Hon'ble Judges : R. P. Collier, J;J. W. Colvile, J;B. Peacock, J

Bench : Full Bench

Judgement

J. W. Colvile, J.—In this case the appellant sued on a mortgage title, completed, as he alleged, by foreclosure under Reg. XVII of 1806, Section 8, to recover possession of the property in suit from the respondent, who held it as purchaser at an execution-sale in a suit against the mortgagor. The mortgage-deed was in the English form, with a power of sale. Inasmuch as it was sought to be enforced in the mofussil, the procedure prescribed by the Regulation has been applied to it as if it were a mere bye-bil-wafa, or deed of conditional sale. The suit is the ordinary suit, which, in such cases, the mortgagee, who has foreclosed, is obliged to bring in order to recover possession of the mortgaged premises, with this difference only, viz., that it is brought against the purchaser under the execution-sale as well as against the mortgagor, and that the former is the substantial defendant.

2. In such a suit the plaintiff has to make out his title to dispossess the other party, and any objection which can be taken either to the original mortgage title, or to the proceedings in foreclosure, may be taken.

3. The respondent was one of a firm of builders who, in December 1872, sued one Surfunnissa Begum, as the daughter of Munshi Bazlur Rahim, and the representative of his estate" by virtue of a certificate under Act XXVII of 1860, for the amount claimed as due to them, for work done partly in the lifetime of Bazlur Rahim and partly after his death. On the 10th of December 1872 they applied for and obtained, under Sections 84 and 85 of the Civil Procedure Code, an attachment before judgment, in order to secure the property. Mr. Doyne took

objection to the regularity of the issue of that attachment, complaining that there was no proof of the proceedings which are enjoined by Section 81 and the subsequent sections having been adopted. But in their Lordships' opinion, it must be taken that, as between Surfunnissa Begum and the plaintiffs in this former suit, there was a valid and subsisting attachment at the date of the execution of the mortgage, and that this is virtually admitted by the consent order of the 23rd January 1872, which was made when part of the property which had been attached was released from the attachment on the payment of part of the plaintiffs' demand, and it was arranged that the attachment should continue as to the particular property, which is the subject of this litigation.

4. In these circumstances Surfunnissa Begum, on the 20th of May 1873, executed the mortgage under which the plaintiff claims; and the principal question raised by this appeal whether that alienation of the property was not, by reason of the attachment, null and void as against the attaching creditors and those deriving title under them. The decree in that suit was made on the 13th of September 1873, and the proceedings in execution began on the 18th of the same month; and it has been suggested on the part of the appellant that, inasmuch as one of these proceedings consisted in an attachment after judgment, it must be presumed that the actual sale in execution proceeded under this subsequent attachment, and that the respondent cannot claim the benefit of the former attachment. Upon this point, the learned Judges of the High Court say:—"The attachment never was removed, and the property remained unaffected by this mortgage (so far as the person at whose suit the attachment issued) at the time it was attached and sold in execution of the decree." Their Lordships must, therefore, assume that, although, where property has been attached before judgment, it is usual to reattach it after judgment, that proceeding implies no abandonment of the first attachment, which gives the priority of lien. There is no trace here of any express abandonment. If this be so, and there was, as their Lordships think there was, a valid and subsisting attachment at the date of the mortgage, that alienation, unless it can be shown not to fall within the provisions of the 240th section, was null and void as against the attaching creditor and those who claim under him. Hence, the determination of this appeal depends very much upon the point which has been ingeniously raised and argued by the learned Counsel for the appellant, and particularly by Mr. Cowell. It is said that Section 240 does not govern the case, for the following reasons:—That section runs thus: "After any attachment shall have been made by actual seizure or by written order as aforesaid, and in the case of an attachment by written order, after it shall have been duly intimated and made known in manner aforesaid, any private alienation of the property attached, whether by sale, gift, or otherwise," and so on, "shall be null and void." It is contended that the words "after it shall have been duly intimated and made known in manner aforesaid" incorporate into the 240th, the provisions of the 239th section, which says, "in the case of lands, houses, or other Immovable property, the written order shall be read aloud at some place on or adjacent to such lands, houses, or

other property, and shall be fixed up in some conspicuous part of the Court-house; and when the property is land or any interest in land, the written order shall also be fixed up in the offices of the Collector of the Zilla in which the land may be situated." Their Lordships entertain some doubt whether, under the circumstances of this case, it was not rather for the plaintiff, who was seeking to oust the defendant from possession, to prove the non-observance of the formalities in question, rather than for the defendant, who was in possession, to prove affirmatively that they had been observed. However that may be, they are clearly of opinion that the point raised is one which cannot be taken here upon appeal for the first time. It is one which ought to have been taken in the Court below and their Lordships can find no trace of its having been so taken. No such trace is to be found in the judgments, or in the evidence, or in the reasons which are stated in the petition presented to the High Court for leave to appeal to Her Majesty in Council. On the contrary, the first of those reasons seems rather to assume the regularity of the attachment, and to suggest that it had ceased to be a valid and subsisting attachment at the time "the mortgage was made. It is in these words: "That their Lordships ought to have held that, even if the said property was legally attached before judgment, such attachment had ceased to be a valid and subsisting attachment u/s 85 of the Act." In the case which has been cited-*Indrochunder Baboo v. Dunlop* 10 W. R. 265 ; S.C., 1 B. L. R. S. N. 20.-It is clear from the judgment of Mr. Justice Macpherson, who is one of the Judges who decided the present case, that there it had been positively proved that those proceedings which were enjoined by the Act had not taken place-Their Lordships think this is clearly an objection which ought to have been taken in the Court below, and not raised for the first time here, because it involves a question of fact; and if it had been taken before the High Court and argued, the Judges of that Court might have directed a further inquiry into the matter under the powers which its procedure gives them. Upon this record they think the judgment of the High Court was right, and will, therefore, humbly advise Her Majesty to affirm that judgment and to dismiss this appeal. The cost of this appeal will follow this result.