Privy Council Appeal No. 93 *of* 1932.

Nawab Major Mohd. Akbar Khan - - - - - *Appellant*

v.

Khan Bahadur Mian Musharaf Shah and another - - - *Respondents*

FROM

THE COURT OF THE JUDICIAL COMMISSIONER OF THE NORTH-WEST FRONTIER PROVINCE.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 20TH JULY, 1934.

Present at the Hearing:

LORD TOMLIN.

LORD MACMILLAN.

SIR JOHN WALLIS.

[*Delivered by* LORD TOMLIN.]

This is an appeal from the Court of the Judicial Commissioner North West Frontier Province, which reversed a decree of the District Judge of Peshawar.

At the outset their Lordships desire to call attention to the unsatisfactory way in which the record in this case has been prepared. Many documents to which reference has necessarily been made have not been printed, and considerable difficulty has been encountered in ascertaining the facts and the nature of the points to be considered. In future, their Lordships will have to consider whether they should hear a case presented in so slovenly a manner until it has been put into proper shape. The time of their Lordships' Board should not be occupied in unravelling matters which it is the duty of the parties to present in an intelligible form.

The facts of the case, as their Lordships understand them, are as next narrated.

In December, 1914, the appellant being then about to proceed on war service, granted a number of leases of his lands to various persons.

Among these leases was one contained in a registered deed dated the 15th December, 1914, whereby a lease of certain lands was granted to the 2nd respondent, who is hereafter called the debtor, for five years, at a yearly rent.

By clause 12 of the lease the debtor hypothecated certain lands of his own, including 250 kanals in the area of Maho Dheri to secure the rent, and it was provided that the debtor should have no power to sell or mortgage the hypothecated land during the period of the lease, and that the appellant could recover his lease money by sale or mortgage of such land.

The rent fell into arrear, and on the 25th January, 1918, the appellant obtained against the debtor, in the Revenue Court before the Assistant Collector, a decree for Rs. 1,484-8-0, together with costs and future interest.

In April, 1932, after the decision of the Judicial Commissioner, which is the subject of the present appeal, the appellant secured an alteration in the decree of the 25th January 1918 by incorporating therein some additional words which had appeared in the antecedent judgment, to the effect that the property hypothecated by the lease should be made liable for the payment.

The plaint or other initiatory proceeding in the suit which resulted in the decree of the 25th January 1918 has not been included in the record. Their Lordships are not satisfied that the Revenue Court would have had any jurisdiction to entertain a suit framed as a suit to enforce the hypothecation. At any rate, the present appeal must, in their Lordships' judgment, be dealt with on the footing that the suit was to recover a money debt, and that the decree in question was a money decree.

It was in fact treated throughout as a money decree, and it will be hereafter referred to as the first money decree.

By way of enforcing the first money decree, the appellant obtained from the Assistant Collector on the 6th August 1918 a prohibitory order restraining the debtor from transferring the property in the annexed schedule by sale, gift, or otherwise.

The schedule is not printed in the record, but it seems to be accepted by the Courts below that it referred to or included the 250 kanals hypothecated by the lease.

It is alleged that an attachment of the 250 kanals followed. The Judicial Commissioner in the present case has held that that attachment has not been proved because there was no direct evidence that a copy of the order of attachment was fixed in the Collector's office. Their Lordships are of opinion that there is evidence that the land was attached, and that in the absence of any evidence to the contrary, it ought to be presumed that all necessary formalities were complied with (see section 114 of the Indian Evidence Act).

Subsequently, on the 31st July, 1919, the Assistant Collector, being of opinion that the debtor was a member of an agricultural tribe within the meaning of section 16 of the Alienation of Land (Punjab) Act, 1900, and that accordingly his land could not be sold, directed " the file to be consigned to the record," meaning presumably that no further proceedings under the first money decree and the subsequent attachment should be taken.

In the meantime further rent became due from the debtor and on the 23rd August, 1919, the appellant obtained in the Revenue Court as against the debtor a decree (hereinafter called the second money decree) for Rs. 8,321-0-9 and costs.

On the 18th May, 1921, the Assistant Collector granted a further prohibitory order upon proof that the debtor had failed to satisfy the first and second money decrees.

The schedule to this order is not printed, but from the report of the attaching officer dated the 26th May, 1921, it appears that some 1,675 kanals in the area of Maho Dheri were attached and on the 17th August, 1921, a proclamation was issued announcing the attachment and inviting objectors to come forward. This land apparently included the 250 kanals covered by the first prohibitory order. Here again the Judicial Commissioner has held that because there is no direct evidence of the fixing of a copy of the order of attachment in the Collector's office, there was no valid attachment at all. Their Lordships do not agree with this conclusion. In their Lordships' judgment there was ample evidence of an attachment and in the absence of direct evidence to the contrary it must be presumed that all formalities were duly complied with.

It seems that the appellant was proceeding concurrently against other lessees of his who were also in default in paying their rent and that in each case the prohibition of sale by section 16 of the Alienation of Land (Punjab) Act was held to apply. An appeal, however, was taken to the Revenue Commissioner on this point. The appeal failed, but the Commissioner intimated that by lease or receivership the attached lands could be made available to satisfy the decretal amounts.

As a result of this intimation, the Collector on the 23rd November, 1926, made an order appointing a receiver of the 1,675 kanals. This order is not printed. Meantime an objector in the person of the first respondent had appeared on the scene. His position was that he was the transferee of a mortgage with possession created in 1915 (that is before either of the prohibitory orders) on some part of the attached land. The mortgage did not include the 250 kanals, as appears from the judgment of the District Judge of Peshawar in the present suit. The objector was also the purchaser (but after both the prohibitory orders) of the debtor's interest in all the attached lands including the 250 kanals.

The 1st respondent accordingly again brought the matter before Court. There had been a change of Collector after the order of the 23rd November, 1926, and the new Collector held that the land belonged to the 1st respondent and was therefore not liable to attachment at all.

An appeal to the Revenue Commissioner failed. He held that the appeal was incompetent and that the appellant's remedy was by way of suit.

Accordingly on the 14th October, 1928, the present suit was begun by the appellant in the Court of the District Court of Peshawar.

In this suit the appellant claimed that the 250 kanals hypothecated by the lease were attached under the 1st attachment and still remained under attachment and that the rest of the land in dispute was attached and still remained attached under the 2nd attachment, and that the appellant could recover his decretal monies by a leasing of the attached lands, and further that all transactions of mortgage or sale under which the 1st respondent claimed, subsequent to the date of the hypothecation or that of the attachment, were null and void and ineffective against the appellant's rights.

The above appears to be the effect of the claim, though there are discrepancies between the dates and amounts mentioned in the plaints and those appearing in other documents in the record.

The District Judge held that the 250 kanals were validly attached and were still attached and that the land could be leased to satisfy the appellant's claims and that it was unaffected by the subsequent sale to the 1st respondent and that the 2nd attachment was valid and subsisting, but that the appellant could only satisfy his claims against the lands comprised in the 2nd attachment subject to the rights of the 1st respondent as transferee of the mortgage of 1915, so far as these lands were affected by such rights.

The 1st respondent appealed to the Court of the Judicial Commissioner where the appeal was allowed and the suit was dismissed with costs. Fraser J.C. delivering the judgment of the Court held that the Civil Court had no jurisdiction to entertain the suit and that even if it had there had been no valid attachment.

Their Lordships are of opinion that the judgment below was wrong and that the District Judge was right.

The real purpose of the present suit is to determine the rights between the appellant and the 1st respondent. That is not a suit which in their Lordships' opinion the Revenue Court was competent to entertain under section 77 of the Punjab Tenancy Act.

Having regard to section 88 of the same Act and the rules made thereunder, Order 21, rules 58 to 63 of the Code of Civil Procedure applied to the case when once the rights of the 1st respondent intervened, and the Revenue Commissioner was right in holding that the matter could only be determined by a suit

under rule 63 of order 21. That suit had to be brought in a Court of competent jurisdiction. The Revenue Court, the jurisdiction of which is strictly limited, was not such a Court.

Their Lordships have already expressed their view that the attachments must be taken to have been validly made, and this being so the only remaining question is as to their effect against the 1st respondent.

Their Lordships agree with the District Judge that so far as the 250 kanals, which were not included in the 1915 mortgage, are concerned, the interest of the 1st respondent, who only came in after the prohibitory orders, is subordinated to that of the appellant.

With regard to the remainder of the land, the attachment can only be effective against the 1st respondent subject to his rights as transferee of the 1915 mortgage.

The rights of the appellant under the hypothecation contained in the lease are of course distinct from his rights under an attachment of the hypothecated land to enforce a money decree. It is with the latter rights only that this suit deals. His rights as holder of the hypothecation can be enforced only in a properly constituted mortgage suit in a court of competent jurisdiction. It is to be noted, however, that before their Lordships' Board it was admitted on behalf of the 1st respondent that the hypothecation is valid.

Their Lordships are therefore of opinion that the appeal should be allowed and that the order of the District Judge should be restored.

Their Lordships will humbly advise His Majesty accordingly.

The costs of this appeal will be paid by the respondent No. 1. There will be no order as to costs below.

In the Privy Council.

NAWAB MAJOR MOHD. AKBAR KHAN

v.

KHAN BAHADUR MIAN MUSHARAF SHAH
AND ANOTHER.

DELIVERED BY LORD TOMLIN.

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