

seriously attempted to challenge the finding against his clients. Conceding for the sake of argument that consideration on the mortgages did pass, it is abundantly clear that there was absolutely no necessity for encumbering the property. The shops in dispute had been built during the time of the late *mahant*, and there is no reliable evidence to show how the money borrowed on mortgages was spent. The sum expended in making repairs must be very small indeed and could have been met out of the current income. The building of a house, if the allegation on this point is correct, does not constitute a necessary purpose, such as would justify an alienation of trust property.

As regards the sale in favour of Har Parshad, the only items said to have been paid by the vendee are Rs. 700 and Rs. 600, and the District Judge has shown very clearly that the alleged payment was a mere myth and that the vendor received practically nothing on the cheques for these sums. As observed already, the conclusion of the lower Court has not been controverted, and it would be an act of supererogation if we repeat here the confused statements made by Sham Gir on different occasions with respect to these two items. Suffice it to say that we fully accept the view that the vendee has failed to establish any payment.

The result of the above discussion is that we uphold the decision of the learned District Judge and dismiss the appeal with costs.

R.M./R.K.

Appeal dismissed.

A. I. R. 1916 Lahore 324

JOHNSTONE, C. J.

Karam Ilahi—Plaintiff—Appellant.

v.

Gulab Rai and another—Defendants—Respondents.

Second Appeal No. 1916 of 1915, decided on 1st December, 1915, from the Decree of Dist Judge, Gurdaspur, dated 12th May, 1915.

Punjab Alienation of Land Act (13 of 1900), Ss. 2 and 16—Mortgagee rights being land within S. 2 (3) are not liable to be sold in execution held that debtor is not bound to keep property available to creditors—Mortgage by him was not fraudulent being made 6 weeks before attachment—Transfer of Property Act (4 of 1882),

S. 53—Held also assignee of mortgage is entitled to object and sue for declaration against attachment—Civil P. C. (5 of 1903), O. 21, R. 63

Defendant No. 2, a member of an agricultural tribe, was the mortgagee of certain land. On 19th February, 1914, defendant No. 1 obtained a money-decree against defendant No. 2. On 5th March, 1914 defendant No. 2 transferred his mortgagee rights on the aforesaid mortgage to the plaintiff (his brother). On 27th April, 1914, defendant No. 1 got the mortgagee rights of defendant No. 2 attached in execution of his decree. Thereupon the plaintiff brought the present suit for a declaration that defendant No. 1 was not entitled by law to attach the mortgagee rights :

Held, (1) that the mortgagee rights of defendant No. 2 being "land" within the meaning of S. 2 (3), Punjab Alienation of Land Act, could not be sold in execution of the decree; 12 P. R. 1911, foll. [P. 325, C. 1.]

(2) that according to law defendant No. 2 was not bound to keep his property in a shape convenient for his creditors to proceed against, and that the mortgage by him to plaintiff was not fraudulent in law considering that it was made six weeks before the attachment; [P. 325, C. 1.]

(3) that the plaintiff's interests being vitally bound up with those of defendant No. 2, he was entitled to object to the action taken against defendant No. 2 in the shape of execution proceedings, when such action injured the plaintiff's interests. [P. 325, C. 2.]

Muhammad Iqbal—for Appellant.

Rambhaj Datta—for Respondents.

Judgment.—In this case one Mihan Singh appears to have mortgaged certain land to defendant No. 2, Allah Ditta. Plaintiff is Allah Ditta's brother. On 19th February, 1914 defendant No. 1, Gulab Rai, obtained a money-decree against defendant No. 2 and naturally intended to execute the decree without delay. On 5th March, 1914, defendant No. 2 mortgaged for Rs. 225 his mortgagee rights aforesaid to plaintiff. On 27th April, 1914, defendant No. 1 got defendant No. 2's mortgagee rights attached in execution of the decree. Upon this plaintiff brought the present suit for a declaration that defendant No. 1 had not by law the right to attach the aforesaid property. The first Court held that the mortgage to plaintiff was made in good faith and for consideration, and that under S. 2 (3) of the Land Alienation Act the rights of defendant No. 2 in the land could not be attached in execution of a decree.

On these findings that Court gave plaintiff the declaration sought for. But when the case came before the District Judge on appeal he took a

totally different view. As regards the question of attachment he drew a distinction between the *zur-i-rahn* which was attached under Gulab Rai's application for execution, and the mortgagee rights dealt with in S. 2 (3) of the Punjab Alienation of Land Act and *Asa Singh v. Buta* (1). He held that the *zur-i-rahn* could be attached notwithstanding the Alienation of Land Act. In my opinion the distinction drawn is sophistical. The proper way to look at the matter is this. Suppose Gulab Rai's application for attachment had been carried into full effect and auction-sale had taken place, what would be the position of the auction-purchaser? No money would have been handed over to him then and there. He would simply have acquired the right to enforce defendant No. 2's mortgage; and I am unable to see any distinction between this and a sale of the mortgagee rights.

This is sufficient for the determination of the appeal, but I think it is desirable for me to point out that Mr. Martineau in my opinion also goes wrong on other points in the case. He says that even if the consideration passed in full from plaintiff to defendant No. 2, the mortgage would be invalid, because it was made with the intention of defrauding the appellant, that is, defendant No. 1. This seems to me to be quite contrary to common sense and to the authorities. The mortgage by defendant No. 2 was made six weeks before the attachment, and according to law defendant No. 2 was not bound to keep his property in a shape convenient for his creditors to proceed against. The lower Appellate Court doubts whether full consideration passed but does not give any finding on the subject. It seems to admit that Rs. 200 passed but is doubtful of about Rs. 25. In my opinion, there is no reasonable doubt on the subject whatever. I hold that full Rs. 225 passed and that the mortgage by defendant No. 2 to plaintiff, though it may have been sharp practice, was not fraudulent in law.

Lastly, I entirely dissent from the lower Appellate Court's idea that it does not lie in the mouth of the plaintiff to object to the attachment by Gulab Rai, defendant No. 1, of the rights of defendant No. 2, but that this objection can

only be raised by defendant No. 2 himself in execution proceedings. In taking this view the lower Appellate Court overlooks the fact that plaintiff's interests are vitally bound up with the interests of defendant No. 2. It seems to me quite clear that, when defendant No. 1 so acts towards defendant No. 2 as to injure plaintiff's interests, plaintiff is certainly entitled to object to the action taken against defendant No. 2.

For these reasons I accept the appeal, set aside the judgment and decree of the lower Appellate Court and restore the decree of the 1st Court with costs throughout.

R.M./R.K.

Appeal accepted.

A. I. R. 1916 Lahore 325

RATTIGAN AND SCOTT-SMITH, JJ.

Tajoo—Convict—Appellant.

v.

Emperor—Prosecutor—Respondent.

Criminal Appln. No. 248 of 1916, decided on 10th May, 1916, from the Order of Sessns. Judge, Shahpur, dated 10th March, 1916.

(a) **Penal Code (45 of 1860), S. 302—Circumstantial evidence when not sufficient evidence for conviction explained.**

Where in a trial for murder it appeared that the first report did not name the murderer, that the only eye-witness who professed to have seen the murder could not identify the murderer before the Police and that the only evidence against the accused consisted in the production of a blood-stained *kurta* from the house where he and his brothers resided and his pointing out a blood-stained knife which was concealed in a bush on the way from the deceased's house to his own:

Held, (1) that in the absence of any direct evidence connecting the accused with the murder the circumstantial evidence that had been produced was altogether insufficient for conviction. [P. 327, C. 1.]

(b) **Criminal trial—Prosecution—Duty—Mere fact that it was not shown who else committed murder is not sufficient to convict.**

That the mere fact that it had not been shown who else could have committed the murder was no ground for holding that the accused must have committed it and he was, therefore, entitled to an acquittal. [P. 327, C. 1.]

Mukund Lal Puri—for Appellant.

Mul Chand—for the Crown.

Judgment.—*Tajoo Lohar*, of *Chak* No. 60, Southern Branch, *Jhelum Canal Colony*, has been convicted of the murder

1) (1911) 12 P. R. 1911=9 I. C. 396.