

APPEAL FROM ORIGINAL CIVIL.

Before C. C. Ghose and Mitter J.J.

MAHAMMAD FAZLUL KARIM

v.

AHMAD MAHAMMAD PARUK.*

1932

Aug. 22.

Appeal—Final decree for mortgage—Order to sell without reserve, if appealable.

An appeal against an order, directing that the Registrar might be at liberty to sell the mortgaged properties without reserve, is not competent.

Justices of the Peace for Calcutta v. Oriental Gas Company (1) and Mathura Sundari Dasi v. Haran Chandra Saha (2) referred to.

APPEAL from a judgment of Panckridge J. by the defendant.

The facts of the case and relevant portions of arguments by counsel appear from the judgment.

H. D. Bose, S. C. Mitter and D. C. Ghose for the appellant.

S. N. Banerjee and K. Basu for the respondent Paruk.

GHOSE J. This is an appeal against an order made by my learned brother Mr. Justice Panckridge on the 21st July, 1932, by which he directed that the Registrar might be at liberty to sell the mortgaged properties without reserve in the circumstances which had happened. The facts involved in this appeal, shortly stated, are as follows: The plaintiff obtained a mortgage decree on the 14th July, 1927, and the decree directed that the Registrar should take the usual accounts on the footing of the mortgage. The Registrar did take the accounts and reported that a sum of one lakh seventy-seven thousand and odd

*Appeal against Original Order, No. 78 of 1932, in Extraordinary Suit No. 3 of 1927.

(1) (1872) 8 B.L.R. 433.

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hundred rupees would be due and owing to the plaintiff mortgagee on the 7th August, 1928. Thereafter, the final decree was passed and that would be found on pages 45 and 46 of the paper book. In the final decree, there was inserted a provision, as is usually done in the Original Side, that the Registrar should fix a reserved price on the mortgaged properties before the sale was held by him. The Registrar, pursuant to the directions contained in the final decree, called a meeting of the parties and settled the sale-proclamation in the presence of the parties. Thereafter, on the 23rd March, 1932, the mortgaged properties were put up to sale and the reserved price not having been reached the sale was adjourned to some date in May, 1932. The date of the next sale was the 20th May, 1932, and on that occasion even the reserved price was not reached. The two sales hereinbefore referred to having been abortive, the plaintiff took out a Master's summons on the 8th day of July, 1932, for an order that "the necessity of "fixing a reserved price at the sale to be held on the "22nd day of July, 1932" (that was the date fixed by the Registrar for the third sale), "be dispensed with "and for an order that the Registrar do pay to "Messrs. Khaitan & Co." a certain sum pursuant to a certain order. That application stood over from time to time at the request of the present appellant and was not finally disposed of by Mr. Justice Panckridge till the 21st July, 1932. There is no judgment in the case, but the minutes are printed on page 36 of the paper book and it appears that the Court was of opinion that, on the plaintiff undertaking to commence the bid at the highest figure arrived at, at the last sale, namely, Rs. 1,90,000, the necessity for fixing a reserved price at the sale to be held on the 22nd July, 1932, should be dispensed with. There were certain other directions about payment of a certain sum of money to Messrs. Khaitan & Co., but we are not concerned with the same.

It is against this order that the present appeal has been filed and, although we have not had the

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advantage of hearing Mr. S. N. Banerjee for the respondent, because we were of opinion that the case did not call for an answer from Mr. Banerjee, Mr. Banerjee has indicated to us that one of his points is that there is no appeal under the law against the order of Mr. Justice Panckridge dated the 21st July, 1932.

It is reasonably clear from the materials on record, to which our attention has been called, that the learned Judge has done nothing which has not been done by a succession of Judges who have sat on the Original Side and who have been and are thoroughly familiar with the practice which obtains there. It has often happened that sales have become abortive and thereupon the Judge taking interlocutory matters on the Original Side has given directions that, inasmuch as the sales have become abortive, the necessity for adhering to the reserved price might be dispensed with. As a matter of fact, this is provided for by the rules on the Original Side (see pages 329 to 332 of the Original Side Rules). Therefore, there is not any particle of substance in Mr. Bose's contention that the learned Judge has done something which is in violation of the terms of the final decree. Any one turning to the forms of final decrees as contained in the Appendix to the Civil Procedure Code will see at once that there is no mention of "reserved price" in the forms in the Civil Procedure Code. It is only according to the rules which obtain on the Original Side that the necessity of a reserved price arises; and, as the sales take place on the footing of what obtains in the Chancery Division in England, the forms prevailing there have been adopted and copied. But the primary object of these rules is to see that the decree-holder is enabled to enjoy the fruits of his decree and that he should do so as early as possible.

Now, when sales become abortive by reason of the paucity of bidders or for reasons allied to the same, the rules contemplate that the Judge's attention should

be drawn and that the Judge, on a full consideration of the matters involved in any application made to him, should give directions either that the reserved price should be adhered to or that the reserved price should be dispensed with (see in particular rule 21 of Chapter XXVII of the Original Side Rules). This is exactly what Mr. Justice Panckridge has done and I am unable to discover even the vestige of a complaint as regards what has been done in this matter. Mr. Justice Panckridge has made the order not only on looking into the matters referred to in the plaintiff's application, but, after hearing the parties fully, *i.e.*, after hearing the plaintiff and the defendant fully, and, after giving due weight to the circumstances which were responsible for the two sales being abortive. In this stage of the record on the merits the appellant has no reasonable case to put forward.

It is said, however, that Mr. Justice Panckridge ought to have looked into the surveyor's report and to have looked into the reserved price and to have heard the Registrar before coming to a decision of his own. I desire to point out that what has been done or what was done by the Registrar subsequent to the final decree was done by him as a ministerial officer of the Court charged with the duty of carrying out the orders of the Court. The Registrar was not exercising judicial powers. He was not even sitting in a *quasi-judicial* capacity. Therefore, his proceedings, on all dates subsequent to the final decree, were of a ministerial character and the learned Judge could not be expected to register the decrees of the Registrar or to abide by what the Registrar chose to say. It was entirely within his competence to send for the Registrar or not to send for the Registrar. It was within his competence to look into the proceedings had before the Registrar or not to look into those proceedings. It was open to him to look into the reserved price or not to look into the reserved price. It was open to him to say "I will not look into the reserved price without looking into the circumstances which happened and, when I find

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“that the two sales have become abortive, and, when
“I find that there is this large sum of money due to
“the plaintiff and that the decree is as old as 1927, I
“must take steps and steps of a speedy character to
“bring the mortgaged properties to sale and to wind
“up the litigations that have been going on”. There
is no force whatsoever in what Mr. Bose has urged
that the Judge’s order was without jurisdiction.

Now, I come to the last point, namely, whether the appeal is a competent one or not. Mr. Bose has invoked the authority of Sir Richard Couch in the well-known case of *Justices of the Peace for Calcutta v. Oriental Gas Company* (1). That case has often been the subject of debate and reference in later cases and, although the definition given by Sir Richard Couch of the word “judgment” in the case is not exhaustive, I am quite certain that Mr. Bose cannot derive any comfort whatsoever from Sir Richard Couch’s judgment or the judgment of Sir Lancelot Sanderson in the case of *Mathura Sundari Dasi v. Haran Chandra Saha* (2). We have got to look into the substance of the thing. Has the learned Judge in this case said or done anything in determining the rights of the parties? The rights of the parties had been already adjudicated upon by means of the preliminary decree or by means of the final decree. What he has done is taking a step in carrying out the directions contained in the final decree and in trying to bring the properties to a speedy sale. Nothing in the nature of the rights of the parties has been determined and, if that is so, whether we look into Sir Richard Couch’s judgment in the case of *Justices of the Peace for Calcutta* (1) or into Sir Lancelot Sanderson’s judgment in *Mathura Sundari Dasi’s* case (2), there is not the smallest chance of it ever being held, so far as we are concerned that the order made by Mr. Justice Panckridge in this case is an

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appealable order. One last observation may be made and it is this. Not only does it not come within the definition of "judgment" as used in clause 15 of the Letters Patent, but it does not come within any of the numerous sub-rules of rule 1 of Order XLIII of the Code of Civil Procedure. That is sufficient to dispose of the matter and I would, accordingly, hold that the appeal is incompetent and is not entertainable.

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In this view of the matter the appeal stands dismissed with costs. The application which stood adjourned till the hearing of the appeal must also be discharged with costs.

MITTER J. I agree.

Appeal dismissed.

Attorney for the appellant: *S. K. Bhattacharya.*

Attorneys for the respondents: *Khaitan & Co.,
P. L. Mullick.*

S. M.