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upon it, would be that upon default in payment of an instalment he would be obliged to sell a portion of the property so as to realise the amount of that instalment. That can scarcely have been in the contemplation of the parties. The instrument must be looked at as a whole, and in their Lordships' opinion the reasonable construction is that there was an absolute power to the mortgagee to take possession on default in payment of an instalment, but if the mortgagor objected to the mortgagee applying the rents in reduction of the principal and interest, the mortgagee might sell the mortgaged property and other property which was brought into the security, in order to satisfy the debt. This seems to their Lordships to be the reasonable construction of the instrument. It is the construction which the District Judge put upon it, but which the Judicial Commissioner thought was wrong, and therefore reversed his judgment.

Their Lordships will humbly advise Her Majesty to reverse the decree of the Judicial Commissioner, leaving the judgment of the District Judge to stand, and the respondent will pay the costs of this appeal, and the costs of the appeal in the Court of the Judicial Commissioner.

Solicitor for the appellant: Mr. *H. Treasure*.

Solicitors for the respondent: Messrs. *Deane, Chubb & Co.*

P. O.*
 1884
 November 18.

BISHENMUN SINGH AND OTHERS (OBJECTORS) v. THE LAND MORTGAGE BANK OF INDIA (PETITIONERS.)

[On appeal from the High Court at Fort William in Bengal.]

Jurisdiction as between District Judge and Subordinate Judge of a Court making a decree to execute it, notwithstanding certain special matters.

The sale of mortgaged property was decreed by a Subordinate Judge. Before the sale another suit, instituted in the same Court for the purpose of having other property substituted in lieu of part of that mortgaged, was transferred to the Court of the District Judge, who decreed, upon consent, that the substituted property should be sold, and that, for the purpose of this sale, this suit should be taken as supplemental to the former one. On the petition of the mortgagee for execution of the decrees, in both suits, in the District Court, it was objected that execution could

* Present: LORD FITZGERALD, SIR B. PEACOCK, SIR R. P. COLLIER, SIR R. COCHRAN, and SIR A. HOUBOURN.

not proceed therein, on the ground that the decree for sale was that of the Subordinate Court.

Held, that the decree (which affected the whole property mortgaged) was that of the District Court, which accordingly had jurisdiction to execute it. To have enabled the Subordinate Court so to do, an order by the District Court would have been necessary.

Matter which had no bearing on the question raised on this appeal having been introduced into the record, it was ordered that all such costs as might have been so occasioned should be disallowed by the Registrar, on the taxation of costs,

APPEAL from a decree (8th April 1881) of the High Court, dismissing an appeal of the present appellant from a decree (6th November 1880) of the District Judge of Bhagulpore.

The above concurrent decrees were made in execution proceedings taken by the present respondents against the appellants. The question now raised was as to the jurisdiction of the District Court to execute the decree of which execution was sought, as that of the District Judge; the appellants contending that it could be executed only by the Court of the Subordinate Judge of that district.

A mortgage, by the appellant to the respondent Bank, not having been satisfied, a suit was instituted thereupon by the latter. A decree was made on the 8th January 1877, for Rs. 1,69,515, to be executed against the property mortgaged.

On application for execution by attachment and sale, certain intervenors objected that the judgment-debtors had, before the mortgage, parted with their interest in part of the mortgaged property. The Subordinate Judge allowed this objection as to part of the property, upholding the right of the decree-holder to execute against the remainder.

The Bank then sued the present appellants in the Court of the Subordinate Judge, asking for a declaration that the properties which had been acquired in lieu of those which the mortgagors professed to mortgage, should be held subject to the mortgage.

This suit having been transferred for trial to the Court of the District Judge, the defendants agreed to the substitution, filing an answer to the effect that the property substituted should be liable to be sold in execution of the decree obtained by the Bank in the Court of the Subordinate Judge on the 8th January 1877,

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and that, for the purpose of that auction-sale, this suit ought to be taken as "supplemental" to the former one, and that the decree of the above date should be "amended" accordingly. It was further agreed that the appellants should have six months' time for payment. The Judge, on the 6th August 1879, made a decree in terms of this agreement.

For execution of this decree by attachment and sale of all the properties, the Bank applied to the District Judge. The present appellants objected that execution in the District Court was unauthorized by the terms of the decree.

This objection was disallowed by the District Court; and a Divisional Bench of the High Court (CUNNINGHAM and PRINSEP, JJ.), dismissed an appeal from this order.

On this appeal,—

Mr. J. F. Leith, Q.C., and Mr. C. W. Arathoon, for the appellants, argued that the sale having been ordered by the subordinate Court on 13th August 1877, and that order remaining, should have been carried out in that Court.

The District Court did not itself decree the sale, but made a decree "supplemental" in its own terms to that of the subordinate Court. Thus the order for sale could not be said to be that of the District Court. Reference was made to ss. 223 and 224 of the Code of Civil Procedure, Act X of 1877.

Mr. R. V. Doyle (with whom was Mr. Horace Davey) for the respondent, was not called upon.

Their Lordships' judgment was delivered by

SIR A. HOBHOUSE.—The question raised in this appeal relates to the propriety of a sale effected on the 6th November 1880, under the order of the District Judge of Bhagulpore. The appellants are the judgment-debtors of the respondents, and the debt was secured by a mortgage. A suit was instituted by the respondents before the Subordinate Judge of Bhagulpore, for the purpose of realising that mortgage, and on the 8th January 1877 a decree was made, under which the property comprised in the mortgage was to be sold. Before the sale was effected certain objectors appeared, and then it turned out that the appellants had assumed to

include in this mortgage certain property which, by a previous family arrangement, had passed to other members of the family. But at the same time, and by the same arrangement, the appellants had received other properties which were not included in the mortgage. The respondents then instituted another suit also in the Court of the Subordinate Judge of Bhagulpore, for the purpose of bringing within the influence of the mortgage the property which by the family arrangement had been substituted for the property that was professedly mortgaged, but did not belong to the mortgagors. That suit was called up by the District Judge into his Court, and in that suit a decree was made on the 6th August 1879 by the District Judge, which has now to be construed.

The decree was made by the consent of the debtors, and the effect of it was this: The Court declared that the substituted properties were fit to be sold by auction in execution of the decree of the creditors (that is the decree of the 8th January 1877), and that for the purpose of that auction-sale this suit ought to be taken as supplemental to the former suit. Then it directed that the mortgage given by the debtors to the creditors, and the aforesaid decree of the 8th January 1877, should be amended according to the previous declaration. Another term of the consent decree was that the debtors should have six months' time, from the date of decree in the new suit, for making arrangements for payment of the amount due.

Those were the main terms agreed upon, and embodied in the decree. The six months elapsed, and some time after they had elapsed the creditors, the respondents, presented a petition for execution of the decree in the second suit. It has been disputed whether it was a petition for the execution of the decrees in both suits. Part of the petition looks one way and part the other, but it may be taken to be, as the appellants contend, that it was a petition for the execution of the decrees in both suits. Now it is a very odd thing that there is not in this record any copy of the order made upon that petition. All their Lordships find is that an order was made fixing the sale for the 5th November 1880, and that an application was made by the appellants for a postponement of that sale. The

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application seems to have been made on the very day for which the sale was fixed. The Judge refused that application. The sale took place. The appellants say they are aggrieved by that sale, and they seek by this appeal in some way to disturb the sale. It is difficult to say what they seek, because they now rest their case upon the allegation that the execution proceedings should have been carried into effect by the Subordinate Judge, and that the District Judge had no such power. If so, the order by which the appellants are aggrieved is the order which was made in answer to the petition for execution, and which ordered the sale; and that order is not appealed from. The order that is appealed from is the order made by the District Judge refusing the application to postpone the sale, which was a totally different question. It would be exceedingly difficult for the appellants to succeed, even if there were no jurisdiction, because they have never taken the proper course to complain on the ground of want of jurisdiction. They complain only of that which is discretionary in the Judge, of ordering the sale to take place at the time fixed or to postpone it. That is the ground of appeal to the High Court, and the ground of their appeal here.

But their Lordships do not desire to rest their decision upon that point. They think on the point which has been argued at the bar here, though it is not properly raised by the petition of appeal, that the appellants have shown no case for disturbing the order made by the District Judge. It is quite clear that in applying to the District Court for execution of the decree in the new suit the parties must have considered that the decree was one of the District Judge, and to be carried out by the District Judge; and though unfortunately we have not got the order made on the petition for execution, the District Judge himself must have so considered, because he made the order for the sale, and the sole question is whether the decree of the 6th August 1879 was the decree of the District Judge.

Now, like other decrees of Indian Courts, this is not drawn in the most artistic form; and it might be open to argument whether in saying the decree of the Subordinate Judge should be amended that decree still remained the decree of the Subordinate

Judge ; but their Lordships think that, even construing the language of the decree strictly, the better construction is that it was intended the decree should be that of the District Judge, and they think that in point of procedure it was more proper to make it the decree of the District Judge than the decree of the Subordinate Judge. If then it was desired that the Subordinate Judge should execute the decree, there should have been an order made by the District Judge ordering the subordinate Court to carry the decree into execution. The District Judge did not take that view. He carried his own decree into execution, and their Lordships consider that the decree which he carried into execution drew up into itself the decree of the Court below, and that it was in effect a decree for a sale of the whole of the property which the new suit appeared to be the property affected by the mortgage. It may be observed in construing that decree that there is certainly one term in it which applies to the whole property ; that which was originally well mortgaged, and that which was substituted into the mortgage, namely, that six months' time should be allowed to the appellants to make arrangements. Their Lordships think that on the broad construction of this decree the sensible view of it is to hold that it was the decree of the District Judge, that it affected the whole property mortgaged, and that his jurisdiction to order execution was clear.

The result is that the appeal ought to be dismissed, and their Lordships will therefore humbly advise Her Majesty to that effect.

The appellants must pay the costs of the appeal ; but their Lordships observe that in this record, as in many others that come before them, there is matter introduced which could not possibly have any bearing upon the question raised by the appeal. There is a map of the district of Bhagulpore, which is nothing but a copy of a public map. It is not an estate map, and even if it were, it would be difficult to see how it could bear on the question involved in this appeal. There are also nearly 30 pages of *jummabundi* accounts, and it is impossible to understand how those could have had any bearing upon the appeal. Therefore, in the taxation of the costs, their Lordships

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1884 desire that the Registrar shall disallow all such as have been
 BISHENMUN occasioned by the introduction of irrelevant matter.
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 v.
 THE LAND Solicitor for the appellants : Mr. T. L. Wilson.
 MORTGAGE Solicitors for the respondents : Messrs. Freshfields and
 BANK OF INDIA. Williams.

APPELLATE CIVIL.

Before Mr. Justice Tottenham and Mr. Justice O'Kinealy.

1885 HARA SUNDARI DEBI (ONE OF THE DEFENDANTS) v. KUMAR DUKHI-
 January 26. NESSUR MALIA (PLAINTIFF) AND OTHERS (DEFENDANTS).^o

*Agreement of Parties—Compromise—Decree on Compromise—Appeal—Code
 of Civil Procedure, Act XIV of 1882, s. 375.*

After suit filed by the plaintiff against several defendants, one of whom was an infant, a petition of compromise entered into between the adult parties was filed in Court. The petition stated the terms of arrangement, and also that an application would be made by the guardian of the minor praying the Court to allow the compromise to be carried out on his behalf. Ten days after the petition of compromise was filed, the first defendant and the plaintiff presented petitions to the Court withdrawing from the compromise, and praying that the suit should proceed. The second defendant presented a petition praying that the compromise should be recorded, and a decree passed according to its terms. The Court made a decree in accordance with the prayer of the second defendant's petition. The first defendant appealed.

Held, that an appeal lay, and that the lower Court was wrong in enforcing the compromise at the instance of the second defendant.

Semble, that s. 375 of the Code of Civil Procedure merely covers cases in which all parties consent to have the terms entered into, carried out and judgment entered up.

Ruttonsey Lalji v. Pooribai (1) questioned.

GOBIND PROSAD PUNDIT died on the 30th of December 1861, leaving him surviving his widow Darimba Debi, who died in 1872, and three daughters—Shama Sundari, who died in 1870; Hara Sundari, the defendant No. 1; and Uttum Coomaree, the defendant No. 3, who was a childless widow at the death of her mother.

^o Appeal from Original Decree No. 39 of 1884, against the decree of Baboo Jogesh Chunder Mitter, Subordinate Judge of Burdwan, dated the 29th of November 1883.

(1) I. L. R., 7 Bom., 304.