

## APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice, and Mr. Justice  
Seshagiri Ayyar.

SINGA RAJA AND FIVE OTHERS (DEFENDANTS NOS. 1 TO 6),  
APPELLANTS,

1918,  
August 16.

v.

PETHU RAJA AND THREE OTHERS (PLAINTIFF AND DEFENDANTS  
NOS. 7 TO 9), RESPONDENTS.\*

*Civil Procedure Code (Act V of 1908), O. XXXIV, r. 5—Preliminary mortgage decree for sale—Non-payment into Court of decree amount within the time limited—Obligation on Court to pass a final decree for sale.*

Order XXXIV, rule 5, Civil Procedure Code, recognizes only one method of payment, viz., payment into Court of the amount fixed by a preliminary mortgage decree; hence, on default of payment into Court within the time fixed by the decree, the Court is bound on the application of the decree-holder to pass a final decree for sale.

*Jogandra Prasad Narain Singh v. Gouri Shankar Prasad Sahu (1917) 2 P.L.J., 533, followed.*

*Semle.*—If any payment had been made to the decree-holder in the interval and certified by Court under Order XXI, rule 2, Civil Procedure Code, credit may be given for the same at the time of passing the final decree.

APPEAL against the decree of T. SRINIVASA AYYANGAR, the Temporary Subordinate Judge of Rāmnād at Madura, in Original Suit No. 59 of 1916.

Plaintiff obtained on 27th September 1916 a preliminary mortgage decree for sale for Rs. 5,800, which fixed 27th March 1917 as the time for payment. Alleging non-payment of the decree amount within the time, the decree-holder applied on 25th June 1917 for a final decree for sale of the mortgaged properties. The third defendant pleaded a settlement of the decree amount at Rs. 5,100 and a payment to the plaintiff of Rs. 3,000 on 13th February 1917. Finding that neither the settlement nor the payment was reported to the Court, the Subordinate Judge disbelieved the plea and passed a final decree for sale for the entire amount of the decree. The judgment-debtors (defendants Nos. 1 to 6) preferred this appeal.

\* Appeal No. 403 of 1917.

SINGA RAJA *T. M. Ramaswami Ayyar* for appellants.

<sup>v.</sup>  
PETHU RAJA. *A. S. Viswanatha Ayyar* for first respondent.

The JUDGMENT of the Court was delivered by—

WALLIS, C.J. WALLIS, C.J.—This is an appeal from the decree for sale in a mortgage suit passed by the Subordinate Judge of Rāmnād. The plaintiff obtained a preliminary decree on the 27th September 1916 and the appellant, the third defendant, complains that the Subordinate Judge at the time of passing the decree for sale refused to inquire into and recognize an alleged settlement of the decree out of Court on the 13th February 1917. The application for the decree for sale was made on the 25th June 1917 and therefore even if the procedure in Order XXI, rule 2, Civil Procedure Code, were applicable the defendant was out of time and was too late to have the adjustment recorded. However, we think that the appeal fails on a wider ground. The scheme of the Code appears to us to be that, if the amount made payable in the preliminary decree is not paid into Court within the time limited, then the decree for sale is to be made. In this respect the provisions of Order XXXIV differ from section 89 of the Transfer of Property Act, which provided for payment to the plaintiff or into Court. Order XXXIV, rule 2, clause (c) and rule 5, Civil Procedure Code, provide that “where on or before the day fixed the defendant pays into Court the amount declared due as aforesaid, together with such subsequent costs as are mentioned in rule 10” the Court is to pass a decree ordering the plaintiff to deliver up the documents and to re-transfer the mortgaged property and, if necessary, to put the defendant in possession. But sub-rule 2 says where such payment is not so made, that is to say, where such payment is not made into Court, the Court shall pass a decree ordering the sale of the mortgaged property or a sufficient part thereof. Forms of mortgage decrees are given in Appendix D and forms Nos. 7 and 8 are drawn up in the same way. Form No. 7 says that if the defendants pay into Court the sum declared due on account of principal, interest and costs, the plaintiff is to deliver up the documents, etc., and the effect of clause (3) is that, if the defendant pays the said sum as aforesaid (that is, into Court) the mortgagor may apply, etc. Therefore we are of opinion that the scheme of the Code, so far

as mortgage decrees are concerned, is that if the amount due under the preliminary decree has not been paid before the appointed day, a decree for sale is to be made and the machinery for sale is to be set in motion. This decision is in accordance with the decision of the Calcutta High Court in *Piran Bibi v. Jiten-driya*(1). It may be that if, between the passing of the preliminary decree and the passing of the decree for sale, the defendant obtains a certificate under the provisions of Order XXI, rule 2, he can take advantage of that to reduce the amount for which the property is to be sold and the decision will be the same as if at the time when the decree for sale was being made he came forward and paid that amount into Court. We do not think that the decision in *Jogandra Prasad Narain Singh v. Gouri Shankar Prasad Sahu*(2) amounts to more than this.

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The provisions of the Code are imperative that if the money is not paid into Court within the time limited, then there is to be a decree for sale. These provisions were advisedly inserted in modification of the corresponding provisions of section 89 of the Transfer of Property Act, and we are bound to give effect to them. On this ground the appeal fails and must be dismissed with costs.

N.B.

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(1) (1917) 25 C.L.J., 558.

(2) (1917) 2 P.L.J., 533.