

APPELLATE CIVIL.

Before Mr. Justice Wallace and Mr. Justice Jackson.

RAJARATHNA NAIDU (EIGHTH RESPONDENT), APPELLANT,

1924,
July 10.

v.

RAMACHANDRA NAIDU AND OTHERS (PETITIONER AND
RESPONDENTS NOS. 1 TO 3 AND 5 TO 7), RESPONDENTS.**Civil Procedure Code (Act V of 1908), O. XXI, r. 16, proviso
2—Transfer of decree—Mortgage-decree for sale against two
or more persons—Transfer to one of them—Decree, whether
executable by transferee against others—Decree for payment
of money, meaning of.*

The second proviso to Order XXI, rule 16 of the Civil Procedure Code (which enacts that where a decree for the payment of money against two or more persons has been transferred to one of them it shall not be executed against the others) does not apply to mortgage decrees for sale, which are in essence decrees, not for the payment of money, but for the sale of property.

Laldhari Singh v. Manager, Court of Wards, Bhabatpura Estate, (1911) 14 C.L.J., 639, followed; *Vaidhinadasamy Ayyar v. Somasundram Pillai*, (1905) I.L.R., 28 Mad., 473 (F.B.), *Ramayya v. Krishnamurti*, (1917) I.L.R., 40 Mad., 296, and *Sadogopa Ayyangar v. Sellammal*, (1922) 43 M.L.J., 761, distinguished.

APPEAL against the order of R. A. JENKINS, District Judge of Chingleput, in Execution Petition No. 51 of 1920 in Original Suit No. 32 of 1916 on the file of the District Court.

A final decree in a mortgage suit for sale of the hypothecated property was transferred by the original decree-holder in favour of one Ramachandra Naidu who applied to have the assignment in his favour recognized by the Court. The first defendant and his son, the second defendant, as well as the widow of the third defendant were joined as parties to the petition. The

* Appeal against Order No. 436 of 1922.

mortgage had been executed by defendants Nos. 1 and 3 and the final decree in the suit was to the effect that, as the balance of the decree amount had not been paid, "it is hereby decreed as follows:—(1) that the mortgaged property or a sufficient part thereof be sold, etc." . . . The third defendant had made a will bequeathing his properties to respondents Nos. 4 to 8 in the lower Court, who applied that they should be made parties to the petition, and, on being made parties, they contended that the transfer of the decree to the petitioner Ramachandra Naidu was only benami for the first defendant who paid the decree amount to the original decree-holder, that the first defendant was the real debtor liable for the decree and that the third defendant was only a surety, and that the transferee of the decree could not be recognized as competent to execute the decree as it was transferred benami for the first defendant. The District Judge held that the provisions of Order XXI, rule 16, did not apply to mortgage decrees and that petitioner was entitled to be recognized as transferee and to bring the land to sale. The eighth respondent preferred this Civil Miscellaneous Appeal against the order of the District Judge.

S. E. Sankara Ayyar for appellant.

T. R. Ramachandra Ayyar for respondent.

JUDGMENT.

The question for decision is whether the second proviso to Order XXI, rule 16 of the Code of Civil Procedure, applies to a mortgage decree for sale. It applies in terms only to a decree "for the payment of money." The phrase in the old Code, section 232, was "a decree for money." The alteration indicates that emphasis is to be laid on the word "payment" and that unless the decree directs payment of money, the rule will not

RAJARATHNA
NAIDU
v.
RAMA-
CHANDRA
NAIDU.

RAJARATHNA
NAIDU
v.
RAMA-
CHANDRA
NAIDU.

apply. This is the view taken in the judgment of the Calcutta High Court in *Laldhari Singh v. Manager, Court of Wards, Bhabatpura Estate*(1). The Calcutta High Court has consistently held the view that this proviso will not apply to mortgage decrees for sale [vide the above ruling and also *Lalla Bhagun Pershad v. Holloway*(2) and *Jagabandhu v. Haladhar*(3)].

2. Appellant relies on three cases of this High Court. Two of these, *Vaidhinadasamy Ayyar v. Somasundram Pillai*(4) and *Ramayya v. Krishnamurthi*(5) are not of much assistance as they do not deal with the language of Order XXI, rule 16, or the corresponding section under the old Civil Procedure Code. In *Sadogopa Ayyangar v. Sellammal*(6) language somewhat favourable to appellant's contention has been used, but even in that case it is clear that the decree was a "decree for the payment of money," although in the case of the first defendant the decree directed the money to be paid out of his family property. None of these cases affects the general principle laid down in the Calcutta cases, and inherent, in our opinion, in the rule itself, that the proviso does not apply to decrees which are in essence decrees not for the payment of money but for the sale of property. We are of opinion that the order appealed against is correct and we dismiss this appeal with costs.

K.R.

(1) (1911) 14 C.L.J., 639 at 642.

(3) (1918) 27 C.L.J., 110.

(5) (1917) I.L.R., 40 Mad., 296.

(2) (1885) I.L.R., 11 Cal., 393.

(4) (1905) I.L.R., 28 Mad., 473 (F.B.)

(6) (1922) 43 M.L.J., 761.