

VALLURI
NARASIMHA
RAO
v.
THE RYOTS
OF PEDDA-
MAMIDIPALLI.

record of the rent in the light of the remarks made above. Petitioner will have the costs of this application.

The costs of further proceedings will abide the result.

WALLER, J.

WALLER, J.—On the first point I think that the matter is concluded by *Ramaswami Goundan v. Kabi Goundan*(1), a decision from which I see no reason to dissent. On the second, I agree that the Revenue Officer in settling a fair and equitable rent is not bound by the provisions of section 30 of the Act. It is obvious that there is no right of suit in regard to the questions raised. If there were, we should not be justified in interfering in revision.

I concur in the order proposed.

K. B.

APPELLATE CIVIL.

Before Mr. Justice Devadoss and Mr. Justice Waller.

CHIDAMBARA THEVAR, SIXTH DEFENDANT,
(RESPONDENT), APPELLANT,

1925,
November 13.

v.

SUBBARAYAR (PETITIONER), RESPONDENT.*

Civil Procedure Code (Act V of 1908), O. XXI, r. 16, proviso 2—Mortgage-decree—Assignment—Application by assignee to execute decree—Assignee, alleged to be benamidar for a purchaser of hypotheca from some of the judgment-debtors—Assignee's right to execute the decree—Mortgage-decree, whether a decree for payment of money.

A mortgage-decree is not a decree for the payment of money within the meaning of the second proviso to rule 16 of Order XXI, Civil Procedure Code.

(1) (1919) I.L.R., 42 Mad., 310.

* Civil Miscellaneous Second Appeal No. 91 of 1924.

Consequently, an assignee of a mortgage decree, though he is a benamidar for a purchaser of a portion of the mortgage property from some of the judgment-debtors in a mortgage suit, is not debarred from executing the decree by Order XXI, rule 16, proviso 2, Civil Procedure Code.

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APPEAL against the appellate order of A. S. BALASUBRAMANYA AYYAR, District Judge of East Tanjore, in Appeal Suit No. 396 of 1923 preferred against the order of the District Munsif of Tirutturaippundi in Miscellaneous Application No. 300 of 1923 in Original Suit No. 248 of 1917.

The material facts appear from the judgment.

A. V. Visvanatha Sastri for appellant.

C. Pulmanabha Ayyangar for respondent.

JUDGMENT.

DEVADOSS, J.—The only question in this appeal is whether a mortgage-decree is a decree for payment of money within the meaning of the expression in Order XXI, rule 16, Civil Procedure Code. The appellant is the sixth defendant in Original Suit No. 248 of 1917, a suit brought on a mortgage. The sixth defendant bought a portion of the hypotheca and the rest of the property was purchased by one Arunachalam Chetti. One Subbarayar obtained a transfer of the mortgage decree and applied to the Court to be recognized as a transferee decree-holder and for execution of the decree.

The sixth defendant opposed the application on the ground that Subbarayar was a benamidar for Arunachalam Chetti and that under the second proviso to Order XXI, rule 16, he was not entitled to execute the decree. The District Munsif held that it was not proved that Subbarayar was benamidar for Arunachalam Chetti. The appeal of the sixth defendant was dismissed by the District Judge. He has preferred this appeal and the contention of Mr. Visvanatha Sastri for the appellant

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is that inasmuch as Arunachalam Chetti purchased a portion of the hypotheca subject to the mortgage, he is a judgment-debtor and the assignment in favour of Subbarayar being benami for him, he is not entitled to execute the decree against a co-defendant.

Granting for argument's sake that Subbarayar is benamidar for Arunachalam Chetti the question is, is Arunachalam Chetti prevented from executing the decree against the sixth defendant? The question is a simple one. Is a mortgage-decree a decree for payment of money within the meaning of the second proviso to Order XXI, rule 16? According to the proviso—

“Where a decree for payment of money against two or more persons has been transferred to one of them it should not be executed against the others.”

We are unable to uphold the contention that a mortgage decree is a decree for the payment of money within the meaning of the proviso. A good deal of argument of Mr. Visvanatha Sastri was based upon *Abdalla Sahib v. Doctor Oosman Sahib*(1), and other cases which were decided before the passing of the present Civil Procedure Code. Under the present Procedure Code a preliminary decree is drawn up and time is given for redemption and if within the given time, money is not paid, a final decree, or a decree absolute is passed and the mortgaged property is brought to sale and, if the proceeds of the sale are not sufficient to pay up the amount of the decree and if the personal remedy is outstanding, a decree is given personally against the mortgagor. Till a personal decree is given, it cannot be said that the decree is one for the payment of money.

Under the old Civil Procedure Code a mortgage decree directed the payment of money and in default of

(1) (1905) I.L.R., 28 Mad., 224.

payment that the property was to be sold. According to form No. 129 time was given to the defendant to pay the principal and interest and costs within six months and in default of the defendant paying into Court such principal, etc., by the time given it was ordered that the mortgaged premises should be sold and it was further provided that, in case the sale-proceeds of the mortgaged property did not cover the decree amount, the judgment-creditor could recover the amount personally or from other property of the mortgagor. Under the old Code, therefore, a mortgage decree could be considered as a decree primarily for the payment of money. *Abdulla Sahib v. Doctor Osman Sahib*(1), and the other cases which were decided under the old Code have no application to a mortgage decree passed under the present Code. Even when the old Code was in force, the Calcutta High Court consistently held the view that a mortgage decree was not a decree for money. In *Laddhari Singh v. Manager, Court of Wards, Bhapatpura Estate*(2), Mr. Justice MOOKERJEE after an exhaustive examination of the cases on the point held that—

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“a decree for sale of the mortgaged property could not be deemed as a decree for money within the meaning of section 232 of the Code of 1882.”

A decree for redemption though it contains a provision for payment of money cannot be said to be a decree for money nor can a foreclosure decree in which a provision is made for the payment of money within the time fixed, be a decree for payment of money. Where a decree is passed for the delivery of a specific movable property, and in default, to pay a certain sum of money it is not primarily a decree for money.

In a mortgage decree the property is to be proceeded against in the first instance and the decree is, therefore, primarily against the property mortgaged.

(1) (1905) L.L.R., 28 Mad., 224.

(2) (1911), 14 C.L.J., 638.

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If a personal remedy is not outstanding, the only remedy of the mortgagee decree-holder is to proceed against the property and the mere fact that a personal remedy is outstanding will not convert the mortgage-decree into a decree for payment of money within the meaning of the proviso to rule 16 of Order XXI. The case *Sudagopa Ayyangar v. Sellammal*(1), does not help the appellant. In that case Mr. Justice SPENCER and Mr. Justice VENKATASUBBA RAO held

“the expression decree for money against several persons in Order XXI, rule 16, is not restricted to a personal decree for money against two or more defendants.”

The decree directed the defendant to pay the amount out of his family properties, and the learned Judges held—

“that the fact that the defendant was directed by the decree to pay the amount out of his family properties does not make the decree any the less, a decree for payment of money against him.”

If a trustee is directed to pay money or an executor is directed to pay money, though he is not personally liable to pay the amount, it is still a decree for the payment of money. But that is quite a different thing from a mortgage-decree which directs that the mortgaged properties should be sold to discharge the debt.

In section 232 of the Code of 1882 the expression was “decree for money.” In the present Order XXI, rule 16, the expression is “decree for the payment of money.” The words “the payment of” were evidently introduced to make the meaning clear.

We have no hesitation in holding that a mortgage-decree is not a decree for the payment of money within the meaning of the second proviso to rule 16 of Order XXI.

The appeal, therefore, fails and is dismissed with costs.

K.R.