

1891
April 9.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

BATAK NATH (DECREE-HOLDER) v. PITAMBAR DAS AND OTHERS
(JUDGMENT-DEBTORS). *

Mortgage—Decree against the person and other property of the Judgment-debtor as well as against the property mortgaged—Act IV of 1882 (Transfer of Property Act) s 90.

In a suit for enforcement of a mortgage security the plaintiff prayed for a decree both as against the mortgaged property and also, in the event of the mortgaged property not realising sufficient to satisfy his claim, as against the other property and the persons of the defendants, and the decree which the plaintiff obtained was framed in accordance with the prayer in the plaint, that is to say, the decree expressly provided that, should the mortgaged property not realise sufficient to satisfy the amount decreed to the plaintiff, the other property of three, and the persons of two, of the judgment-debtors were to be liable.

Held that such a decree could be executed against the persons and other property of the parties named therein, without its being necessary for the decree-holder to obtain a separate decree under s. 90 of the Transfer of Property Act (Act IV of 1882).

Miller v. Digambari Debya (1) referred to.

The facts of this case, so far as they are necessary for the purposes of this report, sufficiently appear from the judgment of the Court.

Munshi Madho Prasad, for the appellant.

The respondents were not represented.

STRAIGHT J. (TYRRELL J. concurring).—This is an execution first appeal and it relates to execution proceedings in regard to a decree of the 17th December 1886. That decree was couched in the following terms:—"It is decreed and ordered that the plaintiff's claim for Rs. 6,251-8-0, with proportionate costs and interest due for the period of pendency at the rate of 8 annas per cent. on the principal amount, from this date on the whole, be decreed by enforcement of lien and sale of 5 biswas of Gadanpur; that if the property hypothe- cated be not sufficient, then the persons and the other property of Pitambar Das and Dhanpat Rai and the property of Chandan Lal will be liable; that the rest of the claim be dismissed."

It is to be observed that this decree was partly a decree for sale of mortgaged property by enforcement of a mortgage security, and

* First Appeal No. 61 of 1890 from an order of Babu Ganga Saran, Subordinate Judge of Mainpuri, dated the 21st December 1889.

it also declared that, in the event of the mortgaged property being insufficient to pay the mortgage-debt when sold, the balance should be recoverable from the other property and person of the judgment-debtor. That decree is very similar in terms to one that was drawn up by my brother Mahmood and myself in the case reported in the *Weekly Notes* for 1890 at page 142.

1891

 BATAK NATH
 v.
 PITAMBAR
 DAS.

When a Court passes a decree for sale under s. 88 of the Transfer of Property Act and that is the only relief asked for in the plaint, the decree should be limited to a decree for sale of the hypothecated property; and it is in that case that the subsequent contingency contemplated by s. 90 of the Transfer of Property Act arises. But here in the present case, having regard to the prayer in the plaint, provision was in terms made in the decree itself for what was to be done in the event of the proceeds of the sale of the hypothecated property proving insufficient to pay the mortgage-debt. With a decree so shaped the Court whose business it was to execute it had no option to go behind its terms, and when the condition precedent mentioned in it as to the enforcement of the decree against the person and other property of the judgment-debtor came into effect, it was bound to give effect to that provision and to enforce it against the person and other property. It was with this object and for that purpose that the decree-holder put in his application of the 14th December 1889, which was the subject of the Subordinate-Judge's order that is made the ground of this appeal. It was objected by the judgment-debtor that the decree-holder could not sell the other property of the judgment-debtor or proceed against his person for the unsatisfied balance of the mortgage-debt without first obtaining a decree under s. 90 of the Transfer of Property Act. I have already pointed out that, looking to the terms of the decree, no such further decree was necessary. But the Subordinate Judge, whilst he appears to have been of opinion that it was necessary for the decree-holder to have a decree under s. 90 of the Transfer of Property Act, refuses to grant him such a decree upon the ground that the grant of such a decree is purely discretionary, and that, having regard to the contention of the judgment-debtors—"That the mortgaged pro-

1891

BATAK NATH
v.
PITAMBAR
DAS.

perty purchased by the decree-holder is more in value than the whole sum due on the mortgage, and in proof of this fact they offer to pay up within a month the whole sum due, if the decree-holder gave up the property. * * * I would therefore presume that the decree-holder in fact has got all that he was justly entitled to."

This seems to me to be not only a wrong method of dealing with this execution proceeding, because the question of s. 90 of the Transfer of Property Act never entered into consideration at all, but a very insufficient reason for disposing of an application for a decree under s. 90. The Subordinate Judge's order in our opinion cannot stand, and, in decreeing this appeal and reversing the order of the Subordinate Judge, we direct that he take up the application of the 14th September 1889, and dispose of it according to law. The appellant will have his costs of this appeal.

Appeal decreed.

1891
April 23.

REVISIONAL CRIMINAL.

Before Mr. Justice Straight.

IN THE MATTER OF THE PETITION OF JAI LAL.

Criminal Procedure Code, s. 145—Order for interim possession of immovable property—Point of time possession at which is to be looked at in determining which party is entitled to an order under s. 145.

The possession which a Magistrate acting under s. 145 of the Code of Civil Procedure has to find and support, is possession at the time of the Magistrate's proceedings. Hence, where a Magistrate decided a question of possession under s. 145 upon evidence taken six months previously,—*Held* that such order was irregular and unsustainable.

This was a reference made by the Sessions Judge of Farakhabad under the circumstances stated in his order of the 23rd March 1891, which is as follows :—"This is an application for the revision of an order of Mr. C. D. Steel, Joint Magistrate of Farakhabad, purporting to have been passed under the provisions of s. 145, Criminal Procedure Code. From the record of the proceedings it appears that the Joint Magistrate made no inquiry as to the actual