

Before Mr. Justice Burkill and Mr. Justice Dillon.

PIRBHU NARAIN SINGH (DECREE-HOLDER) v. RUP SINGH (JUDGMENT-DEBTOR).*

1898
May 4.

Execution of decree—Duties of executing Court—Act No. IV of 1883 (Transfer of Property Act) section 88—Decree for sale on a mortgage wrongly allowing interest after date fixed for payment.

Where a decree for sale under the Transfer of Property Act as framed is ambiguous, the Court executing it must put its own construction on it, and if possible will construe it as a decree properly framed according to law; but where there is no ambiguity in the decree, the executing Court is bound to execute it according to its terms, whether the decree be right or wrong. *Amolak Ram v. Lachmi Narain* (1) and *Badshah Begam v. Hardai* (2) referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Sundar Lal*, for the appellant.

Babu *Parbati Charan Chatterji*, for the respondent.

BURKITT and DILLON, JJ. :—This is an appeal from an order of the Subordinate Judge of Mainpuri passed in execution of a decree which Maharaja Purbhu Narain Singh had obtained against Raja Rup Singh. The suit in which the decree was passed was a suit upon a mortgage for recovery of a sum of money secured by the mortgage by sale of the property mortgaged. The decree under section 88 of the Transfer of Property Act was passed on the 27th of May 1895 and the order absolute under section 89 of the same Act on the 6th of March 1896. The decree was then sent for execution to the Collector, as the property ordered to be sold was ancestral property. During the course of those proceedings the judgment-debtor applied to the Subordinate Judge, objecting to the decree being executed for the full amount stated in the order absolute. The point he took was that the decree under section 88 did not allow interest on the mortgage debt after the 27th of November 1895. The Subordinate Judge, disregarding the order absolute which had been passed on the 6th of March 1896, allowed the objection, and, by order

First Appeal No. 216 of 1897 from an order of Maulvi Muhammad Mazhar Hussain Khan, Subordinate Judge of Mainpuri, dated the 26th June 1897.

(1) I. L. R., 19 All., 174.

(2) Weekly Notes, 1898, p. 17.

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dated the 27th of June 1897, directed that all interest subsequent to the 27th of November 1895 should be disallowed, and ordered the execution clerk to "prepare a correct account" of the money due on the mortgage; that is to say, the Subordinate Judge practically directed the preparation of a new order absolute, notwithstanding that no appeal had been preferred against the order absolute prepared on the 6th of March 1896. In our opinion the latter order absolute is now final and conclusive in the case. It is contended by the respondent's vakil that his client was not properly served with notice of the application on which that order was made, and that he did not come to know of it until notice was served on him under section 248 of the Code of Civil Procedure. Whether that statement be true or not is immaterial here. If the respondent was unaware of the proceedings taken to have that decree prepared, he might perhaps have applied under section 108 of the Code of Civil Procedure to have that order absolute set aside, or he might have asked for a review of judgment, or he might have appealed against it to a higher tribunal. He adopted neither of these courses. That order absolute, as we have said before, is now final and conclusive, and this Court sitting as an execution Court cannot enter into the question as to whether that order absolute, which is the decree in execution before us, was or was not properly prepared. All that this Court as an execution Court can do is to see that that decree is executed as it stands. There can be no doubt that the order absolute does give the decree-holder interest after the 27th of November 1895. On this finding it is almost unnecessary for us to enter into the question as to whether the decree under section 88 passed on the 27th of May 1895 did or did not give interest after the 27th of November 1895. On that point, however, we have no doubt. That decree declared that on the date first mentioned Rs. 47,410-4 will be payable to the plaintiff. Of that sum Rs. 40,000 was the principal sum secured by the mortgage, Rs. 5,412 was for interest up to the date of suit as mentioned in the plaint, and the remainder, Rs. 1,984-4, were

for costs of the suit. This sum of forty-seven thousand four hundred and odd rupees did not include any interest after the date of the institution of the suit. The decree then goes on to provide for interest between the institution of the suit and the 27th of November 1895, by directing the judgment-debtor to pay Rs. 47,410-4 0 with interest during the pendency of the suit on the 27th of November 1895. It then went on to direct that the defendant should pay future interest at one per cent. *per mensem*. It does not in so many words say that that interest shall run up to the date of payment, but we have no hesitation in finding that such was the meaning and intention of the decree. Therefore, in our opinion the order absolute passed on the 6th of March 1896 was right in allowing interest subsequent to the 27th of November 1895. It was contended that the Court hearing the suit had no power to award interest after the 27th of November 1895, and in support of that proposition the case of *Amolak Ram v. Lachmi Narain* (1) was cited. In our opinion that case does not apply here, as explained by one of us in the case of *Badshah Begam v. Musammat Hardai* (2). If there were any ambiguity in the decree under section 88 and the execution Court had to construe that ambiguous decree, the execution Court would no doubt be right in assuming that the decree was one strictly within the terms of the law and that it refused *post diem* interest. Such, however, is not the case here. We are of opinion that the decree under section 88 clearly and unambiguously allowed interest subsequent to the 27th of November 1895. For the above reasons we are of opinion that the order of the Subordinate Judge must be reversed. We therefore allow this appeal, and, setting aside the order of the Subordinate Judge, we direct that execution shall proceed as heretofore on the order absolute of March 1896, by which interest was allowed after the 27th of November 1895. The appellant will have his costs in this Court.

Appeal decreed.

(1) I. L. R., 19 All., 174.

(2) Weekly Notes, 1898, p. 17.

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