

APPELLATE CIVIL.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Beverley.

RUTNESSUR SEIN AND OTHERS (DECREE-HOLDERS) *v.* JUSODA AND
ANOTHER (JUDGMENT-DEBTORS).^{*}

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December 6.

Execution of decree—Decree on Mortgage Bond—Costs against judgment-debtors personally.

Certain plaintiffs were the holders of the following decree obtained on a mortgage bond: "It is ordered that the defendants shall pay to the plaintiffs the sum of Rs. 2,550 and costs Rs. 312, total Rs. 2,862, within two months from the date of the signing of the decree; interest will run on the said amount at the rate of 6 per cent per annum up to realization. If the defendants do not pay the amount within the time prescribed, they will lose their right of redeeming the property mortgaged, and possession thereof will be given to the plaintiffs."

On the judgment-debtors making default, the decree-holders applied for execution, the Subordinate Judge directed execution to issue, but held that execution could not be had for costs under the terms of the decree; and this order was upheld by the District Judge on appeal.

Held, that the decree-holders were entitled to their costs of the suit from the judgment-debtors personally, or from properties belonging to the judgment-debtors other than those mortgaged.

In a suit brought for foreclosure on a mortgage by conditional sale, the plaintiff obtained the following decree: "It is ordered that the defendants shall pay to the plaintiffs the sum of Rs. 2,550 claimed and costs Rs. 312, total Rs. 2,862, within two months from the date of the signing of the decree. Interest will run on the said amount at the rate of 6 per cent per annum up to realization. If the defendants do not pay the amount within the time prescribed, they will lose their right of redeeming the property mortgaged, and possession thereof will be given to the plaintiffs."

The defendants, judgment-debtors, made default in making the payment directed, and the decree-holders then applied that

^{*} Appeal from Order No. 342 of 1886, against the order of W. H. Page, Esq., Judge of Dacca, dated the 3rd of June, 1886, affirming the order of Baboo Moti Lal Sirkar, Subordinate Judge of that District, dated the 26th of November, 1885.

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the mortgage might be foreclosed; and a final decree for foreclosure was passed. Upon the plaintiffs, decree-holders, applying to be put into possession of the property, the question arose as to whether they were entitled to their costs as well as to possession of the land. The Subordinate Judge held that execution could not be had for costs under the terms of the decree; and this order was upheld by the District Judge on appeal.

On appeal by the plaintiffs, decree-holders, to the High Court—

Mr. *Bell* and Baboo *Hari Mohun Chuckerbutty* appeared for the appellants.

Baboo *Guru Das Banerji*, for the respondents.

Mr. *Bell* contended that the decree for costs was a personal decree against the defendants, quite independent of the debt of Rs. 2,550 secured by the mortgage. The Transfer of Property Act had altered the procedure with regard to suits on conditional sales, but it had made no alteration with regard to the costs of the suit. Under the former procedure a notice of foreclosure was first served, and if the money due was not paid within the year, the mortgagee then brought a suit for possession, and if successful he received his costs as a matter of course. Section 86 of the Transfer of Property Act authorizes the Court to award costs of suit, and these costs are a personal decree against the debtor. The Court cannot give a personal decree for the money lent, because if the money is not paid, the mortgagee has to take the mortgaged property in satisfaction of his debt, but the debt only is discharged, not the costs of the suit, which the mortgagee has been compelled to incur owing to the mortgagor's default.

Dr. *Guru Das Banerji* for the respondents contended that the decree merely said that, if the decretal money was not paid, the debtors would lose their right of redeeming the property mortgaged, and possession could be given to the plaintiffs, but it contained no provision as to costs. This was the interpretation put upon the decree by the Judge who had originally passed it. It must be assumed that he knew the meaning of his own decree, and he says that costs were not awarded. The decree is for a total sum of Rs. 2,862, which comprises principal and interest and costs; and the costs must be considered as a charge upon

the property equally with the mortgage debt; and if the debtor is not personally liable for the mortgage debt, he is not personally liable for the costs, which are included in the decree with the original debt.

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Mr. *Bell* was not called upon to reply.

The following judgments were delivered by the Court (PETHERAM, C.J., and BEVERLEY, J.).

PETHERAM, C.J.—I think that this appeal must be allowed.

This is an action to recover certain mortgage money, and the only question in the case is whether the plaintiffs, in addition to recovering the mortgage money from the property, are entitled to recover the costs of the suit from the debtors personally, that is to say, whether they can get execution against any other property of theirs after the mortgage property has been exhausted. In my opinion the only question is, whether the decree, as given by the Judge who tried the case, intended to give the costs against the debtors personally, because I am clearly of opinion that, under s. 220 of the Code of Civil Procedure, the Judge had jurisdiction to decree the costs against the debtors personally if he thought fit to do so. Therefore, as I said before, the question is, whether upon a construction of the decree which was made by him we are to hold that he has decreed the costs against the debtors personally.

I think that he has. The decree proceeds to assess the amount which was due for principal and interest, and the amount due for costs, and then to make an order that the mortgagor shall pay the whole, that is to say, the debt and costs. By the terms of the security it is admitted that the Judge had no right under that security to give judgment against the debtors personally for the amount of the principal and interest, but by virtue of s. 220 he had jurisdiction to give judgment against them personally for the costs. Reading the decree as a whole it declares, as I said before, that this man shall pay the whole of both sums of money. A declaration that he shall pay the whole means that he shall pay it out of any property of his; the liability to pay is not limited to any particular property.

The only question is, having decided that this is an order

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against the debtors to pay the whole, whether such an order is capable of execution. Now, it may be that, so far as the principal and interest are concerned, if it were sought to put the decree in execution to recover those sums against the debtor personally, there might be an answer, because, looking to the terms of the mortgage security, the property and not the individual was made liable; but this is not an application to execute the decree for the mortgage money and interest, but for the costs only; and inasmuch as the decree stands for the whole sum, and as the legal difficulty does not exist to bar execution for the costs which would exist with reference to the mortgage money and the interest, because the Judge had power under s. 220 of the Code of Civil Procedure to direct that the defendants should pay this money personally, I see no reason why the plaintiffs should not be allowed to execute the decree for this sum. The Judge has refused to allow them to execute the decree for this sum. I think that he is wrong, and therefore this appeal must be allowed, and the plaintiffs, the mortgagees, must be allowed to execute their decree for costs amounting to Rs. 312 against the defendants personally or against any other property of theirs.

The appellants will have their costs in all the Courts.

BEVERLEY, J.—In addition to what has fallen from my lord the Chief Justice, I wish to add that, in my opinion, the plaintiffs are entitled to execute their decree for costs under s. 87 of the Transfer of Property Act. I think we must take it that the decree in this case was, amongst other things, a decree for costs, the exact sum being named, and the real question before us is, whether the personal liability to pay those costs is discharged by the decree absolute for possession of the property. Now the 4th clause of s. 87 says, that the foreclosure will only discharge the debt secured by the mortgage, and therefore it seems to me it was not intended that the foreclosure should discharge the decree for costs.

I accordingly concur in allowing this appeal.

T. A. P.

Appeal allowed.