

advanced by him." The argument based on hardship has no force. If a pleader enters into a fair and reasonable agreement with his client which the latter understands and approves of, there is no great hardship in having it reduced to writing and in filing it in Court. In my judgment the utmost the plaintiff was entitled to was a reasonable sum for the preparation of the plaint. He does not, however, sue for this. It does not appear that the plaint was ever made any use of. I very much doubt that the plaintiff refused to act for the other side. If the allegations in the plaint are true, there was certainly no obligation on him, legal or moral, to do so. It is somewhat significant that the defendant (after, as the plaintiff says, leaving important documents with him) was able so easily to go to another pleader. Possibly the Rs. 16, which the plaintiff accepted at the time was not altogether insufficient remuneration for the work done. This suit is not, however, brought for work done, it is a suit for damages, and the liability of the defendant for those damages has been the issue between the parties.

I would allow the appeal.

By THE COURT.—The order of the Court is that the decree of the lower appellate Court be set aside and the decree of the Court of first instance restored with costs of this appeal and also costs in the lower appellate Court.

Appeal decreed.

FULL BENCH.

1906
July 10.

Before Sir John Stanley, Knight, Chief Justice, Mr. Justice Banerji and Mr. Justice Aikman.

DELHI AND LONDON BANK, LIMITED (DECREE-HOLDER) v. PARTAB SINGH (JUDGMENT-DEBTOR).*

Civil Procedure Code, section 273—Attachment of decree for sale of mortgaged property.

A decree for the sale of immovable property under section 88 of the Transfer of Property Act is not a decree for the payment of money or a decree for money, and is therefore liable to attachment and sale under the penultimate clause of section 273 of the Code of Civil Procedure.

*First Appeal No. 42 of 1906, from a decree of Pandit Pitambar Joshi, Subordinate Judge of Bareilly, dated the 22nd of December, 1905.

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Takija Begam v. Siraj-ud-daula (1) overruled. *Abdulla v. Doctor Oosman* (2) dissented from. *Sultan Kuar v. Gulzari Lal* (3), *Ram Charan Bhagat v. Sheobarat Rai* (4), *Barhma Din v. Baji Lal* (5), *Shiam Sundar v. Muhammad Ihtisham Ali* (6), *Jogul Kishore v. Cheda Lal* (7), *Gopal Nana Shet v. Johari Mal Palad Jitaji* (8), *Maonaghten v. Surja Prasad Misra* (9), and *Baij Nath v. Binoyendra Nath* (10) referred to.

IN this case the Delhi and London Bank, Ltd., on the 22nd of June, 1903, obtained a simple money decree against one Kunwar Partab Singh. On the 10th of September, 1905, the judgment-debtor obtained two mortgage decrees against third parties. The Bank thereupon applied to the Court for the attachment of these decrees under the penultimate clause of section 273 of the Code of Civil Procedure, and followed up this application by an application under section 284 of the Code for sale of the decrees attached. The Court to which this application was made (Subordinate Judge of Bareilly) held that the decrees could not be sold, but could only be executed, and accordingly dismissed the application. The decree-holder appealed to the High Court.

Munshi *Jang Bahadur Lal*, for the appellant.

The attachment of the decrees was made under the last clause but one of section 273 of the Code of Civil Procedure and not under the first paragraph. The first paragraph of section 273 applies only to money decrees and the penultimate clause to all other decrees. This was held in *Sultan Kuar v. Gulzari Lal* (3). The decrees in question in this case are not decrees for money or decrees for payment of money:—*Jogul Kishore v. Cheda Lal* (7), *Ram Charan Bhagat v. Sheobarat Rai* (4), *Kashi Prasad v. Sheo Sahai* (11), *Jadu Nath Prasad v. Jagmohan Das* (12) and *Shiam Sundar v. Muhammad Ihtisham Ali* (6). In the case of *Barhma Din v. Baji Lal* (5) it was held by this Court that a decree for foreclosure passed under the Transfer of Property Act cannot be executed under the first paragraph of section 273 of the Code of Civil Procedure, and there is no difference in principle between a decree for foreclosure

(1) Weekly Notes, 1885, p. 123.

(2) (1904) I. L. R., 28 Mad., 244.

(3) (1879) I. L. R., 2 All., 290.

(4) (1894) I. L. R., 16 All., 418.

(5) (1903) I. L. R., 26 A.E., 91.

(6) (1905) I. L. R., 27 All., 501.

(7) Weekly Notes, 1893, p. 184.

(8) (1891) I. L. R., 16 Bom., 522.

(9) (1899) 4 C. W. N., xxxv.

(10) (1901) 6 C. W. N., 5.

(11) (1896) I. L. R., 19 All., 186.

(12) (1903) I. L. R., 25 All., 541.

and a decree for sale. The cases of *Macnaghten v. Surja Prasad Misra* (1), *Baij Nath Lohea v. Binoyendra Nath Palit* (2) and *Gopal Nana Shet v. Johari Mul Valad Jitaji* (3) are also in point. The case of *Takia Begam v. Siraj-ud-daula* (4) is distinguishable from the present. But even if it is not so, it is contrary to the general current of decisions in this and other Courts, and is, it is submitted, incorrectly decided.

Babu *Lalit Mohan Banerji* for (Dr. *Satish Chandra Banerji*), for the respondent, argued that the question raised did not properly arise in the present case. The decrees sought to be sold were not decrees passed on the basis of mortgages, but these were charges, and decrees for the enforcement of those charges were passed. They are not strictly decrees for sale upon mortgages. This Court has held that a decree for sale is not a decree for money, but the Madras High Court has held otherwise—*Kommachi Kathar v. Pakker* (5) and *Abdulla Sahib v. Doctor Osman Sahib* (6). If the Legislature had intended that the phrase "decree for money" should have the same meaning as "decree for payment of money" it would have clearly said so. There is a difference between a decree for sale and a decree for foreclosure: the case of *Barhma Din v. Baji Lal* (7), therefore does not apply.

Munshi *Jang Bahadur Lal* was not heard in reply.

STANLEY, C. J.—This execution first appeal was laid before a Bench of three Judges owing to an apparent conflict to be found in two decisions of this High Court. The facts are shortly as follows:—On the 22nd of June, 1903, the Delhi and London Bank, Limited, obtained a simple money decree against the respondent in this appeal. Subsequent to the date of this decree the respondent, on the 10th September, 1905, obtained two mortgage decrees against third parties. The Bank applied to the Court for the attachment of these decrees under the penultimate clause of section 273 of the Code of Civil Procedure. Afterwards the Bank applied for execution by sale of the attached decrees under section 284 of the Code. The Court below held that there could be no sale of the decrees; that they could only be executed,

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(1) (1899) 4 C. W. N., (Notes) xxxv.

(4) Weekly Notes, 1885, p. 123.

(2) (1901) 6 C. W. N., 5.

(5) (1896) I. L. R., 20 Mad., 107.

(3) (1891) I. L. R., 15 Bom., 522.

(6) (1904) I. L. R., 28 Mad., 224.

(7) (1903) I. L. R., 26 All., 91.

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and accordingly refused the application. The Bank appeals against this decision.

The Court below would seem to have relied upon the decision in the case of *Takiya Begam v. Siraj-ud-daula* (1). In that case Petheram, C.J., and Oldfield, J., purported to follow an older ruling of this Court and held that a sale of a decree, similar according to the report to the decree in this case, could not be had. The question before us was considered in the case of *Sultan Kuar v. Gulzari Lal* (2). In that case it was held that section 273 of Act X of 1877, which corresponds with section 273 of the present Code of Civil Procedure, did not contemplate the sale of a decree for money as the result of its attachment in the execution of a decree, and that the attachment of such a decree in the mode ordained in section 273 could not lead to its sale. It was also held that the last clause but one of section 273, applies to other than money decrees. Pearson, J., in the course of his judgment, says:—"Although debts are mentioned in the category of property liable to attachment and sale in execution of a decree in section 266 of Act X of 1877, yet it is apparent from the provisions of section 273 of the Act, that the sale of a money decree is not contemplated as the result of its attachment, and that an attachment in the mode therein ordained cannot lead to a sale." The learned Judge proceeds:—"In our opinion the Judge is wrong in holding the last clause but one of section 273 to be applicable in the present case. That clause applies to other than money decrees." Now it has been held in this Court in several cases, and we take it to be, so far as this Court is concerned, well settled, that a decree for the sale of immovable property is not a decree for the payment of money or a decree for money. As an authority for this I may refer to one case, namely, that of *Jogul Kishore v. Cheda Lal* (3). The nature of such a decree was fully considered by me and is dealt with in my judgment in the case of *Shiam Sundar v. Muhammad Ihtisham Ali* (4). It is therein pointed out that a decree for the sale of immovable property or foreclosure could not be regarded as a decree for the payment of money or for money. I find that this view has

(1) Weekly Notes, 1885, p. 123.

(2) (1879) I. L. R., 2 All., 290.

(3) Weekly Notes, 1893, p. 184.

(4) (1905) I. L. R., 27 All., 502.

been taken also by the Calcutta High Court in the case of *E. R. Macnaghten v. Surja Prasad Misra* (1). The facts of this last-mentioned case are similar to the facts of the case now before us. The respondent had obtained a decree for money against one Lalji Lal, who had obtained a decree upon a mortgage against one Sadik Ali for the sale of the mortgaged property; the decree declaring the amount of money payable to the mortgagee and directing, in the event of the money not being paid within a time limited, the sale of the mortgaged property. The respondent, Surja Prasad, in execution of his decree obtained an attachment of Lalji Lal's decree against Sadik Ali, and subsequently applied to the Court that he might be substituted in place of Lalji Lal as judgment-creditor and be allowed to execute that decree. This application was opposed by the appellant, who had purchased a portion of the mortgaged premises in execution of some other decree of his against Sadik Ali, and his objection was on the ground that the application of Surja Prasad was not authorized by the Code of Civil Procedure. The lower Court allowed Surja Prasad to execute the decree obtained by Lalji Lal against Sadik Ali, but upon appeal it was held by Ghose and Hill, JJ., that the decree obtained by Lalji Lal against Sadik could not be regarded as a decree for money within the meaning of section 273 of the Code of Civil Procedure. This ruling was approved and followed by Hill and Brett, JJ., in the case of *Baij Nath Loheka v. Binoyendra Nath Palit* (2). I may further refer to the case of *Barhma Din v. Baji Lal* (3), in which it was held by a Bench of this Court that a decree for foreclosure can be attached under the penultimate clause of section 273. The principle which was applied in that case appears to me to be applicable to the case of a decree for sale of mortgaged property.

In the case upon which the Court below would appear to have relied, the learned Chief Justice and Mr. Justice Oldfield purported to follow the decision in *Sultan Kuar v. Gulzari Lal* (4), but they appear to me to have overlooked some of the facts of that case as also some of the matter stated in the judgment. In

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their judgment they say:—"We agree with the reasoning of this ruling and decree the appeal." I am unable from the record of that case to gather what the exact nature of the decree was which was hypothecated in favour of the respondent. It does not appear that the decree was a decree for sale of immovable property or in any way affected immovable property. Moreover, I may point out that in that case a decree for sale of the appellants' decree had already been passed, and in execution the Court could not go behind this decree and refuse to sell. If it be that the judgment in this case is inconsistent with the ruling in *Sultan Kuar v. Gulzari Lal* (1), I find myself unable to follow it. I would therefore allow the appeal, set aside the order of the Court below and remand the case with directions to proceed with it according to law.

BANERJI, J.—I am of the same opinion, and have very little to add. The question which we have to determine is whether the decree-holder is entitled to ask for the sale of the decrees attached by him or whether his only remedy is to apply for execution of those decrees. The decision of this question depends upon whether a decree for sale upon a mortgage is a decree for money within the meaning of the first paragraph of section 273 of the Code of Civil Procedure. If it is a decree for money, as mentioned in that paragraph, the decree-holder's remedy is to apply for attachment of the decrees. If, on the other hand, a decree for sale is not a decree for money, the penultimate paragraph of section 273 would apply as to the mode of attachment of the decree, and the decree being saleable property within the meaning of section 266, the attaching creditor would be entitled to apply for its sale under section 284 of the Code. It has been held in this Court that the Code of Civil Procedure makes a clear distinction between a decree for money and a decree which directs the sale of immovable property in pursuance of a contract specifically affecting the same (see section 322). Having regard to the authorities to which the learned Chief Justice has referred and the other authorities cited at the hearing, it is now too late to contend that a decree for sale upon a mortgage is a decree for money as contemplated by the Code of Civil Procedure, and I feel myself

unable to agree with the decision of the Madras High Court in *Abdulla Sahib v. Doctor Oosman Sahib* (1) cited by the learned vakil for the respondent. In my opinion the Court below was wrong in holding that the decree-holder in this case was not entitled to apply for the sale of the attached decree, and I agree in the order proposed by the learned Chief Justice.

AIKMAN, J.—I am of the same opinion. The question raised by this appeal is a very short one. As pointed out in the case of *Gopal Nana Shet v. Johari Mal Valad Jitaji* (2), all decrees other than decrees for money are both attachable and saleable property under section 266 of the Code of Civil Procedure. Now if the decrees, for attachment of which the appellant Bank got an order and which it now seeks to bring to sale, are decrees for money, no doubt the order of the Court below is right; but having regard to the nature of the decrees which purport to be decrees under section 88 of the Transfer of Property Act, ordering the sale of immovable property for the recovery of money, and having regard to previous rulings of this Court, it is impossible to hold that these mortgage-decrees are “decrees for money” so as to be governed by the earlier portion of section 273 of the Code. As pointed out in the case of *Ram Charan Bhagat v. Sheobarat Rai* (3), when the Legislature intentionally chose to draw a distinction between money decrees or decrees for the payment of money and decrees ordering the sale of property, it drew that distinction in apt words and the learned Judges who decided that case refer in illustration of what they say to section 295 and section 322 of the Code. In my opinion this appeal must for these reasons succeed and I concur in the order proposed.

BY THE COURT.—The order of the Court is that the appeal is decreed, the order of the Court below is set aside and the case is remanded to that Court under the provisions of section 562 of the Code of Civil Procedure, with directions to readmit the application for execution under its original number in the register and proceed to dispose of it according to law. The appellant is entitled to the costs of this appeal. Other costs will abide the result.

Appeal decreed and cause remanded.

(1) (1904) I. L. R., 23 Mad., 224. (2) (1891) I. L. R., 16 Bom., 522.

(3) (1894) I. L. R., 16 All., 418

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