

Before Mr. Justice Richards and Mr. Justice Griffin.

GAURI SAHAI (DECREE-HOLDER) v. ASHFAK HUSAIN AND OTHERS (JUDGMENT-DEBTORS).*

1907
June 27.

Decree ex parte—Civil Procedure Code, section 108—Decree set aside as against one of several joint judgment-debtors—Decree passed subsequently against exempted party—Execution of decree—Limitation.

A decree for sale on a mortgage was passed against several defendants jointly on the 25th of August, 1900, and made absolute on the 21st December, 1901. As against one defendant, however, the decree was *ex parte*, and it was set aside as against her on appeal on the 11th March, 1902. Subsequently a decree was passed on the merits against this defendant, and her appeal was dismissed by the High Court on the 16th November, 1904. As against this defendant the decree was made absolute on the 27th of November, 1905.

Held that the orders of the 25th August, 1900, and the 16th November, 1904, between them, operated as one decree for the sale of the mortgaged property; that the joint effect of the orders of the 21st December, 1901, and the 27th November, 1905, was to make absolute this decree, and that an application for execution made on the 21st December, 1905, was not barred by limitation.

Bhura Mal v. Har Kishan Das (1), *Sham Sundar v. Muhammad Ihtisham Ali* (2) and *Shaida Husain v. Hub Husain* (3) referred to.

THE suit out of which this appeal arose was brought to enforce payment of a mortgage by sale of the mortgaged property according to the provisions of the Transfer of Property Act. There were a number of defendants to the suit representing the mortgagors. A decree against all the defendants was obtained on the 25th August, 1900. On the 21st December, 1901, the decree was made absolute. One of the defendants was, however, a lady named Sakina Bibi, evidently a *pardah-nashin* lady. On whom personal service of the plaint in the suit presented some difficulties. The decree of the 25th August, 1900, was *ex parte* against this lady, and she applied under section 108 of the Code of Civil Procedure to set it aside. Her application was refused, but on appeal to the High Court she succeeded, and on 11th March, 1902 the High Court set aside the decree "as against her" and remanded the case. A decree on the merits was then pronounced against Sakina Bibi. She appealed again to the High Court, but her appeal was dismissed, and on the 16th November, 1904, the High Court confirmed the Court below.

* First Appeal No. 8 of 1907, from a decree of Sheikh Maula Bakhsh, Additional Subordinate Judge of Moradabad, dated the 17th of April 1906.

(1) (1902) I. L. R., 24 All., 383. (2) (1905) I. L. R., 27 All., 501,
(3) Weekly Notes, 1902, p. 184.

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On the 15th February 1905 the plaintiffs applied to make the decree absolute. The judgment-debtors other than Sakina Bibi objected that the decree against them had already been made absolute. This objection was allowed, but the decree was made absolute against Sakina. The plaintiffs then applied for execution, and the defendants other than Sakina objected that the decree was barred by limitation. The executing Court (Subordinate Judge of Moradabad) held that execution of the decree was barred so far as the other judgment-debtors were concerned but not as against Sakina Bibi. Against this order the decree-holder appealed to the High Court.

Babu *Jogindro Nath Chaudhri* and Maulvi *Muhammad Ishaq*, for the appellant.

Pandit *Moti Lal Nehru*, for the respondents.

RICHARDS and GRIFFIN, JJ.—The suit, out of which this execution appeal arises, was brought to enforce payment of mortgage by sale of the mortgaged property according to the provisions of the Transfer of Property Act.

There were a number of defendants to the suit representing the mortgagors. A decree against all the defendants was obtained on the 25th August, 1900. On the 21st December, 1901, the decree was made absolute.

One of the defendants was, however, a lady named Sakina Bibi, evidently a *pardah-nashin* lady, on whom personal service of the plaint in the suit presented some difficulties. The decree of the 25th August, 1900, was *ex parte* against this lady and she applied under section 108 of the Code of Civil Procedure to set it aside; her application was refused, but on appeal to the High Court she succeeded, and on 11th March, 1902, the High Court set aside the decree "as against her" and remanded the case. A decree on the merits was then pronounced against Sakina Bibi. She appealed again to the High Court but her appeal was dismissed, and on the 16th November, 1904, the High Court confirmed the Court below.

On the 15th February, 1905, the plaintiffs applied to make the decree absolute: the judgment-debtors other than Sakina Bibi objected that the decree against them had already been made absolute: this objection was allowed, but the decree was made absolute

against Sakina. The plaintiffs then applied for execution, and the defendants other than Sakina object that the decree is barred by limitation. Hence the present appeal. The decree-holders are certainly very unfortunate if this contention of the respondents is to prevail. The mortgage was a joint mortgage. The plaintiffs could not have sued the respondent to this appeal without making Sakina a party. When the decree was set aside against Sakina the decree still remained a decree for the sale of all the mortgaged property. After the remand the Court below and the High Court decreed the sale of all the mortgaged property and not merely the interest of Sakina Bibi.

The plaintiff has since the year 1900 been engaged in prosecuting what has turned out to be an honest and *bona fide* claim without any unnecessary delay, and having at last succeeded, if the decree below stands, he will be deprived altogether of the fruits of his litigation.

The contention of the respondent is that there are two decrees, one against them and the other against Sakina, and that the decree against them is barred by limitation. Now, having regard to the fact that the mortgage was a joint mortgage, a decree for the sale of the property against the respondents in the absence of Sakina Bibi would have been contrary to the provisions of the Transfer of Property Act: so also would have been a decree against Sakina Bibi in the absence of the respondents. In the connected appeal the lower Court has held that the decree even against Sakina Bibi cannot be executed. Mr. *Moti Lal* says that when the High Court set aside the *ex parte* decree it should perhaps have set aside the whole decree and not merely the decree as against Sakina Bibi; but it did not do so; it set aside only against Sakina. He referred us to the case of *Bhura Mal v. Har Kishan Das* (1). This case certainly suggests that the Court should have set aside the whole decree. But this seems to us a pure technicality. The High Court in dealing with the appeal of Sakina on the 11th March 1902 in effect said:—"We set aside the decree because we hold that Sakina was not served: the case will be remanded and tried out on the merits in her presence, but the other defendants who were present and represented at

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the previous hearing will not be allowed to reopen the case." On the 15th February 1905 the plaintiffs applied against all the defendants to make absolute the decree of the 16th November, 1904, treating that decree as the decree in the suit. The order asked for was made, but only against Sakina. This application would be a "step in aid of execution" unless the argument of the respondents is sound, namely, that there are two separate and distinct decrees. We have already shown that in a suit like the present any decree except one joint decree would be contrary to law. In *Sham Sundar v. Muhammad Ihtisham Ali* (1) it was held that in a suit for foreclosure there could only be one decree. The principle of that ruling is, in our opinion, applicable in the present case. We think as far as possible we ought to construe the decrees and orders of Courts of justice as having been in accordance with and not in opposition to the law. Acting on this principle we hold that the orders of the 25th August 1900 and 16th November, 1904, between them, operate as one decree for the sale of the mortgaged property: that the joint effect of the orders of 21st December, 1901 and 27th November, 1905 was to make absolute this decree, and that the application for execution made on 21st December, 1905, was not barred by limitation. We have also been referred to the case of *Shaida Husain v. Hub Husain* (2). In that case as in the present case a decree obtained against several mortgagors was set aside against one of them on an application under section 108 of the Code of Civil Procedure; the case was remanded, and the defendant against whom the decree was set aside succeeded in reducing the amount due on foot of the mortgage. This Court made a decree regulating how the decree was to be executed against the several defendants judgment-debtors. It is argued that the Court here recognized that there were two separate decrees. The learned Chief Justice after stating the facts and referring to the case of *Bhura Mal v. Har Kishan Das* says:—"This is an anomalous state of things and could not, as it seems to us, have been contemplated by the framers of the Code." In the present case the decree against Sakina is or a larger amount than the decree against the other defendants, but Mr. *Muhammad Ishaq* has wisely waived in open

(1) (1905) I. L. R., 27 All., 501. (2) Weekly Notes, 1902, p. 184.

Court any claim to execute the decree against any of the defendants for any greater sum than the sum decreed against the defendants other than Sakina. We do not think that there is anything inconsistent with our judgment in the case just referred to. On the contrary we think that the Court was clearly of opinion that there could only be, in effect, one decree in a suit like the present. We allow the appeal and set aside the decree of the lower appellate Court and direct that court to restore the execution case and proceed according to law, allowing the decree to be executed against all the judgment-debtors for the amount decreed against the defendants other than Sakina Bibi just as if the decree against the latter had never been set aside.

Appeal decreed.

APPELLATE CIVIL.

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April 29.

Before Sir George Knox, Acting Chief Justice, and Mr. Justice Aikman.

GIRRAJ SINGH AND OTHERS (PLAINTIFFS) v. MUL CHAND

(DEFENDANT)*

Act No. XV of 1877 (Indian Limitation Act), schedule II, articles 61 and 83—Limitation—Suit on bond to recover money of which a third party has in fact had the benefit—Compromise of suit by heirs of obligor—Suit to recover money paid under compromise.

U.S. borrowed money on a bond from U.E. The sole obligor of the bond was U. S., but the money was in fact borrowed for the use of, and was paid to, one M. From time to time the original bond was renewed, and ultimately U. R. sued upon the last bond and obtained a decree for a large sum of money against the heirs of U. S. The defendants appealed to the High Court, but pending the appeal entered into a compromise with the plaintiff on the 2nd of January 1900, whereby they agreed to pay to the plaintiff the sum of Rs. 51,000 and costs of the High Court. Upon the 5th of November 1902 the heirs of U. S. paid to the plaintiff decree-holder in pursuance of this compromise Rs. 40,000, and on the 17th of July 1903 they instituted a suit against M. to recover the amount so paid and their costs. *Held* that on the facts U. S. was not a surety for M. but the principal debtor, although the money was borrowed for M.'s benefit; that the payment made on the 5th of November 1902 in pursuance of the compromise referred to above was not gratuitous, and that the heirs of U. S. were entitled to recover from M. the sum of Rs. 40,000 so paid with interest, but not the costs of the High Court, in respect of which the suit was barred.

* First Appeal No. 75 of 1904, from a decree of H. David, Esq., Subordinate Judge of Meerut, dated the 26th of November 1903.