

to enact that certain orders would have the effect of, and would be liable to the various provisions relating to decrees, there would have been no difficulty in placing the word 'order' in the interpretation clause and defining it, more or less in the same way that it was defined in the Code of Civil Procedure, 1882. We must, therefore, take it that the word 'order' when it occurs in the Act, confers only those privileges on the holder of the 'order' and is subject to only those limitations, which in that Act are expressly said to attach to an 'order.' Moreover, there is no right of appeal from either a 'decree' or an 'order' unless the Statute gives it. The Tenancy Act starts with a section in which it clearly lays down that "no appeal shall lie from any decree or order passed by any court under this Act except as hereinafter provided." It then continues to deal with appeals, and it lays down *seriatim* where an appeal lies from a decree and from an order, where it lies from a decree only, and where it lies from an order only. There is no doubt that the Legislature did take the matter into consideration and put into separate classes 'decrees' and 'orders.' This being so, we dismiss the appeal with costs.

Appeal dismissed.

Before Mr. Justice Sir George Know and Mr. Justice Karamat Husain.
GANESH SINGH (DECREE-HOLDER) v. DEBI SINGH (JUDGMENT-DEBTOR).
Civil Procedure Code (1908), order XXXIV, rule 14—*Usufructuary mortgage—Possession not given to mortgagee—Suit for possession compromised, mortgagee taking simple money decree—Sale of mortgaged property.*

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A usufructuary mortgagee who had not obtained possession of the mortgaged property brought a suit for possession. The suit was compromised and by consent a simple money decree was passed in favour of the mortgagee.

Held that the decree being a decree passed on a compromise the mortgagee was not precluded from bringing the mortgaged property to sale in execution thereof.

Madho Prasad Singh v. Baij Nath (1), *Hem Ban v. Bihari Gir* (2) and *Narsingh Das v. Munna* (3) distinguished. *Rai Kashi Pershad Singh v. Babu Duleep Narain Sahu* (4) followed.

THE facts of this case were as follows:—

The respondent, Debi Singh, executed a usufructuary mortgage in favour of Ganesh Singh. Possession over the mortgaged

* Second Appeal No. 530 of 1909 from a decree of Austin Kendall, District Judge of Cawnpore, dated the 4th of May 1909, confirming a decree of Mohan Lal Hakku, Subordinate Judge, Cawnpore, dated the 18th of January 1909.

(1) Weekly Notes, 1905, p. 152.

(3) (1909) 6 A. L. J., 791.

(2) (1905) I. L. R., 28 All., 58.

(4) (1904) 8 C. W. N., 264.

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property was, however, not given to the mortgagee, and consequently he brought a suit for possession. The parties came to terms and filed a compromise in accordance with which a money decree was passed in favour of Ganesh Singh. Subsequently, on default of payment in terms of the compromise decree, Ganesh Singh applied for the execution of the decree by the attachment and sale of the same property which had formed the subject-matter of the mortgage.

The judgement-debtor objected that under the provisions of section 99 of the Transfer of Property Act [the same as order XXXIV, rule 14, of Act V of 1908] the property was not liable to sale. Both the courts below allowed the objection, holding that the property could not be sold.

The decree-holder appealed.

Babu *Purushottam Das Tandan*, (with him The Hon'ble Pandit *Madan Mohan Malaviya* and Pandit *Rama Kant Malaviya*) for the appellant, submitted that the principle of section 99 of the Transfer of Property Act or of order XXXIV, rule 14 of the new Civil Procedure Code was that where a mortgagee had a *subsisting* mortgage he should not be allowed to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage. The object of section 99 of the Transfer of Property Act was to prevent the mortgagee from depriving the mortgagor of his equity of redemption while his own remedies under the mortgage were open to him as against the mortgagor. Neither the section nor the rule had reference to a case where the mortgagee had no remedies open to him under the mortgage and where the mortgage had expired, having merged into a compromise decree. In the present case the decree-holder had obtained a compromise decree in a suit brought upon the basis of the mortgage. He could not now bring a second suit on the basis of that mortgage. He was no longer a mortgagee, and by taking out execution of his decree he was not depriving the mortgagor of any rights under any mortgage. The judgement-debtor had consented to the decree being passed against him and he was estopped from objecting to the execution of it.

Babu *Jogendra Nath Mukerji*, for the respondent, submitted that the word 'mortgagee' in section 99 of Transfer of Property

Act or in order XXXIV, rule 14, of the Code of Civil Procedure was quite comprehensive and did not necessarily refer to the case of an existing mortgage. He relied on *Madho Prasad Singh v. Baij Nath* (1), *Hem Ban v. Behari Gir* (2) and *Narsingh Das v. Musammat Munna* (3).

Babu *Purushottam Das Tandan* in reply submitted that in none of the above cases was there a compromise decree in question and that for that reason they were distinguishable from the present case. The case of *Rai Kashi Pershad v. Duleep Narain* (4) was more in point.

KNOX and KARAMAT HUSAIN, JJ.:—This second appeal arises out of execution proceedings, taken by one Ganesh Singh on the basis of a compromise decree obtained by him on the 29th of August, 1907.

On the 8th March, 1907, Debi Singh had executed a deed of usufructuary mortgage in favour of Ganesh Singh. Possession over the property mortgaged was, however, not given and in consequence Ganesh Singh brought a suit for possession. The parties came to terms with each other, with the result that in accordance with the compromise a simple money decree was passed in favour of Ganesh Singh. One of the terms of the compromise embodied in the decree was that the decree was not to be executed for 2½ months. At the end of this period, as payment had not been made, Ganesh Singh asked the court to attach and bring to sale the property which had formed the subject-matter of the mortgage, dated the 8th of March 1907.

The judgment-debtor objected that the mortgagee was not entitled to bring this property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage (Order XXXIV, rule 14, of Act No. V of 1908).

The court of first instance sustained the objection, and in appeal the order of the first court was upheld.

The decree-holder comes here in second appeal and urges that the court below has erred in holding that the appellant cannot bring the property in dispute to sale without instituting a suit on the mortgage for sale.

(1) Weekly Notes, 1905, p. 152.

(2) (1905) I. L. R., 28 All., 58.

(3) (1909) 6 A. L. J., 791.

(4) (1904) 8 C. W. N., 264.

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In support of his contention the learned vakil laid stress upon the fact that the decree under which proceedings had been taken was a compromise decree, and therefore order XXXIV, rule 14, did not apply.

The learned vakil for the respondents supported the orders of the courts below upon the authority of *Madho Prasad Singh v. Baij Nath* (1) *Hem Ban v. Bihari Gir* (2) and *Narsingh Das v. Musammatt Munna* (3). All these cases, however, are distinguishable from the present case. In none of them had the judgment-debtors in any way consented to the decree passed against them. The facts of the present case bring it within the principle laid down by the Calcutta Court in *Rai Kashi Pershad Singh v. Babu Dulcep Narain Sahu* (4). Both in the case here and in the case there the decree was passed on a compromise, and we agree with the Calcutta Court in holding that the respondents are consequently estopped from objecting to it. The case here is even stronger than the Calcutta case, and, as the Calcutta Court observe, whether it be a good decree or a bad decree the court executing the decree cannot call it in question but must execute it.

For these reasons we decree the appeal, set aside the orders of both the courts below, and return the case to the first court through the lower appellate court, with directions to readmit the proceedings upon its pending file and to dispose of them on their merits. The appellant will get his costs in all courts.

Appeal decreed.

REVISIONAL CIVIL.

Before Mr. Justice Sir George Know and Mr. Justice Karamat Husain.

MATHURA PRASAD PANDE (APPLICANT) v. GAURI SHANKAR DAS

(JUDGEMENT-DEBTOR) AND KALI CHARAN CHANDAR (DECREE-HOLDER).*

Civil Procedure Code (1882), section 308—Civil Procedure Code (1908), order XXI, rule 80—Execution of decree—Sale in execution—Forfeiture of auction purchaser's deposit.

An auction purchaser deposited in court Rs. 1,000 out of a total sum of Rs. 2,200. Owing to the judgement-debtor making an application to have the sale set aside, the auction purchaser did not deposit the remainder of the purchase

* Civil Revision No. 54 of 1909.

(1) Weekly Notes, 1905, p. 152.

(2) (1905) I. L. R., 28 All., 58.

(3) (1909) 6 A. L. J., 731.

(4) (1904) 8 C. W. N., 264.