

1912

Ram Lal v. Thakur Bachcha Singh, S. A. No. 1148 of 1911,
decided on the 13th June, 1912, (1).

ISHRI
PRASAD
v
GOPI NATH.

We allow the appeal, set aside the decree of this Court and restore that of the court of first instance, with costs in all courts.

Appeal allowed.

1912
July 27.

Before, Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Banerji.
MAHARAJA OF BENARES (DECREE-HOLDER) v. LALJI SINGH AND OTHERS
(JUDGMENT-DEBTORS).*

Civil Procedure Code (1882), section 230—Execution of decree—Decree upon compromise against lessees, and on their failure to pay against the property of the the surety—Execution against the lessees after lapse of twelve years.

A decree for rent was passed upon a compromise against certain lessees and their surety. The decree provided that the amount of it should be realized in the first instance from the lessees by annual instalments, and in the event of failure, it would be recoverable by the sale of certain immovable property which the surety had hypothecated. The decree was put into execution against the lessees as a simple money decree more than 12 years after the date of its passing. *Held*, that section 230 of the Code of Civil Procedure of 1882 applied, and the decree could not be executed after the expiration of 12 years from the date thereof. *Pahalwan Singh v. Narain Das* (2) distinguished.

The facts of this case were as follows:—

The Maharaja of Benares granted a lease of certain property in Arrah to Lalji Singh, Mahabir Singh, and Ram Barat Lal. Lachman Singh became a surety and hypothecated some immovable property. As the lessees did not pay the rent, the Maharaja brought a suit against the four persons, and a decree was passed for Rs. 1,304-13-9 on the 26th of February, 1897. It was directed that the lessees should pay the money in certain instalments; that the property hypothecated should remain so; and that if the lessees should fail to pay any of the instalments, the lessor would be entitled to recover the whole amount of the decree from the defendants (“*muddaileham*”) out of the property mortgaged. The decree-holder made several infructuous attempts to realize the money from the lessees, and finally, the decree having been transferred from Arrah to Benares, he applied to have his money recovered by sale of some immovable property belonging to one or the other of his lessees. This application was made on 5th January, 1910. One of the lessees, Lalji Singh,

* Appeal No. 21 of 1912 under section 10 of the Letters Patent.

(1) (1912) Since reported, 10 A. L. J., 114. (2) (1900) I. L. R., 22 ALL., 401.

contended that the application was statute-barred. The first court repelled the contention and allowed execution. Upon appeal the Judge held that it was a decree for the payment of money within the meaning of section 230 of the Civil Procedure Code and rejected the application as time-barred.

The decree-holder appealed to the High Court, and the case came before KARAMAT HUSAIN and CHAMIER, J.J., who delivered the following judgements:—

KARAMAT HUSAIN, J.—The appellant obtained a decree from the court of the Subordinate Judge of Arrah, against four persons. The operative part of the decree may be rendered as follows:—
“It is decreed and ordered that the plaintiff’s claim against defendant No. 3 be decreed *ex parte*, and against defendant No. 2 on his admission of the claim, and against defendants Nos. 1 and 4 according to a compromise.” The decree goes on further to direct, that, if the decretal money be not recovered from the defendants Nos. 1, 2 and 3, then it should be recovered from the property mortgaged by the 4th defendant as a surety. The decree was transferred to Benares. It was passed on the 26th of May, 1897, and the application for execution of it was made on the 5th of January, 1910.

Lalji, one of the respondents in this Court, objected that the decree was barred under the provisions of section 230 of the Code of Civil Procedure of 1882. This contention was accepted by the learned Judge, who in his judgement said:—

“The decree with which I am concerned is, however, a money decree so far as it affects the appellant and other lessees, and a mortgage decree so far as it affects the surety of Lachman Singh.”

Coming to that conclusion, the lower appellate court dismissed the application for execution. In second appeal it is urged by the learned vakil for the decree-holder that the decree of which execution is sought is a mortgage decree within the meaning of section 230 of the Code of Civil Procedure, Act No. XIV of 1882. I am unable to accept this contention. The decree, so far as the respondent, Lalji Singh, is concerned, cannot be regarded as a mortgage decree in any sense of the word. So far as the appellant is concerned, it is a decree for payment of money. I therefore, would dismiss the appeal with costs.

CHAMIER, J.—The suit in which the decree now in question was obtained was brought against three lessees, who were defendants

1912

MAHARAJA
OF BENARES
v.
LALJI SINGH.

1912

MAHARAJA
OF BENARES
v.
LALJI SINGH.

1, 2 and 3, and their surety, who was defendant No. 4. The decree directed the defendants 1, 2 and 3 to pay the amount decreed in certain instalments, and then went on to provide that if the money decreed could not be recovered from defendants 1, 2, and 3, the decree-holder might proceed to bring to sale the property which had been mortgaged to the plaintiff by the surety. The decree-holder made several ineffectual attempts to recover his money in the district in which the decree was passed. Subsequently, the decree was transferred for execution to Benares. By the present application the decree-holder seeks to bring to sale some immovable property belonging to defendants 1, 2 and 3, or one or more of them. His application has been dismissed on the ground that the decree, so far as defendants 1, 2 and 3 were concerned, was a decree for the payment of money within the meaning of section 230 of the Code of Civil Procedure, 1882. The lower appellate court has accepted the contention and dismissed the application with costs.

This is a second appeal by the decree-holder. It is conceded, in accordance with a recent decision of this Court, that section 48 of the Code of Civil Procedure, 1908, does not apply to the case; and that the question for decision is, whether the decree held by the appellant is a decree for the payment of money within the meaning of section 230 of the Code of 1882. The decree, in my opinion, cannot by any possibility be described as a decree for money against defendant 4. If it is possible to split up the decree into two decrees, then no doubt it may be said that the decree is a decree for payment of money against defendants 1, 2 and 3, and is a decree for the sale of immovable property against defendant No. 4, to which the third paragraph of section 230 of the Code of 1882 does not apply. But it seems to me that if a decree can be split up in this way where different reliefs are given against different sets of defendants, then a decree may be split up also where several distinct reliefs are given against the same set of defendants. I find no justification for this course in section 230. The terms of the decree before us undoubtedly go beyond the terms of an ordinary decree for the payment of money as that expression has been interpreted by this Court. It provides for the sale of immovable property under certain contingencies. In my opinion the principle on which the case of *Pahalwan Singh v.*

Narain Das (1) was decided applies to the present case, and I would hold that the decree before us is not a decree for the payment of money within the meaning of section 230, and I would allow this appeal, set aside the decree of the court below, and remand the case for disposal on the merits according to law.

1912

 MAHARAJA
OF BENARES
v.
LALJI SINGH.

The decree of the Court accordingly followed the judgement of KARAMAT HUSAIN, J., against which the decree-holder preferred this appeal under section 10 of the Letters Patent.

Babu *Beni Madho Ghosh* and Babu *Surat Chandra Chaudhri*, for the appellants.

Munshi *Gulzari Lal*, for the respondents.

RICHARDS, C. J., and BANERJI, J.—The facts connected with this appeal are as follows:—A suit was brought against certain lessees and their surety. The suit resulted in a compromise decree which provided that, in the first instance, the lessees should pay the amount of the decree by instalments and that the decree should be capable of execution against them. If the decree-holder failed to realize the amount of his debt in this way from the lessees, then, he was to be entitled to bring the property which the surety had mortgaged to sale. The decree was granted in May, 1897. The present application for execution was made on the 5th of June, 1910, that is to say, more than twelve years after the granting of the decree. The application was made against the lessees only. It was an application to execute the decree not as a mortgage-decree but as a simple money decree. Section 230 of Act XIV of 1882 provides that where an application to execute a decree for the payment of money or the delivery of other property has been made under this section and granted, no subsequent application to execute the same shall be granted after the expiration of twelve years from, *inter alia*, the date of the decree or the date upon which payment of money was ordered by the decree. It has been conceded here that if the decree can be treated as a simple money decree, then it was barred by limitation by virtue of the provisions of section 230, more than twelve years having elapsed from the date of default in payment of the instalments. It is argued, however, that because the decree directs that if the decree-holder has failed to realize the amount of his decree against the first three judgement-debtors, he can bring the property of the fourth

1912

MAHARAJA
OF BENARES
v.
LALJI SINGH.

judgement-debtor to sale, therefore this decree is not a decree for payment of money but must be regarded as a mortgage decree. It has no doubt been held by this Court that section 230 does not apply to a mortgage decree, but in our opinion, the compromise decree in the present case was a simple money decree as against the first three defendants, and only became a mortgage decree against the fourth defendant after default was made. It was a conditional decree for the sale of his property. We have already pointed out that it was being executed as a simple money decree, and that it could never have been executed against the first three defendants as anything else except a simple money decree. It comes within the very words of section 230, clause (iii). The case of *Pahalwan Singh v. Narain Das* (1) has been referred to. In that case the compromise decree was against a single defendant. It only differed from an ordinary mortgage decree under section 88 of the Transfer of Property Act by substituting certain instalments for the usual six months allowed for payment of the mortgage money. The application to execute such decree was an application to execute a mortgage decree by sale of the mortgaged property. Therefore, it is quite clear that that case has no application to the present case. In our opinion the decree appealed against was correct, and this appeal should be dismissed. We accordingly dismiss the appeal with costs.

Appeal dismissed.

1912
June 24.

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

NANDAN SINGH (PLAINTIFF) v. JUMMAN AND OTHERS (DEFENDANTS).*

Mortgage—Estoppel—Power of representatives of mortgagor to question validity of mortgage—Adverse possession—Possession adverse to mortgagor not necessarily adverse to mortgagee.

Held that, although the representatives of a mortgagor cannot as such question the validity of the mortgage, it may be open to them as *mutawallis* to plead that the property was waqf and that the mortgage of it was void. *Gulzar Ali v. Fida Ali* (2) distinguished.

Held, also, that a simple mortgage being not merely a security for a debt but a transfer of an interest in the property mortgaged, a trespasser who ousts the mortgagor and holds the property adversely to him may by prescription become

* Second Appeal No. 985 of 1911 from a decree of G. A. Paterson, District Judge of Benares, dated the 8th of August, 1911, confirming a decree of Srish Chandra Basu, Subordinate Judge of Benares, dated the 21st of June, 1911.

(1) (1900) I. L. R., 22 All., 401. (2) (1883) I. L. R., 6 All., 24.