

Before Mr. Justice Tudball and Mr. Justice Sulaiman.

DARBARI MAL (PLAINTIFF) v. MULA SINGH AND OTHERS (DEFENDANTS)*.

1920
April, 16.

Civil Procedure Code (1908), order XXXIV, rule 6—Mortgage—Decree over—Sale of mortgaged property but not in execution of the applicant's decree.

A second mortgagee sued on his mortgage and obtained a final decree for sale of the mortgaged property. He did not put his decree into execution and made no attempt to get the property sold. Subsequently, the first mortgagee obtained a decree for sale of the property, and the property was sold in satisfaction of that decree. The second mortgagee then applied for a decree over under order XXXIV, rule 6, of the Code of Civil Procedure.

Held that he was not entitled to a decree over, as the mortgaged property had not been put to sale in execution of his decree.

Kamta Prasad v. Saiyed Ahmad (1), Muhammad Akbar v. Munshi Ram (2) and Badri Das v. Inayat Khan (3) followed. Kedar Nath v. Chandu Mal (4), Pirdhu Narain Singh v. Amir Singh (5) and Jeena Bahad v. Parmeshwar Narayan Mahtha (6) distinguished.

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi Panna Lal, for the appellant.

Munshi Giridhari Lal Agarwala and Pandit Radha Kant Malaviya, for the respondent.

TUDBALL and SULAIMAN, JJ.:—The facts of this case are very simple. The appellant is a puisne mortgagee. He sued and obtained a decree for sale on the basis of his mortgage deed, which was dated the 14th of April, 1906, on the 22nd of April, 1912. His suit was brought within six years of the mortgage. He obtained a final decree for sale on the 20th of January, 1915. He has now made the present application for a decree over under order XXXIV, rule 6. In the meantime he has not put his decree into execution in any way whatsoever nor has he attempted to bring the property to sale. The reason for this is that there was a prior mortgage upon the estate. The prior mortgagee sued and obtained a decree on the 21st of January, 1918. The whole of the property was sold in satisfaction of the prior mortgage. The present appellant made no attempt to pay off the prior mortgage at any time. He has come into

*Second Appeal No. 377 of 1919, from a decree of V. E. G. Hussey, District Judge of Moradabad, dated the 7th of December, 1918, confirming a decree of Ratan Lal, Munsif of Nagina, dated the 22nd of June, 1918.

(1) (1903) I. L. R., 31 All., 373.

(2) Weekly Notes, 1803, p. 203.

(3) (1900) I. L. R., 22 All., 404.

(4) (1903) I. L. R., 26 All., 25.

(5) (1907) I. L. R., 29 All., 369.

(6) (1918) I. L. R., 47 Calc., 370.

Court, as we have said above, asking for a decree under order XXXIV, rule 6. Order XXXIV, rule 6, runs as follows:—

1920
 DARBARI
 MAL
 v.
 MULA SINGH.

“ Where the net proceeds of any “*such*” sale are found to be insufficient to pay the amount due to the plaintiff, if the balance is legally recoverable from the defendant otherwise than out of the property sold, the court may pass a decree for such amount.”

The rule runs immediately after rule 5, clause 2, which says:—

“ Where *such* payment is not so made, the court shall on application made in that behalf by the plaintiff pass a decree that the mortgaged property or a sufficient part thereof be sold and that the proceeds of the sale be dealt with as is mentioned in rule 4.”

Rule 6, therefore, clearly contemplates that the property should have been put to sale in execution of the decree before an application under rule 6 could be made. Both the courts below have held that in the circumstances the plaintiff is not entitled to a decree as asked and they have based their decision on a ruling of this Court to be found in *Kamta Prasad v. Saiyed Ahmad* (1). That was a decision of a Division Bench of this Court sitting in Letters Patent Appeal, and the Court upheld the decision of a Single Judge of this Court in that case. It will be seen on a perusal of the judgment that Mr. Justice BANERJI who delivered it referred to the case of *Muhammad Akbar v. Munshi Ram* (2) and also to the case of *Budri Das v. Inayat Khan* (3). All those rulings clearly apply to the facts of the present case which it is impossible to distinguish from the facts of the cases concerned in those judgments. Our attention has been called to certain other decisions of this Court to be found in *Kedar Nath v. Chandu Mal* (4) and in *Pirbhu Narain Singh v. Amir Singh* (5), and it is suggested that these later rulings have deviated from the rulings in the former decision, but on a careful examination it will be seen that these cases were clearly distinguished from the older cases. In each of these the property for which the decree for sale had been passed had actually been sold and it was after such sale had taken place that an application was made for a decree over, under

(1) (1909) I. L. R., 31 All., 373. (3) (1900) I. L. R., 22 All., 404.

(2) Weekly Notes, 1899, p. 208. (4) (1903) I. L. R., 26 All., 25.

(5) (1907) I. L. R., 29 All., 369.

section 90 of the Transfer of Property Act, with which order XXXIV, rule 6, coincides. Our attention was also called to the decision of their Lordships of the Privy Council in *Jeona Bahu v. Parmeshwar Narayan Muktha* (1). That case also does not help the present appellant. Its facts were very different. There a compound decree was given for the sale of the mortgaged property and for the recovery of the balance due thereafter by the sale of other property belonging to the mortgagor. There as a matter of fact the mortgaged property was sold, and it was in execution of the decree as it then stood that an attachment of other property was made and that property was subsequently sold. In a subsequent suit it was contended that the second attachment and sale were null and void because no decree for the balance due could be passed until the mortgaged property had been sold. Their Lordships of the Privy Council pointed out that in such cases where a compound decree had actually been passed and had become final, the attachment and sale in execution of that decree could not be held to be invalid. At the utmost it cannot be more than a decision that a compound decree is binding if final. In the present case we have a decree for sale that has been obtained, but has never been executed: no sale has taken place, and yet the mortgagee has come into Court under the order mentioned to obtain a decree over. It is urged that it is very hard lines upon him that he cannot obtain it, because the property has been sold in execution of the prior mortgagee's decree. We do not think it is at all hard lines for a foolish man. He took the second mortgage with his eyes open. He could have redeemed the other mortgage; he could have obtained a decree on the basis of both mortgages and have put the property to sale, and if the sale proceeds were insufficient, he could have applied for a decree under order XXXIV, rule 6. He might, if he had liked, have dropped his mortgage completely, and brought a suit to recover his debt as against the person of the mortgagor in the beginning. He has done none of these things, and he has merely his own foolishness to thank for being in the position in which he now finds himself. We think that it would be quite wrong to differ from the former rulings of this

1920

DARBARI
MAL
v.
MULA SINGH.

(1) (1918) I. L. R., 47 Calo., 370.

1920

DARBARI
MAL
v.
MUEA SINGH.

Court which have been consistently followed for many years. Our attention has been called to a ruling of the Oudh Court which is to the opposite effect. We do not think that the reasons therein are sufficiently strong to entice us to strike out a new line and confuse the law as it is well understood in this Court. In our opinion the decision of the court below is correct. We, therefore, dismiss the appeal with costs.

Appeal dismissed.

APPELLATE CRIMINAL.

Before Mr. Justice Walsh.

EMPEROR v. MOHAN SINGH*

1920

April, 17.

Criminal Procedure Code, section 222 (2)—Act No. XLV of 1860 (Indian Penal Code), section 408—Criminal breach of trust—Charge of general deficit in accounts, where agent had not only to receive but also to expend moneys of his principal.

Section 222, sub-section (2), of the Code of Criminal Procedure was meant to provide for the case of an agent or subordinate whose duty it might be merely to receive sums of money from time to time and to account for them. It is not suitable to the case of an agent whose employment involves the expenditure of money belonging to the principal as well as its receipt. *Emperor v. Ibrahim Khan* (1) referred to.

Although transactions which involve civil liabilities may amount to criminal offences, and often do, so that the dividing line between the two in a discussion of the case is almost indistinguishable, the use of the criminal law, not for the purpose of punishing an offender or in the public interest, but as a means of exerting pressure to extract money from an agent, is to be discouraged.

The appellant Mohan Singh was employed at Nagina by a Company which dealt in babhar grass. The grass was collected in the Tarai in the Saharanpur and Bijnor districts and despatched to various paper mills in Bengal and elsewhere. It was also stacked at Nagina railway station and sold there or despatched. The Company had what was called a head office at Saharanpur and an agency at Nagina. Mohan Singh was employed by the Company as a girdawar and posted at Nagina on the 15th of December, 1918, on Rs. 25 a month, and he worked there until the 8th of May, 1919, or thereabouts. He was given various

*Criminal Appeal No. 68 of 1920, from an order of Murari Lal, Additional Sessions Judge of Moradabad, dated the 24th of November, 1919.