APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Justice Rampini.

1892 *March* 11.

KANCHAN MODI AND OTHERS (PLAINTIFFS) *v.* BALJ NATH SINGH AND OTHERS (DEFENDANTS).*

Certificate to collect debts—Act VII of 1889, *s.* 4—*Mortgage decree—Suit by assignee of mortgagee for sale.*

The assignee of a property mortgaged is not a debtor within the meaning of section 4, Act VII of 1889; and a mortgagee praying for the sale of the property, and asking for no relief personally against the mortgagor, is not bound to take out a certificate under that Act before he can obtain a decree.

Roghu Nath Shaha v. *Poresh Nath Pundari* (1) applied in principle.

Janaki Ballav Sen v. *Hafiz Mahomed Ali Khan* (2) distinguished.

THIS was a suit brought on the 29th April 1889 by the members of a joint Mitakshara family to recover Rs. 1,000 secured on a mortgage bond executed in favour of one Labo Modi, the plaintiffs being the sons of Labo and his cousin. It was alleged that the cousin of Labo and Labo himself were members of a joint Hindu family governed by the Mitakshara law, and that subsequent to the death of Labo the family continued to be joint. The mortgagors were made parties to the suit, but did not appear or contest it, the only relief asked for being the sale of the mortgaged premises. The remaining defendants, who were the assignees of the mortgaged premises amongst other matters, contended, relying on section 4 of Act VII of 1889, that in the absence of a certificate no decree could be obtained by the plaintiffs.

The Subordinate Judge held that the plaintiffs and Labo were members of a joint family, and as such members they were before Labo's death possessed of an interest in the bond executed in favour of Labo, and that therefore a certificate was unnecessary.

*Appeal from Order No. 191 of 1891, against the order of B. G. Geidt, Esq., Additional District Judge of Bhágalpur, dated the 23rd of April 1891, reversing the order of Babu Lal Gopal Sen, Subordinate Judge of Bhágalpur, dated the 23rd of May 1890.

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He further held that it was doubtful whether Act VII of 1889 applied to suits and proceedings pending at the time the Act came into force; he therefore gave the plaintiffs a decree.

On appeal by the assignees of the mortgaged premises the Additional District Judge considered that the Legislature had not intended to exempt the members of a joint family from taking out certificates, and that as in his opinion the plaintiffs claimed as being entitled to the effects of Labo, and had not taken out a certificate, he allowed the appeal, and remanded the case to give the plaintiffs an opportunity of taking out a certificate, and directed that the case should be disposed of by the Sub-Judge after that opportunity had been given.

The plaintiffs appealed to the High Court.

Babu *Mohini Mohun Roy* and Babu *Monmotha Nath Mitter* for the appellants.

Mr. *Sandel* and Babu *Surendra Nath Roy* for the respondents.

The judgment of the Court (GHOSE and RAMPINI, JJ.) was as follows:—

This is an appeal against an order of remand passed by the Additional District Judge of Bhágalpur.

The suit was to enforce a mortgage security executed in favour of Labo Modi on the 10th June 1881; and it was brought by the cousin of Labo Modi and his sons, it being alleged in the plaint that he and the plaintiff No. 1, that is to say, the cousin, were members of a joint undivided Hindu family governed by the Mitakshara law, and that since the death of Labo Modi the plaintiffs have continued to be members of the joint family.

We observe, that although the mortgagors were parties to his suit, no personal decree was asked for against them. The relief that was asked for was that the property hypothecated in the mortgage bond might be sold for the satisfaction of the plaintiff's claim.

A decree was passed in the plaintiffs' favour by the Court of first instance; the Subordinate Judge, before whom an objection was raised by some of the defendants that by reason of section 4 of Act VII of 1889, the Succession and Certificate Act, no decree could be passed against the defendants unless a certificate as provided by that section was produced, observed as follows: "This suit is based on a mortgage bond, dated the 27th April 1875,

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and having been instituted after more than six years had elapsed after the money became payable, plaintiffs cannot have any decree against the persons or other property of the executants, and plaintiffs have also sought to recover their money by sale of the mortgaged property (immoveable)." In this view of the matter he negatived the objection of the defendants; and the decree that was pronounced by him was as follows:—"The suit be decreed with costs and interest at 6 per cent. per annum from this day till realized by sale of the property pledged in the bond in suit. The property mortgaged will be liable to be sold unless the decree be otherwise satisfied within three months from this day."

Against this decree the mortgagors did not prefer any appeal; and the only appeal preferred was by the assignees of the mortgaged premises, who were also defendants in the suit. Upon their appeal the learned Additional District Judge was of opinion that a certificate under section 4 of the Succession Act was necessary before a decree could be pronounced in favour of the plaintiffs; and being of that opinion he reversed the judgment and decree of the Court of first instance, and remanded the case to that Court in order to give the plaintiffs an opportunity to take out the requisite certificate.

It appears to us, in the first place, that this remand ought not to have been made, because the case had not been decided by the Court of first instance upon any preliminary point. Section 562 of the Code of Civil Procedure provides:—"If the Court against whose decree the appeal is made has disposed of the suit upon a preliminary point, and the decree upon such preliminary point is reversed in appeal, the Appellate Court may, if it thinks fit, by order remand the case, together with a copy of the order in appeal, to the Court against whose decree the appeal is made, with directions to re-admit the suit under its original number in the register, and proceed to determine the suit on the merits." Now, there can be no doubt that this order of remand was made by the District Judge under section 562, because he directs that the case be restored to the file of the Subordinate Judge in order to give the plaintiffs an opportunity to take out the requisite certificate, and that it be disposed of after such opportunity has been given to the plaintiffs. It seems to be clear that section 562 has no application; and if section 562 does not apply, there is, so far as we can

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see, no other section under which the order of remand could have been made. We think that the Judge, if he thought that the production of a certificate under section 4 of the Certificate Act was essentially necessary, should have retained the case on his own file, and required the plaintiffs to produce a certificate within a given time.

However that may be, we are of opinion that the Judge is in error in holding that section 4 of the Succession and Certificate Act has any application to the facts of the present case. As already mentioned, no personal decree was asked for by the plaintiffs against the debtors; and the only parties before the Appellate Court being the plaintiffs on the one hand, and the assignees of the mortgaged premises on the other hand, no question whatever could arise before the District Judge in terms of section 4 of the Succession and Certificate Act as to any decree being passed against the debtors of the deceased person for payment of the debt to the persons claiming to be entitled to the effects of the deceased person. The assignees of the mortgaged premises could not in any sense of the word be regarded as debtors. The plaintiffs have an equitable claim against them by reason of their being in possession of the property mortgaged; and upon that equitable right the plaintiffs brought their suit against them to sell the mortgaged property and to realize the money due to them.

This point was considered in the case of *Roghu Nath Shaha* v. *Poresh Nath Pundari* (1), decided by a Division Bench of this Court (Wilson and O'Kinealy, JJ.), and the learned Judges distinctly held that in a case like this no certificate was required under the provisions of Act XXVII of 1860, section 2. The wording of that section is very similar to that of section 4 of the Succession and Certificate Act, so far as the particular matter before us is concerned.

A case, however, has been quoted before us by one of the learned pleaders for the respondents, *Janaki Ballav Sen* v. *Hafiz Mahomed Ali Khan* (2). But the distinction between that case and a case like the one before us has been pointed out by the learned Judges who decided the case of *Roghu Nath Shaha* v. *Poresh Nath Pundari*, (1) and that distinction lies in this: that in the case of *Janaki Ballav*

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Sen v. *Hafiz Mahomed Ali Khan* (1) a personal decree was asked for, but here no personal decree was asked for and no personal decree was given by the Court of first instance. Section 4 says:—"No Court shall pass a decree against a debtor for payment of his debt," and so on. A mortgagee might ask for a decree against the person of the debtor; but the Court is not bound to make a personal decree: it might, if the facts permit, make a decree only against the property mortgaged by the defendant; and in the circumstances of the present case it was quite open to the Court of first instance—in fact, it was its duty—to refrain from making a personal decree and to pass a decree charging the property in the hands of the defendants, 2nd party, for satisfaction of the claim of the plaintiffs. The relief that the plaintiffs asked for in this suit was not for recovery of the debt, but, as observed by Sir Barnes Peacock in the Full Bench decision in *Surwan Hossein* v. *Shahazdah Golam Mahomed*, (2) it was a suit for the recovery of an interest in immoveable property. The question that the learned Judges had to decide in that case was no doubt a different question; it was one of limitation, but we take it, as it has always been understood in this Court, that a suit to enforce a charge against immoveable property is a suit for the recovery of an interest in immoveable property; and if that be the correct view to take, it seems to be obvious that the plaintiffs were entitled, notwithstanding the absence of a certificate under the Succession and Certificate Act, to sustain the decree that had been pronounced in their favour by the Court of first instance, that being a decree charging the immoveable property in the hands of the 2nd party defendants.

In the view we have just expressed it is unnecessary to decide the other questions which have been raised in this appeal; one of them being whether Labo Modi and the plaintiffs having been members of a joint Mitakshara family, any certificate as provided by section 4 of the Certificate Act was necessary.

The result is that the decree of the lower Appellate Court must be set aside, and the case remanded to that Court for trial of the other issues in the case.

Costs will abide the result.

Case remanded.

T. A. P.

(1) I. L. R., 15 Calc., 54. (2) 9 W. R., 170.