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dead and her interest has reverted now to the plaintiff by survivorship. It is not necessary to enter into the other questions raised in this appeal.

The learned counsel for the defendants appellants asks for three months' time for removing the materials of the house constructed by the defendants appellants.

The appeal is dismissed except in so far that we extend the time for the removal of the materials to three months from the date of the decree of this Court. The defendants appellants will bear their own costs and pay those of the plaintiff respondent.

Appeal dismissed.

Before Mr. Justice Gokul Prasad and Mr. Justice Stuart.

SITAL SINGH AND OTHERS (DEFENDANTS) v. BALNATH PRASAD (PLAINTIFF) AND MAHANT PURNANAND SADHU UDASI AND OTHERS (DEFENDANTS).*

Civil Procedure Code (1908), order XXXIV, rules 4 and 5—Mortgage—Preliminary decree made on a compromise—Application for decree absolute—Plea of satisfaction of preliminary decree out of court.

Proceedings to get a decree absolute for sale are not proceedings by way of execution of the preliminary decree. Such proceedings are not to obtain any order absolute for sale as used to be the case under section 89 of the Transfer of Property Act, but they are proceedings in the suit to obtain a final decree for sale, which would be the only decree capable of execution. *Ramji Lal v. Karan Singh* (1) referred to.

Where the preliminary decree is based on a compromise and is in terms thereof, and is not prepared in strict accordance with order XXXIV, rule 4, it is open to the judgment-debtors, on application made for a final decree, to prove that the preliminary decree has been satisfied out of court. *Mangar Sahu v. Bhatoo Singh* (2) referred to.

THE facts of this case are fully set forth in the judgment of the Court.

Dr. S. M. Sulaiman, Mr. Abu Ali, Babu Piari Lal Banerji and Munshi Sheo Dehal Sinha, for the appellants.

Dr. Kailas Nath Katju, for the respondents.

GOKUL PRASAD and STUART, JJ. :—This is an execution second appeal arising under the following circumstances :—

A compromise decree was passed on the 14th of August, 1917 in favour of Purnanand and Bhagwan Ram against Sital Singh and others, judgment-debtors, under which Rs. 2,950 were to be realized by sale of certain hypothecated property, but in case the judgment-debtors paid Rs. 2,500 to the decree-holders within three months of the date of the

* Second Appeal No. 99 of 1921, from a decree of B. J. Dalal, District Judge of Allahabad, dated the 27th of July, 1920 reversing a decree of Man Mohan Sanyal, Subordinate Judge of Mirzapur, dated the 2nd of February, 1920.

(1) (1917) I. L. R., 39 All., 532.

(2) (1920) 57 Indian Cases, 473.

decree, the judgment-debtors and their property would be released from all liability under the decree or, in other words, the decree for sale would cease to exist.

On the 30th of November, 1918 the present application was put in by Baijnath, a transferee of the decree from the original decree-holders, for a decree absolute for Rs. 850, the balance alleged to be due under the decree on the allegation that the judgment-debtors had already paid Rs. 2,100. The judgment-debtors preferred an objection to the preparation of the decree absolute on the ground that they had paid the whole amount of the decree in the following manner:— They had paid Rs. 25 to the original decree-holders on the 6th of November, 1917 that is, within the three months allowed by the decree and obtained an extension of time up to the 2nd of December, 1917 to pay the balance and that on the 29th of November, 1917 that is within the extended time allowed by the decree-holders, they paid Rs. 2,500 to them, and thus the whole decree was satisfied in the manner agreed upon between the parties. This objection was allowed by the learned Subordinate Judge and the respondent's application for preparation of a decree absolute was dismissed.

On appeal by the decree-holders the learned District Judge has agreed with the first court in holding that the arrangement set up by the judgment-debtors had been proved, but he disallowed the objection of the judgment-debtors on the ground that the preparation of the final decree was a step in execution of the preliminary decree and as the settlement pleaded by the judgment-debtors had not been certified to the court, it could not be recognized in the execution department. He accordingly allowed the appeal and directed the preparation of the decree absolute for sale as prayed by the decree-holders. The judgment-debtors come here in second appeal and their contention is that the learned Judge of the lower appellate court has erred in holding that the proceedings for obtaining a decree absolute for sale are proceedings in execution. This contention seems to have force, and having regard to the repeal of sections 88 and 89 of the Transfer of Property Act and the enactment of order XXXIV of the Code of Civil Procedure (Act V of 1908), the proceedings to get a decree absolute for sale are not proceedings by way of execution of the preliminary decree.

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Such proceedings are not to obtain any order absolute for sale, as used to be the case under section 89 of the Transfer of Property Act, but they are proceedings in the suit to obtain a final decree for sale, which would be the only decree capable of execution. This view of ours finds support from the case of *Ramji Lal v. Karan Singh* (1), where this matter has been fully discussed.

It is, however, urged by Dr. *Katju* on behalf of the respondents that having regard to order XXXIV, rule 5, of the Code of Civil Procedure, a payment like the one alleged by the judgment-debtors to have been made out of court would not be valid and could not be recognized. In our opinion this contention must fail because the decree originally prepared was not prepared in strict accordance with the provisions of order XXXIV, rule 4, and hence order XXXIV, rule 5, would not apply to this decree. It was a decree based on a compromise arrived at between the parties and the terms of the compromise were embodied in the decree. Strictly speaking, order XXXIV, rule 5, has no application to such a decree. This view of ours finds support from the well considered judgment of Mr. Justice *JWALA PRASAD* in the case of *Mangar Sahu v. Bhatoo Singh* (2). There is nothing against public policy in the compromise arrived at between the parties in the present case on which the decree was based and we can find no provision of law which prohibits the payment of a compromise decree out of court. There is, therefore, no bar to the judgment-debtors setting up and proving the adjustment set up here. Before a court can pass a decree absolute for sale, it has to find out the amount which is due to the decree-holder for which a decree absolute can be passed. On the findings arrived at concurrently by the two lower courts in this case, nothing is due to the decree-holders and the whole amount of the decree has been paid up according to the arrangement arrived at between the decree-holders and the judgment-debtors.

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

Appeal decreed.

(1) (1917) I. L. R., 89 All., 532.

(2) (1920) 57 Indian Cases, 473.