

prosecution of the accused started by the City Magistrate or by the civil court in case it is found that the document is really a forgery.

1925.

KANHAIYA
LAL
v.
BHAGWAN
Das.

Reference accepted.

APPELLATE CIVIL.

*Before Sir Grimwood Mears, Knight, Chief Justice, and
Mr. Justice Sulaiman.*

1925.
June, 12.

BISHNATH SINGH AND OTHERS (JUDGMENT-DEBTORS) v.
BASDEO SINGH (DECREE-HOLDER).*

Act (Local) No. II of 1903 (Bundelkhand Land Alienation Act), section 9, sub-clause (3)—Mortgage—Final decree for sale—Powers conferred by section 9 exercisable even after final decree.

Although it is advisable that original courts, when they find that a mortgage has been made which is ordinarily enforceable but which covers property situated within Bundelkhand which cannot be sold, should take action under section 9 (3) before passing the decree and not wait till the decree has been passed, the passing of a final decree for sale on a mortgage is not a bar to the exercise of powers under that section.

THIS was an appeal from the judgment of a single Judge of the Court under section 10 of the Letters Patent. The facts of the case sufficiently appear from the judgment under appeal, which was as follows:—

In a suit filed on foot of a mortgage effected by the appellants on the 13th of May, 1909, a preliminary decree for sale was passed on the 17th of January, 1918, which was made absolute on the 20th of December, 1919. The parties are members of an agricultural tribe.

When the decree was put under execution, an objection was filed by the judgment-debtors under section 16 of the

* Appeal No. 132 of 1924, under section 10 of the Letters Patent.

1925.

BISHNATH
SINGH
v.
BARDHO
SINGH.

Bundelkhand Land Alienation Act (United Provinces Act II of 1903), saying that the mortgaged property could not be sold in execution of a decree. The court upheld that objection. The decree-holder then asked the court to take proceedings under section 9 of the said Act. That prayer was acceded to by the court of first instance and the order of that court was upheld by the lower appellate court.

The contention here is that no reference can be made under section 9, clause (3), of that Act after a decree has been made absolute. But that section contains no such limitation. All that it lays down is that if a suit is instituted in any civil court on a mortgage made after the commencement of this Act by a member of an agricultural tribe, the court shall, if it finds that the mortgage is enforceable, refer the case to the Collector with a view to the exercise of the power conferred by clauses (1) and (2) of section 9. This power can be exercised at any stage, i.e., either before a decree has been passed or made absolute, or after it has been so passed or made absolute, because under section 16 the decree in such a case cannot be enforced by the sale of the mortgaged property and must be left out of account, as if it had in effect never been passed. So long as the decree or mortgage subsists, the claim to recover the money or to enforce the mortgage also subsists; and a reference can be made to the Collector, who can refuse or alter the terms of the mortgage so as to bring it into accordance with the Act and make it conform to the limitations imposed thereby. The decision in *Hanuman Prasad Narain Singh v. Harakh Narain* (1), does not apply, because no reference under section 9 was there asked for. On the other hand the decision in *Sheopargash Singh v. Radha Mohan Singh* (2), decided on the 18th of July, 1922, supports the conclusion that the claim can be referred to the Collector, though it had nominally matured into a decree which has been since found to be unenforceable.

The appeal, therefore, fails and is dismissed with costs.

On this appeal—

Munshi *Baleshwari Prasad*, for the appellants.

Mr. *S. Abu Ali*, for the respondent.

(1) (1919) I.L.R., 42 All., 142.

(2) S.A. No. 1457 of 1920, decided July 18, 1922.

MEARS, C. J., and SULAIMAN, J.:—This is a Letters Patent Appeal arising out of certain proceedings on the 13th of May, 1909. The judgment-debtors had executed a mortgage-deed of property situated in Bundelkhand in favour of the decree-holder. A preliminary decree for sale was obtained on the 17th of June, 1918, which was followed up by a final decree on the 20th of December, 1919, when an application for execution was filed and the decree-holder wanted to have the mortgaged property sold. An objection was raised by the judgment-debtors that the property being situated in Bundelkhand was not liable to be sold under section 16 of the Bundelkhand Land Alienation Act (United Provinces Act II of 1903). This objection was allowed, and the application was dismissed. After this, the decree-holder filed an application purporting to be an application under section 9, sub-clause (3) of the Act requesting the court to refer the case to the Collector with a view to the exercise of the power conferred upon him by sub-section 1 of section 9. The objection was raised on behalf of the judgment-debtor that the sub-section was not applicable after the final decree was passed. The objection was disallowed by both the courts below and also by a learned Judge of this Court.

Section 9, sub-clause (3), is not limited to a case where the point is raised before the decree is actually passed by the court. We, therefore, find it impossible to hold that the civil court ceased to have jurisdiction to act under that sub-section as soon as a nominal decree was passed which cannot in fact be executed by the sale of the property mortgaged. The position of the judgment-debtor and the decree-holder would be the same even if a decree has been passed which is incapable of execution. This view is supported by a decision of this Court in Execution Second Appeal

1925.

 BISHNATH
SINGH
v.
BASDEO
SINGH.

1925.

BISHNATH
SINGH
v.
BASDEO
SINGH.

No. 1457 of 1920 decided on the 18th of July, 1922, where it was held that there was nothing in the wording of the section to support the contention that the provisions of section 9 have effect only before a decree is passed and not afterwards. The view taken by the learned Judge of this Court is in accordance with the previous decision, with which we agree.

We would, however, like to point out that it is advisable that original courts, when they find that a mortgage had been made which is ordinarily enforceable but which covers property situated within Bundelkhand which cannot be sold, should take action under section 9 (3) before passing the decree and not wait till the decree has been passed. We accordingly dismiss this appeal with costs.

Appeal dismissed.

1925.
June, 12.

*Before Sir Grimwood Mears, Knight, Chief Justice, and
Mr. Justice Sulaiman.*

NAGESHAR RAI (DEPENDANT) v. NAND LAL AND OTHERS
(PLAINTIFFS).*

*Act No. IV of 1882 (Transfer of Property Act), section 63—
Mortgage—Suit for redemption—Accession—Grove
planted without consent of mortgagor.*

During the continuance of a mortgage and without the consent of the mortgagor the mortgagee planted a mango grove on part of the mortgaged property amounting to 1 bigha, 8 biswas, in area. The mortgagor sued for redemption, and it was found that there were on this area at the time of suit some 110 large trees over 30 years old.

Held that this grove was an accession not capable of separate possession or enjoyment, and as it was not made for the preservation of the principal property from destruction, forfeiture or sale, nor with the consent of the mortgagor, the

* Appeal No. 140 of 1924, under section 10 of the Letters Patent.