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contains merely a penal provision which declares a certain omission to be an offence punishable with fine, that the manner in which and the court by which the penalty is to be enforced are outside the purview of Act XLII of 1923, and that the mutwalli should be punished by a regular criminal court in accordance with the provisions of the Criminal Procedure Code. There are many enactments, besides the Indian Penal Code, which declare certain acts and omissions to be offences, though the trial for those offences is regulated not by those Acts but by the general criminal law. On the other hand, the whole scheme of Act XLII of 1923 suggests that the District Judge is the proper authority to impose the penalty provided for by section 10 in respect of certain duties enjoined by that Act. Section 11 requires the Local Government to make rules "to carry into effect the purposes of this Act". This seems to include rules prescribing the forum and the procedure for enforcement of the penalty laid down in section 10. No rules have, however, been framed by the Local Government in this behalf. In this state of things I am inclined to the view, though not without hesitation, that the District Judge is the proper authority to enforce the provision contained in section 10 of Act XLII of 1923. For these reasons I concur with my learned brother in dismissing this revision.

Before Mr. Justice Pullan and Mr. Justice Niamat-ullah.

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RAM SAHAI (PLAINTIFF) *v.* DEBI DIN (DEFENDANT).*

Bundelkhand Alienation of Land Act (Local Act II of 1903), sections 6, 9 and 16—Simple mortgage by member of agricultural tribe in favour of another such member—Mortgagee's suit disposed of, before Amending Act, without any relief—Bundelkhand Alienation of Land (Amendment) Act (Local Act VII of 1929)—Whether retrospective effect—"Decree"—Final adjustment of suit without formal decree being drawn up.

A member of an agricultural tribe, within the meaning of the Bundelkhand Alienation of Land Act, made a simple

*Civil Revision No. 17 of 1931.

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mortgage in 1913 in favour of another such member. The mortgagee sued for sale in 1924, and the court held that section 16 of the Act prohibited sale, that the mortgage being simple there could be no foreclosure, but that action could be taken by the Collector under section 9 of the Act. Upon a reference by the civil court to the Collector, the latter was of opinion that section 9 was not applicable to the case as both the parties were members of an agricultural tribe, and he returned the reference to the civil court. That court then made a reference to the High Court, which upheld the opinion of the Collector. The civil court, holding that no relief could be given to the mortgagee, ordered that the case "should be consigned to the record room"; this was in 1927. After the amending Act VII of 1929 was passed, the mortgagee made an application to the court, alleging that the suit was still pending, and claiming a decree for sale by virtue of the new proviso to section 16 introduced by that Act.

Held that, without deciding whether the amending Act VII of 1929 had no retrospective effect as regards deeds executed before but sought to be enforced after that Act was passed, it was clear that it could not have retrospective effect so far as to revive proceedings in suits which had terminated before it was passed.

When the civil court makes a reference to the Collector under section 9, such reference is the final order of the civil court and no further proceedings can take place before that court; and there is no provision in the Act requiring the Collector, if he refuses to take action under section 9, to return the reference. Without deciding, however, whether on such a reference being made to the Collector the suit terminates or remains pending, in the present case the suit certainly terminated with the order of the civil court in 1927, by which the court clearly ruled that no relief could be given to the mortgagee and the case should be consigned to the record room, and the suit was in effect dismissed. It was a final adjudication, so far as that court was concerned, as to the rights of the plaintiff; and the mere fact that a formal decree was not drawn up would not prevent such final adjudication operating as a decree determining the suit.

Mr. *S. N. Seth*, for the applicant.

Mr. *A. Sanyal*, for the opposite party.

PULLAN and NIAMAT-ULLAH, JJ.:—This is an application for revision of an order dated the 25th of July, 1930, passed by the Subordinate Judge of Banda.

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The applicant, who is a member of an agricultural tribe within the meaning of the Bundelkhand Land Alienation Act, was a mortgagee under a deed of simple mortgage dated the 24th of January, 1913, executed by Mst. Raj Rani, who is now represented by Debi Din the opposite party, who was also a member of such tribe. The land hypothecated by the aforesaid deed is "land" within the meaning of that Act. The circumstances which have led to the revision are so inter-related to the provisions of the Bundelkhand Land Alienation Act, II of 1903, that it is necessary to make a reference at the outset to sections 6, 9 and 16 of the aforesaid Act. Section 6 provides that a member of an agricultural tribe can make a mortgage in one of the prescribed forms and not in others. Generally speaking, the object of the section is to minimise the chances of foreclosure, if not altogether to prevent it. Section 16 declares that no land belonging to a member of an agricultural tribe shall be sold in execution of any decree or order of any civil or revenue court. Section 9 provides, *inter alia*, that if a suit is instituted in any civil court on a mortgage not in the prescribed form made by a member of an agricultural tribe, the court should refer the matter to the Collector who can modify the mortgage so as to make it conform to the provisions of section 6. Broadly speaking, the mortgages permitted by section 6 enable the mortgagee to remain in possession for a period not exceeding 20 years, during which the usufruct is to satisfy the mortgage money and at least interest, which is, in no case, to run over and above the usufruct. After the expiry of the period the mortgagor is entitled to redeem on payment of the sum, if any, due on the mortgage.

To advert to the facts of this particular case, the mortgage of the 24th of January, 1913, was in the form of a simple mortgage, the only remedy of the mortgagee being to obtain a simple money decree or a decree for sale of the mortgaged property.

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The mortgagee instituted a suit for the enforcement of that mortgage in 1924, when a claim to simple money decree was barred by limitation. Accordingly he prayed for a decree under order XXXIV, rule 4, of the Code of Civil Procedure for satisfaction of the mortgage money by sale of the mortgaged property. The suit was contested. The Subordinate Judge was of opinion that no decree for sale could be passed in view of section 16 of the Bundelkhand Land Alienation Act, as that section contained a clear provision against sale of "land" belonging to a member of the agricultural tribe. No decree for foreclosure could be passed having regard to the terms of the mortgage deed. He however considered that section 9 of the Bundelkhand Land Alienation Act was applicable, and accordingly on the 9th of October, 1925, he made a reference to the Collector with a view to the latter substituting a mortgage in the form prescribed by section 6 in place of the mortgage then in suit. The Collector, however, ruled that section 9 was not applicable as both the mortgagor and the mortgagee were members of an agricultural tribe, the section being confined to cases in which the mortgage is made by a member of an agricultural tribe in favour of a person who is not a member of such tribe. The result of this view, which was subsequently upheld by this Court, was that a mortgagee who is a member of an agricultural tribe is in a worse position than a mortgagee who is not. The Collector refused to take action under section 9 and returned the reference. Strictly speaking, there is no provision in the Act requiring the Collector to "return" the reference. If the Collector cannot take action under section 9, the proceedings before him terminate. The Subordinate Judge, on receipt of the Collector's reply, made a reference to this Court under order XLVI, rule 1, of the Code of Civil Procedure asking for a decision of the question as to what was the proper remedy for the mortgagee

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in view of the Collector refusing to take action under section 9. The matter was considered by a Full Bench in *Ram Sahai Singh* v. *Debi Din* (1). The majority of the Judges composing the Full Bench held that section 9 of the Bundelkhand Land Alienation Act as it then was did not apply to a simple mortgage between members of the same agricultural tribe. The learned Judges pointed out that there was a hiatus in the Act which worked injustice in a class of cases of which the one before them was an instance. They felt constrained to hold that the law as it stood left the mortgagee without a remedy. After this Court's decision on the reference the Subordinate Judge passed an order, on the 10th of June, 1927, in the following words: "No steps can be taken now. The reference has been decided against the decree-holder. It is accordingly ordered that the case be consigned to the record room."

The view expressed by the learned Judges was taken notice of by the legislature and the Bundelkhand Land Alienation Act was amended by Act VII of 1929 which has added a proviso to section 16 under which "land" belonging to a member of an agricultural tribe can be sold in execution of a decree passed on foot of a simple mortgage made by him in favour of a member of the same tribe or to a member of an agricultural tribe residing in the district in which the land is situated. The amending Act came into force on the 14th of September, 1929. The applicant is protected by the newly added proviso. The application which has given rise to this revision was made by him shortly afterwards, praying for a decree for sale under order XXXIV, rule 4, of the Code of Civil Procedure being passed. The learned Subordinate Judge has held that the amending Act has no retrospective effect and that no decree for sale can be passed. The applicant questions the correctness of this view.

(1) (1926) I.L.R., 49 All., 3.

There is no doubt that this is a hard case, but the law as it stood when the suit was instituted and when it was "consigned to the record room" has so materially affected his position that the amendment since made in the law cannot help him. The order of the Subordinate Judge dated the 9th of October, 1925, referring the case to the Collector under section 9 is tantamount to an adjudication that no decree for sale could be passed (foreclosure being out of the question) and that the only relief which could be granted to the mortgagee was a reference to the Collector who, it was believed, could substitute a mortgage in the form prescribed by section 6 for the mortgage then in suit.

Ordinarily a suit for sale of the mortgaged property terminates either in dismissal or in a decree under order XXXIV, rule 4, of the Code of Civil Procedure. In cases in which the mortgagor is a member of an agricultural tribe and the Bundelkhand Land Alienation Act applies a third course is possible, namely a reference to the Collector who can take action under section 9. In such a case the final order of the civil court is a reference to the Collector and no further proceedings can take place before the court which, *ex hypothesi*, cannot pass a decree for foreclosure or sale. In this case, however, the Subordinate Judge reopened the proceedings after the Collector's refusal to take action under section 9 of the Bundelkhand Land Alienation Act and pursued the matter further by making a reference to this Court, and it was not till the 10th of June, 1927, after the decision of this Court, that he passed an order "consigning the case to the record room". It is contended by the learned advocate for the applicant that the suit not having been dismissed and no formal decree having been drawn up declaring the dismissal of the suit it should be deemed to have been pending when the amending Act VII of 1929 was passed and also when an application was

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made for a decree under order XXXIV, rule 4 being passed. The argument is that neither the order dated the 9th of October, 1925, nor that of the 10th of June, 1927, can be considered to be a decree as defined in section 2 of the Code of Civil Procedure and that therefore the suit never terminated. *Gobind Rao* v. *Kamta Prasad* (1) is relied on as an authority for the proposition that a reference under section 9 of the Bundelkhand Land Alienation Act to the Collector does not terminate the suit. In that case the Collector refused to take proceedings on a reference being made to him under section 9 on the ground that the mortgagor was not a member of an agricultural tribe. On such refusal the Subordinate Judge passed a foreclosure decree. In appeal to this Court it was held that the mortgagor not being a member of an agricultural tribe the foreclosure decree passed after the refusal of the Collector to take action under section 9 was a good decree. The only question which was raised before this Court was whether the mortgagor in that case was a member of an agricultural tribe. On a consideration of the circumstances of the case it was held that he was. The question whether the proceedings in a suit terminate on a reference being made to the Collector under section 9 of the Bundelkhand Land Alienation Act was not raised and decided. It was assumed by the parties and by all the courts including this Court that the proceedings do not terminate. The case is therefore no authority for the proposition that on a reference being made by a civil court under section 9 the suit must remain pending. It is not necessary to decide this question as in view of the subsequent order passed by the Subordinate Judge on the 10th of June, 1927, it is purely academic. If the Subordinate Judge did not intend by his order of the 9th of October, 1925, to decide the case once and for all he must be deemed to have done so by his order of the

(1) (1914) I.L.R., 36 All., 376.

10th of June, 1927. After an expression of opinion by a Full Bench of this Court, the Subordinate Judge clearly ruled that no relief could be given to the mortgagee and that the case "should be consigned to the record room". The suit was in effect dismissed. Refusal to grant any relief to a plaintiff can have no other meaning. Decree is defined in section 2 of the Code of Civil Procedure as "the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit". There can be no doubt that the adjudication in the case was that the mortgagee (the applicant) was not entitled to any relief in the view of the law taken by this Court. So far as the Subordinate Judge was concerned that was a final adjudication of the mortgagee's right to obtain relief on foot of the mortgage deed then in suit. The mere fact that a formal decree was not drawn up will not prevent the court's final order operating as such adjudication. For these reasons we hold that the order dated the 10th of June, 1927, operates as a final adjudication of the rights of the parties and is a decree determining the suit for sale.

The amending Act VII of 1929 now entitles a mortgagee who is a member of an agricultural tribe, claiming under a simple mortgage made by another member of an agricultural tribe, to have the "land" belonging to the mortgagor and mortgaged to him sold in execution of a decree passed on foot of his mortgage. It is not necessary to decide for the purposes of this case whether it has no retrospective effect as regards deeds executed before but sought to be enforced after the amending Act was passed. It is, however, perfectly clear that it cannot have retrospective effect so far as to revive proceedings in suits which had terminated before it was passed.

In this view of the case this application for revision must fail and is dismissed with costs.