

Before Mr. Justice Bennet and Mr. Justice Verma

1938
March, 30

RAGHUBAR DAYAL (JUDGMENT-DEBTOR) v. AMBA PRASAD
(DECREE-HOLDER)*

U. P. Encumbered Estates Act (Local Act XXV of 1934), sections 7(1)(a) and 9(5)—Stay of execution proceedings—Stay as against all judgment-debtors although only some have applied under the Act—Mortgage decree for sale of two properties, owned by two persons, respectively—One such person applying under the Act—Sale of the other person's property must also be stayed, until apportionment of the liability by the Special Judge.

A final decree for sale upon a mortgage was passed against the mortgagor, who then owned a part of the property mortgaged, as well as against the purchaser of the other part, namely a house. In execution of the decree the house was sold, and while the sale was pending confirmation the mortgagor judgment-debtor applied under section 4 of the U. P. Encumbered Estates Act and an order was passed under section 6 of the Act:

Held, that all proceedings in execution of the decree, whether as against the property owned by the judgment-debtor who had applied under the Act or as against the house which was owned by the other judgment-debtor, must be stayed under section 7(1)(a) of the Act; and the decree-holder would be entitled to proceed against the house only after the liability of the house had been apportioned by the Special Judge in proceedings under section 9(5) of the Act.

Section 7(1)(a) does not say that the proceedings which must be stayed have to be in respect of the property of the applicant, but directs the stay of all proceedings in respect of a debt with which his property is encumbered, and it makes no difference that some other person's property may happen to be also encumbered by the same debt.

Messrs. G. S. Pathak and S. K. Mukerji, for the appellant.

Messrs. Panna Lal and C. B. Agarwala, for the respondent.

BENNET and VERMA, JJ.:—This appeal arises out of proceedings under the U. P. Encumbered Estates Act.

*First Appeal No. 72 of 1936, from a decree of Daya Nand Joshi, Civil Judge of Bulandshahr, dated the 30th of January, 1936.

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The facts briefly are these. The appellant had executed a simple mortgage in favour of the respondent. Subsequently one Lachhmi Narain obtained a money decree against the appellant and in execution of that decree attached the mortgaged property. Thereafter the respondent brought a suit for sale on foot of his mortgage and impleaded the appellant as well as Lachhmi Narain as an attaching creditor. A preliminary decree was passed on the 8th of July, 1929. Some time later a sale of certain house property, which was part of the property mortgaged, took place in execution of Lachhmi Narain's money decree and it was purchased by Mst. Shivanandi, who happens to be the appellant's daughter. The respondent subsequently applied for the preparation of a final mortgage decree and made Mst. Shivanandi also a party to his application, and a final decree was passed on the 22nd of March, 1930. By the time the final decree was passed Mst. Shivanandi had died and Mst. Gopi had been brought on the record as the heir of Mst. Shivanandi. This mortgage decree was put into execution and the house property which had been purchased by Mst. Shivanandi was sold on the 18th of September, 1935, and while the sale was awaiting confirmation, the appellant on the 7th of January, 1936, filed an application before the Collector under section 4 of the U. P. Encumbered Estates Act and the Collector passed an order under section 6 of the Act on the 11th of January, 1936. Thereupon the appellant filed an application in the court below on the 23rd of January, 1936, praying that action be taken under section 7 of that Act. The court below has dismissed that application by its order dated the 30th of January, 1936, and this appeal is directed against that order.

The contention of the appellant is that the Collector having passed an order under section 6, the court was bound to take action under section 7 of the Act, as the proceedings that were pending at the date of the said order were proceedings in respect of a debt with which

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his immovable property is encumbered, as required by section 7(1)(a) of that Act. The learned counsel refers to the definition of "debt" as given in section 2(a) and to section 9(5) and contends that as the immovable property of the appellant is encumbered with this debt the provisions of section 7(1)(a) have to be followed even though some property which has been purchased by another person is also encumbered by that debt. Reliance has been placed on the case of *Babu Ram v. Manohar Lal* (1). That appears to have been a case of a simple money decree, but we consider that the reasoning on which that decision is based will apply to the case of a mortgage decree also. The language used by the legislature in section 7 is very wide and it seems to us that in view of the language used the court below was bound to grant the appellant's application under section 7. Mr. *Panna Lal* on behalf of the respondent has argued that as the proceedings which were pending in the court below were not in respect of the property which belongs to the appellant the section was not applicable. The section, however, does not say that the proceedings have to be in respect of the property of the applicant but speaks of proceedings in respect of a debt with which his property is encumbered. We see no justification for introducing into the section words which are not there. We may point out that the result of the appellant's application under section 7 being granted will be that apportionment of the liability of the house property purchased by Mst. Shivanandi will have to be made under the provisions of section 9(5) of the Act by the Special Judge if and when a proper application under section 9(5) is made. Thereafter the decreeholder will be entitled to proceed against the property purchased by Mst. Shivanandi for the realisation of the amount declared to be realisable from that property. For the remainder of the debt the proceedings laid down

(1) I.L.R. [1938] All 22.

in the subsequent sections of the Act will have to be taken.

For the reasons given above we allow this appeal, set aside the order of the court below and send the case back to that court with the direction that it shall re-admit it to its original number and shall proceed according to law.

Before Sir John Thom, Chief Justice, and Mr. Justice
Ganga Nath

ANGAD AND OTHERS (JUDGMENT-DEBTORS) v. MADHO RAM
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Civil Procedure Code, order XXI, rule 32(5)—Not applicable to prohibitory injunctions—Remedy for breach of prohibitory injunction—Fresh suit—Civil Procedure Code, section 47(2)—Conversion of application for execution into a suit.

Order XXI, rule 32(5) of the Civil Procedure Code does not apply to prohibitory injunctions. The "act required to be done", mentioned in sub-rule (5), refers to a positive act such as is required to be done under a mandatory injunction and cannot refer to an act which is prohibited from being done.

Where a prohibitory injunction is disobeyed, e.g. a construction is made which was prohibited, the remedy of the plaintiff decree-holder for the removal of such construction is by way of a fresh suit and not by way of execution of decree.

In such a case the application for execution, which is misconceived, can be converted into a suit, under the provisions of section 47(2) of the Civil Procedure Code.

Mr. *Baleshwari Prasad*, for the appellants.

Mr. *Ram Narain Verma*, for the respondents.

THOM, C.J., and GANGA NATH, J.:—This is a judgment-debtor's appeal from a decision of a learned single Judge of this Court in an execution case. The respondents decree-holders brought a suit for the removal of certain constructions from a piece of land and also for the removal of a certain drain opening on to this land. The decree which was ultimately passed by this Court

*Appeal No. 99 of 1935, under section 10 of the Letters Patent.