

Before Mr. Justice Harries and Mr. Justice Bajpai

SHYAM LAL (JUDGMENT-DEBTOR) *v.* BAHAL RAI
(DECREE-HOLDER)*

1936
February, 3

Civil Procedure Code, order XXXVIII, rule 5—Applicable where, before the execution sale of the whole of the mortgaged property, it is apprehended that a personal decree will have to be passed—Jurisdiction—Civil Procedure Code, order XXXIV, rule 6.

Where, before the whole of the mortgaged property has been sold in execution of a decree under order XXXIV, rule 5 and a right to apply for a personal decree under rule 6 can have arisen, the mortgagee satisfies the court that the amount likely to be realised by the sale of the rest of the mortgaged property would not be sufficient to satisfy the decretal amount and that a personal decree for the balance would have to be passed subsequently under order XXXIV, rule 6, then, inasmuch as the original suit is still undisposed of, in the sense that the plaintiff mortgagee is entitled in certain circumstances to obtain a personal decree, the court has jurisdiction to act under order XXXVIII, rule 5, if the conditions contemplated by that provision are made out, and to attach other properties of the mortgagor before any personal decree under order XXXIV, rule 6 has been passed or applied for.

Mr. S. B. Johari, for the appellant

Messrs. K. C. Mital and P. M. Verma, for the respondent.

HARRIES and BAJPAI, JJ.:—This is a judgment-debtor's appeal against an order passed by the Additional Subordinate Judge of Moradabad allowing the decree-holder's application for attachment of certain property before judgment.

In the year 1929 the decree-holder brought a suit upon a mortgage for the sale of certain property, the subject-matter of that mortgage. In due course he obtained a preliminary decree and then a final decree and eventually he put up for sale certain portions of the property mortgaged. By the sale of these properties the decree-holder recovered a substantial part of the sum due, but it would appear that the amount that he was

*First Appeal No. 211 of 1934, from an order of Lachhman Prasad, Additional Subordinate Judge of Moradabad, dated the 30th of August, 1934.

likely to obtain upon the sale of the remaining property was insufficient to satisfy the whole of the debt due to him.

Before proceeding with the sale of the remainder of the mortgaged property the decree-holder made an application in the court of the Additional Subordinate Judge of Moradabad praying for the attachment of certain other property of the judgment-debtor before obtaining a personal decree against him. The learned Additional Subordinate Judge having heard arguments passed an order in these terms: "The judgment-debtor Shyam Lal objects. I have heard counsels for both parties. The application of the decree-holder is proper and maintainable, vide *Jogemaya Dassi v. Baidyanath Pramanick* (1). The objection of the judgment-debtor has no force. I allow the application, and order under order XXXVIII, rule 5 of the Civil Procedure Code attachment of the properties mentioned in the application but to the extent of about Rs.12,000 only, which amount appears to be likely to remain unpaid after the mortgage securities are exhausted."

The appellant judgment-debtor contends before us that the learned Subordinate Judge had no jurisdiction to entertain this application. It was contended that the decree-holder could not obtain a personal decree against the judgment-debtor until the mortgaged properties had all been sold, and this, admittedly, had not been done when the application was made to the learned Subordinate Judge. Consequently it was argued that no application for attachment of other non-mortgaged properties could be entertained at this stage because it could not be said with any certainty that the decree-holder would ever become entitled to a personal decree. The learned Subordinate Judge, however, held that he could order attachment of non-mortgaged properties before the decree-holder obtained a final decree, by reason of the provisions of order XXXVIII. rule 5.

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Order XXXVIII, rule 5 provides: "Where, at any stage of a suit, the court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him, is about to dispose of the whole or any part of his property, the court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security."

The original suit was still undisposed of, as the decree-holder was entitled in certain circumstances to obtain a personal decree. That being so, he could, upon satisfying the court that he was entitled to such personal decree and that the defendant was disposing of the whole or part of his property or removing the same out of the jurisdiction in order to obstruct or delay the execution of the personal decree when obtained, ask for an order under order XXXVIII, rule 5. This view is in accordance with the view expressed by GREAVES, J., in the case of *Jogemaya Dassi v. Baidyanath Pramanick* (1). In our judgment the learned Subordinate Judge had jurisdiction to entertain the decree-holder's application.

In our view, however, the order passed by the learned Subordinate Judge cannot stand. From the terms of the order it is impossible for us to say that the learned Judge considered the matters which order XXXVIII, rule 5 of the Civil Procedure Code directs that he should consider. According to the order passed by him the learned Subordinate Judge heard counsel for each party and thereupon passed the order. There was an affidavit filed by the decree-holder, but the order makes no mention of it and therefore we are unable to say whether or not he considered the facts deposed to in that affidavit.

(1) (1918) I.L.R., 46 Cal., 245.

He appears to have heard no evidence on behalf of either party and, as we have stated previously, to have decided the matter upon hearing arguments of counsel.

Before the learned Subordinate Judge could act under order XXXVIII, rule 5 he had to be satisfied that the present appellant was about to dispose of the whole or a part of his property or remove the same out of the jurisdiction in order to obstruct or delay the execution of the personal decree when obtained. Further, he had to be satisfied that the amount which would be realised upon sale of the remainder of the mortgaged property would not be sufficient to satisfy the decree-holder's claim. The learned Subordinate Judge does say indirectly that the sale of the remainder of the mortgaged properties would still leave about Rs.12,000 due and owing to the decree-holder, but we have no means of ascertaining how he arrived at this finding. Nowhere in the order does he say that he is satisfied that the judgment-debtor is about to dispose of the whole or any part of his property or to remove the same from the local limits of the jurisdiction of the court. In the absence of positive findings that there would be a sum due and owing to the decree-holder after the sale of the remainder of the mortgaged properties, and that the judgment-debtor was disposing of or removing or attempting to dispose of or remove the whole or any part of his property, this order cannot stand.

Further the learned Subordinate Judge, even if satisfied, that there would be a sum due and owing to the decree-holder after the sale of the mortgaged properties and that the judgment-debtor was attempting to delay and obstruct a possible execution by disposing of or removing his property, could not there and then pass an order attaching other properties of the judgment-debtor. If satisfied upon the above points the learned Subordinate Judge should have called upon the judgment-debtor to furnish security to produce and place at

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the disposal of the court, when required, the said property or the value of the same, or such portion thereof as might be sufficient to satisfy the decree, or to appear and show cause why he should not furnish such security. From the terms of the order it would appear as if the judgment-debtor was never called upon either to furnish security to produce and place at the disposal of the court the property concerned, or to appear and show cause why he should not furnish such security. The moment the learned Subordinate Judge was satisfied that there would be a sum still owing after the sale of the remainder of the mortgaged properties and that the judgment-debtor was disposing of his property he made an order attaching the properties mentioned in the application. This he could not do until he had called upon the defendant to furnish security to produce and place at the disposal of the court the property or called upon the judgment-debtor to show cause why he should not furnish security.

Having failed to comply with the requirements of order XXXVIII, rule 5, any order passed attaching the property cannot stand and must be set aside.

In our view the proper course to take in this appeal is to set aside the order and send the case back to the lower court to be heard and determined in the manner which we have pointed out. We therefore allow this appeal with costs, set aside the order of the learned Additional Subordinate Judge of Moradabad and send back the case to the court below to be determined according to law.