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Act does not repeal the provisions of section 54 of the Land Acquisition Act.

For these reasons I consider that the court fee payable on a memorandum of appeal against an order by a Tribunal, constituted under the U. P. Town Improvement Act of 1919, does come under section 8 of the Court Fees Act on the difference between the amount awarded and the amount claimed by the appellant and it should not be a fixed court fee under the second schedule, article 17 (iv). I may add that in my opinion section 8 will apply whether the appellant is the person claiming compensation or whether the appellant is the Secretary of State.

APPELLATE CIVIL.

Before Mr. Justice Iqbal Ahmad and Mr. Justice Verma

KARIMUL RAHMAN KHAN AND ANOTHER (JUDGMENT-

DEBTORS) v. SARASWATI SUGAR SYNDICATE

AND OTHERS (DECREE-HOLDERS)*

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October, 18

Civil Procedure Code, order XXXIV, rule 5—Order in which the mortgaged properties are to be sold—Court executing the decree can direct such order if mortgagee is not prejudiced—Equities in favour of subsequent transferees—Civil Procedure Code, sections 2(2), 47—“Decree”—Decision directing order of sale of mortgaged properties—Whether appealable.

A court passing a decree for sale on the basis of a mortgage, or a court executing such a decree, has full discretion, even where the doctrine of marshalling is not strictly applicable, to prescribe the order in which the various items of the properties comprised in the mortgage decree are to be sold, provided it is necessary to do so with a view to adjust the equities arising between subsequent transferees from the mortgagor or with a view to protect the rights of a subsequent transferee, and further provided that the order of sale prescribed by the court has not the effect of prejudicing the right of the mortgagee to realise the whole of the decretal amount.

The question whether such an order of the execution court, prescribing the order in which the various items of mortgaged

*First Appeal No. 59 of 1936, from a decree of Raj Rajeshwar Sahai, Civil Judge of Etah, dated the 6th of January, 1936.

properties are to be sold, amounts to a decree and is appealable or not was discussed.

Mr. *Mushtaq Ahmad*, for the appellants.

Messrs. *A. M. Khwaja* and *S. B. L. Gaur*, for the respondents.

IQBAL AHMAD and VERMA, JJ.:—Apart from the question whether the order sought to be assailed by the present appeal is an appealable order, we have come to the conclusion that there are no merits in this appeal and that the decision of the court below must stand.

It is well settled that so long as the mortgaged property remains in the hands of the mortgagor it is open to the mortgagee to realise the mortgage debt from the whole or any portion of the mortgaged property. The reason for this rule is that every item of mortgaged property is a security for the entire mortgage debt, and, as such, it is open to the mortgagee to realise the mortgage debt from any item of the mortgaged property. This rule is, however, subject to two exceptions. Firstly the rule is subject to the doctrine of marshalling provided for by sections 56 and 81 of the Transfer of Property Act, and secondly to the court's power under order XXXIV, rule 4 of the Civil Procedure Code to adjust the equities between the mortgagor and subsequent transferees from him by directing that the various items of mortgaged properties be sold in a certain order. The order in which the properties are to be sold may be regulated either by the decree for sale passed by the court or in the course of execution proceedings of such a decree.

The provisions of section 56 are analogous to the provisions of section 81 of the Transfer of Property Act and the only difference between the two sections is that section 56 prescribes the rule as to marshalling by subsequent purchasers whereas section 81 provides for the marshalling of securities at the instance of a subsequent mortgagee. The rule of law enacted by these two sections is that if the owner of two or more

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properties mortgages them to one person and then sells or mortgages one or more of the properties to another person, the buyer or the subsequent mortgagee is, in the absence of a contract to the contrary, entitled to have the mortgage debt satisfied out of the property or properties not sold or mortgaged to him, so far as the same will extend, but not so as to prejudice the rights of the prior mortgagee or persons claiming under him or of any other person who has for consideration acquired an interest in any of the properties.

It is evident from the provisions of these sections that the rule as to marshalling can prevail only if its application to a particular case is not calculated to prejudice the rights of the prior mortgagee or of any other person who has acquired an interest in any item of the mortgaged property and that for consideration. The application of the rule as to marshalling has the effect of adjusting the equities between the mortgagor and subsequent transferees from him and can be enforced by a court as against the prior mortgagee, provided his interests are not adversely affected by the application of the rule. Further, it is clear that marshalling can be enforced only at the instance of a subsequent purchaser or a subsequent mortgagee of one of the items of the mortgaged property.

In the case before us the rule as to marshalling has no application, for the simple reason that the subsequent purchaser in the present case, viz. the Saraswati Sugar Syndicate, Lahore, which is respondent No. 1 in the present appeal, has not invoked to its assistance the rule as to marshalling and this appeal is by the legal representatives of the mortgagor who unsuccessfully prayed in the court below that the various items of the mortgaged properties should be sold in a particular order. The question that arises for consideration in the present appeal, therefore, is whether the second exception to the general rule mentioned at the inception of our judgment has any application to the facts of the present case.

It has been laid down in a series of cases that even if the doctrine of marshalling is not strictly applicable, the court has, under order XXXIV, rule 4 of the Civil Procedure Code, the power to direct the order in which various items of mortgaged properties are to be sold, provided the order laid down by the court does not in any way prejudice the rights of the mortgagee decree-holder.

In *Nobin Chandra Bhattacharyya v. Debendra Sen* (1) it was held that if the court finds that a stranger to the mortgage transaction purchased a portion of the mortgaged property *bona fide* and without notice of the mortgage and on payment not merely of the value of the equity of redemption but the value of the absolute interest in properties, the court has jurisdiction to make such provision as regards the order of sale of the various items of mortgaged property as would work no injustice to the stranger purchaser. It was observed in that case that when the interest of a third person has intervened who has *bona fide* taken a transfer of a portion of the mortgaged property, the mortgagee is not entitled to insist on his right to sell such portion of the mortgaged property as he likes, and that in such a case it is for the court to regulate the order of sale of the various items of mortgaged properties in such a way as to do justice to the *bona fide* subsequent transferee without in any way prejudicing the right of the mortgagee to realise the whole of his mortgage debt. This decision was based on the provisions of order XXXIV, rule 4 of the Civil Procedure Code which lays down that a preliminary decree for sale should provide that in default of the payment of the mortgage debt the plaintiff mortgagee shall be entitled to a final decree directing "that the mortgaged property or a sufficient part thereof be sold". This provision leads to the conclusion that while ordinarily a mortgagee is entitled to realise the mortgage debt

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(1) A.I.R. 1927 Cal, 522.

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from the whole of the mortgaged property, it is open to the court in cases in which it is necessary to adjust the equities arising between the subsequent transferees from the mortgagor and the mortgagor to direct that in the first instance only such properties as were not transferred by the mortgagor are to be sold, and if the proceeds of the sale of such properties are not sufficient to satisfy the mortgage debt then the properties transferred to subsequent transferees may be sold. In *Kommineri Appayya v. Mangala Rangayya* (1), while it was observed that "a bona fide purchaser, who purchases for value a portion of a mortgaged property without notice of such mortgage, has no right in a suit by the mortgagee to enforce his mortgage, to insist that the portion not sold to him must be proceeded against first and the portion purchased by him must be sold only for the balance, if any, due", it was laid down that "it is competent to the court under section 88 of the Transfer of Property Act" (which corresponds to order XXXIV, rule 4 of the Civil Procedure Code) "to order a sufficient portion of the mortgaged property to be sold; and if the portion not sold by the mortgagor is sufficient, and if the mortgagee will not be prejudiced, the court may by its decree direct such unsold portion to be sold first." It was further held in that case that if the decree directs the sale of the whole of the mortgaged property, the court, in execution, may first bring to sale the portion not transferred by the mortgagor and, if the sale proceeds be sufficient, stop the sale of the portion transferred by the mortgagor. Similarly it was ruled in *Raghavachariar v. Duvvuru Krishna Reddi* (2) that in executing a mortgage decree the court can direct, at the instance of a subsequent transferee of one of the items of the mortgaged property, the sale of some of the items of the mortgaged property first before selling the property transferred to the subsequent transferee, provided the mortgagee is in no way prejudiced.

(1) (1908) I.L.R. 31 Mad. 419.

(2) A.I.R. 1924 Mad. 509.

The question was considered at length by a Bench of this Court in *Kaisar Beg v. Sheo Shankar Das* (1) and it was held that in cases in which the doctrine of marshalling of securities has no application it is the paramount right of a mortgagee to have the mortgage satisfied by sale of every part of the mortgaged property, but this paramount right does not make the mortgagee the complete master of the situation and so long as his rights under the mortgage are not prejudiced the court executing the decree has, in an appropriate case, full discretion to regulate the order in which the mortgaged properties should be sold, provided it is necessary to so regulate the order with a view to do justice between two subsequent transferees from the mortgagor.

The consideration of the appeal before us must, therefore, be approached on the assumption that a court executing a decree for sale passed on the basis of a mortgage has full discretion to prescribe the order in which the various items of the properties directed to be sold by that decree are to be sold, provided it is necessary to do so with a view to adjust the equities arising between two subsequent transferees from the mortgagor or with a view to protect the rights of a subsequent transferee, and further provided that the order of sale prescribed by the court has not the effect of prejudicing the right of the mortgagee to realise the whole of the decretal amount.

The facts giving rise to the disputes between the parties that have culminated in the present appeal are not disputed and are as follows. One Ahmad Saeed Khan owned zamindari in various villages including a village called Nauli. His zamindari properties were subject to a simple mortgage in favour of Kishori Lal and Babu Lal, respondents 2 and 3. On the 1st of October, 1922, Ahmad Saeed Khan executed a *wakf alal-aulad* of all his zamindari properties. In this deed

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specific mention of the mortgage debt due to the respondents 2 and 3 was made and it was provided that it would be open to Ahmad Saeed, with the permission of the District Judge, to sell the whole or a part of the dedicated property with a view to satisfy the mortgage debt referred to above. According to the provisions in the deed of wakf Ahmad Saeed was to be the first mutwalli and after his death his sons, Karimul Rahman and Mazhar Ahmad, were to be the mutwallis.

Ahmad Saeed took no steps to transfer any portion of the dedicated properties or to satisfy the mortgage debt, with the result that the respondents 2 and 3 put their mortgage into suit and eventually obtained a final decree for sale on the 2nd of October, 1932. This decree was for a sum of about Rs.60,000 and directed the sale of the entire mortgaged property, including village Nauli.

The decree-holders applied for execution of this decree in December, 1932, and then Ahmad Saeed filed an application before the District Judge soliciting permission to sell village Nauli with a view to satisfy the decree. The District Judge granted this application on the 18th of February, 1933, and on that very date Ahmad Saeed died and his sons, Karimul Rahman and Mazhar Ahmad, became the mutwallis of the wakf. These mutwallis on the 24th of February, 1933, sold village Nauli to two ladies, Masudi Begam and Israr Fatima, for a sum of Rs.1,00,000 and out of the sale consideration a sum of about Rs.43,000 was left in the hands of these vendees for payment to respondents 2 and 3 decree-holders. It may be mentioned here that Masudi Begam is a sister of Ahmad Saeed and Israr Fatima is a daughter of Ahmad Saeed.

It has been stated above that the mortgage decree in favour of respondents 2 and 3 was for about Rs.60,000 and that only about Rs.43,000 were left with the vendees for payment to the decree-holders. The remaining sum of about Rs.17,000 was paid by the

two mutwallis to the decree-holders in part satisfaction of the decree on the 6th of January, 1934.

It appears that by the 29th January, 1934, Masudi Begam and Israr Fatima had entered into an agreement with the Saraswati Sugar Syndicate, Lahore, respondent No. 1, for sale of village Nauli for a sum of Rs.1,00,000 and in pursuance of that agreement respondent No. 1 paid a sum of Rs.25,000 to respondents 2 and 3 the decree-holders on the 29th of January, 1934. On receipt of this sum of Rs.25,000 the decree-holders filed an application in the execution court mentioning that they had released Nauli from the charge created by the decree and they would be in no case entitled to sell village Nauli in execution of their decree. The court accepted this application and ordered that village Nauli would not in future be liable to sale in execution of the decree. It is common ground that on the 26th of May, 1934, Masudi Begam and Israr Fatima executed a deed of sale in favour of respondent No. 1 with respect to village Nauli for a lakh of rupees and out of the sale consideration a sum of Rs.35,000 was left with respondent No. 1 for payment to the vendors on future dates.

On the 26th of January, 1935, the appellants, who are the mutwallis of the wakf, filed an application in the execution court praying that the decretal amount be realised first from sale of village Nauli and this application was granted on the 27th of April, 1935. It is, however, necessary to mention that no notice of this application was given to respondent No. 1.

The respondent No. 1 in its turn on the 1st of August, 1935, filed an objection in the execution court pointing out that in view of the decree-holders' application dated 29th January, 1934, and the order passed by the court on that date, it was not open to the decree-holders to sell village Nauli. This objection was headed as an objection under section 47 and section 151 of the Civil Procedure Code. The present

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appellants were not implicated as parties to the objection, nor was notice of this objection given to them. The application was disposed of by the court on the 3rd of August, 1935. The court observed that the decree-holders' counsel had no objection to the prayer of respondent No. 1 and ordered that village Nauli shall not be sold.

The present appellants then, on the 16th of September, 1935, filed an application praying that the order dated the 3rd of August, 1935, be re-called. This application was headed as an application under sections 47 and 151 of the Civil Procedure Code. The court below dismissed this application on the 6th of January, 1936, holding that as the order dated the 3rd of August, 1935, had not been appealed against it became final and could not be assailed. The appeal before us is against the order dated the 6th of January, 1936.

A preliminary objection has been raised to the hearing of the appeal on the ground that the order does not fall within the purview of section 47 and as such is not appealable. In support of this contention reliance has been placed by the learned counsel on *Alimuddin v. Gobind Prasad* (1), *Mangat Rai v. Babu Ram* (2) and *Behari Lal Ram Charan v. Badri Prasad* (3). The first two cases just mentioned have no application to the case before us. In the first case it was held that no appeal lies against an order passed by the execution court fixing the estimated value of the property sought to be sold in proceedings under order XXI, rule 66; and in the second case it was held that an order passed by an execution court rejecting an application for stay of sale does not fall within the purview of section 47 of the Civil Procedure Code and is not appealable. The order before us is not of the nature referred to in the first two decisions noted above. Those cases therefore are clearly distinguishable.

(1) A.I.R. 1927 All. 208.

(2) A.I.R. 1929 All. 85.

(3) [1931] A.L.J. 895.

Much reliance has, however, been placed by the learned counsel for the respondents on the decision in *Behari Lal Ram Charan's* case (1). In that case the execution court had ordered that the mortgagee decree-holder must sell certain items of mortgaged properties first and if he was unable to realise his decree money by the sale of those properties, then he was entitled to proceed against the remaining items of the mortgaged properties. This Court held that this order of the execution court "amounted to a temporary stay of execution against defendants 4 and 5 and merely decided the mode in which the execution was to proceed and there was no conclusive determination of the decree-holder's right to proceed against defendants 4 and 5, and therefore the order was not a decree as defined in section 2(2) and was not appealable."

A diametrically opposite view was expressed in *Kaisar Beg's* case (2) to which reference has already been made. One of the learned Judges constituting the Bench made the following observation, at page 399: "There was some discussion in the course of arguments that no appeal lies from the order passed by the lower appellate court. That the question arising between the parties relates to execution, discharge or satisfaction of the decree within the meaning of section 47 of the Code of Civil Procedure cannot be doubted and has not been questioned. It is, however, contended that in so far as the order does not amount to a formal expression of an adjudication determining the rights of the parties, it is not a decree within the meaning of section 2(2) of the Code of Civil Procedure. I am unable to accede to this contention. The whole question is whether the decree-holders have an absolute right to choose the order in which the mortgaged properties should be sold in disregard of the rights of the appellant, or whether the rights of the parties in this respect are regulated by the discretion of the

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(1) [1931] A.L.J. 895.

(2) (1930) I.L.R. 53 All. 391.

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court. Any answer to these questions necessarily involves adjudication of the rights of the parties. Where the right of one or the other of the parties to have a certain thing done depends upon the discretion of the court, the order of the court giving such direction against one party or the other necessarily decides the right in controversy in the particular case and is to that extent a decree if the order is one passed under section 47 of the Code of Civil Procedure. For these reasons I am of opinion that an appeal lay to this Court from the order passed by the lower appellate court now in question."

In *Khirodhar Singh v. Gajadhar Lal Matho* (1) it was held that an order regulating the order in which the mortgaged properties are to be sold is "a final order between the parties in a matter relating to the execution, satisfaction and discharge of the decree" and is appealable.

We have noticed these cases with a view to show that there appears to be divergence of judicial opinion on the question whether or not an order of the nature passed by the court below is an appealable order. But having regard to the fact that we have come to the conclusion that the appeal must fail on the merits, we refrain from deciding the preliminary objection raised by the respondents' counsel.

Very little need be said as to the merits of the appeal. The transfer in favour of Masudi Begam and Israr Fatima was made by the legal representatives of Ahmad Saeed after the decree for sale had been passed in favour of respondents 2 and 3. Respondents 2 and 3 were no parties to the agreement between the vendors and the vendees as to the payment of Rs.43,000 in part satisfaction of the decretal amount. Similarly the sale by Masudi Begam and Israr Fatima in favour of respondent No. 1 was without the consent of respondents Nos. 2 and 3. The case before us is not a case

(1) A.I.R. 1925 Pat. 484.

in which a subsequent transferee from the mortgagor invokes the assistance of the court for the protection of the interest acquired by him in some of the items of the mortgaged properties. This is a case in which the legal representatives of the mortgagor in effect seek the specific performance of an agreement entered into between them and their transferees for payment of a portion of the amount due on the basis of the decree for sale. No authority has been shown to us which would justify our acceding to the request of the appellants to fetter the rights of the decree-holders in the present case by laying down the order in which the various items of the mortgaged properties are to be sold. It is to be noted in this connection that on payment of a sum of Rs.25,000 by respondent No. 1, the decree-holders viz., respondents Nos. 2 and 3, entered into an agreement with the respondent No. 1 not to proceed against village Nauli. The respondents 2 and 3 are entitled to say that this agreement be respected by the court and that the appellants be left to seek their remedy, if any, as against respondent No. 1. It is needless to observe that the mere refusal by decree-holders to proceed against village Nauli cannot adversely affect the rights of the appellants to claim contribution as against village Nauli, provided they have such a right in law.

The appeal must therefore fail and is accordingly dismissed. Having regard to all the circumstances of the case, we have come to the conclusion that it would be just to direct the parties to bear their own costs here and below and we order accordingly.

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