

self expressly under the English law when the person to whom the legal ownership is transferred would become a trustee in the specific sense of the term."

We are accordingly of opinion that even assuming that the property in suit was property appertaining to the *asthan* of Parela, it cannot be said that it had become vested in trust for any specific purpose and therefore section 10 does not apply to the case.

We accordingly allow the appeal, set aside the decision of the Court below and dismiss the plaintiffs' suit with costs in both courts.

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BHARTHI
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and
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J.

Appeal allowed.

APPELLATE CIVIL

*Before Mr. Justice Bisheshwar Nath Srivastava and
Mr. Justice E. M. Nanavutty*

MUSAMMAT AYUB FATIMA AND ANOTHER (JUDGMENT-DEBTORS-APPELLANTS) v. JHAO LAL AND OTHERS (DECREE-HOLDERS-RESPONDENTS)*

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November, 24

Civil Procedure Code (Act V of 1908), Order XXIII, rule 3 and Order XXXIV, rule 4—Mortgage suit—Compromise decree in mortgage suit—Provision to sell property in default of payment of instalment—Decree in terms of compromise—Default of instalment beyond the fixed time—Extension of time—Court whether can extend time and compel decree-holder to accept money deposited beyond time—Provision allowing decree-holder to sell mortgaged property in default of payment of an instalment, whether of a penal character—Court's power in case of consent decrees to relieve a party of provision of a penal character.

Where a suit on the basis of a mortgage was decided by means of a compromise, the terms of which were that the defendant was to pay the decretal amount by instalments and in case of default in payment of any instalment the decree-holder was entitled to realise the unpaid balance by sale of the property mortgaged without the necessity of getting a final decree prepared and the court decreed the claim in terms of the compromise under Order XXIII, rule 3 of the Code of Civil Procedure and the decree which was prepared in pursuance of this order was not one under Order XXXIV, rule 4 of the Code

*Execution of Decree Appeal No. 55 of 1932, against the order of Pandit Damodar Rao Kelkar, Subordinate Judge of Kheri, dated the 9th of July, 1932.

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of Civil Procedure and was in no sense a preliminary decree for sale but was clearly a composite decree allowing the decree-holder the right to sell the property without the necessity of getting a final decree prepared, *held*, that in such a case the court could not compel the decree-holder to accept money deposited beyond time and could not extend the time for payment.

Even in the case of a consent decrees the court can relieve a party from provisions which are of a penal character. The provisions in a compromise allowing the decree-holders the right to sell the mortgaged property in case of default in payment of any instalment is not a provision of such a character and the court is not justified in interfering with the terms agreed to between the parties. *Dayaram Gidumal v. Nabibux* (1), relied on.

Mr. B. K. Dhaon, for the appellant.

Mr. G. P. Bajpayi, for the respondents.

SRIVASTAVA and NANAVUTTY, JJ.:—This is a judgment-debtor's appeal against the order, dated the 9th of July, 1932, of the learned Subordinate Judge of Kheri. It arises under the following circumstances:

The decree-holders respondents instituted a suit on foot of a mortgage. This suit was decided by means of a compromise. The terms of the compromise were that the appellant was to pay the decretal amount by nine annual instalments of Rs.2,000 each. In case of default in payment of any instalment, the decree-holders were given the right to realise the remaining amount with interest at 12 annas per cent. per mensem from the date of default till the date of realisation by sale of the property mortgaged without the necessity of getting a final decree prepared. The judgment-debtor paid the first two instalments in due time. The third instalment fell due on the 21st of March, 1932. On that date the judgment-debtor made an application accompanied with a tender offering to deposit the amount in Court but no money was actually deposited. Ten days later on the 31st of March, 1932, the judgment-debtor made another application to the Court explaining that the money could not be deposited because of some delay which occurred in getting a deed, which he had executed in order to raise money, registered. He asked for permission to deposit

(1) (1929) Sindh, 98.

the money within three days. The Court permitted him to deposit the money within three days and when it was deposited on the 2nd of April, notice was issued to the decree-holders to withdraw the money. The decree-holders objected that the money had not been deposited within the time fixed in the compromise and that no extension of time could be granted. The learned Subordinate Judge accepted the objection and directed the judgment-debtor to take back the money deposited by him.

It is contended in appeal that the learned Subordinate Judge has overlooked the provisions of Order XXXIV, rule 4 of the Code of Civil Procedure which allows the Court to extend the time fixed for payment of the amount due to the mortgagee. This provision has in our opinion no application to the present case. The order passed by the Subordinate Judge on the back of the petition of compromise shows that he decreed the claim in terms of the compromise under Order XXIII, rule 3 of the Code of Civil Procedure. The decree which was prepared in pursuance of this order is also not one under Order XXXIV, rule 4 of the Code of Civil Procedure. It is in no sense a preliminary decree for sale but is clearly a composite decree allowing the decree-holder the right to sell the property without the necessity of getting a final decree prepared. Under the circumstances the judgment-debtor cannot derive any benefit from the provisions of clause 2 of Order XXXIV, rule 4 of the Code of Civil Procedure.

Next it was contended that the appellants should be granted relief by the Court in the exercise of its equitable jurisdiction. No doubt there are authorities in support of the view that even in the case of consent decrees the Court can relieve a party from provisions which are of a penal character. The provisions in the compromise before us allowing the decree-holders the right to sell the mortgaged property in case of default in payment of any instalment is not a provision of such a character.

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We can under the circumstances see no ground to justify us in interfering with the terms agreed to between the parties. See *Dayaram Gidumal v. Nabibux* (1).

Lastly it was argued that the learned Subordinate Judge having once permitted the judgment-debtor to deposit the money within three days he had no authority to go behind that order. The learned Subordinate Judge never passed any order either holding that the judgment-debtor was entitled to extension of time or granting an extension. The permission to deposit the money within three days was obviously subject to any objections which might be raised by the decree-holder and the final orders which the Subordinate Judge was to pass in the case. As held by a Bench of this Court in *Abdul Rahman v. Banke Behari Lal* (2) to which one of us is a party section 148 of the Code of Civil Procedure does not apply to the present case. We have already pointed out that Order XXXIV, rule 4 also has no application. The Court therefore had no authority to grant any extension of time. The case is perhaps one of some hardship for the judgment-debtor but as remarked by the learned Subordinate Judge, the Court cannot compel the decree-holder to accept the money deposited beyond time in the absence of any provision of law authorising it to do so.

The result therefore is that the appeal fails and is dismissed with costs.

Appeal dismissed.

APPELLATE CIVIL

*Before Sir Syed Wazir Hasan, Knight, Chief Judge and
Mr. Justice E. M. Nanavutty*

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November, 20

S. AMIR HAIDER (JUDGMENT-DEBTOR-APPELLANT) v. LALA
BABU LAL (DECREE-HOLDER-RESPONDENT)*

Execution of decree—Government Notification requiring execution of decree involving sale of agricultural land to be transferred to Collector from a certain date—Sale by Civil Court

*Execution of Decree Appeal No. 59 of 1932, against the order of Pandit Bishwa Nath Hukku, Additional Subordinate Judge of Hardoi, dated the 6th of August, 1932.

(1) (1929) Sindh, 98.

(2) (1933) 10 O.W.N., 1151.