APPELLATE CIVIL

Before Mr. Justice Bisheshwar Nath Srivastava and Mr. Justice Ziaul Hasan

1935 *February*, 27

PANDIT SEWA RAM AND ANOTHER (PLAINTIFFS-APPELLANTS) *v.* PARBHU DAYAL AND OTHERS (DEFENDANTS-RESPONDENTS)*

Civil Procedure Code (Act V of 1908), Order XXIII, rule 3, Order XXXIV, rule 5, and Order XXI, rule 2—Mortgage—Preliminary decree for sale—Payment out of Court before final decree—Payment, if can be recognized—Construction, rules of.

Where the amount of a preliminary decree for sale on the foot of a mortgage is paid out of Court before the decree is made final, the question as to whether such payment can be recognized or not would depend on the fact whether the payment is admitted by both the parties or not. Order XXI, rule 2 does not apply to payments made before the final decree for sale. Order XXIII, rule 3 on the other hand applies to payments made before the decree and there is nothing in the terms of that Order to exclude suits based on mortgages from the operation of that rule. But while Order XXXIV, rule 5 contemplates a payment into court, under Order XXIII, rule 3, the payment has to be recognized even though it has been made out of Court. One of the elementary canons of construction is to construe the various provisions of a statute so as to make them consistent. Therefore the proper construction to be placed on the two apparently inconsistent rules is to hold that if the payment is admitted by both parties the satisfaction based on such payment ought to be recorded under Order XXIII, rule 3 in spite of its not being made into Court. On the other hand if the alleged payment out of Court is disputed the payment having been made in clear disregard of the mandatory provisions of Order XXXIV, rule 5, the Court is not bound to embark upon an inquiry into the question whether the alleged payment was in fact made or not. *Durga Devi* v. *Nand Lal* (1), *Tirloki Nath Dube* v. *Sadhu Ram Tewari* (2), and *Viswanatha Ayyar* v. *Chimmuktti Amma* (3), relied on. *Piran Bibi* v. *Jitendra Mohun Mukerjee* (4), *Manager Sahu* v. *Bhatoo Singh* (5), and *Ahmed Rahman* v. *A. L. A. R. Chettiar Firm* (6), distinguished.

*First Civil Appeal No. 42 of 1933, against the decree of Pandit Bishnath Hukku, Subordinate Judge of Hardoi, dated the 13th of February, 1933.

(1) (1931) 136 I.C., 732.
(2) (1927) 1 Luck. Cas., 63.
(3) (1931) I.L.R., 55 Mad., 320.
(4) (1917) 21 C.W.N., 920.
(5) (1920) 5 P.L.J., 672.
(6) (1928) I.L.R., 6 Rang., 285.

Messrs. *M. Wasim, Khaliq-uz-zaman* and *Ali Hasan,* for the appellants.

Messrs. *Hyder Husain* and *Akhtar Husain,* for the respondents.

SRIVASTAVA and ZIAUL HASAN, JJ.:—This is an appeal by the plaintiffs against the order, dated the 13th of February, 1933, passed by the Subordinate Judge of Hardoi on an application made by them under order XXXIV, rule 5 of the Code of Civil Procedure for a final decree for sale.

The facts of the case are that on the 2nd of March, 1932, the plaintiffs-appellants obtained a preliminary decree for sale on the basis of a mortgage-deed which had been executed in their favour by defendants 1 to 3 on the 29th of January, 1920. On the 28th of September, 1932, the plaintiffs made an appliction under Order XXXIV, rule 5 alleging that the date fixed for payment in the preliminary decree had expired and the defendants had not made any payment to the plaintiffs and praying that a final decree be passed for Rs.6,601-4 together with interest thereon. 15th November, 1932, was the date fixed for the hearing of this application. Three days before this date, on the 12th of November, 1932, an application was made by one Gulzari Lal, a general agent of plaintiff No. 1, to the effect that he had realized the entire decretal amount and nothing remained due from the defendants in respect of the decree and praying that the application which had been made by the plaintiffs for a final decree be dismissed. When the case came up for hearing before the Court on the date fixed both the plaintiffs made an application denying the payment alleged to have been received by Gulzari Lal in his application, dated the 12th of November, 1932, and alleging that the application had been made by him in collusion with the defendants. The Court thereupon ordered that notices be issued to the defendants as well as to Gulzari Lal to show cause against the application made that day by the

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plaintiffs. On the 11th of February, 1933, when the matter came up for disposal before the Court, counsel for both the parties stated that they did not want to adduce any oral evidence in the case. The learned Subordinate Judge held that Gulzari Lal was the agent only of plaintiff No. 1 and that he had neither authority nor could give a valid discharge of the decree on behalf of plaintiff No. 2. He was, however, of opinion that the satisfaction of the decree certified by Gulzari Lal by means of his application, dated the 12th of November, 1932, must be upheld as valid to the extent of half the amount of the decree so far as it concerned plaintiff No. 1. In result he made the decree for sale final only for half of the mortgage money and proportionate costs in favour of plaintiff No. 2 alone. Both the plaintiffs have come to this Court in appeal against the last mentioned order of the Subordinate Judge.

The main contention on behalf of the appellants is that no payment having actually been made in Court it could not be recognized under Order XXXIV, rule 5 of the Code of Civil Procedure and a final decree should therefore be passed for the entire amount due under the preliminary decree and not merely for half of that amount. Order XXXIV, rule 4 which provides for a preliminary decree in a suit for sale lays down that if the plaintiff succeeds the Court shall pass a preliminary decree to the effect mentioned in clauses (*a*), (*b*) and (*c*)(i) of sub-rule (1) of rule 2. Clause (*c*)(i) of sub-rule (1) of rule 2 directs "that if the defendant pays into Court the amount so found or declared due". Order XXXIV, rule 5 provides for the final decree in a suit for sale and clause (1) of it uses the words "makes payment into Court". Clause (3) of that rule lays down that "where payment in accordance with sub-rule (1) had not been made", the Court shall pass a final decree. Form No. 5A in Appendix D of the Code of Civil Procedure which gives the prescribed form for a preliminary decree for sale also contains the words "pay into

Court", and the preliminary decree for sale prepared in the present case is also in the same form. Thus there can be no doubt that these provisions of Order XXXIV of the Code of Civil Procedure relating to decrees for sale contemplate payment into Court of the amount payable under the preliminary decree. It should also be noted that the words relating to payment into Court did not find place in section 89 of the Transfer of Property Act but were introduced for the first time when the provisions relating to decrees passed in mortgage suits were included in the Code of Civil Procedure of 1908. The learned counsel for the respondents does not deny that under the provisions of Order XXXIV. rule 5 the payment has to be made into Court. He has, however, argued that the provisions of Order XXI. rule 2 and Order XXIII, rule 3 of the Code of Civil Procedure apply to such a case and that even if the payment does not comply with the terms of Order XXXIV. rule 5, yet the Court is bound to take notice of them. if the necessary conditions of Order XXI, rule 2 or Order XXIII, rule 3 are satisfied. We are of opinion that Order XXI, rule 2 has no application to the case. Order XXI opens with the heading "Execution of decrees and orders". All the rules contained in that order are rules laying down the procedure relating to execution of decrees and orders. It is not disputed that proceedings for a final decree for sale are proceedings in the suit and not proceedings in execution. We have therefore no difficulty in holding that Order XXI, rule 2 did not apply to a payment made before the final decree for sale. The same view has been taken by the Lahore High Court in *Musammat Durga Devi* v. *Nand Lal* (1), and by a learned Judge of this Court in *Tirloki Nath Dube* v. *Sadhu Ram Tewari* (2). The learned counsel for the respondents on the other hand has relied on the decisions in *Piran Bibi* v. *Jitendra Mohun Mukerjee* (3), *Manager Sahu* v. *Bhatoo Singh* (4),

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(2) (1927) 1 Luck. Cas., 63.
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and *Ahmad Rahman* v. *A. L. A. R. Chettiar Firm* (1), in support of the contrary view. In all these cases the application of Order XXI, rule 2 to proceedings for a final decree for sale seems to have been assumed, but the specific question about the rule in question having no application because of the proceedings being proceedings in suit and not in execution was not considered or discussed in any of those cases.

Next as regards the application of Order XXIII, rule 3. It deals with the adjustment wholly or in part of a suit by means of an agreement, compromise or satisfaction and provides that where it is proved to the satisfaction of the Court that a suit has been so adjusted the Court shall order such agreement, compromise or satisfaction to be recorded. The provisions of Order XXI, rule 2 and XIII, rule 3 are complimentary of each other. While Order XXI, rule 2 deals with adjustments made after decree, order XXIII, rule 3 deals with adjustments before decree. We are of opinion that there is nothing in the terms of Order XXIII, rule 3 to exclude suits based on mortgages from the operation of this rule. But the application of that rule to the present case gives rise to an apparent inconsistency. While on the one hand Order XXXIV, rule 5 contemplates a payment into Court, on the other hand, under Order XXIII, rule 3, the payment has to be recognized even though it has been made out of Court. One of the elementary canons of construction is to construe the various provisions of a statute so as to make them consistent. If before a final decree is passed a payment is made out of Court and the payment is admitted by the plaintiff it would be in the highest degree unreasonable to ignore that payment because of its not being made in Court as required by Order XXXIV, rule 5. We are therefore inclined to hold that in such cases if the payment is admitted by both parties the satisfaction based on such payment ought to be recorded under Order

(1) (1928) I.L.R., 6 Rang., 285.

XXIII, rule 3 in spite of its not being made into Court. On the other hand if the alleged payment out of Court is disputed the payment having been made in clear disregard of the mandatory provisions of Order XXXIV, rule 5, the Court is not bound to embark upon an inquiry into the question whether the alleged payment was in fact made or not. The view taken by us appears to be the only reasonable and middle course between the two provisions which are not quite consistent with each other. A similar view appears to have been taken in the two cases referred to above, *Musammat Durga Devi* v. *Nand Lal* (1), *and Tirloki Nath Dube* v. *Sadhu Ram Tewari* (2), and also by the Madras High Court in *Vishwanatha Ayyar* v. *Chimmuktti Amma* (3). In the present case the payment alleged to have been received out of Court by Gulzari Lal was denied by both the plaintiffs. In the circumstances we are of opinion that the Court was not required to enter upon an inquiry as regards the alleged payment and ought to have refused altogether to recognize it as the payment was not made into Court. In any case assuming that the Court was bound to make an inquiry under Order XXIII, rule 3, we must hold that the defendants have completely failed to establish the alleged payment. They have given absolutely no evidence in proof of the payment and rely solely on the application, dated the 12th of November, 1932, made by Gulzari Lal. No attempt was made even to prove this application which was challenged by the plaintiffs. Admittedly Gulzari Lal was the agent of only one of the plaintiffs. He alleged that as the family of the plaintiffs was joint so he as general agent of one of the plaintiffs had realized the entire decretal amount. No evidence has been given about the plaintiffs being members of a joint family or about the plaintiff No. 1 being the manager thereof. It is well settled that in the case of a

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joint decree passed in favour of several mortgagees one of them cannot give a valid discharge against the other mortgagees. Thus *prima facie* Gulzari Lal as the agent of one of the mortgagees could not realize the money on behalf of both the plaintiffs.—The whole story as regards the alleged payment contained in the application of Gulzari Lal is in the highest degree suspicious. So the burden lay heavily upon the defendants to establish the alleged payment. The mere admission of Gulzari Lal cannot in the circumstances be accepted as sufficient. We are therefore of opinion that even if an inquiry under Order XXIII, rule 3, was necessary the defendants having failed to adduce any evidence in support of the payment we must find that they have failed to establish it.

Srivastava and Ziaul Hasan, JJ.

For the above reasons we are of opinion that the appeal must succeed. Cross-objections have also been filed on behalf of the defendants. In view of the opinion expressed by us above the cross-objections must fail. The result therefore is that we allow the appeal with costs and modify the order of the lower Court by directing that a final decree for sale in terms of Order XXXIV, rule 5 should be prepared for Rs.6,601-4 instead of Rs.3,300-10 as ordered by the lower Court. The cross-objections fail and are dismissed with costs.

Appeal allowed.