

REVISIONAL CIVIL

Before Mr. Justice G. H. Thomas

BAIJNATH (CREDITOR-APPLICANT) *v.* R. S. CH. GAJADHAR
PRASAD AND ANOTHER (INSOLVENTS-OPPOSITE PARTY)*

1935
February. 7

*Provincial Insolvency Act (V of 1920), sections 6(e) and 75—
“Decree for payment of money” in clause (e), meaning of—
Decree for sale on foot of mortgage, whether included—
Order of District Judge on appeal—Revision, when lies to
High Court.*

Clauses (e) and (h) of section 6 of the Provincial Insolvency Act must be construed to have the same meaning. Therefore under clause (e) the phrase, “for the payment of money”, means a decree which has been passed personally against the individual concerned, and does not include a decree for sale on foot of a mortgage. *Shyam Behari v. Mohandei* (1), referred to.

Section 75 of the Provincial Insolvency Act contemplates that the High Court should be very reluctant to interfere in revision on the findings arrived at by the District Judge on appeal under that Act, unless the order is perverse or palpably wrong.

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

Messrs. Radha Krishna and Akhtar Husain, for the opposite party.

THOMAS, J.:—This is an application for revision against the order of the learned District Judge of Lucknow, dated the 24th of November, 1933.

One Lala Girdhari Lal obtained a mortgage decree against the opposite party and in execution of his decree, put to sale a house belonging to the opposite party. The sale was confirmed by the learned Subordinate Judge of Lucknow on the 13th of May, 1933.

The applicant, Baij Nath, is an unsecured creditor of the opposite party, and on the 29th of May, 1933, he

*Section 75 Application No. 1 of 1934, against the order of Mr. H. J. Collister, I.C.S., District Judge of Lucknow, dated the 24th of November, 1933, confirming the order of M. Humayun Mirza, Judge, Small Cause Court, Lucknow, dated the 24th of August, 1933.

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applied to the insolvency court for adjudging the opposite party insolvent, the alleged act of insolvency being that a house belonging to the opposite party had been sold in execution of Girdhari Lal's decree. The application was opposed by the opposite party and the learned Small Cause Court Judge, sitting as a Court of Insolvency, held that clause (e) of section 6 of Act V of 1920 (Provincial Insolvency Act), does not cover a sale in pursuance of a decree for sale on the basis of a mortgage.

Baij Nath appealed against that order to the court of the learned District Judge of Lucknow who also dismissed the appeal. The applicant has come up in revision against the said order.

The sole question for decision in this application is whether, under the provisions of section 6(e) of the Insolvency Act, "a decree for the payment of money" includes a decree for sale at the foot of a mortgage.

The contention of the learned counsel for the applicant is, that a mortgage decree is "a decree for the payment of money", and, in support of his contention, he has relied on the following commentaries and decisions:

(1) Agarwala's *Vade Mecum*, Volume II, page 1009. The learned author in discussing the words "for the payment of money", under section 6, clause (e) of the Provincial Insolvency Act remarks that, "it includes a decree for sale on a mortgage or charge".

(2) Ghose's *Provincial Insolvency Act*, 9th Edn., 1933, at page 88, where it is said that, every decree by virtue of which money is payable, is to that extent a decree for money.

(3) *Dewan Chand's commentaries on Insolvency Law*, page 56.

(4) 11 *Calcutta*, page 718;

(5) 28 *Madras*, page 473;

(6) 29 *Madras*, page 318;

(7) 48 *Madras*, page 846;

- (8) 30 Allahabad, page 248;
 (9) 33 Allahabad, page 240; and
 (10) Ghose's Law on Mortgage, 5th Edn., page 71.

The view of these authorities, to a great extent, supports the case for the applicant, but their view appears to be based on the interpretation of the words, "decree for the payment of money", as used in the Code of Civil Procedure, and they do not appear to have taken any assistance from the Insolvency Act itself. Ghose in his Law of Mortgage in India, 5th Edition, Volume I, page 71, says "In this country the question whether the phrase 'decree for money' or 'for payment or money' which is to be found in many of our Acts, includes decrees upon mortgages, has given rise to a great divergence of opinion, due not so much to inartistic drafting as to the absence of a proper technical terminology. The truth is, the question whether a decree upon a mortgage is a decree for payment of money, may admit either of an affirmative or a negative answer, according to the context, from which the phrase should not be detached. To take the words out of their setting or divorce them from their natural connection and construe them as if they stood alone can only lead to error; for the context is a sort of interpretation clause which shows the sense in which the words are used. . ."

The learned author, in my opinion, has summed up the position in an admirable manner. In my opinion, the words "decree for the payment of money", as used in clause (e) of section 6, must be interpreted in the light of the Act itself.

The contention of the learned counsel for the opposite party is, that the test in such cases should be whether a decree-holder has got the present right to proceed against the judgment-debtor or not. If he has that right, it is a decree "for the payment of money", but if it is optional, then it is not a decree "for payment of money". In support of his contention, the learned

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counsel has cited a large number of rulings which I do not think are necessary for me to quote except for the following:

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- (1) 31 Calcutta, 792;
- (2) I. L. R., 6 Luck., 202;
- (3) A.I.R., 1930 Lahore, 592;
- (4) 54 All., 448, and
- (5) 47 Madras, 948.

Some of these cases undoubtedly support the contention of the learned counsel for the opposite party.

There is no decision of this Court where the question has directly been decided, and, as a matter of fact, no case has been cited by either party of any High Court which has dealt with the question directly in issue.

Clauses (e) and (h) of section 6 of the Insolvency Act are as follows:

(e) "If any of his property has been sold in execution of the decree of any Court for the payment of money".

(h) "If he is imprisoned in execution of the decree of any Court for the payment of money."

The learned District Judge has very rightly in his judgment remarked that, "admittedly a person can only be arrested and imprisoned in execution of a *personal* decree against him; and when the same expression occurs in two different clauses of section 6, I find it difficult to believe that it was the intention of the legislature that this expression should have a different meaning in each of these two clauses. In my opinion the analogy of clause (h) must apply to clause (e) and it must be held that the words in the latter clause "decree for the payment of money" mean a decree which has been passed personally against the individual concerned."

In my opinion clauses (e) and (h) of section 6 must be construed to have the same meaning. I have not the slightest doubt that under clause (h) the phrase, "for the payment of money", means a decree which has been passed personally against the individual concerned.

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The mortgage deed and decree of Girdhari Lal are not on the record, and we can only surmise the terms of the decree.

In the case of *Shyam Behari v. Mohandei* (1), it was held that, "as a pure question of interpretation there can be no doubt that an application for a personal decree under order XXXIV, rule 6 of the Code of Civil Procedure is not maintainable unless a sale in pursuance of the preceding rule has, as a matter of fact, taken place. It is plain that the expression 'any such sale' has reference to rule 5, sub-rule (2) and consequently, before the plaintiff can invoke the aid of the provisions of rule 6, he must establish that the mortgaged properties have been sold as contemplated by sub-rule (2) of rule 5".

It is admitted by the learned counsel for the applicant that the judgment-debtors have property worth about two and a half lakhs, but he states that it is all incumbered. The learned counsel for the opposite party states that its clients have got property worth five lakhs of rupees. In this case all we know is that a house belonging to the opposite party situated in Lucknow has been sold for Rs.1,500.

Under the circumstances, it is difficult for me to hold that the opposite party has committed an act of insolvency.

For instance, take a case of a solvent man who has got property worth several lakhs of rupees. He has a detached village which does not pay him; he executes a mortgage deed in respect of that village and does not pay the mortgage money. The mortgagee brings a suit on the basis of his mortgage and obtains a decree enabling him to sell that village. Does it necessarily then follow that the mortgagor has committed an act of insolvency? I do not think so. As I have stated above

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this is an application for revision. Section 75 of the Provincial Insolvency Act is as follows:

“Any creditor. . . aggrieved by a decision come to or an order made in the exercise of insolvency jurisdiction by a Court subordinate to a District Court may appeal to the District Court, and the order of the District Court upon such appeal shall be final.”

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I do not suggest that the High Court has no power to interfere in a decision arrived at by a District Judge, but this section clearly contemplates that the High Court should be very reluctant to interfere in revision on the findings arrived at by the District Judge, unless the order is perverse or palpably wrong.

The position before the learned District Judge was that the parties cited a large number of rulings in support of their contention. The learned Judge, after considering the rulings cited on behalf of the judgment-debtors, and taking all the circumstances came to the conclusion that a “decree for the payment of money” in clause (e) of section 6 of the Insolvency Act means a personal decree, and does not include a decree for sale at the foot of a mortgage under order XXXIV, rule 4 of the Code of Civil Procedure.

Taking all the circumstances of the case into consideration, I am of opinion that there are no grounds before me for interfering with the order passed by the learned District Judge.

I accordingly dismiss the application with costs.

Application dismissed.