

## MISCELLANEOUS CIVIL

Before Mr. Justice Ziaul Hasan and Mr. Justice H. G. Smith

MUSAMMAT SUSHILA (APPELLANT) v. DWARKA PRASAD  
AND OTHERS (RESPONDENTS)\*

1936  
October 19

*United Provinces Encumbered Estates Act (XXV of 1934), sections 4, 6 and 7(1)(a)—Civil Procedure Code (Act V of 1908), section 151—Mortgage—Final decree for mortgage passed—Application under section 4, Encumbered Estates Act—Collector forwarding application to Special Judge before order for final decree—Final decree for mortgage, whether could be passed after Collector's order under section 6, Encumbered Estates Act—Section 7(1)(a) Encumbered Estates Act, effect of—Final decree, if could be set aside under section 151, Civil Procedure Code.*

Where during the pendency of an application for final decree in a mortgage suit an application is made under section 4 of the United Provinces Encumbered Estates Act to the Deputy Commissioner who orders it to be forwarded to the Special Judge under section 6 of that Act and subsequently order is passed for the mortgage decree being made final, held, that the effect of the passing of the Deputy Commissioner's order is automatically to bring into operation the consequences set forth in section 7(1)(a) and a final decree ought not to have been passed and such a decree can be set aside under the provisions of section 151 of the Code of Civil Procedure.

Mr. Naziruddin, for the appellant.

Mr. R. P. Verma (R. B.) holding brief of Mr. L. S. Misra and Mr. A. Rauf, for the respondents.

ZIAUL HASAN and SMITH JJ.:—This is an appeal against an order by the learned Subordinate Judge of Unao by which he dismissed an application which was ostensibly under order IX, rule 13, and section 151 of the Code of Civil Procedure for the setting aside of a final decree for foreclosure which had been passed *ex parte* on the 9th of December, 1935.

The mortgage decree was passed against one Chandrapal Singh, his wife Musammat Sushila, (who is the

\*Miscellaneous Appeal No. 40 of 1936, against the order of Babu Shiva Charan, Civil Judge of Unao, dated the 21st of April, 1936.

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appellant now), and his two sons Mahadeo Bakhsh Singh and Sheo Shankar. Chandrapal Singh has since died, and is represented by his two sons, who were already parties to this appeal as respondents Nos. 3 and 4.

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When the decree-holder, one Dwarka Prasad, respondent No. 1, made his application for a final decree, Musammat Sushila put in objections in July, 1935. Those objections came up for disposal on the 9th of December, 1935, and it appears that as her pleaders did not appear on that date her objections were dismissed, and the final decree was passed on that same date. The order for the final decree disposed also of Musammat Sushila's objections, and also separate objections which had been put in by Chandrapal Singh and his sons.

The learned Subordinate Judge believed the statement made before him on oath by the decree-holder to the effect that three opportunities were given on the date in question to Musammat Sushila's son, Mahadeo Bakhsh Singh, to call her vakils, and he accordingly found that no sufficient cause had been made out for the setting aside of the *ex parte* decree.

The learned counsel for the appellant maintains, with reference to certain authorities which we do not think it necessary to mention in detail, that having regard to the fact that Musammat Sushila is said to be a *pardanashin* lady, who was entirely at the mercy of her pleaders, the fact that her pleaders, for reasons not definitely disclosed, did not appear when called was not a sufficient reason for the case being disposed of *ex parte*, and that the learned court below ought to have acceded to her application for restoration. The learned counsel for Dwarka Prasad, the decree-holder, contends on the other hand that since it is not shown precisely why the appellant's pleaders did not appear, no sufficient cause is shown within the meaning of order IX, rule 13, of the Code of Civil Procedure for the setting aside of the

*ex parte* decree. He further contends that it is not open to this Court to exercise inherent jurisdiction in the matter under the provisions of section 151 of the Code of Civil Procedure.

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We do not think it necessary to deal with the matter with reference to the question whether sufficient cause has been shown for the non-appearance of the appellant's pleaders on the 9th of December last, since we have been shown that an application was made on the 8th of November, 1935, by Chandrapal Singh under section 4 of the United Provinces Encumbered Estates Act (XXV of 1934). On the 3rd of December, 1935, the Deputy Commissioner passed the following order:

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"This application has been duly made under the provisions of section 4 of the United Provinces Encumbered Estates Act, 1934,

"Forwarded to the Special Judge, Unao, under section 6 of the said Act."

The provisions of section 7(1)(a) of the Act in question are as follows:

"When the Collector has passed an order under section 6 the following consequences shall ensue:

(a) all proceedings pending at the date of the said order in any civil or revenue court in the United Provinces in respect of any public or private debt to which the landlord is subject, or with which his immovable property is encumbered, except an appeal or revision against a decree or order, shall be stayed, all attachments and other execution processes issued by any such court and then in force in respect of any such debt shall become null and void, and no fresh process in execution shall, except as hereinafter provided, be issued."

We do not definitely know whether the Deputy Commissioner's order of the 3rd of December, 1935, had reached the Special Judge before the order of the 9th of December was passed. We are informed that the Special Judge for the purposes of the Encumbered Estates Act was the same Subordinate Judge who passed

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the order of the 9th of December, 1935. In any case, however, the order of the Deputy Commissioner had undoubtedly been passed before the order of the 9th of December, and according to the strict interpretation of section 7(1) the effect of the passing of the Deputy Commissioner's (Collector's) order was automatically to bring into operation the consequences set forth in section 7(1)(a).

The result is that it seems to us to be clear that a final decree ought not to have been passed on the 9th of December, 1935, and would not have been passed, if the learned Subordinate Judge had been aware of the Deputy Commissioner's order of the 3rd of December last. This being so, we think it right, under the provisions of section 151 of the Code of Civil Procedure, which we think can properly be utilised in the special circumstances of the present matter, to allow this appeal, and set aside the decree passed on the 9th of December, 1935, and we direct that the matter be taken up again and disposed of by the learned Subordinate Judge, after a consideration of the circumstances which were apparently not brought to his notice when he passed that decree. We direct, however, that the appellant, Musammat Sushila, pay Rs.100 to the decree-holder respondent Dwarka Prasad as a condition of the matter being reopened. That sum must be paid within one month from the date of this decision. If it is not so paid, this appeal will stand dismissed, and the matter will not be reopened before the learned court below. As regards the costs of this appeal, we direct that each side bear its own costs.

*Appeal allowed.*