

## APPELLATE CIVIL.

*Before Rowland and Chatterji, JJ.*

LALITA PRASAD CHAUDHURY

1939.

August, 4.

v.

SYED MUHAMMAD MANSOOR.\*

*Security Bond—hypothecation of properties for satisfaction of decree—bond in the name of the Judge—execution—decree-holder seeking to sell hypothecated properties without assignment and attachment—legality—Code of Civil Procedure, 1908 (Act V of 1908), Order XX, rule 11—instalment decree passed under rule 11(1)—Court, power of, to amend the decree under rule 11(2).*

Where the decree in a money suit provided for instalments, and thereafter the Court amended the decree with the consent of both parties, making it an instalment decree coupled with a hypothecation of properties, and the security bond was expressed in favour of the Judge, and the decree-holder without taking assignment of it and without taking out attachment proceeded to sell the hypothecated properties in execution:

*Held*, (i) that rule 11(2) of Order XX, Code of Civil Procedure, 1908, is wide enough in its terms to apply to the fixing of instalments and the taking of security after the passing of any decree for the payment of money whether the form of the original decree was for instalments or for a lump sum, and, therefore, that the Court had jurisdiction, under rule 11(2), to pass a further and different kind of decree coupled with a hypothecation of property;

(ii) that the decree-holder could proceed to sell the hypothecated properties without attachment since they were the subject-matter of a security bond executed by the judgment-debtor for the satisfaction of the decree in the suit;

(iii) that the Judge was not a juridical person and the decree-holder could enforce the bond without assignment.

*Tata Iron and Steel Company, Limited v. Charles Joseph Smith*(1), followed

\*Appeal from Original Order no. 172 of 1938, from an order of Babu Gobind Sharan, Subordinate Judge of Motihari, dated the 16th May, 1938.

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Appeal by the judgment-debtor.

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The facts of the case material to this report are set out in the judgment of Rowland, J.

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MANSOOR.*Mahabir Prasad* and *A. K. Mitter*, for the appellant.*Syed Ali Khan*, for the respondent.

ROWLAND, J.—This miscellaneous appeal by the judgment-debtor arises out of his objections under section 47 of the Civil Procedure Code against execution of a decree, the Subordinate Judge having decided all the objections against him. The points raised before the Subordinate Judge were numerous, but in appeal only the following are taken. It is said that the properties which the decree-holder sought to put to sale could not be put up for sale without first being attached. The answer to this was that the properties were the subject-matter of a security bond executed by the judgment-debtor hypothecating these very properties for the satisfaction of the instalment decree in the suit. In such a case there is good authority in this Court in *Tata Iron and Steel Company, Limited v. Charles Joseph Smith*(<sup>1</sup>) that the decree-holder may proceed to sell all the hypothecated properties without taking out attachment of them.

The appellant then objects to the validity of the security bond. First, it is said that the money suit had been decreed on 21st December, 1932, the decree providing for instalments. Thereafter on the 13th January, 1933, both parties by a joint petition moved the Court for amending the decree by making it a decree for instalments coupled with a hypothecation of properties for due payment. The amount and dates of instalments as fixed on 20th December were not altered. So Mr. Mahabir Prasad contends that the new contract which led to the security bond was

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a contract without consideration and as an agreement was unenforceable. The answer to this seems to be that we are in the domain of decree and not of contract. This was an objection before the executing Court which ordinarily is precluded from going behind the decree. It may also perhaps be said that the consideration of the agreement as a whole was the existence of a debt. In any case there does not seem to be substance in the contention that the security bond was bad as being founded on an agreement without consideration.

Then it is said that the amended decree drawn up in pursuance of the order of 14th January, 1933, was made without jurisdiction and that absence of jurisdiction will entitle the executing Court to go behind the decree. The argument is that once the Court had passed an instalment decree under Order XX, rule 11(1), of the Code of Civil Procedure, it was functus officio and no jurisdiction remained to pass a further and different kind of instalment decree coupled with a hypothecation of property. The answer to this seems to be that rule 11(2) is wide enough in its terms to apply to the fixing of instalments and the taking of security after the passing of any decree for the payment of money whether the form of the original decree was for instalments or for a lump sum, provided that the new direction is made by consent of both parties. According to the words of the rule it should be on the application of the judgment-debtor and with the consent of the decree-holder. Undoubtedly the consent of both parties was present to the passing of the order of 14th January, 1933. The alleged defect of jurisdiction, therefore, fails.

Then it is said that the bond by which the properties were hypothecated is expressed to be in favour of the Subordinate Judge of Motihari and the contention is that it cannot be enforced by the decree-holder unless he first obtains an order of the Court assigning

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it to him and permitting him to enforce it. The argument is sought to be supported by the analogy of section 35 of the Guardians and Wards Act which deals with the assignment by the District Judge of a security bond executed in his favour by a guardian to a person whom the District Judge authorises to sue on the bond. The procedure regarding security bond under the Guardians and Wards Act is, however, a special procedure governed by a special statute and its analogy is no guide for us in proceedings under the Code of Civil Procedure. As regards the effect of expressing a security bond in the name of the presiding officer of the Court, this matter is dealt with in the case above cited of *Tata Iron and Steel Company, Limited v. Charles Joseph Smith*<sup>(1)</sup> where it is pointed out that the Subordinate Judge is not a juridical person. In that case the bond had been expressed in favour of the Subordinate Judge; but the latter had purported to assign the bond in favour of the decree-holder. It was held that what purported to be an assignment was of no effect at all, but nevertheless that the decree-holder could enforce the bond as the bond created an unquestioned liability which must be enforced in the only method available.

The result is that all the objections taken on behalf of the judgment-debtor fail and I would dismiss the appeal with costs.

I hardly think it necessary to enter into a further point taken in reply by Mr. Syed Ali Khan that the objections are barred by the principle of constructive *res judicata*.

CHATTERJI, J.—I agree.

K. D.

*Appeal dismissed.*

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