

**APPELLATE CIVIL.***Before Agarwala and Rowland, JJ.*

DHANUKDHARI SINGH

v.

RAMRATAN SINGH.\*

*Bihar Money-Lenders (Regulation of Transactions) Act, 1939 (Bihar Act VII of 1939), section 11—order under the section, whether appealable as a “decree”—Code of Civil Procedure, 1908 (Act V of 1908), sections 2(2) and 47.*

An order under section 11 of the Bihar Money-Lenders (Regulation of Transactions) Act, 1939, is not a “decree” within section 47, read with section 2(2), of the Code of Civil Procedure, 1908, and is not, therefore, appealable.

*Saurendra Nath Mitra v. Mritunjay Banarji*(1) and *Deoki Nandan Singh v. Bansi Singh*(2), followed.

*Bishundeo Singh v. Rasdhari Singh*(3), *Sia Ram Sinha v. Sanjab Sinha*(4), *Saya Hattie v. Ma Pwa Sa*(5), *U Tha Me v. Paungde Co-operative Town Bank*(6), *Abdul Karim v. Maung San Kyaw*(7) and *Jugeshwari Prasad v. Kamala Prasad*(8), referred to.

Appeal by the judgment-debtors.

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

*G. P. Sahi*, for the appellants.

*Harinandan Singh*, for the respondents.

AGARWALA, J.—This is an appeal by the judgment-debtors. The opposite party obtained a decree

\*Appeal from Original Order no. 271 of 1939, from an order of Babu Atal Bihari Sharan, Subordinate Judge of Gaya, dated the 19th July, 1939.

(1) (1920) 5 Pat. L. J. 270.

(2) (1911) 16 Cal. W. N. 124.

(3) (1939) Civil Revision no. 266 of 1939 (Unreported).

(4) (1940) M. A. \_\_\_\_\_ of 1940 (Unreported).

(5) (1926) I. L. R. 4 Rang. 247.

(6) (1929) A. I. R. (Rang.) 192.

(7) (1932) A. I. R. (Rang.) 54.

(8) (1940) 21 Pat. L. T. 255.

against the appellants for Rs. 5,470-2-0. On the application of the appellants under section 11 of the Bihar Money-Lenders Act the Court fixed instalments for the payment of this decretal debt. The judgment-debtors were to pay Rs. 200 within a week, and Rs. 1,000 on the 1st of January, 1940, and on the 1st of January of each succeeding year until the debt with interest had been repaid. The judgment-debtors failed to pay the initial sum of Rs. 200 within the week allowed. The Court then extended that time and gave them three weeks within which to make the payment. The payment, however, was not made within the extended time, although we are told that Rs. 150 was deposited later as a part of the initial sum of Rs. 200. No part of the instalment which fell due on the 1st of January, 1940, has been paid. The judgment-debtors attempted to persuade the Court that they were capable of paying only Rs. 300 per annum, and they now appeal against the decision of the Court below on the ground that the instalments fixed are too high.

1940.

DHANUK-  
DHARI  
SINGHv.  
RAMRATAN  
SINGH.AGARWALA,  
J.

A preliminary objection has been taken on behalf of the respondents that no appeal lies in this case. The respondents referred us to orders which have been passed in two similar cases. In *Bishundeo Singh v. Rasdhari Singh*(<sup>1</sup>), decided by Wort, J. on the 19th December, 1939, it was held that no appeal lay against an order under section 11 of the Bihar Money-Lenders Act. The learned Judge relied on the fact that whereas an appeal against an order under section 13 of the Act is expressly provided, there is no such provision with regard to an order under section 11. The other case mentioned was the case of *Sia Ram Sinha v. Sanjab Sinha*(<sup>2</sup>) which was disposed of on the 4th of March, 1940, by a Division Bench of this Court. The matter was before that Bench for the purpose of considering an application for extending the time for filing an appeal under section 5 of the Limitation

(1) (1939) Civil Revision no. 366 of 1939 (Unreported).

(2) (1940) M. A.—of 1940 (Unreported).

1940.

DHANUK-  
DHARI  
SINGH  
v.  
RAMRATAN  
SINGH.  
AGARWALA,  
J.

Act. The Bench held that, as no appeal lay from an order under section 11, the question of extending the time did not arise. Wort, J., in the first of these cases, pointed out that the right of appeal from a decree is not a constitutional right but is the creature of statute, and as the Money-Lenders Act did not confer a right of appeal from an order under section 11, no right of appeal existed. No reference was made to the provisions of section 96 of the Code of Civil Procedure, which confers a right of appeal against a decree, and section 2(2) of the Code of Civil Procedure, which defines "decree" and includes within the definition an order passed by an executing Court under section 47. It has been contended before us on behalf of the appellants that an order under section 11 of the Money-Lenders Act is an order within section 47 of the Code of Civil Procedure and that it, therefore, falls within the definition of "decree" and is appealable. During the course of the argument reference has been made to Order XX, rule 11, of the Code of Civil Procedure. Under sub-rule (1) of rule 11 of Order XX the Court which passes a decree may, at the time of passing a decree for money, make an order that payment of the decree shall be postponed, or shall be made by instalments, with or without interest, and sub-rule (2) of the same rule provides that, after the passing of a decree for payment of money, the Court may, on the application of the judgment-debtor and with the consent of the decree-holder, order that payment of the amount decreed shall be postponed or shall be made by instalments. The order under sub-rule (1) is a part of the decree in the suit, and may be challenged in an appeal from the decree. The order under sub-rule (2), for payment by instalments, can be made only with the consent of the decree-holder. No appeal, therefore, can lie against an order passed with his consent. Nor, on the other hand, can an order refusing instalments under sub-rule (2) be appealed against, as the right to pay by instalments does not exist unless the

decree-holder has consented to it. Three Rangoon cases with regard to sub-rule (2) have been brought to our notice. It appears from the first of these, *Saya Hattie v. Ma Pwa Sa*(1), that in Burma, or at least in that part of Burma from which the appeal arose, the consent of the decree-holder is not necessary for an order under sub-rule (2) of rule 11. Carr, J., sitting singly, in that case held that an order under sub-rule (2) is appealable. That decision was followed by Maung Ba, J., sitting singly, in *U Tha Me v. Pauwde Co-operative Town Bank*(2) and by a Division Bench in *Abdul Karim v. Maung San Kyaw*(3). In the first of the Rangoon cases Carr, J. observed that when a question arises whether an order under sub-rule (2) should be passed or not the question appears to be one between the parties to the suit and one relating to the execution, discharge or satisfaction of the decree, and that consequently it comes within section 47 of the Code and is appealable. The two other Rangoon cases followed the decision of Carr, J. without further investigation into the matter. It has been conceded before us that it is not every order passed between the parties to a suit in the course of execution proceedings that falls within the definition of "decree" so as to be appealable. In *Surendra Nath Mitra v. Mritunjay Banarji*(4) it was held that a decision under section 47 is not a decree within the meaning of section 2(2) unless it in some way finally determines the rights of the parties with regard to all or any of the matters in controversy. The same view was taken in *Deokinandan Singh v. Bansi Singh*(5) in which it was held that the order, to be appealable as a decree, must conclusively determine the rights of the parties, and that consequently no appeal lay against an order by which the value of the property directed to be sold under a decree has

1940.

DEANUK-  
DHARI  
SINGH  
v.  
RAMRATAN  
SINGH.

AGARWALA,  
J.

(1) (1926) I. L. R. 4 Rang. 247.

(2) (1929) A. I. R. (Rang.) 192.

(3) (1932) A. I. R. (Rang.) 54.

(4) (1920) 5 Pat. L. J. 270.

(5) (1911) 16 Cal. W. N. 124.

1940.

DHANUK-  
DHARI  
SINGH  
v.  
RAMRATAN  
SINGH.  
AGARWALA,  
J.

been assessed at a certain figure according to the statement of the decree-holder. The question, therefore, is whether an order determining instalments under section 11 of the Money-Lenders Act is an order which conclusively determines the rights of the parties. The right of the decree-holder to be paid the decretal amount and the liability of the judgment-debtor are determined by the decree in the suit. The power conferred on the executing Court by section 11 of the Money-Lenders Act is a discretion which the Court may exercise in derogation of the rights of the decree-holder to execute the whole of his decree immediately against the judgment-debtor. In deciding whether it shall or shall not exercise the discretion conferred upon it by this section the Court is not determining any question of the parties' rights, but merely whether an indulgence shall be shown to the judgment-debtor for the purpose of enabling him to meet the just demands of the decree-holder and at the same time avoid the forced sale of his own properties.

In deciding whether the circumstances justify the exercise of the discretion in favour of the judgment-debtor the Court is required by section 12 to take into consideration the circumstances of the judgment-debtor, the amount of the decree and the capacity of the judgment-debtor to pay the instalments on due dates. From the discussions on this question which are heard from time to time in this Court, it would appear as if the impression is that the only person whose difficulties are to be considered in the application of section 11 of the Money-Lenders Act is the judgment-debtor, and that the difficulties of the judgment-creditor are not to be considered at all. It is true that the Court is required to take into consideration the capacity of the judgment-debtor to pay the instalments, but the Court is also required to take into consideration the amount of the decree and the circumstances of the judgment-debtor. To my mind it appears that what the Legislature had in view was

that if, taking into consideration the various circumstances mentioned, it appears to the Court that a judgment-debtor will be able to discharge his obligations to his creditor provided he is given a reasonable time, the Court is empowered to give that time by ordering instalments, but the Court is bound to consider whether the resources of the judgment-debtor are such as to justify an expectation that the decreeholder's claim to his dues will not be defeated by allowing instalments. Where it is clear that the resources of the judgment-debtor are so meagre in relation to his liability that he is not likely to be able to discharge the decretal debt within a reasonable time, the Court would not be exercising a wise discretion in prolonging the execution proceedings by fixing instalments which would make but little impression on the possibility of judgment-debtor discharging his indebtedness.

1940.

DEANUK

DHARI

SINGH

v.

RAMRATAN

SINGH.

AGARWALA,

J.

There is one other case of this Court to which reference was made, namely, *Jugeshwari Prasad v. Kamala Prasad*(<sup>1</sup>). In this case the Court below had held that it had no power to pass an instalment decree under the Money-Lenders Act. The Bench before which the appeal came did not consider the question whether an appeal from an order refusing to fix instalments lay or not, but holding that the Court had jurisdiction to pass an order for instalments, set aside the order of the Court below and directed it to dispose of the matter according to law. As the question of the maintainability of an appeal was not raised and was not considered, this case cannot be looked upon as an authority on the question which we have to decide, particularly in view of the fact that, whether an appeal lay or not, it was competent to the Bench, in the exercise of its revisional powers, to direct the Court to exercise the jurisdiction which the Court had mistakenly refused to exercise.

(1) (1940) 21 Pat. L. T. 255.

1940.

DHANUK-  
DHARI  
SINGH  
v.  
RAMRATAN  
SINGH,  
AGARWALA,  
J.

One other aspect of the matter must also be considered, and that is the ground on which Wort, J. decided the case of *Bishundeo Singh v. Rasdhari Singh*(1), as that ground has been again urged before us. It has been pointed out that, in the case of a mortgage suit, by section 10 of the Act, the Court which passes a decree is empowered to fix instalments by which the decretal debt is to be paid, and that an order passed by the Court which passed the decree and forming part of the decree may be challenged in an appeal from the decree. By section 13 of the Act the Court is directed to value the property of the judgment-debtor which is sought to be sold, and to determine how much of it is necessary to sell in order to satisfy the decree. From the Court's decision in that matter there is an appeal expressly provided. It has been contended that the only reason why an appeal has not been expressly provided in section 11 is because the Legislature contemplated that an order under section 11 would be viewed as an appealable order under section 47 of the Code of Civil Procedure. As I have already shewn, under the decisions of this and of the Calcutta High Court it is clear that the only orders under section 47 which are appealable are orders which finally determine the rights of the parties and that an order under section 11 is not of that nature.

I would, therefore, uphold the preliminary objection, and dismiss this appeal with costs.

ROWLAND, J.—I entirely agree. There was one line of authority in the Calcutta High Court favouring the view that, as argued before us, any order deciding a matter between the parties to the suit in the course of execution proceedings was to be regarded as a decree under section 47 read with the definition of "decree" in section 2, clause (2), of the Code of

---

(1) (1939) Civil Revision no. 366 of 1939 (Unreported).

Civil Procedure, but the considered decision of that Court in *Deokinandan Singh v. Bansi Singh*<sup>(1)</sup> has since been regularly followed and, if I may say so, treated as having settled the law. The order which, it was contended in that case, was appealable was an order fixing the valuation for the purpose of settling a sale proclamation. The Judges pointed out that if the contention of the appellant were to prevail, whereas there would be only one appeal under the Code from a decision upon the question of valuation in the course of proceedings for reversal of the sale under rule 90 of Order XXI, there would be a first and a second appeal against an order for assessment of valuation antecedent to the sale. This, they say, could hardly have been the intention of the Legislature. In this Court that decision was followed in *Saurendra Nath Mitra v. Mritunjay Banarji*<sup>(2)</sup> in which after considering a number of authorities Dawson Miller, C.J. accepted the view of the Calcutta High Court as explained in the decision of the Madras High Court in *Sivagami Achi v. Subrahmania Ayyar*<sup>(3)</sup>, and observed that an order to be a decree must conclusively determine the rights of the parties and that if any other view were adopted the result would be that an appeal might be preferred against every order in the course of execution proceedings and this could hardly have been contemplated by the framers of the Code of 1882. Dawson Miller, C.J. thought that no wider interpretation was to be given to section 2, sub-section (2), which defines "decree" and states that it shall be deemed to include the determination of any question within section 47. "These words", he said, "must be limited by the words which immediately precede and unless the decision appealed from is one which in some way determines the rights of the parties with regard to all or any of the matters in controversy in the suit, it cannot be

1940.

DHANUK-  
DHARI  
SINGHv.  
RAMRATAN  
SINGH.ROWLAND,  
J.

(1) (1911) 16 Cal. W. N. 124.

(2) (1920) 5 Pat. L. J. 270.

(3) (1908) I. L. R. 27 Mad, 259, F. B.



1940.  
 DHANUK-  
 DHARI  
 SINGH  
 v.  
 RAMBATAN  
 SINGH.  
 ROWLAND,  
 J.

included under the definition of decree," otherwise it would be merely an interlocutory order and although it may be true to say that the Judge acts judicially in coming to the conclusion, that does not in itself make his determination a decree within the meaning of the section. As my learned brother has pointed out, there was nothing for the Court to decide as to the rights of the parties in the suit, those rights having been conclusively determined by the judgment and decree in the suit itself. The point before the Subordinate Judge was a matter of procedure whether the judgment-debtor should be given time to pay and the decree-holder restrained from exercising the right which he had under the law to execute his decree at once. An order regulating the procedure in this matter was an interlocutory order, and so not appealable.

*Appeal dismissed in limine.*

S.A.K.

### FULL BENCH.

*Before Harries, C.J., Wort and Manohar Lall, JJ.*

RAMPHAL SAHU

1940.

March, 29.  
 April, 1, 15.

v.

BABU SATDEO JHA.\*

*Code of Civil Procedure, 1908 (Act V of 1908), Order XXII, rules 3 and 11, and Order XLI, rule 4—appeal by all the plaintiffs or defendants—decree appealed from proceeding on a ground common to all—death of one of the appellants—legal representatives not substituted—appellate Court, whether has power under Order XII, rule 4, to reverse or vary the decree in favour of all the plaintiffs or defendants—rule 4 of Order XLI, whether overrides or creates an exception to Order XXII, rules 3 and 11.*

\* Appeal from Original Decree no. 232 of 1936, from a decision of Babu Dwarka Prasad, Subordinate Judge of Muzaffarpur, dated the 30th September, 1936.