

a mortgage suit all the questions in issue between the parties have been adjudicated upon, and at the time of the plaintiff's application for a final decree, if any, the only question that arises is whether there has been payment as directed by the preliminary decree or not. By a comparison of the terms of an ordinary mortgage decree for sale and those of the decree in *Lachmi Narain Marwari v. Balmakund Marwari* (1) it will be seen that in the former there is much less to be done towards the passing of the final decree than in the latter. The substantive rights and liabilities of the parties are finally determined by the preliminary mortgage decree. The plaintiff's right to sue has accordingly been merged in the preliminary decree, and I fail to see how the question of the survival of the right to sue can arise after the preliminary decree has been passed.

1933
 A.T.K.P.L.M.
 MUTHIAH
 CHETTYAR
 v.
 THAZAN
 HIA.
 MYA BU, J.

CRIMINAL REVISION.

Before Mr. Justice Mya Bu and Mr. Justice Dunkley.

KING-EMPEROR v. V. MOHAMED.*

1933
 June 20.

Criminal Procedure Code (Act V of 1898), s. 388—Sentence of nominal imprisonment with fine—Time given to pay fine—S. 388 (2), applicability of.

Where a sentence of imprisonment is passed in addition to a sentence of fine, even if the sentence of imprisonment is a nominal sentence only, the provisions of s. 388 of the Criminal Procedure Code have no application, and the Court has no power to grant time to pay the fine and suspend the execution of the sentence of imprisonment in default of payment of fine.

The provisions of s. 388 (2) refer to an order made by a criminal Court for the payment of money, but which is not a punishment inflicted on an offender for an offence.

Tun Byu (Assistant Government Advocate) for the Crown.

* Criminal Revision No. 311A of 1933 from the order of the Second Additional Magistrate of Bogue in Criminal Trial No. 9 of 1933.

(1) (1924) I.L.R. 4 Pat. 61.

1933
 KING-
 EMPEROR
 V. MOHAMED.

MYA BU and DUNKLEY, JJ.—In his Criminal Regular Trial No. 9 of 1933 the Second Additional Magistrate of Bogale convicted the respondent of an offence under s. 420 of the Indian Penal Code and sentenced him to suffer imprisonment till the rising of the Court, and to pay a fine of Rs. 150, or in default of payment of the fine to undergo two months' imprisonment. As the respondent was unable to pay the fine at once and prayed for time in which to pay it, the Magistrate, purporting to act under the provisions of s. 388, sub-section (1) of the Criminal Procedure Code, granted the respondent fifteen days time in which to pay the fine, on his executing a bond as required by the provisions of clause (b) of sub-section (1) of s. 388.

The action of the Magistrate in granting time for the payment of the fine was, in our opinion, illegal, and not justified by the provisions of s. 388. Sub-section (1) of s. 388 says :

“When an offender has been sentenced to fine only and to imprisonment in default of payment of the fine,” * * * *

The provisions of this sub-section are perfectly clear, and plainly refer solely to cases in which a sentence of fine only is passed. They are not applicable to a case where the sentence is a sentence of imprisonment combined with a sentence of fine, and it makes no difference whether the sentence of imprisonment is merely nominal, as in the present case, or is for a substantive term.

It has been suggested that the provisions of sub-section (2) of s. 388 might cover a case like the present. The provisions of sub-section (2) are to the following effect :

“The provisions of sub-section (1) shall be applicable also in any case in which an order for the payment of money has been made, on non-recovery of which imprisonment may be awarded, and the money is not paid forthwith.”

It is plain that the provisions of this sub-section refer to an order for payment of money which order is not a sentence passed upon an accused person. There is a clear distinction between the provisions of sub-section (1), which refer to a sentence passed in a trial, and the provisions of sub-section (2), which refer to an order made by a criminal Court for the payment of money, but which is not a punishment inflicted on an offender for a criminal offence. The provisions of this latter sub-section refer to cases like that of the payment of compensation, under s. 250 of the Criminal Procedure Code, or the payment of the penalty due on a bond, under s. 514.

In our opinion, whenever a sentence of imprisonment is passed in addition to a sentence of fine, even if the sentence of imprisonment is a nominal sentence only, the provisions of s. 388 of the Criminal Procedure Code have no application, and the execution of the sentence of imprisonment in default of payment of fine cannot be suspended.

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KING-
EMPEROR
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V. MOHAMED.

MYA BU and
DUNKLEY, JJ.