

APPELLATE CIVIL.

Before Mr. Justice Mosely.

YATHA CO-OPERATIVE SOCIETY

v.

MAUNG PO MYA AND ANOTHER.*

1935

Feb. 22.

Burma Co-operative Societies Rules, 1931—Award by an arbitrator—Enforcement of award as decree—Society's claim for mortgage decree and sale—Simple money decree-holder as purchaser of the property—Objection by simple money decree-holder—Society's right of sale—Remedy of money decree-holder.

Under Rule 15 of the Burma Co-operative Societies Rules, 1931, an arbitrator decided that the 1st respondent and his wife should pay the appellant society in three days a certain sum which they owed to the society on a registered mortgage: on default the mortgaged property was to be sold and the proceeds applied towards the debt. Under Rule 15 (4) the award, on application being made to the civil Court, was enforceable as a decree of such Court. An application in that behalf was made, but the 2nd respondent who had obtained a money decree against the 1st respondent and his wife, and who had brought the property to sale and had purchased it, objected to the application. The society applied for a re-sale of the property in execution. The executing Court dismissed the application, but ordered that the sale proceeds of the 2nd respondent's decree should be rateably distributed. On appeal the Assistant District Judge held that the arbitrator had no power to pass a mortgage decree.

Held, reversing the orders of the lower Courts, that the arbitrator did not pass any decree, but had made an award which the Court could enforce as a decree; that the society was entitled to execute the decree by sale of the property; that the 2nd respondent had only bought the right, title and interest of the debtor in the property subject to the mortgage; that he was not entitled to question the mortgage or the order for sale in execution proceedings; and that he could do so only in a regular suit.

Kyaw Myint for the appellant.

Chari for the 2nd respondent.

MOSELY, J.—The appellants are the Yatha Co-operative Society, by their agent, Maung Po Shein. The Society and their debtors, Po Mya and

* Civil Second Appeal No. 313 of 1934 from the order of the Assistant District Judge of Prome in Civil Appeal No. 7P of 1934.

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Ma Sein Khin, had a dispute over the amount due to the Society by Po Mya and Ma Sein Khin on a registered mortgage to the Society. An arbitrator was appointed under Rule 15 of the Burma Co-operative Societies Rules, 1931, and gave a decision or award to the effect that the debtors were to pay a certain sum within three days, failing which the mortgaged property was to be sold and the sale proceeds applied towards the debt.

Rule 15 (4) says that such a decision or award shall on application to the civil Court be enforceable as a decree of such Court.

Application was accordingly made, but the holder of a simple money-decree against the same debtors, the second respondent here, C.R.M.M.L.A. Chettiar, had sold the property and purchased it himself. The Society then applied that they be allowed to sell the property again in execution. This was refused by the executing Court, which passed an order, however, allowing them to share rateably with the Chettiar in the sale proceeds.

In appeal the learned Assistant District Judge quoted a case of this Court,—*Maung Tay Gyi v. Maung Yan and others* (1),—reported in an unauthorized report, where it was said that such an arbitrator has no power to pass mortgage decrees. This judgment was misconstrued,—the emphasis was on the word “decree”. What was meant was that the arbitrator could only pass an award, but that award can be executed as if it were a decree. It is not an order which cannot legally be passed and of which execution should be refused, as in the case quoted, *Maung Ba Lat v. Liquidator, Kemmendine Thathanahtita Co-operative Society* (2).

(1) A.I.R. (1933) Ran. 81.

(2) (1933) I.L.R. 11 Ran. 125.

I see no difficulty in the position created. The order to be executed as if it were a mortgage decree does not bind other persons claiming to have a mortgage of the same property any more than a mortgage decree of the Court would bind them, but the order is conclusive and binding on the property until it is attacked by way of a regular suit. A stranger to the proceedings by the Society cannot dispute the order in execution but must do so by way of a suit. If he sues he can attack the order on exactly the same grounds as if it were a mortgage decree by a Court, that is to say, on the grounds of fraud or collusion, or that the mortgage was not properly registered and so on.

It is needless to say, what is admitted here,—that the order for rateable distribution cannot be upheld.

The Chettiar, decree-holder, has only bought the right, title and interest subject to the mortgage. The Society must be allowed to execute their decree by sale of the property. This will be ordered accordingly, and the orders of the executing and lower appellate Courts set aside with costs throughout, advocate's fee here, two gold mohurs.

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