

1935

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LATT  
v.  
MA PO BYU.  
MOSELY, J.

evidently worded in the way it was expressly to preclude the possibility of such an evasion.

The order of the Magistrate allowing enforcement of the order of maintenance for 15 months was correct. This application in revision will be dismissed.

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## APPELLATE CIVIL.

*Before Sir Arthur Page, Kt., Chief Justice, and Mr Justice Mya Bu.*

1935

Jan. 17.

### THE ADMINISTRATOR-GENERAL, BURMA

v.

### TEWARY.\*

*Mortgage—Suit for simple money-decree by mortgagee—Averment in plaint as to surrender of security—Attachment and sale of mortgaged property in execution of money-decree—Civil Procedure Code (Act V of 1908), O. 34, r. 3 (6).*

A mortgagee who obtains a simple money-decree against his debtor, averring in his plaint that he surrenders his security, cannot bring the mortgaged property to sale in execution of his decree. The mere averment in the plaint that he gives up his rights under the mortgage for the purpose of that suit cannot be regarded as an extinguishment of the mortgagee's rights.

*Chedi Lal v. Sadar-Un-Nisa Bibi, I.L.R. 39 All. 36; Uderpal Singh v. Mewa Lal, I.L.R. 36 All. 264—referred to.*

*Barnabas* for the appellant. A mere statement in the plaint that the plaintiff surrenders his security without effectively transferring the same to the debtor and even his offer to hand over the title deeds, is not a valid and effectual surrender of his security.

The decree-holder cannot proceed against the security on a mere allegation of surrender. He must file a regular suit for sale under O. 34, r. 3 (6), of the Civil Procedure Code, as amended by the Rule Committee of the High Court, corresponding to O. 34, r. 14, of the Code. It is tantamount to a fraud on the mortgagor and an abuse of the process of the

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\* Civil First Appeal No. 124 of 1934 from the order of this Court on the Original Side in Civil Execution Case No. 598 of 1933.

Court; and such a procedure also defeats the provisions of s. 68 of the Transfer of Property Act.

The alleged surrender was without consideration, and of no effect at all. The mortgage was not extinguished thereby.

*Chedi Lal v. Sadar-Un-Nisa Bibi* (1); *Inderpal Singh v. Mewa Lal* (2).

*N. Jeejeebhoy* for the respondent. The question of abandonment of the mortgage security having been raised in the plaint the Court must be deemed to have applied its mind to the matter, and to have held that the mortgage security had been validly extinguished. All that section 65 (2) of the Transfer of Property Act requires is an abandonment of the mortgage security. In the present case the sale was voidable and not void. *Ashutosh Sikdar v. Beharilall* (3). No application to have the sale set aside has been made in accordance with O. 21, r. 89, and the sale cannot now be set aside. *Sorimuthu Pillai v. Muthakrishna Pillai* (4); *Seth Nanhelal v. Umrao Singh* (5).

PAGE, C.J.—In this case a device has been employed, which has become not unusual, to evade the provisions of Order 34, rule 3 (6), of the Civil Procedure Code\* which runs as follows:

“In territories to which the Transfer of Property Act, 1882, has been extended, a mortgagee who has obtained a decree for payment of money in satisfaction of a claim arising under his mortgage shall not be entitled to bring the mortgaged property to sale otherwise than by a suit for sale under this rule, and he may institute such suit notwithstanding anything contained in Order 11, Rule 2.”

(1) I.L.R. 39 All. 36.

(3) I.L.R. 35 Cal. 61.

(2) I.L.R. 35 All. 264.

(4) I.L.R. 56 Mad. 808.

(5) 60 M.L.J. 424.

\* As amended by the Rule Committee of this Court—*Ed.*

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Order 34, rule 3 (6) is in substantially the same form as section 99 of the Transfer of Property Act and Order 34, rule 14, of the Civil Procedure Code, 1908. The object of these provisions is to prevent a person who has lent money upon the security of a mortgage from selling the property to liquidate the debt without giving the mortgagor or other person interested an opportunity of redeeming the property according to law.

In the present case the respondent brought a suit for a money decree in the Small Cause Court, and in paragraph 2 of the plaint he stated "that plaintiff surrenders his security and is claiming a simple money decree only." The respondent obtained the money decree which he sought in the Small Cause Court. The decree was transferred to the Original Side of the High Court for execution, and the respondent then applied for leave to execute the decree against the property which under the mortgage was security for the loan for the payment of which he had obtained the money decree.

On the 16th July 1934 the Administrator-General, who represented the estate of the judgment-debtor, applied under section 47 and Order 34, rule 3 (6); for an order that the proclamation for sale might be cancelled and that the order for sale might be set aside. The application was dismissed by the Deputy Registrar, and on appeal by Leach J. From the order of Leach J. refusing to set aside the order for sale the present appeal has been filed. Meanwhile, the property has been sold.

Now, assuming, without deciding, that the provisions of section 68 of the Transfer of Property Act apply to a mortgage created by the deposit of title deeds (see section 96), and also that in the present case the mortgagor "bound himself to repay the

amount due under the mortgage", the respondent would be entitled to sue the mortgagor for a personal decree for the amount due in respect of the loan, provided that the Court in its discretion did not stay the suit under section 68 (2).

In the present case no application was made or order passed under section 68 (2), and it follows that the personal decree passed in the Small Cause Court was valid in law. In my opinion, however, to such a decree the provisions of Order 34, rule 3 (6), apply [*Inderpal Singh and others v. Mewa Lal and others* (1)]. The respondent, however, contends that at the date when he filed his suit in the Small Cause Court and/or when he applied in the High Court for leave to execute the decree which he had obtained in that suit there was no subsisting mortgage in his favour upon the property in suit.

At the trial no evidence was called, and the plaintiff did not pretend that any evidence had been adduced, that at any material time the mortgage in respect of which he had obtained the decree in the Small Cause Court was not subsisting. The learned advocate for the respondent, however, contended that because he had pleaded in paragraph 2 of the plaint "that plaintiff surrenders his security" there was evidence that in fact the mortgage had ceased to exist at the time when the plaint was filed. In my opinion that contention is misconceived. I agree with the following observations by Richards C.J. and Banerji J. in *Inderpal Singh and others v. Mewa Lal and others* (1):

"It is urged that the bar is afforded by the fact that in the plaint in the previous suit the plaintiffs stated that they relinquished their right to enforce the mortgage. If this statement be regarded as an agreement releasing their rights

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as mortgagees that agreement, being without consideration, cannot be enforced. The mere averment in the plaint that the plaintiffs gave up their right under the mortgage for the purpose of that suit cannot be regarded as an extinguishment of the mortgagee's rights " ;

[see also *Chedi Lal v. Sadar-Un-Nisa Bibi* (1)].

In these circumstances the application of the appellant that the sale proclamation should be cancelled and that the order for sale should be set aside in my opinion ought to have been granted. The appeal will be allowed, and, as the sale has not been confirmed, the order for sale and the sale consequent upon that order will be set aside.

As regards the costs the appellant is entitled to recover the two gold mohurs which he has paid as costs to the respondent under the order from which the appeal has been brought, and in addition he is entitled to his costs of the trial, advocate's fee two gold mohurs, and to his costs of the appeal, advocate's fee five gold mohurs.

MYA BU, J.—I agree.