

REVISIONAL CIVIL.*Before Abdul Qadir J.***MAM CHAND (DECREE-HOLDER)** Petitioner**1932***versus**July 27.*

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| 1. ROSHAN LAL (DECREE-HOLDER) | } Respondents. |
| 2. ALI MOHAMMAD (JUDGMENT-DEBTOR) | |

Civil Revision No. 121 of 1932.

Transfer of Property Act, IV of 1882, Section 89: Decree for sale of mortgaged property—whether extinguishes rights under the mortgage—Sale proceeds—Order of lower Court directing ratable distribution with other creditor holding simple money decree—whether High Court should interfere on revision. another remedy being available—Civil Procedure Code, Act V of 1908, Order XXXIV, rule 5: whether applicable to decree passed on an arbitration award.

Where the petitioner's decree was a mortgage-decree and as such was entitled to priority, and the lower Court notwithstanding this had ordered ratable distribution to another decree-holder under a simple money decree:—

Held, that a decree, which directs the realization of the decretal amount from the hypothecated property and, if insufficient, makes the defendant remain personally liable, is a mortgage-decree.

Fazal Howladar v. Krishna Bundhoo Roy (1), followed.

Digambar Suthar v. Suajan (2), distinguished.

Held also, that there is no inflexible rule that when an aggrieved party has another remedy available to him, the High Court should not interfere in revision; and where a serious injustice had been done to the petitioner, his mortgage decree not having been given the priority to which it was entitled by law, the order of the Execution Court ratably distributing the proceeds of the sale should be set aside by the High Court on revision.

Bakshish Singh v. Biru (3), relied on.

(1) (1898) I. L. R. 25 Cal. 580. (2) 1929 A. L. R. (Cal.) 233

(3) (1932) 33 P. L. R. 53.

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Held further, that the provisions of Order XXXIV of the Civil Procedure Code do not apply to decrees passed in accordance with an award on a reference to arbitration.

Punjab National Bank v. Thakar Das-Mathra Das (1), followed.

Petition for revision of the order of Mr. D. Falshaw, Senior Subordinate Judge, Hissar, dated the 20th January, 1932, ordering that Rs. 1,450 be rateably distributed in satisfaction of the three decrees of the parties.

SHAMAIR CHAND and MEHR CHAND SUD, for Petitioner.

M. L. PURI, for Roshan Lal, Respondent.

ABDUL QADIR J. ABDUL QADIR J.—A mortgage with possession had been effected by the father of one Ali Mohammad, in favour of Mam Chand, the petitioner in this civil revision. Mam Chand obtained a decree against Ali Mohammad for Rs. 1,000 on account of the mortgage money with interest, on the 6th of February 1931, on the basis of the award made by an arbitrator, to whom the parties had referred their case without the intervention of the Court. The decree purported to be in accordance with the award, but it did not recite the terms of the award, which were that Ali Mohammad was to pay Mam Chand Rs. 1,000 within ten days—with a charge on the mortgaged house—and if he failed to pay, Mam Chand would be entitled to realise the decretal amount with interest by the attachment and sale of the mortgaged property. It added that “the mortgaged house would remain mortgaged and hypothecated as before.” Roshan Lal, another creditor of Ali Mohammad, obtained another decree against him for Rs. 3,800 with costs and applied for

its execution on the 4th of May 1931. The execution of the decree of Mam Chand was proceeding in the Court of the Junior Subordinate Judge, while that of Roshan Lal proceeded in the Court of the Senior Subordinate Judge. Mam Chand got the mortgaged house attached and it was sold to one Mahabir Parshad by auction sale, on the 29th of October 1931 for Rs. 1,450. Roshan Lal took out execution against four houses belonging to the judgment-debtor, including the one which was mortgaged with Mam Chand. On the 4th July 1931 the three other houses of the judgment-debtor were attached in execution of Roshan Lal's decree. On the 12th of August 1931, Roshan Lal applied to the Senior Subordinate Judge that the execution of the decree of Mam Chand may be transferred to the Court of the Senior Subordinate Judge as the property of Ali Mohammad was involved in both the proceedings and he also wanted to have the fourth house attached. This prayer was granted. On the 2nd of November 1931 Mam Chand put in an application asking that the decree for Rs. 1,000 should be first satisfied out of the proceeds of the sale in favour of Mahabir Parshad, and the balance should be distributed ratably between him and the other creditor. Mam Chand had another decree for Rs. 400 against Ali Mohammad and claimed a ratable share out of the remaining assets of the judgment-debtor on account of that decree. Roshan Lal objected to Mam Chand getting any priority, and, in an application filed on the 13th of November 1931, took up the position that Mam Chand's decree was not a mortgage decree but simply a money decree and was not entitled to any priority over his decree. It appears from a report, dated 29th November 1931, that the sum of Rs. 1,450 had

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been duly deposited in Court. Mam Chand met the objection of Roshan Lal by applying to the Court concerned that his decree may be amended and the terms of the award may be incorporated in it. This prayer was granted by an order dated the 10th of December 1931. Strengthened by this, Mam Chand insisted that his decree was entitled to a priority. Roshan Lal put in another application, dated the 4th January 1932, stating that as the house sold to Mahabir Parshad had also been attached under his decree, he was entitled to a ratable distribution of the assets, which had been secured by the sale of that house. The learned Senior Subordinate Judge in his order, dated the 20th of January 1932, accepted this contention of Roshan Lal and ordered the assets to be ratably distributed between him and Mam Chand.

It is against this order that Mam Chand has filed a revision to this Court. I have heard Mr. Mehr Chand, Sud, who appears for Mr. Shamair Chand, on behalf of the petitioner and Mr. M. L. Puri on behalf of the respondents.

Mr. M. L. Puri raises two preliminary objections to this revision being heard:—(1) That the petitioner has another remedy by a suit under clause (2) of section 73, Civil Procedure Code. He refers to a number of authorities which hold that the High Court should not interfere in revision where the petitioner has another remedy open to him; (2) That the petition for revision is not justified because the executing Court has interpreted the decree in favour of Mam Chand to be a money decree, and even if it is has gone wrong in doing so, that is no ground for revision. The reply of Mr. Sud is that the Court below acted against the second part of the provisions of section 73 (c) of

the Civil Procedure Code in entertaining the application of Roshan Lal for ratable distribution, in a case the decree of which was clearly a mortgage decree and thus assumed jurisdiction which it did not possess. He relies upon a Division Bench decision of the Calcutta High Court, in *Fazil Howladar v. Krishna Bundhoo Roy* (1), which is to the following effect:—

“ A decree, which directs the realisation of the decretal amount from the hypothecated property, and, if insufficient makes the defendant remain personally liable, is a mortgage decree, and not a ‘ decree for the payment of money.’ ”

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As regards the question of another remedy being open to the petitioner, I am referred to the case of *Bakhshish Singh, etc. v. Biru* (2), which lays down that there is no inflexible rule that when an aggrieved party has another remedy available to him, the High Court should not interfere in revision.

I think there is not much force in the preliminary objections of Mr. M. L. Puri, and the merits of the case must be considered.

The history of the case has been sufficiently summarised above. The following issues were framed in the Court of the Senior Subordinate Judge:—

(1) Whether Mam Chand has a burden of Rs. 1,000 on the property sold and if so whether this burden will have priority in the sale?

(2) Whether Mam Chand is entitled to a ratable share on account of his other decree for Rs. 400 with costs?

Issue No. 2 is no longer in dispute, as in the Court below Roshan Lal conceded it. Issue No. 1 only is disputed. In my opinion there is no doubt that the decree was a mortgage decree and as such is entitled

(1) (1898) I. L. R. 25 Cal. 580.

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to priority. The Court below decided otherwise mainly because it followed *Digambar Suthar and others v. Suajan and others* (1), which says that an order under section 89 of the Transfer of Property Act for the sale of mortgaged property has the effect of substituting the right of sale thereby conferred upon the mortgagee for his rights under the mortgage and the latter rights are extinguished. Mr. Sud contends that the Transfer of Property Act is not in force in the Punjab and section 89 of the Transfer of Property Act was repealed in 1931. Mr. M. L. Puri replies that section 89 of the Transfer of Property Act has been embodied in Order 34, rule 5, Civil Procedure Code and therefore the ruling mentioned above is applicable. This argument ignores the fact that the provisions of Order 34, Civil Procedure Code, do not apply to decrees passed in accordance with an award on a reference to arbitration. This principle is recognised in a judgment of this Court in *Punjab National Bank, Ltd. Lyallpur v. Thakar Das-Mathra Das and another* (2).

In my opinion a serious injustice appears to have been done to the petitioner, by his mortgage decree not being given the priority to which it was entitled by law. This revision is accepted with costs and the order of the Court below ratably distributing the proceeds of the sale to Mahabir Parshad is set aside. It is hereby ordered that the decree of the petitioner for Rs. 1,000 should be first satisfied out of the sum realised by the sale of the mortgaged house and the rest of the sum should be ratably distributed among the two decree-holders.

N. F. E.

Revision accepted.

(1) 1929 A. I. R. (Cal.) 233. (2) 1930 A. I. R. (Lah.) 116.