

APPELLATE CIVIL.

Before Bhide J.

RAJA RAM (DEFENDANT) Appellant.

versus

ALLAHABAD BANK, LIMITED (PLAINTIFF)

AND OTHERS (DEFENDANTS) Respondents.

1938

Nov. 5.

First Appeal from Order No. 57 of 1938.

Civil Procedure Code (Act V of 1908), O. XXXIV, rr. 4, 5 (3) and O. XXIII, r. 3 — Mortgage suit — Preliminary decree — money not paid in Court by mortgagor as directed — Application by mortgagee for final decree — Payment out of Court alleged by mortgagor — Whether can be recognised by Court under O. XXIII, r. 3.

Held, that where in a mortgage suit, the Court has passed a preliminary decree under O. XXXIV, r. 4 of the Code of Civil Procedure, directing the defendant to pay money into Court and the money is not paid by the mortgagor as directed, the Court on the application of the mortgagee is bound to pass final decree for sale as provided in r. 5 and the Court cannot recognise any payment out of Court or any other adjustment under O. XXIII, r. 3.

Banarsi Das v. Nathu Lal (1), Mussammat Durga Devi v. Nand Lal (2) and Piara Lal v. Messrs. Bulaqi Mal & Sons (3), followed.

Lachmi Narain Marwari v. Balmokand Marwari (4), relied upon.

Other case law referred to.

Appeal from the order of Sayed Shaukat Hussain, Senior Subordinate Judge, Delhi, dated 21st March, 1938, dismissing the defendant's application.

ACHHRU RAM, for Appellant.

RAM KISHORE, B. D. BANSAL and KARTAR SINGH,
for Respondents.

(1) 12 P. R. 1913.

(3) 1935 A. I. R. (Lah.) 168.

(2) 1932 A. I. R. (Lah.) 231.

(4) I. L. R. (1925) 4 Pat. 61 (P. C.).

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BEIDE J.—In a suit for recovery of Rs.3,43,998-15-0 on the basis of a mortgage by the Allahabad Bank, Limited, Lahore, a preliminary decree was passed on the 6th April, 1937, in terms of Order 34, rule 4, Civil Procedure Code, directing that the defendant-mortgagors shall pay in Court the amount due by the 6th October, 1937, and in default of such payment the mortgaged property shall be sold on an application being made for a final decree. The necessary payment was not made in Court as ordered, but when an application was made for a final decree, it was opposed by the mortgagors on the ground that there had been a compromise out of Court. The learned Subordinate Judge has held that the alleged compromise could not be recognized in view of the terms of the preliminary decree and has therefore dismissed the application of the mortgagors for the compromise being recorded as an adjustment of the decree either under Order 23, rule 3, Civil Procedure Code, or section 151, Civil Procedure Code. From this decision the present appeal has been preferred.

The learned Subordinate Judge has relied on *Banarsi Das v. Nathu Mal* (1), *Piara Lal v. Messrs. Bulagi Mal and Sons* (2), *Rasan Chettiar v. Rangayan Chettiar* (3) and *Adasi Sanyasi v. Vaddadi Nookalamma* (4) in support of his decision. It may be pointed out here that *Piara Lal v. Messrs. Bulagi Mal and Son* (2) is a Single Bench ruling, but is based on a Division Bench ruling of this Court reported as *Mussammatt Durga Devi v. Nand Lal* (5).

(1) 12 P. R. 1913.

(3) 1930 A. I. R. (Mad.) 105.

(2) 1935 A. I. R. (Lah.) 168.

(4) 1931 A. I. R. (Mad.) 592.

(5) 1932 A. I. R. (Lah.) 231.

It was conceded before me by the learned counsel for both the parties that the preliminary decree not being executable, the provisions of Order 21, rule 2, Civil Procedure Code, do not apply. It was, however, contended on behalf of the defendant-appellant that as the suit is not terminated by the preliminary decree [*cf. Kishan Chand v. Sohan Lal* (1)] there is no reason why the provisions of Order 23, rule 3, Civil Procedure Code, should not apply. As regards the Punjab rulings, it was contended that they are distinguishable as they relate only to *payment* out of Court, and strong reliance was placed on *Raja Bahadur Harihar Prasad Narain Singh v. Maharaj Kumar Gopal Saran Narain Singh* (2) and *Inayat Khan v. Harbans Lal* (3) which support the appellant.

The contention that the Punjab rulings relate merely to the question of recognition of a payment made out of Court does not appear to be correct. It appears that in *Banarsi Das v. Nathu Mal* (4) it was pleaded that there had been a settlement out of Court by which the "plaintiff-respondents had agreed to take over part of the property in satisfaction of the debt." There is no specific reference to Order 23, rule 3, Civil Procedure Code, in the ruling, but it seems clear enough that that was the rule which the Court was considering. In *Mt. Durga Devi v. Nand Lal* (5), *Banarsi Das v. Nathu Mal* (4) was followed. In that case, the whole of the decretal amount was apparently alleged to have been paid out of Court. It was however remarked that the "alleged payment could not be recognised as an "adjustment, compromise or satisfaction" under Order 23, rule 3, Civil Procedure

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(1) I. L. R. (1921) 2 (Lah.) 95, 97.

(3) 1936 A. I. R. (All.) 9.

(2) I. L. R. (1935) 14 Pat. 488.

(4) 12 P. R. 1913.

(5) 1932 A. I. R. (Lah.) 231.

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Code." The remarks would seem to cover not only payment out of Court but any adjustment out of Court.

In *Piara Lal v. Messrs. Bulaqi Mal and Son* (1), a private adjustment contrary to the terms of the preliminary decree was alleged, but it was held (following the decision in *Mt. Durga Devi v. Nand Lal* (2) that the adjustment could not be recognised under Order 23, rule 3, Civil Procedure Code. It will thus appear that *Banarsi Das v. Nathu Mal* (3) and *Piara Lal v. Messrs. Bulaqi Mal and Son* (1) at any rate were not mere cases of payment out of Court. But apart from this, I do not see that any material distinction can really be drawn between a payment out of Court and any other adjustment after the preliminary decree for the purpose of the point now under consideration. The payment out of Court would seem to fall under Order 23, rule 3, Civil Procedure Code, as part-satisfaction of the subject-matter of the suit and would, therefore, stand on the same footing as any other adjustment.

The main contention of the learned counsel for the appellant was that if the suit remains pending till the final decree, there is no reason why the provisions of Order 23, rule 3, should not apply. But a preliminary decree in a suit for sale is a formal adjudication of the rights of the parties with reference to the mortgage and the decree directs that the plaintiff's claim shall be satisfied by a payment in Court in a certain manner. Any adjustment out of Court would, therefore, be obviously contrary to the terms of the decree. In this aspect of the question, the adjustment out of Court made without its sanction, may, I think,

(1) 1935 A. I. R. (Lah.) 168. (2) 1932 A. I. R. (Lah.) 231.

(3) 12 P. R. 1913.

be looked upon as 'unlawful' and therefore inadmissible under Order 23, rule 3, Civil Procedure Code.

The terms of a preliminary decree passed according to the provisions of Order 34, rule 4, Civil Procedure Code as regards payment in Court, etc., are imperative. It may further be pointed out that under the provisions of the corresponding provisions of sections 88 and 89 of the Transfer of Property Act which were in force before the provisions of Order 34 were enacted in the Code of 1908, payment out of Court was permitted. But the law in this respect seems to have been deliberately changed. This departure from the previous law also indicates that payment or adjustment out of Court was not intended to be recognised under Order 34, Civil Procedure Code. If, of course, both the parties appear in Court and agree to a certain adjustment and the Court sees no reason otherwise to disallow it as 'unlawful' the position may be different. In such circumstances, the adjustment may be taken to have been made with the express or implied permission of the Court and consequently there will be no objection in principle to the variation of the terms of the decree [*cf. Viswanatha Ayyar v. Chimmukutti Amma* (1)].

In *Lachmi Narain Marwari v. Balmakund Marwari* (2) a suit had been dismissed in default after a decree of a *preliminary* nature had been passed in a partition suit. Their Lordships of the Privy Council held that the suit could not be so dismissed after the preliminary decree and in giving their reasons remarked as follows:—

“After a decree has once been made in a suit, the suit cannot be dismissed unless the decree is reversed on appeal. The parties have, on the making of a decree, acquired

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(1) I. L. R. (1932) 55 Mad. 320, 330. (2) I. L. R. (1925) 4 Pat. 61 (P. C.).

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rights or incurred liabilities which are fixed, unless or until the decree is varied or set aside."

It will thus appear that although a suit does not terminate till the passing of a final decree, the passing of a preliminary decree does fix the rights of the parties to a certain extent and thus alter their position materially.

In addition to the Punjab rulings the Madras rulings relied on by the learned Subordinate Judge also seem to support his decision. The learned counsel for the appellant relied strongly on *Inayat Khan v. Harbans Lal* (1) and *Raja Bahadur Harihar Prasad Narain Singh v. Maharaj Kumar Gopal Sarn Narain Singh* (2) as stated above. But in the former ruling, there is no discussion of any authorities while in *Raja Bahadur Harihar Prasad Narain Singh v. Maharaj Kumar Gopal Sarn Narain Singh* (2) the applicability of Order 23, rule 3, Civil Procedure Code (in case Order 21, rule 2, was held inapplicable) was apparently conceded by counsel (see page 503). It appears further that the preliminary decree in that case was one based on a compromise and not an ordinary one in accordance with the provisions of Order 34, Civil Procedure Code.

In my opinion, the Punjab rulings cover the point raised and support the decision of the learned Subordinate Judge. I am also unable to see any adequate ground for referring the case to a Division Bench, as I have been requested to do.

I dismiss the appeal, but in view of the conflict of judicial decisions, leave the parties to bear their costs.

A. N. K.

Appeal dismissed.