

1902  
MAY 7.  
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APPELLATE  
CIVIL.  
—  
29 C. 638.

For the foregoing reasons I think the order of the Judicial Commissioner ought to be maintained. His order may not, it is true, have been framed precisely in the manner intended by s. 10. But that is, I think, as I have already said, immaterial, more particularly as the application upon which it was made proceeded from the representative in the district of the Court of Wards. The appeal ought in my opinion to be dismissed with costs.

PRINSEP, J. I am of the same opinion.

*Appeal dismissed.*

29 C. 644.

*Before Mr. Justice Rampini and Mr. Justice Pratt.*

TARA PADO GHOSE v. KAMINI DASSI.\* [18 November, 1901.]

*Second Appeal—Civil Procedure Code (Act XIV of 1882) ss. 244 and 588—Decree, execution of—Order absolute for foreclosure—Transfer of Property Act (IV of 1882) s. 87—Question arising as to the order absolute for foreclosure—Notice.*

When an order absolute for foreclosure of mortgaged property has been made, any question that arises afterwards as to that order absolute is not a [645] question relating to the execution of a decree within the meaning of s. 244 of the Civil Procedure Code. Therefore no second appeal lies from an order disposing of such a question.

*Akikunnissa Bibee v. Roop Lall Dass* (1) referred to.

S. 87 of the Transfer of Property Act does not require that any notice should be given to the judgment-debtor before the order absolute for foreclosure is made.

THE plaintiff Tara Pado Ghose appealed to the High Court.

One Tara Pado Ghose obtained a decree for foreclosure against the defendants Kamini Dassi and another on the 17th June 1898. Six months' time was allowed, but the decree was not satisfied. On the 22nd December 1898 the order absolute for foreclosure was made, and possession was taken by the decree-holder on the 30th January 1899. The defendant applied for a rehearing under s. 108, Civil Procedure Code, on the ground that no notice was served upon her. The application was rejected by the Munsif; but on appeal to the Subordinate Judge he remanded the case under s. 562 of the Civil Procedure Code. On remand the Munsif again rejected the application. On appeal for the second time, the Subordinate Judge allowed the defendant to pay a sum of Rs. 380, and on her doing so, directed possession of the land to be restored to her.

*The Advocate General* (Mr. J. T. Woodroffe), Babu Nilmadhub Bose, Babu Satis Chunder Ghose and Babu Biraj Mohun Mazumdar for the appellant.

Babu Lal Mohun Das for the respondent.

RAMPINI AND PRATT, JJ. This is an appeal against an appellate order. The facts are that a decree for foreclosure was passed in favour of the respondent on the 7th June 1898. It was made absolute on the 22nd December 1898. Possession was taken on the 30th January 1899. On the 8th February 1899 the defendant applied for a rehearing under

\* Appeal from order No. 145 of 1900, against the order of Babu Karuna Das Bose, Subordinate Judge of 24-Pergunnahs, dated the 22nd of March 1900, reversing the order of Babu Bhuban Mohun Ghose, Munsif of Alipore, dated the 19th of December 1899.

s. 108, Civil Procedure Code. The Munsif refused her application. She appealed to the Subordinate Judge, who remanded the case for re-enquiry under s. 562, Civil Procedure Code. The Munsif then adhered to his [646] former decision. The Subordinate Judge on a further appeal to him being made passed an order, allowing the defendant to pay a sum of Rs. 380, and on her doing so, directed her restoration to possession of the land. The plaintiff prefers this second appeal. A preliminary objection is raised that no second appeal lies under the provisions of s. 588. This objection would seem to be valid. The learned Advocate-General contends for the appellant that a second appeal lies because the order of the Munsif was an order passed in execution. This contention, however, cannot prevail in face of the decision in *Akikunnissa Bibee v. Roop Lal Dass* (1). We therefore dismiss the appeal, but without costs.

The learned Advocate-General on our intimating our intention of taking this course presented an application under s. 622, Civil Procedure Code, and prayed that we should deal with the matter under that section. We think that in the interests of justice we should do so.

The Subordinate Judge held that the respondent could not impugn the order making the decree for foreclosure absolute on the ground that no notice had been served upon her before it was passed, but was of opinion that the plaintiff had given the defendant some assurance that he would deal leniently with her, and therefore the defendant should be allowed another opportunity of paying off the debt due by her, notwithstanding that the decree for foreclosure had been made absolute.

It is clear, we think, that the Subordinate Judge was right in holding that the order absolute was not invalid by reason of no notice having been given to the defendant before it was made. The defendant was present when the decree for foreclosure was passed. She knew she would be foreclosed, if she did not pay within six months. No further notice to her was necessary, and s. 87 of the Transfer of Property Act does not require that any such further notice should be given before the order absolute is made.

We are of opinion that in these circumstances the Subordinate Judge was wrong in allowing the defendant to pay off the debt after the order absolute had been made and in directing her to [647] be restored to possession. The Subordinate Judge has held that the plaintiff gave the defendant some assurance, but he does not definitely find what assurance the plaintiff gave the defendant, nor that it was of such a nature as to make his conduct fraudulent in applying for the order for foreclosure being made absolute. The Subordinate Judge seems to have allowed his feelings of sympathy with the defendant to influence him. We do not think this was right, and we can see no reason which can justify his setting aside the order absolute and allowing the defendant to pay off the debt long after the time for doing so had elapsed.

We must therefore, under s. 622, Civil Procedure Code, set aside the order of the Subordinate Judge in the case and restore that of the Munsif, which we accordingly do. The applicant is entitled to costs.

*Order set aside.*

1901  
NOV. 18.  
APPELLATE  
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29 C. 644.