

doctor when called could recollect no such occurrence. The District Judge attached great importance to this discrepancy. The High Court thought it not unnatural that this gentleman might have forgotten a single visit to a patient after the lapse of so many years—a view in which their Lordships concur.

Their Lordships see no sufficient reason for dissenting from the conclusion arrived at by the learned Judges of the High Court. They will humbly advise His Majesty that the appeal should be dismissed. The appellants will pay the costs.

1904
MAY 11, 17.
JUNE 2.

PRIVY
COUNCIL.

31 C. 914=9
C. W. N. 49.

Appeal dismissed.

Solicitor for the appellants: *G. T. B. S. Thurnall.*

Solicitors for the respondent, *Surendra Nath Chuckerbutty: Withers, Pollock & Crow.*

31 C. 922 (=8 C. W. N. 264).

[922] APPELLATE CIVIL.

Before Mr. Justice Rampini and Mr. Justice Geidt.

KASHI PERSHAD SINGH v. JAMUNA PERSHAD SAHU.*

[1st, 2nd and 4th February, 1904.]

Decree—Execution—Civil Procedure Code (Act XIV of 1882), s. 287, cl. (e)—Proclamation of sale—Value of property—Executing Court—Transfer of Property Act (IV of 1882), ss. 67, 99—Right of Mortgagee to bring mortgaged property to sale—Decree for interest—Legality of decree.

Section 287, clause (e) of the Civil Procedure Code does not require the executing Court to make an investigation, on the application of the judgment-debtor, into the question of the value of the property to be sold, to record evidence and to come to a decision on the point.

Saadatmand Khan v. Phulkuar (1) and Sivasami Naicker v. Ratnasami Naicker (2) distinguished.

Section 98 of the Transfer of Property Act does not prevent a mortgagee from bringing the mortgaged property to sale in execution of a decree for interest only obtained in accordance with the terms of the mortgage bond.

The executing Court cannot call the legality of a decree in question.

Maharaja of Bharipur v. Rani Kanno Dei (3) followed.

[Com. on: 12 C. W. N. 542. Ref. 14 C. L. J. 35=10 I. C. 371=16 C. W. N. 124; 11 N. L. R. 153; Foll. 32 Cal. 377; Not Foll. 2 Pat. L. J. 190.]

APPEALS by the judgment-debtors, Kashi Pershad Singh and others.

Kashi Pershad Singh and his two brothers executed a mortgage bond, dated the 7th January 1893, for a loan of Rs. 3,25,000 in favour of one Ganga Pershad Sahu with interest at the rate of Re. 0-10-1 per cent. per month, with provision for compound interest in case of default of payment of interest, on hypothecation of a number of properties owned by them. The [923] principal money of the bond was payable within 11 years from the date thereof.

The bond further provided: "If we do not pay interest on the principal and interest upon interest to the said mahajan for three successive years, then the said mahajan shall have power to institute a suit in Court

* Appeals from Original Orders Nos. 443 of 1902 and 9 of 1903 against the order of Gopal Chunder Banerjee, Subordinate Judge of Monghyr, dated the 19th of November 1902.

(1) (1898) I. L. R. 20 All. 413; L. R. 25 I. A. 146.

(2) (1900) I. L. R. 23 Mad. 568.

(3) (1900) I. L. R. 23 All. 181.

1904 for such amount of interest and compound interest only as may be due at
 FEB. 1, 2, 4. the time for the period of three years: and by obtaining a decree therefor
 shall realise the interest due to him from the property mortgaged by us."

APPELLATE
 CIVIL.

31 C. 922=8
 C. W. N. 264.

On the 26th June 1900, Ganga Pershad Sahu obtained a compromise mortgage decree against Kashi Pershad Singh, his brothers and their sons, described as the defendants first party, and some subsequent mortgagees, described as the defendants second party, for the sum of Rs. 1,85,873, being the amount of interest and interest upon interest due up to the date of the decree with costs. The decree provided that, if the defendants did not pay the decretal money before the 25th June 1902, the mortgaged property should be sold subject to a first mortgage for the principal of the bond in suit and future interest. Six months' time was given for redeeming the mortgaged property. The judgment-debtors not having paid anything within the prescribed time, an order absolute for sale was passed on the 29th August 1902, and the present application for execution was made by the decree-holders, Jamuna Pershad Sahu and another, the heirs of Ganga Pershad Sahu, on the 4th September 1902, for realisation of the decretal amount by sale of the mortgaged property, subject to a first mortgage as aforesaid. Thereupon proclamation of sale was directed to be issued fixing the 10th November 1902 for sale. On the 3rd November 1902, the judgment-debtors put in a petition of objection to the execution proceedings on the following grounds :—

(i) that the execution of the decree was barred by s. 99 of the Transfer of Property Act;

(ii) that the execution proceedings should not be proceeded with before disposing of the objection of the judgment-debtors to the order absolute for sale;

(iii) that the valuation of the properties given in the sale proclamation was grossly inadequate, that this amounted to a serious irregularity and illegality, and that the Court ought not [924] to put up the properties to sale without satisfying itself that the value thereof given in the sale proclamation was approximately correct.

The Subordinate Judge disposed of the objections by an order dated the 19th November 1902. He held that although the decree could be treated only as an ordinary money decree and s. 99 of the Transfer of Property Act should bar a sale of the mortgaged property, yet the decree being on the face of it a mortgage decree he could not go into this question, or into the other questions raised regarding the validity of the decree. On the question of the value of the property, he held that the value given in the sale proclamation, viz., Rs. 51,200 was inadequate, and he fixed the value at 10 years' purchase, the annual income being fixed at Rs. 21,410, according to the valuation given by the decree-holders. The decree-holders were directed to apply for fresh proclamation of sale accordingly. On the 18th December 1902, a clerical error as to the annual valuation of the property given by the decree-holders and inserted in the order of the 19th November was corrected.

Babu Saligram Singh (Babu Baghunandan Pershad with him), for the appellants, contended that the suit, as held by the Lower Court, could be treated only as an ordinary money suit, and therefore under s. 99 of the Transfer of Property Act, no order for sale in execution of the decree could be passed. On the question of valuation, it was submitted that the judgment-debtors had the right to have a just and true valuation placed upon the property before it was sold and the duty of holding an investigation on the valuation was imposed upon the Court

by s. 287 of the Civil Procedure Code. See *Raja Ramessur Proshad Narain Singh v. Rai Sham Krissen* (1).

Babu *Digambar Chatterjee*, for the respondents, contended that s. 99 of the Transfer of Property Act had no application to the present case, as the decree was a mortgage decree, that at any rate the present suit might be treated as one brought under s. 67 of the Transfer of Property Act, and that the executing Court could not go behind the decree, which [925] was based on a compromise: *Maharaja of Bhartpur v. Rani Kanno Dei* (2). Section 287 of the Civil Procedure Code did not contemplate a regular investigation by the Court into the question of valuation.

Cur. adv. vult.

1904
FEB. 1, 2, 4

APPELLATE
CIVIL.

31 C. 922=8
C. W. N. 264.

RAMPINI AND GEIDT, JJ. These are appeals against orders of the Subordinate Judge of Monghyr, passed in an execution case. The decree, which it is now being endeavoured to execute, is dated the 26th June 1900. It was passed on a compromise. The present objectors had mortgaged certain property to the opposite party and borrowed from him Rs. 3,25,000, and there was a clause in the mortgage bond providing that, if the interest was not paid for three consecutive years, the creditors would be at liberty to institute a suit for the interest only and recover it by sale of the mortgaged property, subject to the charge for the principal money. The opposite party sued under this clause for interest amounting to Rs. 1,76,779 and a decree was given on a compromise between the parties to the effect that the decretal amount was to be paid within two years' time and in default was to be realized by sale of the mortgaged property, subject to the remaining charge under the mortgage bond. The decretal amount was not paid within the two years. The decree-holder accordingly applied for the sale of the mortgaged property. The judgment-debtors objected. The Subordinate Judge overruled their objections and they now appeal to us.

In appeal No. 9 of 1903, they appeal against an order of the 18th December 1902, directing under section 287, clause (e), Civil Procedure Code, that the estimated income from the property about to be sold should be entered in the sale proclamation at Rs. 21,400, and that the estimated value of the property should be entered as at ten times this estimated annual income.

In appeal No. 443 of 1902, the judgment-debtors appeal :—(1) against an order of the Subordinate Judge, estimating the value of the property at this amount, and (2) against his further order overruling the judgment-debtors' objection that the execution could not proceed at all.

[926] On behalf of the judgment-debtors the same objections as taken in the lower Court have been pressed before us.

We consider that there is no force in either of these objections. The law does not require the Court executing a decree to enter in the sale proclamation the value of the property to be sold, but only that it shall enter "any other thing which it considers material for the purchaser to know in order to judge of the nature and value of the property." Now, the Court executing the decree has entered in the sale proclamation both the estimated annual income of the property and its estimated value. It has calculated the value at ten times the amount of the annual income according to the decree-holder. It has allowed only 10 years' purchase, because the property is subject to the mortgage charge for the loan of

(1) (1901) 8 C. W. N. 257.

(2) (1900) 1. L. R. 23 All. 181.

1904
FEB. 1, 2, 4.
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APPELLATE
CIVIL.
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31 C. 922=8
C. W. N. 264.

Rs. 3,25,000, the principal of the debt and for future interest on the debt. We consider that in the circumstances the Court could not have estimated the value at any higher rate. But the Judgment-debtors urge that the annual income from the property is not Rs. 21,410, but Rs. 87,395, and the complaint of the appellants is that the Subordinate Judge has not accepted this estimate of the income and has not made an elaborate investigation into this question, recorded evidence and come to a decision on this point. But section 287, clause (e), Civil Procedure Code, does not require the Judge to do so. No law or case has been shown us that makes it necessary for an executing Court to do this. If this were regarded as incumbent on an executing Court, it would be disastrous to decree-holders. It would make it necessary for an executing Court to hold a trial every time it proceeded to draw up a proclamation for sale and the subsequent inevitable appeal and possible second appeal would protract the proceedings to such an extent as practically to deny execution of the decree to the decree-holder altogether. We have been pressed with the decisions in *Saadatmand Khan v. Phulkuar* (1) and *Sivasami Naickar v. Ratnasami Naickar* (2). But these rulings go no further than to hold that the value of the property stated in the sale proclamation is a material fact within the meaning of sub-section (e) of section 287, and that a material misrepresentation of its value is a material [927] irregularity in publishing or conducting the sale. This has not been denied by any one in this case. No ruling has gone so far as to fetter the discretion given to the executing Court by the law or to lay down how it is to ascertain the material facts it considers necessary to be entered in the sale proclamation.

The next plea urged on behalf of the judgement-debtors is that the decree cannot be executed at all, as the decree-holder in obtaining his decree did not proceed under section 99, Act IV of 1882, by bringing a suit under section 67 of the same Act.

To this it may be replied that—

(1) the provisions of section 99 do not apply at all, as the decree to be executed is a mortgage decree, and there was no attachment required or made ;

(2) that the decree-holder would appear to have brought a suit under section 67 of Act IV of 1882 ;

(3) that in any case the decree was passed on a compromise and the appellants are consequently estopped from objecting to it ; and

(4) that whether it be a good or a bad decree, the Court executing the decree cannot call it in question, but must execute it. *Maharaja of Bhartpur v. Rani Kanno Dei* (3).

For these reasons we dismiss both appeals with costs. We direct that the records be returned to the lower Court without delay so that it may proceed with the execution of the decree.

Appeals dismissed.

(1) (1898) L. R. 20 All. 412; L. B. 25
I. A. 146.

(2) (1900) I. L. R. 23 Mad. 568.

(3) (1900) I. L. R. 23 All. 181.