

1904
JUNE 28, 29.
JULY 1.

APPELLATE
CIVIL.

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[792] APPELLATE CIVIL.

Before Mr. Justice Rampini and Mr. Justice Bodilly.

CHANDI CHARAN ROY CHOWDHRY v. AMBIKA CHARAN DUTT.*

[28th, 29th June and 1st July, 1904.]

Decree—Execution—Mortgage decree—Transfer of Property Act (IV of 1882), ss. 88, 90—Recovery of balance due on mortgage—Civil Procedure Code (Act XIV of 1882), s. 230—Decree for payment of money—Limitation—Continuation of previous application for execution.

A combined decree under Sections 88 and 90 of the Transfer of Property Act is contrary to the procedure prescribed by that Act.

When such a decree is passed and the decree-holder proceeds to execute it for the realisation of the balance after the mortgaged property has been sold, the provisions of Section 230 of the Civil Procedure Code shall apply, and an application for execution after the expiry of twelve years from the commencement of proceedings against the person and other property of the judgment-debtor will be barred.

Kartick Nath Fandey v. Juggernath Ram Marwari (1) explained.

Fazi Howladar v. Krishna Bundhao Roy (2) referred to.

Jadunath Prasad v. Jagmohan Das (3) dissented from.

[Expl. 32 Mad. 534; Ref. 14 C. L. J. 639=16 C. W. N. 332. Dist. 18 C. W. N. 492 =24 I. C. 35.]

APPEAL by the decree-holder, Chandi Charan Roy Chowdhry.

One Nabin Krishna Roy Chowdhry, father of the present decree-holder, obtained a mortgage decree dated the 27th July 1885, against the present judgment-debtors, Ambika Charan Dutt and others. The decree was for Rs. 5,202-4 annas with costs and provided that, if the defendants failed to pay the whole amount on or before the 30th November 1885, the mortgaged property would be sold, and that, if after realisation of the proceeds of the sale, any balance remained due on the mortgage, the same would be realised by the sale of the other properties of the defendants.

[793] The first application for execution was made on the 1st February 1887, and in execution thereof, the mortgaged property was sold for Rs. 5,500 on the 10th May 1887. The next application for execution for the recovery of the balance of the decretal money was made on the 17th January 1890, and thereupon a process for the attachment of other properties was directed to be issued on the 25th February 1890, and the order for sale was passed on the 31st March 1890. On the 10th October 1890, the Court Mohurir submitted an account specifying the exact sum due from the judgment-debtors. Some properties were sold, Rs. 499 were realised by sale, and the case was struck off on the 11th July 1891. Two more applications for execution having been made on the 31st January 1893 and the 29th March 1894 respectively, and the decree-holder having in the meanwhile died, an application for execution was made on the 11th June 1895 by his legal representative, the present decree-holder. The execution of the decree was however stayed by the order of the High Court on different occasions, in consequence of appeals being preferred by some of the judgment-debtors, the last of which appeals was dismissed by the High Court on the 28th

* Appeal from Order No. 195 of 1903, against the order of Kali Kumar Bose, Subordinate Judge of 24-Pergunnahs, dated the 5th of March 1903.

(1) (1899) I. L. R. 27 Cal. 285.

(3) (1903) I. L. R. 25 All. 541.

(2) (1897) I. L. R. 25 Cal. 580.

March 1901, there being an intervening period between the 27th July 1897 and the 3rd October 1898, during which there was no bar to the execution proceedings.

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The present application for execution was made on the 10th July 1902, and it was objected on behalf of the judgment-debtor, Ambika Charan Dutt, that the execution was barred by Section 230 of the Civil Procedure Code. The Subordinate Judge gave effect to the objection and held that the application was barred by the twelve years' rule of limitation, which was accordingly rejected. He held that as the present application was filed after the expiry of 12 years from the 17th January 1890, on which date the mortgage decree had, according to him, been converted into a money decree, Section 230 of the Civil Procedure Code applied, the money having become payable from the other properties of the judgment-debtors on the said date.

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Babu Digambar Chatterjee (Babu Khetra Mohan Sen, with him) for the appellant : I submit that the decree is a mortgage decree [794] and Section 230 of the Civil Procedure Code does not apply. See *Kartic Nath Pandey v. Juggernath Ram Marwari* (1) and *Fazil Howladar v. Krishna Bundhoo Roy* (2). No doubt, a distinction is made between the portion of the decree directing sale of the mortgaged property and the portion directing realisation of the balance from other properties of the judgment-debtors. But in *Fazil Howladar v. Krishna Bundhoo Roy* (2), the distinction was assumed, not discussed; in the other case, there is merely an expression of opinion. I contend that a mortgage decree always continues to be a mortgage decree. [RAMPINI, J. The case of *Jadunath Prasad v. Jagmohan Das* (3) supports your contention.] Even according to the expression of opinion in the case of *Kartic Nath Pandey v. Juggernath Ram Marwari* (1), the application, I submit, is not barred; for the mortgage decree can only be deemed to be converted into a money decree when the amount of the balance recoverable by execution is exactly determined, and in the present case this was done on the 10th October 1890, i.e., within twelve years from the date of the present application, when the Court Mohurir submitted an account specifying the exact amount due from the judgment-debtors. Besides, having regard to the impediments, due to acts of the opposite parties, to the execution proceedings, the present application should be treated as a continuation or revival of the previous application of 1895.

Babu Mahendra Nath Roy (Babu Sanat Kumar Pal, with him), for the respondent : I submit that having regard to the expression of opinion in *Kartic Nath Pandey v. Juggernath Ram Marwari* (1) and to the facts that process for attachment was directed to be issued on the 25th February 1890 and sale was directed on the 31st March following, the mortgage decree must be deemed to have been converted into a money decree on the 31st March 1890 at the latest, viz., more than twelve years before the date of the present application. The case of *Jadunath Prasad v. Jagmohan Das* (3), holding that Section 230 of the Civil Procedure Code does not at all apply, was, I submit, wrongly decided and ought not to be followed. The application is therefore barred. Nor can it be treated as a continuation or revival of the previous application, [795] for there were considerable intervals of time during which there was no bar to execution, but the decree-holder did nothing.

Cur. adv. vult.

(1) (1899) I. L. R. 27 Cal. 285.
(2) (1897) I. L. R. 25 Cal. 580.

(3) (1908) I. L. R. 25 All. 541.

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RAMPINI AND BODILLY, JJ. This is an appeal against an order of the Subordinate Judge of the 24-Pergunnahs passed in an execution case. The Subordinate Judge has held that execution of the decree is barred under Section 230 of the Code of Civil Procedure.

The decree in question is dated the 27th July 1885. It is a mortgage decree and provides for the realization of the debt due by the sale of the mortgaged properties and directs that, if the full amount of the debt is not so satisfied, then the balance is to be realized by the sale of the other properties of the judgment-debtors. This decree is, strictly speaking, not in proper form. There should, according to the Transfer of Property Act, have been first a decree under Section 88 for the sale of the mortgaged properties, and then a decree under Section 90 for the balance remaining unpaid.

The mortgaged properties were sold off some time in or previous to 1890. The present application is for the sale of the other properties of the judgment-debtors and was made on the 10th July 1902.

The Subordinate Judge has held that the mortgage decree was converted into a money decree on the 17th January 1890 and so execution is now barred, as the present application was made more than twelve years after that date. The learned pleader for the appellant endeavours to show that the mortgage decree was not converted into a money decree till the 10th October 1890, as it was on that date that the Subordinate Judge's mohurir submitted an account specifying the exact sum due from the judgment-debtors. The respondent's pleader on the other hand contends that the mortgage decree was converted into a money decree at the latest, in March 1890, for in that month orders for the attachment and sale of the other property of the judgment-debtors were passed. This would appear to be correct, so the present application is [796] made after more than twelve years from the date when proceedings against the other property of the judgment-debtors were commenced. The pleader for the appellant next argues that the present application must be considered as a continuation of the last previous application for execution, which was presented on the 11th June 1895. He says the execution proceedings were delayed by appeals and orders for the stay of execution. But we regard this argument as untenable. The present application is an entirely distinct and different application from that of the 11th June 1895 and the execution proceedings were not carried on continuously. There were intervals between the proceedings referred to. The present application was not made promptly on the conclusion of the last of them.

We have therefore to decide whether an application for execution of a mortgage decree after the expiry of twelve years from the commencement of proceedings against the other property of the judgment-debtor is barred by the provisions of Section 230, Civil Procedure Code or not.

It would appear to us that it is. It has been conceded by the appellant's pleader that, if the decree-holder had followed the strict provisions of the Transfer of Property Act and obtained first a decree for sale of the mortgaged property under Section 88 and then a decree under Section 90 for the realization of the balance, the latter decree would have been a money decree and its execution would have been barred by the provisions of Section 230, Civil Procedure Code. It would be unreasonable and unfair then to hold that the decree-holder would be entitled to a longer period of limitation, or rather would be fettered by

no period of limitation at all, by improperly obtaining a combined decree under Sections 88 and 90, contrary to the procedure of the Transfer of Property Act.

There is apparently only one decision against this view, viz., that of *Jadunath Prasad v. Jagmohan Das* (1). But this decision is not binding on us, and we regret that we cannot assent to it, for in it the learned Judges, who decided it, have not noticed the fact that a combined decree under Sections 88 and 90 is one passed in contravention of the provisions of the Transfer of Property Act [797] and that it would therefore not be just that a decree-holder by obtaining such a decree should gain an advantage, to which he would not have been entitled, if he had strictly followed the procedure prescribed by the Act. Moreover, Aikman J. in his judgment in that case has relied on two cases, in neither of which the point now discussed arose. But in the case decided by this Court, to which he has referred, viz., *Kartick Nath Pandey v. Juggernath Ram Marwari* (2), one of the reasons given for holding that the execution of the decree was not barred was that the decree for the balance due after the sale of the mortgaged properties had been obtained on the 5th July 1889, that is, only nine years previously to the application for execution in that case, which had been made on the 5th November 1897.

Another case, viz., *Fazil Howladar v. Krishna Bundhoo Roy* (3) has been cited to us. The question now under consideration was not mooted in that case. The application in that case was, "for the realization of the mortgaged debt by sale of the mortgaged property." It had been held by the Court below that "so much of the decree as authorizes the decree-holder to realize the judgment-debt out of any property of the judgment-debtor other than the mortgaged property was barred under section 230 of the Code" and this finding was not impugned before the learned Judges, who decided that case.

For these reasons we agree with the Subordinate Judge in holding that the execution of the decree in this case is barred and we dismiss this appeal with costs.

Appeal dismissed.

31 C. 798 (= 8 C. W. N. 635)
 [798] ORIGINAL CIVIL.
 Before Mr. Justice Sale.

BEHARI LALL SHAHA v. JAGODISH CHUNDER SHAHA.*

[20th, 25th & 30th May, 1904.]

Excise Act (III of 1886) and II (B. C.) of 1903—Sale of liquor—License—Agreement in contravention of Excise Act.

The object of the Excise Act is to prohibit persons from selling or carrying on the business of selling exciseable articles without a license.

The prohibition by the Act of the sale of liquor without a license is based upon the principle of public policy, and on moral grounds, and the purpose of the Act is not confined to the protection of the Revenue.

Boistub Churn Naun v. Wooma Churn Sen (4) referred to.

* Original Civil Suit No. 4 of 1903.

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| (1) (1908) I. L. R. 25 All. 541. | (3) (1897) I. L. R. 25 Cal. 580. |
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