

30 C. 1060 (=7 C. W. N. 914.)
[1060] APPELLATE CIVIL.

1903
JULY 30.

APPELLATE
CIVIL.

30 C. 1060=
7 C. W. N.
914.

SHYAM SUNDAR LAL v. BAJPAI JAINARAYAN.*
[30th July, 1903.]

Execution of decree—Security bond—Mortgage—Sale of mortgaged property—Civil Procedure Code (Act XIV of 1882) s. 545—Transfer of Property Act (IV of 1882) s. 67 and s. 99.

The relationship between a decree-holder and a judgment-debtor who has executed a security bond under s. 545, cl. (c) of the Civil Procedure Code, mortgaging certain properties, for the due performance of the decree or order that may ultimately be passed by the Appellate Court, is not that of mortgage and mortgagor; and in the event of the appeal being dismissed the decree-holder is entitled to realize his decretal money by sale of the properties given in security without instituting a suit under s. 67 of the Transfer of Property Act.

[Ref. 14 Bur. L. R. 170; 23 C. W. N. 769=51 L. C. 786; Dist. 32 Cal. 494=9 C.W.N. 372=1 C. L. J. 118; 37 I. C. 397=1 Pat. L. W. 69; Foll. 41 Mad. 327.]

APPEAL by the plaintiff, Shyam Sundar Lal, the decree-holder.

The plaintiff, decree-holder, obtained a money decree on a bond and applied for execution of the decree while an appeal against the decree was pending; thereupon an application was made by the defendant judgment-debtors for the stay of execution under s. 545 of the Code of Civil Procedure. The application was granted upon the defendant giving security for the due performance of any decree that might ultimately be passed. A security bond was executed by the judgment-debtors by which they mortgaged certain properties as security. The appeal was eventually dismissed. Thereupon the decree-holder applied for realization of the money due under his decree by sale of the properties mortgaged by the security bond of the judgment-debtors. The security-bond which was not addressed to the decree-holder or any body in particular was in the following terms:—

“We execute this security bond for Rs. 10,000 by mortgaging property and we declare as follows:—

1. We mortgage in this security bond for Rs. 10,000, the property mentioned at the foot of this security bond, the estimated value of which exceeds Rs. 40,000 and which is free from any lien whatever.

2. That before the disposal of the appeal which we were to file in the Allahabad High Court at the time when the order for furnishing security was passed and which we have now filed, the decree-holder shall have no right to take out execution of the decree, and in the event of the appeal [1061] being decided against us, which God forbid, the decree-holder shall have right to realize up to Rs. 10,000 on account of the decretal money, as will be found due to him by account from the property mentioned in this security bond and to his doing so we and our heirs and representatives neither have nor shall have any objection whatever. Therefore this security bond containing the conditions mentioned above is given in writing for Rs. 10,000 so that it may be of use when required.”

The Subordinate Judge disallowed the application for sale on the ground that the properties could not be sold without obtaining a decree under s. 67 of the Transfer of Property Act.

Babu *Raghu Nandan Prosad* for the appellant. The decree-holder is not a mortgagee within the meaning of s. 99 of the Transfer of Property Act. The security bond is not addressed to him or any one in particular,

* Appeal from Original Order No. 391 of 1902 against the decree of Kartick Chandra Pal, Subordinate Judge of Shahabad, dated July 24, 1902.

1903
JULY 30.
—
APPELLATE
CIVIL.

30 C. 1060 =
7 C. W. N.
914.

it was given for the satisfaction of the Court ; cl. (c) of s. 545 of the Civil Procedure Code makes it clear.

Babu *Lakshmi Narain Singh* for the respondent. The decree-holder seeks the benefit of the mortgage created by the security bond and he cannot proceed to sell the properties without instituting a suit under s. 67 of the Transfer of Property Act ; s. 99 of the Act is a bar to the remedy asked for by the decree-holder : *Chundra Nath Dey v. Burroda Shoondury Ghose* (1) and *Aubhoyessury Dabee v. Gouri Sunkur Panday* (2).

GHOSE AND PARGITER, JJ. This is an appeal by the decree-holder. The facts out of which this appeal arises are shortly these :—

The plaintiff decree-holder obtained a money-decree in the Court of first instance, but before the time for appeal against the said decree had expired, he applied for execution of the decree. Thereupon, an application was made by the defendant judgment-debtor for the stay of execution under section 545 of the Code of Civil Procedure. The Court of first instance granted the application upon the defendant giving security in the amount of Rs. 10,000. In accordance with the order of the Court, the security bond was executed by the defendant, by which certain properties were mortgaged as security for the due [1062] performance of any decree or order that might ultimately be passed.

It would appear that an appeal was preferred by the defendant against the decree of the Court of first instance, but that appeal was dismissed. Thereupon the decree-holder applied for realization of the money covered by his decree, by sale of the properties comprised in the security bond, executed by the defendant judgment-debtor. The Court below has disallowed the application upon the ground that under section 99, read with section 67 of the Transfer of Property Act, the decree-holder could not bring to sale the properties in question before obtaining a decree under the provisions of the last-mentioned section of the Transfer of Property Act. Hence this appeal by the decree-holder.

Section 99 of the Transfer of Property Act runs as follows :—
“Where a mortgagee in execution of a decree for the satisfaction of any claim, whether arising under the mortgage or not, attaches the mortgaged property, he shall not be entitled to bring such property to sale otherwise than by instituting a suit under section 67, and he may institute such suit notwithstanding anything contained in the Code of Civil Procedure, section 43.

The question that arises before us for consideration is whether the decree-holder is a “mortgagee” within the meaning of the section. If he be such a mortgagee, no doubt, he cannot sell the properties comprised in the mortgage without obtaining, in the first instance, a decree under the provisions of section 67 of the Transfer of Property Act. But if otherwise, there is no bar to the decree-holder obtaining the remedy he has asked for. Now looking at the security bond in question, it will be observed that it is not addressed to the decree-holder nor to any body in particular ; but it is in reality in favour of the Court. And this seems to be clear if we read the document by the light of clause (c) of section 545 of the Code of Civil Procedure. That clause is as follows:—“That security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him,” that is to say, the judgment-debtor.

(1) (1895) I. L. R. 22 Cal. 813.

(2) (1895) I. L. R. 22 Cal. 859.

It was for the due performance of the decree or order that might ultimately be passed by the Appellate Court that the security [1063] was given and in this view of the matter, the decree-holder could not be regarded as a mortgagee in the strict sense of the term, though no doubt in the event of the appeal being dismissed, he would be entitled to realize his decretal money by sale of the properties given in security. For these reasons we are unable to hold that the decree-holder is a mortgagee within the meaning of section 99 of the Transfer of Property Act. It follows therefore that there is no bar to the decree-holder suing for the remedy he has asked for, in execution of his decree.

The result is that the order of the Court below is set aside with costs, and the case sent back to that Court, so that the execution asked for may be granted.

Appeal allowed ; case remanded.

1903
JULY 30.
—
APPELLATE
CIVIL.
—
30 C. 1060=
7 C. W. N.
914.

30 C. 1063.

APPELLATE CIVIL.

BOIDYA NATH PANDAY v. GHISU MANDAL.*

[10th February, 1903.]

Notice—Bengal Tenancy Act (VIII of 1885) s. 155—Ejectment, Suit for—Alternative relief—Limitation.

A suit for the ejectment of a tenant for misuse of the land was dismissed by the Court below on the ground that the notice served on the tenant under s. 155 of the Bengal Tenancy Act was bad, as the compensation claimed in the notice for the misuse was demanded in the alternative :—

Held, that the notice was not bad in law merely because the compensation was demanded in the alternative.

Pershad Singh v. Ram Pertab Roy (1) distinguished.

[Ref. 29 C. L. J. 430—51 I. C. 385.]

SECOND APPEAL by the plaintiffs Boidya Nath Panday and others.

This appeal arose out of an action brought by the plaintiffs to eject the defendant, after notice under section 155 of the Bengal Tenancy Act. The allegation of the plaintiffs was that they [1064] were the *darputnidars* of mouzah Chainpore; that the defendant was holding the land in suit, for agricultural purposes in the said mouzah under a settlement taken from the putnidar on the 23rd Joisto 1303 (4th June 1896); that the defendant had no right other than that of holding and cultivating the land; but that he had dug out earth from a portion of the land rendering it unfit for cultivation for which purpose only he took the settlement; that under the terms of the settlement, the defendant, by reason of the excavation, made himself liable to ejectment; that the plaintiffs served upon the defendant a notice, under section 155 of the Bengal Tenancy Act, requiring him on pain of ejectment to fill up the excavation within a certain time or in the alternative to pay to the plaintiffs the sum of Rs. 320 as compensation for the injury done to them; and that the defendant did not comply with the requirements of the notice and hence the suit.

* Appeal from Appellate Decree No. 198 of 1900, against the decree of W. Tennon, District Judge of Moorshedabad, dated November 6, 1899, affirming the decree of Purna Chandra Banerjee, Munsif of Lalbagh, dated March 15, 1899.

(1) (1894) I. L. R. 22 Cal. 77.