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We are accordingly of opinion that the order of the lower Court is correct and we dismiss this appeal with costs.

The rule issued in this case necessarily falls through. We discharge it without costs.

Appeal dismissed ; Rule discharged.

32 C. 494 (=9 C. W. N. 372=1 C. L. J. 118.)

[494] APPELLATE CIVIL.

Before Mr. Justice Harington and Mr. Justice Mookerjee.

TOKHAN SINGH v. GIRWAR SINGH.*

[8th February, 1905.]

Execution of decree—Security for costs—Sale of properties given as security—Mortgage—Transfer of Property Act (IV of 1882), ss. 67, 99—Costs—Interest on costs.

As security for the costs of the respondents in appeal to the Privy Council the appellants executed a duly attested and registered bond whereby they "put certain immoveable properties in security" for such costs.

The Privy Council in dismissing the appeal awarded the respondents their costs, who thereupon in execution applied for the sale of the properties comprised in the bond :

Held, that the effect of the bond was to create a mortgage ; and that having regard to s. 99 of the Transfer of Property Act, the properties could not be sold without instituting a suit under s. 67 of the Act.

Girindra Nath Mukerjee v. Bejoy Gopal Mukerjee, (1) *Abdul Karim v. Salimun*, (2) and *Gokul Mandar v. Padmanand Singh*, (3) referred to.

Ramji Haribhai v. Bai Parvati, (4) *Ganga Dei v. Shiam Sundar*, (5) and *Janki Kuar v. Sarup Ram*, (6) dissented from.

Bans Bahadur Singh v. Mughla Begam, (7) and *Shyam Sundar Lal v. Bajpai Jainarayan*, (8) distinguished.

When the order of the Privy Council awards costs, but is silent as to interest on the costs so awarded, it is not competent to the Court executing the order to direct payment of the costs with interest.

Forester v. Secretary of State for India, (9) *Dakhhina Mohan Roy v. Saroda Mohan Roy*, (10) followed.

[T. P. Act, S. 99—Suit, necessity for : Fol. 35 Cal. 61 : Ref. 6 C. L. J. 462 ; 23 C. W. N. 769=51 I. C. 736 ;

T. P. Act, S. 58—Security Bond if should be registered : Ref. 31 Mad. 330.]

APPEAL by the judgment-debtors, Tokhan Singh and others.

[495] The appellants, judgment-debtors, had preferred an appeal to Her late Majesty in Council and in giving security for costs of the respondents as required by s. 602 of the Civil Procedure Code, executed a security bond to the amount of Rs. 4,000 in favour of the Registrar of the Appellate Side of the High Court, the material portion of which is given in the judgment of Harington, J.

The bond was duly attested by two witnesses and registered and in effect created a mortgage as defined in s. 58 of Transfer of Property Act.

* Appeal from Order, No. 809 of 1903, against the order of Mati Lal Haldar, Subordinate Judge of Monghyr, dated Aug. 12, 1903.

(1) (1898) I. L. R. 26 Cal. 246.

(2) (1899) I. L. R. 27 Cal. 190.

(8) (1902) I. L. R. 29 Cal. 707.

(4) (1902) I. L. R. 27 Bom. 91.

(5) (1903) All. W. N. 201.

(6) (1895) I. L. R. 17 All. 99.

(7) (1880) I. L. R. 2 All. 604.

(8) (1908) I. L. R. 30 Cal. 1060.

(9) (1877) I. L. R. 3 Cal. 161 ; L. R. 4 I. A. 137.

(10) (1896) I. L. R. 23 Cal. 357.

By the decree of the Privy Council the appellants, who did not appear at the hearing of the appeal, were ordered to pay the costs of the respondents who obtained an assignment of the mortgage from the Registrar and in execution of the order of the Privy Council awarding them costs applied to the Subordinate Judge to bring the properties comprised in the bond to sale without instituting a suit under s. 67 of the Transfer of Property Act. In their application for execution the decree-holders (respondents) asked for interest at 6 per cent. on the amount decreed for costs.

The judgment-debtors (appellants) raised the objections that the decree-holders were not entitled to interest on costs because the decree of the Privy Council allowing them costs made no mention of any interest and that, having regard to s. 99 of the Transfer of Property Act, they were not entitled to bring to sale the properties comprised in the bond without instituting a suit under s. 67 of the Act.

The Subordinate Judge disallowed the objections and ordered the sale of the properties. From that order the judgment-debtors appealed to the High Court.

Babu *Khetter Mohun Sen*, for the appellants.

Babu *Jogesh Chandra De* and Babu *Digambar Chatterjee*, for the respondents.

HARINGTON, J. This is an appeal against an order of the Subordinate Judge of Monghyr disallowing an objection by the judgment-debtors and directing certain property to be sold in execution of a decree.

[496] The judgment-debtors had as appellants preferred an appeal to Her late Majesty in Council and had executed a bond to the amount of Rs. 4,000 as security for the respondent's costs. The respondents now desire to enforce that security by selling in execution of their decree for costs the property comprised in it. The appellants objected that the property could only be sold after a decree in a regular suit. This objection was overruled. The judgment-debtors thereupon appealed to this Court.

In my opinion the appeal must be allowed.

The security bond is addressed to the Registrar and the material portion is as follows:—"We the appellants to England of our free will and accord put a portion of our Zamindari Milkiat as per schedule given below of which we are in possession without the participation and interference on the part of any person and which is worth Rs. 20,000, in security for the Rs. 4,000, being the amount of costs of the respondents to England (stipulating) that, till the passing of an order by the Privy Council, we or our heirs and representatives shall not execute any deed of sale, mortgage or ticca pottah or create encumbrance of any other kind and that, if we or they do any such thing it shall be null and void and inadmissible in a Court of Justice."

In my opinion the effect of this bond is to transfer to the Registrar an interest in specific immoveable properties to secure a future debt, which may become due from the appellants to the respondents and as such it is a mortgage within section 58 of the Transfer of Property Act.

A similar question arose with reference to a bond given as security for costs in the case of *Girindri Nath Mukerjee v. Bejoy Gopal Mukerjee* (1) in which it was held that the security bond was a mortgage within section 58 of the Transfer of Property Act and therefore had to be attested by two witnesses in accordance with section 59 of that Act. If it be once conceded that what the appellants have done is to mortgage their interest

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in their zemindari, then by section 99 of the Transfer of Property Act the mortgagee is not entitled to bring that interest to sale without a regular suit under section 67, unless he can show that [497] by some provision of law this mortgage is excepted from the operation of that statute.

The respondent relies on the case of *Shyam Sundar Lal v. Bajpai Jainarayan* (1) as showing that the property comprised in a security bond can be sold without suit : but in that case it was held that the particular security bond then before the Court did not create a mortgage, because it did not purport to transfer an interest to any person. It is not therefore an authority for the respondent's contention.

It is also argued that it was not the intention of the Legislature that a successful respondent should be driven to a suit to enable him to realize his security, and the provisions of the Civil Procedure Code, section 610, were relied on. That section only enables a decree for costs to be executed against a surety in the same manner as it might be executed against an appellant and does not touch the question raised in this case.

I think it is fallacious to say that the mortgagee is driven to a suit. The interest of a mortgagee may be sold ; there is nothing to prevent the Registrar assigning the mortgagee's interest under the security bond for valuable consideration and leaving the assignee to sue on the mortgage.

The Subordinate Judge has in fact treated the security bond as though it contained a power of sale under section 69 of the Transfer of Property Act : it in fact contains no such power : if it had, the power would not have been valid under section 69.

There is another objection taken by the appellant, viz., that the Subordinate Judge had no power to allow interest on the costs to which the judgment-creditor is entitled. The objection is well founded.

For these reasons, I consider that the appeal must be allowed with costs.

MOOKERJEE, J. I agree with my learned brother that the order made by the Court below in this case must be reversed. In the first place it is quite clear that the security bond creates a valid mortgage as defined in section 58 of the Transfer of Property Act, inasmuch as it effects the transfer of an interest in [498] specific immoveable property to the Registrar of this Court for the benefit of the Respondents, with a view to secure a future debt, namely a judgment-debt that might be created by the order of Her Majesty in Council. This conclusion is in accordance with the case of *Girindra Nath Mukerjee v. Bijoy Gopal Mukerjee* (2) which appears to me to be well founded on principle and was followed in *Abdul Karim v. Salimun* (3) although it was dissented from in *Iamji v. Bai Parvati* (4) and *Ganga Dei v. Shyam Sundar* (5). As the respondents for whose benefit the security was given, have subsequently obtained an assignment of the mortgage from the Registrar, it follows that they are now the mortgagees within the meaning of section 99 of the Transfer of Property Act. The question therefore necessarily arises whether the respondents, who desire to obtain execution of the order of His Majesty in Council in so far as such order awards costs to them, are entitled to bring the properties comprised in the security to sale otherwise than by instituting a suit under section 67 of the Transfer of Property Act. I feel no hesitation that this question must be answered in favour of the present appellants, as all the elements which are necessary

(1) (1903) I. L. R. 30 Cal. 1060.

(2) (1898) I. L. R. 25 Cal. 246.

(3) (1899) I. L. R. 27 Cal. 190.

(4) (1902) I. L. R. 27 Bom. 91.

(5) (1903) All. W. N. 201.

to make section 99 of the Transfer of Property Act applicable are present here. The mortgagee in execution of a decree for the satisfaction of a claim, which does not arise under the mortgage, seeks to sell the mortgaged properties; the order of His Majesty in Council does not direct the sale of these properties, and under section 610 of the Civil Procedure Code, it has to be executed in the manner and according to the rules applicable to the execution of original decrees of the primary Court; the property therefore must be first attached under section 274 of the Civil Procedure Code and then an order for sale obtained under section 284: this is precisely what section 99 of the Transfer of Property Act says, shall not be done without the institution of a suit under section 67 of that Act. The learned vakil for the respondents urges, however, that a more limited construction ought to be put upon section 99 and in support of his argument places reliance upon the case of *Janki Kuar v. Sarup Ram* (1) in which the learned Judges of the Allahabad [499] High Court held that section 99 of the Transfer of Property Act has no application to the enforcement by a process of the Court, of a security bond given to the Court for the performance of its decree. I regret I am unable to follow this decision, which is not supported by any reasons and seems to me to incorporate into section 99 a limitation inconsistent with its clear and perfectly general terms. As pointed out by their Lordships of the Judicial Committee in a recent case *Gokul Mandar v. Padmanand Singh* (2), "the essence of a Code is to be exhaustive on matters in respect of which it declares the law, and it is not the province of Judge to disregard or go outside the letter of the enactment according to its true construction." It further appears that the case of *Bans Bahadur Singh v. Mughla Begam* (3) upon which the learned Judges, of the Allahabad High Court relied and in which the judgment-debtor was permitted to recover the costs allowed by the order of Her Majesty in Council, by the attachment and sale of the property hypothecated by the sureties, was decided before the Transfer of Property Act was passed and cannot consequently be regarded as an authority upon the question of the construction of section 99 of that Act.

The learned vakil for the respondents has further contended that the view I take is opposed to the decision of this Court in *Shyam Sundar Lal v. Bajpai Jainarayan* (4). I am of opinion that this contention is not well founded. The decision of the learned Judges in that case was, as I understand it, based upon a construction of the security bond which had been given under section 545, Civil Procedure Code, and which, it was held, did not constitute the decree-holder a mortgagee. I am not called upon to consider whether a different view of the effect of the security bond might not be taken, but assuming that the true effect of the security bond was not to constitute the decree-holder a mortgagee, the case would be outside the scope of section 99 of the Transfer of Property Act. The learned Judges, however, went on to add that if the decree-holder 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 [500] Transfer of Property Act." As I have already held that the security bond in the case before us created a valid mortgage the observations I have just quoted, in reality, support the view I take.

(1) (1895) I. L. R. 17 All. 99.

(2) (1902) I. L. R. 29 Cal. 707.

(3) (1880) I. L. R. 2 All. 604.

(4) (1903) I. L. R. 30 Cal. 1060.

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The learned vakil for the respondents placed some reliance upon section 610 of the Civil Procedure Code which provides that "in so far as the order awards costs to the respondent, it may be executed against a surety therefor, to the extent to which he has rendered himself liable, in the same manner as it may be executed against the appellant." He also invited our attention to the terms of sections 253, 546, 549 of the Civil Procedure Code.

But assuming that the decree may be executed against a surety in the same manner as it may be executed against the judgment-debtor, the question still remains in what manner it can be executed against the judgment-debtor. Where the security bond, as in the present instance, creates a valid mortgage, the provisions of section 99 of the Transfer of Property Act, must, I think, be enforced whether the bond is given by the judgment-debtor himself or by a stranger.

The learned vakil for the respondents has pressed upon me with great earnestness that the view I propose to take is contrary to the existing practice and must cause considerable inconvenience to the successful litigant. Assuming that considerations of this description are entitled to any weight when the language of the Code is clear, it cannot be overlooked that, if the contention of the respondents is well founded, a sale of the hypothecated properties in the manner suggested may in some instances lead to complications and further litigation. It is quite conceivable for instance that after a property has been given in security by the judgment-debtor an interest may be acquired in it by other persons; if it is sold in execution of the decree for costs, it would in such a case be necessarily sold behind the back of persons interested who would have no opportunity of redemption and their interest would not be prejudiced by the sale and they would be entitled to enforce their claim by independent suits. On the other hand, if the mortgagee decree-holder has to institute a suit under section 67 to enforce the security as required by section 99, all the parties interested must be brought before the Court [501] under section 85 and their rights would be adjudicated upon and finally determined by a single suit.

The second point which has been taken on behalf of the appellants is that the decree-holders are not entitled to claim interest on the costs as no such interest is allowed by the order of His Majesty in Council. This contention is clearly well founded and must prevail: see *Dakhina Mohan Roy v. Saroda Mohan Roy* (1) where it was held upon the authority of *Forester v. Secretary of State for India* (2) that where interest on costs is not allowed by the order of His Majesty in Council, such interest cannot be given by any Court in this country.

Appeal allowed.

(1) (1896) I. L. R. 23 Cal. 357. (2) (1877) I. L. R. 3 Cal. 161; L. R. 4 I.A. 197.