

1904
JULY 21.
—
CRIMINAL
REVISION.

32 C. 249 = 8
C. W. N. 885

If the latter question be left out of consideration, there is really no dispute to be adjudicated on. And if the Magistrate were to declare either party in exclusive possession, it is clear that that party would be worsted in a suit upon title and consequent right of joint possession.

The partners may of course agree to limit their own control of the business by appointing a manager, but in that case the manager becomes the servant of all the partners, and their possession of the land and premises is not taken away by his appointment. Thus it appears that the claim to exclusive possession in this case is quite illusory and meaningless unless it refers to the management only, which is a question outside the purview of section 145 of the Criminal Procedure Code. We, therefore, make the Rule absolute and quash the present proceedings.

Rule absolute.

32 C. 253 (=9 C. W. N. 81.)

[253] FULL BENCH.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, Mr. Justice Ghose, Mr. Justice Rampini, Mr. Justice Stephen and Mr. Justice Mitra.

BIBI TASLIMAN v. HARIHAR MAHTO.*

[19th August, 1904.]

Mortgagee—Foreclosure—Sale—Notice to Mortgagee—Transfer of Property Act (IV of 1882), ss. 87, 89—Order absolute for Sale.

Where an order absolute has been made under s. 87 or s. 89 of the Transfer of Property Act without notice to the mortgagee, the Court has an inherent power to deal with an application to set aside the order made *ex parte*, and can set it aside upon a proper case being substantiated.

Tara Pado Ghose v. Kamini Dassi (1) dissented from.

[Fol. 10 C. W. N. 306 ; 31 Bom. 45=8 Bom. L. R. 803 ; 35 Cal. 767 : Ref. 2 C. L. J. 306 ; 7 Bom. L. R. 961 ; 3 N. L. R. 55 : Dist. 4 C. L. J. 317 : Ref. 10 C. L. J. 492=3 I. C. 488 ; 10 C. L. J. 91 ; 17 C. W. N. 862.]

REFERENCE to Full Bench by Maclean C. J., and Bodilly and Mookerjee JJ.

The plaintiffs, Harihar Mahto and others, the mortgagees, obtained an *ex-parte* decree on the 29th May 1903, which was made absolute on the same date.

The judgment-debtors, Bibi Tasliman and others, afterwards, on the 8th June 1903, applied under s. 108 of the Code of Civil Procedure for a rehearing and setting aside of the *ex-parte* decree obtained by the plaintiffs on the grounds, (i) that no notice had been given to them by the plaintiffs ; (ii) that they had cunningly caused the process to be served clandestinely, so that the defendants would not be able to do anything ; (iii) that the account given in the decree was quite wrong ; and (iv) that the decree-holders having acted fraudulently, the defendants had suffered loss.

The Subordinate Judge on the 10th June 1903 held that there was no procedure for setting aside an order making a decree absolute, and refused the petition of the judgment-debtors. Against this order they preferred an appeal to the High Court

[254] The appeal came on for hearing before MACLEAN C. J. and BODILLY and MOOKERJEE JJ. Their Lordships having dissented from the

* Reference to Full Bench in Appeal from Original Order No. 260 of 1903.

(1) (1901) I L. R. 29 Cal. 644.

view of the law taken in the case of *Tara Pado Ghose v. Kamini Dass* (1) as to the question of a previous notice to the defendant, referred it for decision by a Full Bench.

The order of reference was in the following terms:—

“The question which arises for decision in this appeal is whether an order absolute for sale of the mortgaged property may be made under section 89 of the Transfer of Property Act, without notice to the mortgagor. There is no case in this Court directly bearing on this point. But in the case of *Tarapado Ghose v. Kamini Dass* (1), it was held by a Division Bench of this Court that an order absolute for foreclosure of the mortgaged property under section 87 of the Transfer of Property Act may be made without notice to the mortgagor. If that case be taken to have been correctly decided, the same principle must apply to an order absolute for sale, for we do not think that so far as the question of notice to the mortgagor is concerned, there is any substantial distinction between an order absolute for foreclosure and an order absolute for sale. We are unable, however, to accept the view of the law taken in the case of *Tara Pado v. Kamini* (1). It is perfectly true that section 87 of the Transfer of Property Act does not provide in so many words that before an order absolute for foreclosure can be made, notice must be served upon the mortgagor. But it is a condition precedent to the exercise of jurisdiction by the Court under the second paragraph of section 87, that the payment of the sum specified in the first paragraph of that section has not been previously made; consequently, before the Court exercises jurisdiction, it must first determine whether the payment has been made. Such determination, we think, ought to be made after notice to the party who is bound under section 86 to make the payment. The view we take is supported by the decision of the Madras High Court in the case of *Narayana Reddi v. Pappayya* (2), though a contrary view appears to have been accepted in *Krishna Ayyar v. Muthusami Ayyar* (3), where the earlier decision does not appear to have been brought to the notice of the Court. We may add that the contrary view, if adopted, may encourage fraud as is well illustrated by the facts of the case now before us, where it is alleged that the whole of the mortgage debt had been satisfied by the sale of the properties of the judgment-debtor in execution of the decree of the Court of first instance and before the order absolute was obtained on the basis of the decree made by the Appellate Court. We are aware that, in England, an order absolute for foreclosure is obtained as of course on motion without notice to the mortgagor: *Withall v. Nixon* (4); but the procedure followed and the machinery available there are quite different from what we have in this country, and we do not think it would be safe to follow the English procedure in cases arising under sections 87 and 89 of the Transfer of Property Act.

[255] We accordingly dissent from the view of the law taken in the case of *Tarapado Ghose v. Kamini Dass* (1), and under rule 1, Chapter V of the Rules of this Court, we refer the following question for decision by a Full Bench:—

“Whether an order absolute for foreclosure under section 87 of the Transfer of Property Act can be made without previous notice to the defendant mentioned in section 86 of that Act?”

Babu *Saligram Singh* and Babu *Raghunandan Prosad*, for the appellants. If a decree-holder applies for the decretal amount the other side must have an opportunity of showing that further time should be given to pay the money. Reading ss. 86 and 87 of the Transfer of Property Act together, it appears that notice to the mortgagor is necessary, which is clearly contemplated by both the sections. The case of *Tara Pado Ghose v. Kamini Dass* (1) is against me, but I respectfully submit that the law as laid down as regards notice in that case is not correct. The practice on the Original Side of this Court is in my favour. This is a proceeding in continuation of the suit and not in execution of a decree. *Pramatha Chandra Roy v. Khetra Mohan Ghose* (5) referred to. The same view is taken in the case of *Hatem Ali Khundkar v. Abdul Gaffur Khan* (6). Irrespective of an order absolute for sale, the mortgagor may apply for extension of time: see *Narayana Reddi v. Pappayya* (2) and *Krishna Ayyar v. Muthusami*

(1) (1901) I. L. R. 29 Cal. 644.

(2) (1898) I. L. R. 22 Mad. 133

(3) (1901) I. L. R. 25 Mad. 506.

(4) (1885) 28 Ch. D. 413.

(5) (1902) I. L. R. 29 Cal. 651.

(6) (1902) 8 C. W. N. 102.

1904
AUG. 19.
—
FULL
BENCH.

32 C. 253—9
C. W. N. 81.

Ayyar (1). In the case of *Akikunnissa Bibee v. Roop Lal Das* (2), this Court refused to follow the decisions of the Madras Court, and adopted the same view as is taken in the later case of *Pramatha Chandra Roy v. Khetra Mohan Ghose* (3).

Babu Mohendra Nath Roy and *Rabu Kulwant Shahai*, for the respondent. The whole question here is whether absence of notice vitiates an order under s. 89 of the Transfer of Property Act. I submit that it would not : see General Rules and Circular Orders, High Court, Vol. I, p. 60. This is the rule which the High Court has framed as regulating the procedure under s. 89 of the Transfer of Property Act. Neither in the Act nor in the [256] regulation of the High Court is there any provision for service of notice on the judgment-debtor before an order absolute is made.

[MACLEAN, C. J. If he cannot come in under s. 89 of the Transfer of Property Act, what remedy has he?]

He can institute a suit if he can prove fraud. The case of *Taru Pado Ghose v. Kamini Dassi* (4) is in my favour, and there is no provision in the rules for the guidance of the Courts. The following cases were also cited : *Hari Doss Sanjal v. Saritulla* (5), *Ali Ahmad v. Nazirun Bibi* (6) and *Bhagawan Ramji Marwadi v. Ganu* (7).

Babu Saligram Singh, in reply.

MACLEAN, C. J. Although I am partially responsible for the form of this reference and the shape in which the question is presented, I am bound to admit, after the further discussion which has taken place, that I do not think it has been very happily worded having regard to the real question which arises.

I am not prepared to say that no order under section 89 of the Transfer of Property Act can be made without previous notice to the mortgagor, but, as is obvious from the judgment of the Subordinate Judge, the real question is whether if an order has been made under section 87 or section 89 without notice to the mortgagor, the Court has or has not power to deal with an application by the mortgagor to set it aside on the ground that it was made *ex-parte*. The Subordinate Judge proceeded upon the footing that the Court had no such power : he did not go into the merits. I respectfully differ from that view. I think that the Court has an inherent power to deal with an application to set aside an order made *ex-parte* and to set it aside upon a proper base being substantiated. I can find nothing in the Code of Civil Procedure to militate against this view. I think, therefore, that the proper course in this case is to send the case back to the lower Court for trial on the merits. The cost will abide the result. It now becomes unnecessary to make any order on the Rule.

[257] GROSE, J. I agree.

RAMPINI, J. I agree.

STEPHEN, J. I agree.

MITRA, J. I agree in the judgment delivered by the learned Chief Justice.

Case remanded.

(1) (1901) I. L. R. 25 Mad. 506.
(2) (1897) I. L. R. 25 Cal. 133.
(3) (1902) I. L. R. 29 Cal. 651.
(4) (1901) I. L. R. 29 Cal. 644.

(5) (1898) I. L. R. 15 Cal. 603, 624.
(6) (1902) I. L. R. 24 All. 542.
(7) (1399) I. L. R. 24 Bom. 644.