

[ORIGINAL CIVIL.]

Before Mr. Justice Markby.

NEERUNJUN MOOKERJEE v. OOPENDRO NARAIN DEB.

1872
Aug. 23.

Money-decree in Suit for Foreclosure or Sale—Effect of Note appended to Decree varying Decree—Practice—Affidavit filed after Adjournment for Convenience of Counsel, Admissibility of.

A mortgagee sued for foreclosure or sale in the usual form. The suit was undefended. The plaintiff elected to take a simple money-decree against the mortgagor. The following words were appended to the decree :—“*Note.*—The equity of redemption in the property comprised in the mortgage is not liable to attachment and sale under this decree.” After ineffectual attempts to realize his debt, the plaintiff applied to the Court for liberty to sell the mortgaged premises. Held, that the Court had a discretionary power to grant or refuse the sale. The note at the end of the decree did not amount to an absolute prohibition against the sale, but was merely meant as a guide to the Court which should have to execute the decree, and to show that execution should not issue against the equity of redemption, except by special leave of the Court.

The Court made an order as if there had been a decree for sale in the first instance, except that the account was to be treated as a final account at the date of the decree.

In this case the plaintiff had instituted a suit on a mortgage-deed, praying, in default of payment of the money secured thereby, for a foreclosure or sale of the mortgaged premises. The plaintiff, however, believing that the defendant was possessed of other property which he could immediately attach, and thereby obtain satisfaction of his debt, elected to take a simple money-decree. The decree was as follows :—

“ It is ordered and decreed that the defendant do pay to the plaintiff the sum of Rs. 19,154-7-9, with interest thereon, at the rate of 6 per cent. *per annum*, from the 13th day of September last until realization ; and do also pay to the plaintiff his costs of this suit (to be taxed by the taxing officer as between attorney and client under the heading ‘ Class 1, Short Causes’), with interest thereon at the rate aforesaid from the date of taxation until realization ; and it is further ordered that execution of this decree do not issue until the mortgage-deed in the plaint mentioned be brought into Court. (*Note.*—The equity of redemption in the

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property comprised in the mortgage is not liable to attachment and sale under this decree)."

The plaintiff found some difficulty in executing this decree and realizing his money, and accordingly petitioned for an order that the mortgaged premises might be sold by the Court, and that all further directions might be given for that purpose. The learned Judge directed the plaintiff to give notice of the application to the defendant and to renew it upon such notice.

Mr. *Goodeve*, on the 10th February 1872, applied on behalf of the plaintiff, upon notice to the defendant, for an order "that the mortgaged promises mentioned in the plaint in this suit may be sold by this Honorable Court, and that all further necessary directions may be given for that purpose."

Mr. *Evans*, for the defendant, opposed the application. He contended that the notice was unintelligible, or, if it meant anything, it was an application for the ordinary decree for sale, which was a varying of the decree to which he could not consent.

MARKBY, J., dismissed the application. His order was in the following terms :—

"That the application of the plaintiff, pursuant to the said notice, dated the seventh day of February instant, for an order that the property comprised in the mortgage in the plaint mentioned may be sold, be, and the same is hereby, refused with costs, to be taxed by the taxing officer and paid by the plaintiff to the defendant."

After the dismissal of the application, the plaintiff obtained a writ of attachment against the person of the defendant, but the writ was returned unexecuted. The plaintiff then obtained a certified copy of the decree for execution in the Zillah Court of Hooghly, but this also remained unexecuted. The plaintiff thereupon presented another plaint on the mortgage, setting forth the above facts, and praying for an account, and for payment by the defendant to the plaintiff of what might be found due on such account and in default of payment for foreclosure; but Macpherson, J., refused to admit the plaint on the ground that the plaintiff's claim had already been disposed of. The plaintiff

appealed against the order rejecting the plaint. The appeal was heard by Couch, C.J., and Markby, J.

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Mr. *Woodroffe* for the appellant.—The first plaint set out the claim under the mortgage; it did not pray for a decree on any covenant in the mortgage. [Couch, C.J.—Why could the plaintiff not have taken the mortgaged premises in execution?] Because it was part of the decree that he should not do so without bringing the mortgage-deed in to Court. It was one of those notes appended to the decree which have recently become common, but of which the legal effect is doubtful. The practice, no doubt arose in consequence of mortgagees pressing all their remedies at once. [Markby, J.—I think you are mistaken as to the effect of the note to the decree; its object is to prevent the plaintiff avoiding an account.] It is true that this is a suit on the same cause of action as the former one, but that cause of action was not adjudicated upon. Couch, C.J.—As a general rule, if a suit is so framed that the plaintiff may have a certain decree, and he chooses not to take it, he cannot sue again. It is different in the case of a mortgage; the mortgagee may pursue all his remedies simultaneously. In the present instance, the plaintiff elected to take a money-decree, but the judgment did not determine his right to the other remedies. [Couch, C.J.—Could you not escape from your difficulty by obtaining special leave to attach the property on notice to the defendant? Perhaps this appeal had better stand over till you have made that application.]

The appeal was accordingly adjourned, and subsequently

Mr. *Woodroffe*, on behalf of the plaintiff, and upon notice to the defendant, applied before Markby, J., for an order to enable the plaintiff to execute the decree by the attachment and sale of the mortgaged premises (the plaintiff being willing to consent to a sale with the approbation of the Registrar of the High Court, if the defendant would consent thereto), or for such other order as the Court might be pleased to grant.

Mr. *Kennedy*, for the defendant, opposed the application on the ground that the Court could not thus vary its decree. If there

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had been an order for sale, the Court might have made a personal decree for the balance, but the natural and ordinary remedy was by foreclosure. A Court of Equity will not sell mortgaged property without allowing the mortgagor a reasonable time to redeem. Mortgaged property ought not to be made the subject of a money-decree. Relying upon that principle, the defendant did not defend the suit. [The learned Counsel proposed to read an affidavit filed by the defendant on the 8th of August, Mr. Woodroffe objected. The motion was fixed for August 2nd, and stood over for Mr. Kennedy's convenience. The affidavit contained charges of fraud: and the plaintiff had no notice of it; it cannot, therefore, be referred to—*Courjon v. Courjon* (1). Mr. Kennedy.—That was an affidavit in reply. (Mr. Woodroffe.—No, it was used to support the original affidavit.) Mr. Kennedy did not press the point, but continued.] The cases have gone so far as to show that an equity of redemption cannot be attached under an ordinary money-decree—*Ramlocham Sirkar v. Sreemutty Kaminee Debee* (2), and *Brajanath Kundu Chowdhry v.*

(1) 9 B. L. R., App., 10. [It should have been stated in the report of that case that there also the hearing had been adjourned for Mr. Kennedy's conveyance and that the affidavit which he sought to read had been filed after such adjournment.]

(2) *Before Sir Barnes Peacock, Kt., Chief Justice, and Mr. Justice Markby.*

The 22nd May 1868.

RAMLOCHUN SIRKAR (PLAINTIFF) v.
S.M.KAMINEEDEBEE, (DEFENDANT).

Appeal from the judgment of Norman, J., dated 26th September 1867 (a).

The *Advocate-General* for the appellant.
Mr. *Kennedy* for the respondent.

The judgment of the Court was delivered by.

PEACOCK, C.J.—The Court, at the conclusion of the argument yesterday, in-

timated its opinion upon the main question raised before us, viz., whether the injunction restraining the plaintiff from proceeding to a sale of the right, title, and interest of the defendant, under the decree of this Court of the 28th July 1862, until further orders, ought to be set aside. The learned Judge who made the order of the 4th of July also issued the order for the injunction.

The order is to restrain the appellant from further proceeding under the order of sale and the decree made in the cause. It has been argued that the effect of it is to restrain the plaintiff not only from proceeding to sell under the order of the 4th July 1867, but also from proceeding under the decree of the 25th September 1865; and it was contended that the Court had no jurisdiction to restrain the plaintiff from proceeding under the decree without a suit to set aside the

(a) 5 B. L. R., 469, in foot-note.