

Before Mr. Justice Jackson and Mr. Justice Mitter.

**AZIM NULLA MOODEEN (DEFENDANT v. W. D. CRUIKSHANK.
AGENT, BANK OF BENGAL, RANGOON (PLAINTIFF).***

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April 16.

Execution of Decree—Variation—Order made by Consent.

The High Court, on appeal from a judgment of the Recorder of Rangoon, directed that an account should be taken between the parties, and that in default of payment of the amount thereby found to be due from the defendant to the plaintiff within three months, a sale of the mortgaged property should be effected. On the 18th March 1872, an order was passed by the Recorder of Rangoon, which was as follows:—"By consent the property subject to the equitable mortgage be given up to the plaintiff in satisfaction of all claims and demands against the defendant under the decree of the High Court." On the 3rd July 1872, the Recorder directed the defendant to execute within six days a conveyance of the mortgaged property to the plaintiff. On the 11th July 1872, the Recorder declared that, if the conveyance was not executed within twenty-four hours by the defendant, the Court would execute it, and accordingly on the 12th July 1872, the Court executed the conveyance. Held that the Recorder had no power to pass the order of the 18th March 1872, and that the defendant could not be required to execute the conveyance.

THIS appeal arose out of the Regular Appeal No. 120 of 1871 between the same parties, and decided by the High Court in favor of the present respondent. The facts disclosed in that regular appeal, as far as they are material to the present case, were these:—The present respondent was an equitable mortgagee of certain property, which was, subsequently to the mortgage, sold in execution of a decree against the mortgagor; the present appellant, who became the purchaser, bought with notice of the respondent's mortgage, but claimed to hold the property discharged therefrom, on the ground that the transaction with the mortgagor was one beyond the power of the respondent to enter into; he relied on *Ibrahim Azim v. Cruikshank* (1). A suit was instituted in the Court of the Recorder of Rangoon by the respondent to have his rights declared, and on appeal the High Court, on the 25th August 1871, order an account to be taken, and directed that, in default of payment of the amount

*Miscellaneous Regular Appeal, No. 295 of 1872, from an order of the Recorder of Rangoon, dated the 10th and 11th July 1872.

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thereby found due to the present respondent within three months, the mortgaged property should be sold in the usual manner. It appeared that difficulties arose in proceeding to sell the mortgaged property, and an agreement was come to between the present appellant and respondent, whereby it was agreed that the latter should take over the mortgaged property in full satisfaction of his claim. On the 18th of March 1872, an order was passed by the Recorder of Rangoon, sanctioning this agreement; the order ran as follows:—"By consent the property subject to the equitable mortgage be given up to the plaintiff in satisfaction of all claims and demands against the defendant under the decree of the High Court." Under this order the respondent tendered to the appellant for execution a conveyance to him of his right, title, and interest in the mortgaged property; this he would not do, but put off the respondent from time to time until the 3rd July 1872, when the respondent put in a petition, stating the above facts and also the further facts that, on the 29th April 1872, the respondent had tendered for the approval of the Judge of the Recorder's Court of Rangoon the deed of conveyance which had been submitted by him to the appellant for execution, and that the same had been approved of by that Judge. The petition went on to pray that an order should issue to the appellant, directing him to execute the conveyance within two days, and that, in default of his so doing, the Court would be pleased to execute the conveyance in the appellant's name. On this petition the Court, on the same day, ordered that the appellant should execute this conveyance within six days. The appellant, on the 8th July 1872, presented a petition to the Recorder, in which, after referring to the order passed by consent on the 18th March 1872, and to the order of the 3rd July 1872, he submitted that he had only given his right to have an account taken, and to redeem the land under the decree of the High Court, but that it was never understood that he should execute a transfer and waive his right to a refund of the purchase-money paid by him to the original mortgagor. The Court on the 10th July 1872, passed an order on that petition, stating that any matter between the appellant and the original mortgagor must be settled between themselves, and

that all the appellant was required to do was to transfer by the deed his own right, title, and interest in the mortgaged property. On the 11th July 1872, the appellant presented a second petition to the effect that he had never consented and did not consent to execute a conveyance to the respondent, and prayed that the original decree of the High Court might be executed according to the terms thereof. On the 11th July the Recorder declared that the deed of conveyance would be executed by the Court unless the appellant executed it within twenty-four hours: this order the appellant failed to comply with, and accordingly the Court, on the 12th July 1872, executed the conveyance.

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The defendant appealed to the High Court.

Mr. *Twidale* for the appellant.—It was not competent for the Recorder to go beyond the terms of the decree of this Court. The Court executing a decree is bound to execute it as it finds it, and cannot add or in any way alter the terms of the original decree even by consent of the parties—*Krishna Kamal Sing v. Hiru Sirdar* (1). Moreover, it is denied that the defendant consented.

The *Advocate-General*, offg. (Mr. *Paul*) for the respondent.—The orders of the Recorder are perfectly correct. The appellant consented that the mortgaged property should be handed over to the Bank, and this consent was made an order of Court. Where property is sold by an order of Court, and the purchaser wants a conveyance, the Court will compel the necessary parties to execute it. Whether or not a supplemental decree can be executed is the question, and the case of *Krishna Kamal Sing v. Hiru Sirdar* (1) nowhere says it cannot. The decree is the same, but by the consent-agreement the plaintiff is enabled to carry out the terms of it more expeditiously. The Court was empowered to compel the execution of the conveyance; if not, the plaintiff will be compelled to bring a fresh suit, and there is no reason for making him do that. [JACKSON, J.—This is a decree of the High Court, and the question is whether the parties can change that decree by consent.]

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Decrees are often altered and amended by consent on the original side of the Court. The Recorder's Court is regulated by the same practice as the original side. [JACKSON, J.—As regards procedure, the Recorder is governed by Act VIII of 1859, and there would be no difficulty if the whole of the proceedings had taken place in his Court.] A party can give up property, and so agree to satisfy a decree which has been passed against him : here the appellant consented to give up his equity of redemption : it is simply an agreement between the parties as to how the decree is to be executed. Suppose a decree is passed against a man for Rs. 10,000 and he comes into Court and says such a sum is deposited to his credit in Court, and agrees that this sum should be transferred to satisfy the decree, but he afterwards draws back from this, would the Court compel the decree-holder to bring a fresh suit ? It is submitted the Court would order the debtor to complete the agreement entered into. If the appellant really contends that he never consented, then an inquiry can be ordered, but the plaintiff ought not to be compelled to bring a fresh suit.

Mr. *Twidal* was not called upon to reply.

The judgment of the Court was delivered by

JACKSON, J.—It appears to me that, irrespective of the question as to whether or not the appellant before us really consented to the arrangement recited by the Recorder, which consent appears to me to be extremely doubtful, and to require some investigation, it was beyond the power of the Recorder to substitute for the decree of the High Court a new decree altogether, and to require the appellant to execute a conveyance in favor of the opposite party. I think this order of the Recorder must be set aside, and he should be desired to carry out the decree of the High Court. If follows that all acts done under the said order of the Recorder will be of no effect. We make no order as to costs,

Appeal allowed.