

character of the order issued, and the result which might arise if an appeal were entertained by their Lordships in Council against an order of this description, we are led to conclude that it was not the intention of the Legislature that such an order should be appealable. It has here been determined that the plaintiff is not entitled to a Receiver in the terms desired by him. If he should obtain permission to appeal to the Privy Council, the trial of the suit would nevertheless proceed independently of the course of that appeal. It may so happen that the result of the trial might be that the plaintiff is found by both Courts in this country to have no merits in his case, and it may also possibly happen that, by reason of the nature of the suit and the judgments passed by the Courts in this country, the plaintiff might be without the right of an appeal to Her Majesty in Council by reason of there being concurrent judgments on questions of fact. So that there would then be an appeal to Her Majesty in Council as regards the question of the appointment of a Receiver when actually the suit itself is finally determined in this country against the plaintiff, and it would not be open to the plaintiff to appeal to the Privy Council on its merits. It seems to us that probably the Legislature had this in view when, in allowing an appeal against a refusal to appoint a Receiver under section 588 of the Code of Civil Procedure, it simultaneously declared that the order passed in appeal shall be final.

For these reasons the application for leave to appeal to Her Majesty in Council in this case is refused with costs.

S. C. C.

*Application refused.*

*Before Mr. Justice Norris and Mr. Justice Gordon.*

TARA PROSAD ROY (DECREE-HOLDER) *v.* BHOBODEB ROY (JUDGMENT-DEBTOR).\*

1895  
July 31.

*Mortgage—Execution of decree—Simple mortgage—Decree nisi—Order absolute—Transfer of Property Act (IV of 1882), sections 88, 89.*

A decree on a simple mortgage directing the sale of mortgaged property on default of payment within a fixed period is substantially a decree *nisi*

\* Appeal from Order No. 73 of 1895, against the order of A. F. Steinberg, Esq., Officiating Judge of Nuddia, dated the 5th of September 1894, reversing the order of Babu Bepin Pehary Chatterjee, Munsif of Chuadanga, dated the 24th of September 1895.

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or conditional decree under section 88 of the Transfer of Property Act, and cannot be executed unless it is made absolute by an order under section 89 of that Act. *Ram Lal v. Narain* (1) followed. *Siva Pershad Maity v. Nundo Lall Kar Mahapatra* (2) distinguished. *Poresh Nath Majumdar v. Ram Jodu Majumdar* (3) referred to.

ONE Amarnath Roy, when living in commensality with his cousin Bhobodeb Roy, executed a bond mortgaging joint properties in order to pay off joint family debts. After Amarnath's death, the mortgagee brought a suit on the mortgage bond against Bhobodeb. The suit was referred to arbitration, and a decree was passed in conformity with the award of the arbitrators. The decree directed that the money due should be realized by sale of Amarnath's share in the mortgaged properties now inherited by Bhobodeb, and exempted Bhobodeb's own share from liability to sale. The decree went on in the following terms: "On default of payment of the decretal amount within four months, the mortgaged property will be sold, and if the amount falls short the amount (balance) will be realized from the properties left by Amarnath, deceased."

In execution of this decree a sale proclamation was issued putting up to sale an 8-annas share in the mortgaged property as Amarnath's share. Bhobodeb objected to the proceeding on the ground that the decree had not been made absolute, and that the extent of Amarnath's interest had been exaggerated. The Munsif overruled both the objections, but on appeal the learned District Judge allowed the first objection and set aside the entire proceedings in execution. He said:—

"The wording of the relevant sections of the Transfer of Property Act (sections 67, 86 to 89) is by no means clear, and as a question of grammar, the necessity of a decree absolute for sale in the case of a simple mortgage is not clear. It seems to me that the following arguments make strongly in favor of the appellant's contention: (1) The general tenor of these sections which contemplate that the ordinary procedure should be by decree *nisi* and by decree absolute. (2) The danger of fraud and of hardship to the creditors which the suggested relaxation

(1) I. L. R., 12 All., 539.

(2) I. L. R., 18 Calc., 139.

(3) I. L. R., 16 Calc., 246.

would involve. As these provisions are taken from the practice of the Court of Chancery which habitually interfered to protect a suitor or debtor from the extreme legal consequences of his acts, as literally interpreted, this consideration has great weight in my mind. (3) All reported cases imply the complete procedure, and where any relaxation is allowed, it is in favor of the debtor, not of the creditor."

The decree-holder appealed to the High Court.

Babu *Sris Chandra Chaudhuri* for the appellant.—The first Court was right in holding that, in a case on a simple mortgage bond, it is not necessary to apply for an order absolute. A decree for sale in such a case is very different from a decree for foreclosure, and the grant of a period of grace does not alter the decree into one for foreclosure. Dr. Ghose on Mortgage in India, p. 128.

The provision for an order absolute for sale in section 89 of the Transfer of Property Act does not apply to a suit on a simple mortgage, but refers to a suit for foreclosure in which a decree for sale has been passed under the latter part of section 88. At all events the law does not prescribe a *form* for a decree absolute for sale on simple mortgages as in foreclosure (section No. 129 of Schedule 4, Civil Procedure Code). The decree in this case was passed by the arbitrators, and was not in the form prescribed by law for decrees for sale. Even if it was, the objection taken is unsubstantial. The formal defect was cured by the order issuing sale proclamation. *Siva Pershad Maity v. Nundo Lall Kar Mahapatra* (1). The cases referred to by the lower Court on the question of the necessity of an order absolute relate to suits for foreclosure or for sale under the latter part of section 88.

Babu *Prosunno Chunder Roy* for the respondent.—Section 89 of the Transfer of Property Act makes it imperative to obtain an order absolute for sale. *Ram Lal v. Narain* (2). The objection is not a technical one, for the judgment-debtor might obtain an extension of the period of grace at the hearing of the application for an order absolute. The principle laid down in *Poresh Nath Mojumdar v. Ram Jodu Mojumdar* (3) applies.

(1) I. L. R., 18 Calc., 139 (142).

(2) I. L. R., 12 All., 539.

(3) I. L. R., 16 Calc., 246.

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Babu *Sris Chandra Chaudhuri* in reply.—In the case decided by the Allahabad High Court the decree was a conditional decree of the prescribed form. The only element of a decree of that form existing in the present case is the period of grace fixed in the decree. The report of that case, moreover, does not give the nature of the mortgage or of the suit. The order which was not admitted in that case as equivalent to an order absolute also does not appear in the report.

The judgment of the High Court (NORRIS and GORDON, JJ.) was as follows :—

This is an appeal from an order of the District Judge of Nuddia, reversing an order of the Munsif of that District. It appears that the appellant sued the respondent to enforce a mortgage security. The case was referred to arbitration, and a decree was passed declaring that the mortgagor's share was liable on the mortgage. Execution was taken out, and a proclamation of sale was issued. Thereupon the judgment-debtor objected that the property could not be sold, because the decree had not been made absolute. The Munsif was of opinion that in the case of a simple mortgage no decree absolute is necessary. On appeal, the District Judge held that a decree absolute is necessary, and accordingly he allowed the objection of the judgment-debtor, and set aside the execution proceedings as premature. On second appeal by the decree-holder it is contended (1) that under the provisions of the Transfer of Property Act a decree absolute is unnecessary in the case of a simple mortgage ; and (2) the objection taken is of a highly technical character, and ought not to be allowed.

We think the District Judge's view is correct. The decree has been read to us, and it appears to be substantially a decree under section 88 of the Transfer of Property Act, that is to say, it is a conditional decree or decree *nisi*, and we think it is clear from the provisions of section 89 of the Act that, until an order absolute for sale of the mortgaged property has been made, the judgment-debtor has a right to redeem. The objection taken by him to the execution of the decree is, therefore, in our opinion a substantial one, and not merely one of a technical character, as is argued by the learned pleader for the appellant.

He relied on *Siva Pershad Maity v. Nundo Lall Kar Mahapatra* (1), but we think that it is not on all fours with the present case. On the other hand, there is a case, *Ram Lal v. Narain* (2), which is exactly in point; and is, we think, a clear authority for the view we take. In another case *Poresh Nath Mojundar v. Ram Jodu Mojundar* (3), it was held that in a foreclosure suit the mortgagor can redeem at any time until the order absolute is made under section 87 of the Transfer of Property Act, and similarly we think that in a suit for sale the mortgagor can under section 89 redeem at any time before an order absolute for sale has been made. The appeal fails and must be dismissed with costs.

s. c. G.

*Appeal dismissed.*

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### CRIMINAL REFERENCE.

*Before Sir W. Comer Pethcram, Knight, Chief Justice, and Mr. Justice Beverley.*

QUEEN-EMPRESS v. GASPER. \*

*Criminal Procedure Code (Act X of 1882), section 386—Distress Warrant—Claim by third party to the property distrained.*

1894  
Sept. 11.

A Magistrate, who has issued a distress warrant under section 386 of the Criminal Procedure Code, is not required by law to try any claim which may be preferred to the ownership of the property distrained.

THIS was a reference by the Chief Presidency Magistrate of Calcutta under section 43 of the Criminal Procedure Code.

The facts of the case and the point referred for the opinion of the High Court appear sufficiently from the following letter of reference:—

"Mr. D. M. Gasper having been sentenced to a fine of Rs. 600 under section 293 of the Penal Code, warrants for the levy of the amount by distress and sale were issued on the 8th day of August 1894.

"Certain moveable property, found on the premises occupied by Mr. D. M. Gasper, was in execution of such warrant seized, and a date was duly fixed by me for the sale of such property. Prior to the date of sale a claimant, Mr. T. A. Frangopolo, appeared to such property, and I thereupon fixed a day for hearing his claim. Objection was taken as to my jurisdiction to hear it.

\* Criminal Reference No. 2 of 1894, made by T. A. Pearson, Esq., Chief Presidency Magistrate, dated 3rd September 1894.

(1) I. L. R., 18 Calc., 139.

(2) I. L. R., 12 All., 539.

(3) I. L. R., 16 Calc., 246.