

APPELLATE CIVIL.

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

CHUNDRA NATH DEY AND ANOTHER (JUDGMENT-DEBTORS) v.
BURRODA SHOONDURY GHOSE (DECREE-HOLDER).^a

1895
June 4.

*Execution of decree—Transfer of Property Act (IV of 1882), sections 90 and 67
—Application for the attachment and sale of mortgaged property in execution
of a decree obtained not in accordance with the Transfer of Property
Act, though suit instituted after the passing of the Act.*

A mortgagee obtained a decree on the 15th February 1883 upon a mortgage bond, dated 18th January 1879. The decree simply provided that the plaintiff do obtain the amount of his claim, and that the mortgaged property should remain liable for the satisfaction of the debt. The judgment-creditor in execution of that decree sold one of the mortgaged properties, and afterwards assigned over the decree, and the assignee, on the 18th August 1894, applied for the execution of the decree by attachment and sale of another of the mortgaged properties.

Held, on the objection of the judgment-debtors, that section 90 of the Transfer of Property Act was applicable to the case, and that the mortgaged property could not be sold, unless a suit under section 67 of the Act be brought, and the procedure prescribed by the Transfer of Property Act followed. The property, however, could be attached, as there is nothing in section 99 prohibiting such attachment.

THIS appeal arose out of an application by the assignee of the decree-holder for the execution of the decree by attachment and sale of one of the mortgaged properties. Chundra Nath Dey and another executed a mortgage bond in favor of one Hurrish Chunder Shaha on the 18th January 1879. The property No. 5 (with other properties) was included in the mortgage bond, though it was then in the possession of one Haran Moni Dasi, but the judgment-debtors afterwards acquired ownership in it. Hurrish Chunder Shaha instituted a suit on the 11th January 1883, and obtained an *ex parte* decree on the 13th February 1883, which

^a Appeal from Order No. 223 of 1894, against the order of F. H. Harding, Esq., District Judge of Mymensingh, dated the 24th of April 1894, reversing the order of Babu Chuckradhur Prosad, Subordinate Judge of that District, dated the 17th of August 1893.

1895

CHUNDR
NATH DEY
v.
BURRODA
SHOONDURY
GHOSH.

was to the following effect: "The suit is decreed *ex parte*. The plaintiff to obtain the amount of his claim and costs of the suit with interest at 6 per cent. per annum until the date of realization, and the mortgaged property to remain liable for the satisfaction of the debt, and the plaintiff to obtain interest." The judgment-creditor, Hurrish Chunder Shaha, after realizing a portion of the decretal amount by sale of a portion of the mortgaged property, transferred the decree to one Burroda Shoondury Ghose, who applied on the 18th August 1891 for the execution of the said decree by attachment and sale of property No. 5. The judgment-debtor objected to the execution, on the ground that there being no decree under the Transfer of Property Act the property could not be attached and sold. The Court of first instance allowed the objection of the judgment-debtor, and declared that the property could not be attached and sold, because section 99 of the Transfer of Property Act was applicable to the case. On appeal the District Judge overruled the objection of the judgment-debtor, holding that section 99 did not apply to the case, and allowed execution to proceed. Against this order the judgment-debtors appealed to the High Court.

Mr. *C. P. Hill* and Babu *Jogesh Chunder Roy* for the appellants.

Babu *Sreenath Das* and Babu *Govind Chunder Das* for the respondent.

Mr. *Hill*, for the appellants, contended that in this case the suit was instituted and decree obtained after the Transfer of Property Act came into force. The decree was not in accordance with the provisions of that Act. There was no order for sale. It only directed that the mortgaged property should remain liable for the debt. The decree-holder cannot execute the decree without getting an order for sale under the Transfer of Property Act. The District Judge simply says that section 99 of the Transfer of Property Act does not apply to the case, and he does not give any reason for it. The effect of the Judge's order is that the property will be sold without any account being taken. Section 2 of the Transfer of Property Act enacts that the Act shall not affect any right or liability arising out of a legal relation constituted before it comes into force, or any relief in respect of any right or liability. Where, however, a suit is brought

after the date of the Transfer of Property Act, for the foreclosure or sale under a mortgage dated previous to the Act, the procedure to be followed is that given by the Transfer of Property Act; the procedure of Regulation XVII of 1806 not being saved by the Transfer of Property Act, section 2, cl. (c). See *Rhobo Sundari Debi v. Rakhal Chunder Bose* (1). In the course of the argument the following cases were referred to: *Ikram Singh v. Intizam Ali* (2), *Kaceri v. Aynanthayya* (3), *Sathuvayyan v. Muthusami* (4), *Durgayya v. Anantha* (5), *Bajinath Persad Narain Singh v. Moheswari Persad Narain Singh* (6), *Umesh Chunder Das v. Chun Chun Ojha* (7), *Jadub Lall Shaw Chowdhry v. Madhub Lall Shaw Chowdhry* (8).

Babu *Sreenath Das* for the respondent.—The main question is whether section 99 of the Transfer of Property Act precludes the decree-holder from executing his decree. It is submitted that section 99 does not apply to the present case, as the decree-holder does not want to sell any of the mortgaged property, properly so called, and the mortgage was executed before the Transfer of Property Act came into operation. If, in fact, the decree be taken as a money decree, no difficulty can arise. The decree-holder is proceeding against a property which is not a mortgaged property. The judgment-debtors had no interest in the property at the time of the mortgage. The mere fact that they acquired a title to the land afterwards does not make it a mortgaged property. The decree-holder cannot bring a second suit for the declaration of his lien upon the terms of the Transfer of Property Act, as he has already obtained satisfaction. The cases cited by the other side do not apply, as in those cases the suits were not brought upon the mortgage bonds.

Mr. *Hill* in reply.—To say that property No. 5 is not a mortgaged property is an after-thought. The decree-holder took advantage of section 43 of the Transfer of Property Act.

The judgment of the Court (PETHERAM, C.J., and BEVERLEY, J.) was as follows:—

- (1) I. L. R., 12 Calc., 583.
- (3) I. L. R., 10 Mad., 129.
- (5) I. L. R., 14 Mad., 74.
- (7) I. L. R., 15 Calc., 357.

- (2) I. L. R., 6 All., 267.
- (4) I. L. R., 12 Mad., 325.
- (6) I. L. R., 14 Calc., 451.
- (8) I. L. R., 21 Calc., 34.

1895

CHUNDRANATH DEY
v.
BURBODASHOONDURY
GHOSE.

1894

CHONDRA
NATH DEY
v.
BURRODA
SUGONDURY
GHOSE.

It is not necessary to go over the facts of this case, as they are fully stated in the judgments of the Courts below, and the only question we have to consider is whether a decree in this form, in a suit brought after the Transfer of Property Act came into operation, can be executed by sale of the mortgaged property.

The suit was upon a mortgage deed to recover the money secured by the deed upon mortgage of various properties, of which that now in question was one, though at the time of the mortgage this particular property was in the possession of a tenant for life, the mortgagor having, at that time, only a reversionary interest in it.

The operative part of the decree was as follows: "The suit is decreed *ex parte*. The plaintiff to obtain the amount of his claim and costs of the suit with interest at 6 per cent. per annum until the date of realization, and the mortgaged property to remain liable for the satisfaction of the debt, etc."

The Subordinate Judge thought that, as the property now attached was part of the property included in the mortgage, it could not, by reason of the provisions of section 99 of the Transfer of Property Act, be brought to sale under the attachment without further proceedings under section 67 of the Act.

The learned District Judge has formed a different opinion. He thinks that, although the decree was not either in form or in substance such a decree as could be passed in an action brought under section 67, still the action was, in fact, brought under that section, and that for that reason section 99 did not apply to the case.

We think that the view taken by the Subordinate Judge is the correct one. The objects of sections 65, 86, 83 and 99 of the Act are to prevent mortgagees from realizing their securities, except in the way prescribed by the Act, and unless the action in which it is sought to realize the security is one in which the procedure followed is that prescribed by the Act, we think it is within the provision of section 99, and that the mortgaged property cannot be sold in it. We accordingly set aside the order of the District Judge, and restore so much of that of

the Subordinate Judge as directed the case to be struck off, as the attached property cannot be sold in this execution proceeding. As, however, section 99 does not provide that the mortgaged property shall not be attached, we do not restore so much of his order as directs that the property be released from attachment.

1895

CHUNDR
NATH DEY
v.
BURRODA
SROONDARY
GHOSE.

Appeal allowed.

S. C. G.

APPELLATE CRIMINAL.

Before Mr. Justice Macpherson and Mr. Justice Banerjee.

QUEEN-EMPRESS v. RAZAI MIA. ^o

1895
July 1.

Confession—Criminal Procedure Code (Act X of 1882), section 364—Confession not recorded in language in which it is given, Admissibility of in evidence—Unsoundness of mind—Penal Code (Act XLV of 1860), section 84.

The confession of an accused person made in Bengali, the language in which the accused was examined, was recorded in English. The committing Magistrate, in his evidence in Court, said that he could not write Bengali well, and that there was no *mohurrir* with him at the time when the confession was recorded.

Held, the provisions of section 364 of the Criminal Procedure Code had been sufficiently complied with.

Jai Narayan Rai v. Queen-Empress (1) distinguished.

Where the unsoundness of mind deposed to was not such as would make the accused incapable of knowing the nature of the act, or that he was doing what was contrary to law, it was held to be insufficient to exonerate him from responsibility for crime under section 84 of the Penal Code.

THE accused was charged with having murdered his wife. He made a statement to Mr. Halliday, the Assistant Commissioner of Sylhet, in the following terms: "I was ill, I struck my wife with a *dao* on the head in the verandah of my house yesterday and killed her." The statement was made in Bengali, but recorded in English. The accused made his mark on the

^o Criminal Appeal No. 371 of 1895, against the order passed by R. H. Graves, Esq., Sessions Judge of Sylhet, dated the 2nd of May 1895.