

1894
 PROSONNOMOI DASSI
 v.
 SREENAULTI
 ROY.

In my opinion this is not a case of distribution of assets under section 295. The rights of the judgment-creditors claiming to share in this fund must therefore be postponed to the rights of the plaintiff Prosonnomoyi Dassi under the lien declared in her favour by the order of the 14th September 1893.

There being no contest as between the plaintiff Prosonnomoyi Dassi and the trustees and Messrs. Watkins & Co. there must be an order for payment of the balance to her after satisfaction of the claims of the trustees and of Messrs. Watkins & Co. The costs of the parties sharing in the fund may be added to their claims.

Attorney for the plaintiff Prosonnomoyi Dassi: Mr. Rutter.

Attorneys for the trustees and the judgment-debtors: Messrs. Watkins & Co.

Attorneys for the attaching creditors in suits 51 and 52 of 1893: Messrs. Sanderson & Co.

J. V. W.

APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Justice Gordon.

1894
 May 21.

AJUDHIA PERSHAD (JUDGMENT-DEBTOR) v. BALDEO SINGH (DECREE-HOLDER).*

Civil Procedure Code, 1882, section 235—Order absolute for sale, Application for—Execution of decree—Verification of application—Limitation—Transfer of Property Act (IV of 1882), section 89.

An application for an order absolute for sale of mortgaged property under the provisions of section 89 of the Transfer of Property Act, 1882, is not an application for execution of a decree and need not therefore be in the form prescribed by section 235 of the Code of Civil Procedure.

A decree was passed in a mortgage suit on the 13th July 1887 by consent, which directed that the amount due was to be paid in ten annual instalments during the years 1295—1304 (1888—1897) in the month of Falgoon (February) each year, and that on default of three successive instalments the whole amount was to become at once due and payable. The mortgagor having defaulted in payment of the instalments due in the years 1297, 1298, and 1299 (1880, 1891, 1892) the mortgagee on the 18th February 1893 presented an application to the Court under section 89 of the Transfer

* Appeal from Order No. 152 of 1893, against the order of Babu Madhab Chander Chatterjee, Subordinate Judge of Bhagalpur, dated the 10th of May 1893.

of Property Act for an order absolute for sale. That application was not verified by the mortgagee, and the mortgagor objected that, not being so verified as required by section 235 of the Code, it could not be granted. On the 9th May 1893 the mortgagee applied for and obtained leave to verify the application which he did on that day. It was urged on behalf of the mortgagor that the application must be treated as made on the 9th May, and therefore not within three years of the date on which the 1297 instalment became due (7th March 1890), and that it was therefore barred by limitation.

Held, that the application did not require to be in the form provided by section 235, and consequently the non-verification did not affect it, and that it was not barred by limitation.

THE facts of this case were as follows :—

The respondent Baldeo Singh, on the 13th July 1887, obtained a decree against several defendants in a suit instituted by him against them on a mortgage. There were three sets of defendants the judgment-debtors in this proceeding, Ajudhia Pershad being one out of the second set. The decree was made by consent being the result of a compromise under which it was agreed that the decree should be for Rs. 12,000 without interest and costs, and that each set of defendants should be liable for a third of that amount, and that their respective shares in the mortgaged property should remain charged till the decree was satisfied. It was provided in the decree that the amount due should be paid in ten annual instalments during the years 1295 to 1304 (1888—1897) in the month of Falgoon (February) in each year, and that on default being made in the payment of three successive instalments the whole amount outstanding was to become due and payable to the plaintiff, and be realized by the sale of the respective shares of the defendants in the mortgaged property.

On the 18th February 1893 the plaintiff Baldeo Singh applied to the Subordinate Judge for an order absolute for the sale of the mortgaged property against all the defendants, alleging that the three instalments for the years 1297, 1298, and 1299 (1890, 1891, 1892) due under the decree had not been paid.

Ajudhia Pershad alone opposed the application and filed several petitions of objections against the order being made. Amongst other grounds he urged that the decree being separate against each set of defendants one application against them all jointly would not lie; that the application for sale not being verified by

1894

 AJUDHIA
 PERSHAD
 v.
 BALDEO
 SINGH.

1894

AJUDHIA
PERSHAD
v.
BALDEO
SINGH.

the decree-holder no order could be passed ; and that there had been default in the payment of the first three instalments, *viz.*, those for the years 1295 to 1297 (1888 to 1890), and that consequently the application was barred by limitation.

In answer to the second objection the plaintiff decree-holder on the 6th May 1893 filed a petition asking to be allowed to verify his petition. The matter appeared to have come on for hearing on the 9th May, and on that date the Subordinate Judge allowed the petition to be verified, which was immediately done. The objection having been heard judgment was reserved till the following day. On the 10th May the judgment-debtor Ajudhia Pershad filed a further petition of objection, contending that the application must be treated as made on the 9th May, the date of its being verified, and that it was therefore barred by limitation, being made more than three years after the accrual of the right on the 1st Cheyt 1297 (8th March 1890).

The Subordinate Judge delivered judgment on the 10th of May, and disposed of the three objections above referred to in the following manner :—

“ The first point was not pressed during the hearing of the application, but as the objection was taken in the written objections filed, I think it proper to notice it here. This is not an application for execution. Consequently under the provisions of section 647, the provisions of section 34 of the Code of Civil procedure are applicable to this case. This being virtually an objection on the ground of misjoinder of parties, it ought to have been taken at the earliest opportunity before the first hearing of the case, for which the 20th March was fixed. The judgment-debtor appeared on that day, but did not object to the petition on that ground ; he only asked for time. The Court allowed him seven days' time, but even then he did not take this objection. I think, therefore, that such an objection cannot be entertained now. But supposing it can be raised now, still it does not seem to me that the objection is valid. The decree is based on the same compromise ; the mortgaged property is the same, although each has a separate share. This being merely an application for an order absolute for sale, the irregularity, if any, cannot be fatal.

“ The second objection is reasonable. Such application must be verified, but the applicant neglected to verify it. He has however applied for permission to verify when that defect was pointed out at the hearing by the pleader for the judgment-debtor. The latter contends that such an amendment cannot be allowed at this stage, because under the ruling in *Oudh Behari Lal v. Nageshwar Lal* (1) this application must be deemed as an application for

(1) I. L. R., 13 All., 278.

execution, and it has been held in *Asgar Ali v. Trailokya Nath Ghose* (1) that no such amendment can be allowed when the petition has been registered. But there is nothing in the first ruling to show that this petition can be regarded as a petition for execution of a decree; consequently section 245 of the Code of Civil Procedure, on which the second decree is based, does not govern this case. It is not an application for execution of a decree, and, what is more, it has not been entered in any register, as none has been prescribed for it. Under section 647 of the Code of Civil Procedure, section 53 is applicable with respect to this petition, and as such it can be amended now. I have therefore allowed it to be verified now. The objection therefore is no longer tenable.

“Third : It was also contended that there was default in the first three instalments; consequently petitioner’s cause of action for such an application accrued when default was made with respect to the instalment of 1297. Limitation began to run from that time. This may be true, but calculated from that time this petition was presented within three years. Therefore plaintiff’s right to execute the decree was not barred on the 20th February, when this petition was filed. If it be held that limitation began to run from the date of the *kist* of 1297, that is Falgoon 1297, and no steps in aid of execution be existing to save the case from limitation, then possibly it may be so barred, although I am not at all sure of it. But that circumstance cannot be taken into consideration now. Here all I have to see is, when this application was filed had the decree-holder any subsisting right to realize the decretal amount, or was it barred by limitation, I have shown it was not so barred. This objection therefore also falls to the ground.

“In the view I take of the case it is unnecessary to enquire whether there was default only in 1297, 1298 and 1299.

“Just before delivery of judgment, the judgment-debtor has filed a fourth petition of objection. Objection by such instalments is extremely irregular, and is inconvenient to all concerned. It is now urged that as the petition for the order absolute for sale was verified only yesterday, it should be considered that the petition in question was filed yesterday, and the plaintiff’s right to realize the debt is consequently barred by limitation; but the date of a petition or plaint is not the date when it is amended but when it is presented. This objection is not therefore more reasonable than the others.

“It is ordered therefore that the objections be disallowed and the order for sale be made absolute.”

The judgment-debtor Ajudhia Pershad appealed to the High Court.

Dr. *Trailakya Nath Mitter* and *Babu Makhan Lal* for the appellant,

Babu Saligram Singh and *Babu Raghunandun Pershad* for the respondent.

(1) I. L. R., 17 Calc., 634.

1894

AJUDHIA
PERSHAD
v.
BALDEO
SINGH.

1894

AJJUDHIA
PERSHAD
v.
BALDEO
SINGH.

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

The parties to this proceeding stand to each other in the relation of mortgagor and mortgagee. The mortgagors are three in number ; they had borrowed from the mortgagee a considerable sum of money ; and a suit was brought upon the mortgage, and, in the course of the suit, a compromise was entered into between the parties. Under this compromise, each of the mortgagors agreed to pay to the mortgagee the sum of Rs. 4,000 by certain instalments ; and it was provided that as security for the sum payable by each mortgagor, a third share of the properties already mortgaged should continue to be in mortgage, and that in the event of any of the mortgagors committing default in three consecutive instalments, the mortgagee should be entitled to realise the money payable by such mortgagor by sale of his share of the properties mortgaged. A decree was accordingly made in those terms. Subsequently the mortgagee, by reason of the default committed by the mortgagors in paying the instalments on account of the years 1297, 1298 and 1299, applied for the sale of the mortgaged properties. It appears that at the time when this application was presented, it bore no verification by the mortgagee, but subsequently, upon an order made by the Court, the defect, if there was any, was rectified.

The mortgagors raised several objections to the application of the mortgagee being granted. They contended that this being an application for execution of the decree, it could not be proceeded with, inasmuch as it did not contain, at the time of presentation, the verification of the mortgagee, that being one of the requirements of section 235 of the Code of Civil Procedure ; that the application was barred by limitation ; and that because subsequent to the default complained of by the mortgagee, *i.e.*, as regards the instalments for 1297, 1298 and 1299 he received from them (the mortgagors) the instalment for the year 1296, he thereby waived the default on account of those years.

As regards this last objection, it is sufficient to say that the amount received by the mortgagee after this default was not in respect of any one of the three years with which we are now concerned. What was received by the mortgagee was the amount payable on account of a year antecedent to the three years in respect

of which default has now occurred, and for which, in accordance with the express stipulations contained in the decree, the mortgagee is entitled to apply for realization of the amount due to him by sale of the mortgaged properties.

The question of limitation raised by the mortgagors is intimately connected with the objection that the application presented on behalf of the mortgagee, having not being duly verified at the time it was presented, it could not be regarded as an application for execution within the meaning of the Code of Civil Procedure. The learned vakil in support of his argument relied upon a case in the Allahabad High Court, *Oudh Behari Lal v. Nageshar Lal* (1), where it seems to have been held that an application for an order absolute for sale under section 89 of the Transfer of Property Act is a proceeding in execution and subject to the rules of procedure governing such matters. Now, on referring to the Transfer of Property Act itself, it will be found that when a mortgagee applies either for foreclosure of a mortgage, or for sale of the mortgaged premises, the Court makes a preliminary decree—a decree *nisi* so to say—ordering that the mortgagors should be at liberty to pay to the mortgagee the amount of money due to him within a certain time fixed, and that in the event of the mortgagor not satisfying the claim of the mortgagee within the time limited, the property should be foreclosed, or, in the case of an application for sale of the mortgaged premises, the mortgaged property or a sufficient part thereof should be sold.

Then we find in section 89 of the Act that, in the event of the mortgagor not paying to the mortgagee the amount of money mentioned in the preliminary decree, and upon an application being made by the mortgagee, an order absolute for sale should be made. Therefore when, after a preliminary decree made by the Court, the mortgagee makes an application for an order absolute (or for a decree absolute, for that would perhaps be a more appropriate expression), the application is not an application for execution of the decree, because, until the decree absolute is made under section 89, there is in fact no decree capable of execution. A question somewhat akin to that which we have to determine

1894

 AJUDHA
 PERSHAD
 ?
 BALDEO
 SINGH.

(1) I. L. R., 13 All., 278.

1894

ANUBHITA
PERSHAD
v.
BALDEO
SINGH.

was considered by this Court in *Poresh Nath Mojumdar v. Ranjodu Mojumdar* (1). The question that was raised in that case was whether, until the order absolute is made under section 87 of the Transfer of Property Act, the mortgagor could not redeem the mortgage; and with reference to this question the learned Judges expressed themselves as follows: "Apart however from the English cases, it is quite clear that the Legislature in enacting section 87 intended to give *some* effect to it, but if the respondent's contention were right, this section would be of no effect, and section 86 *plus* non-payment of the money would give a right of possession. Section 87 of the Transfer of Property Act provides that if the payment be not made within the time fixed in the decree 'the plaintiff may apply to the Court for an order that the defendant, and all persons claiming through or under him, be debarred absolutely of all right to redeem the mortgaged property.' That means without such an order the defendant would not be debarred of all right to redeem the mortgaged property. The fact that the Legislature allowed the plaintiff to apply for such an order shows that without that order the right to redeem would not be taken away. Section 87 goes on to say: 'And the Court shall then pass such order, and may, if necessary, deliver possession of the property to the plaintiff.' If the property be not redeemed the Court would have to pass an order absolute. It seems quite clear to us that the fact of the Legislature having made this provision requiring an order absolute to be made, makes the earlier order simply an order *nisi*, and the mortgagor can at any time, until the order absolute is made, redeem his property."

We may say we entirely concur in the view thus expressed. It seems to us that the application that was presented by the mortgagee for sale of the mortgaged property, being an application within the meaning of section 89 of the Transfer of Property Act, it could be given effect to, even if it was not in compliance with the terms of section 235 of the Code of Civil Procedure.

We have already said that the question of limitation that was raised in the Court below by the appellant depended upon the validity of the objection that the application of the mortgagee should have been verified. If this objection could not be sustained,

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

it was admitted by the learned vakil for the appellant that the plea of limitation also could not succeed.

1894

On these grounds we are of opinion that this appeal should fail, and we accordingly dismiss it with costs.

AJUDHIA
PERSHAD
v.
BALDEO
SINGH.

H. T. H.

Appeal dismissed.

Before Mr. Justice Ghose and Mr. Justice Gordon.

ROGHU SINGH (AUCTION-PURCHASER) v. MISRI SINGH (APPLICANT) AND ANOTHER (JUDGMENT-DEBTOR) AND ANOTHER (DECREE-HOLDER)⁴⁵
Appeal—Bengal Tenancy Act (VIII of 1885), section 173—Order setting aside sale in execution of decree for rent.

1894
May 18.

No appeal lies from an order setting aside a sale under section 173 of the Bengal Tenancy Act.

THIS was an application under section 173, sub-section 3 of the Bengal Tenancy Act, to set aside an execution sale on the ground that the purchase had been made by the judgment-debtor in the name of Roghu Singh. The applicant Misri Singh claimed to be a co-sharer with the judgment-debtor Khiali Singh, though he was not sued for the rent in execution of the decree, for arrears of which the sale took place.

The Munsif, after holding that the application was not barred by limitation, found on the merits that Khiali, the judgment-debtor, had himself purchased the property in order to deprive Misri Singh, the applicant (who was found to be a relative of the debtor), of it. The Munsif, therefore, ordered that the sale be set aside.

The auction-purchaser Roghu Singh appealed to the Judge, who held that no appeal lay from the order, and this is the only question material to this report. As to this the Judge said:—

“In this case I am asked to hear an appeal from an order of the Court below setting aside a sale under section 173 of the Bengal Tenancy Act. It is admitted on both sides that such an order is not appealable under section 588 of the Civil Procedure Code; but it is contended for the appellants that not being provided for in section 588 it must be taken to be a ‘decree.’ I cannot agree to this proposition. The word ‘decree’ and the word ‘order’ are both defined in the Civil Procedure Code; and if all orders which are not included in section 588 are decrees, then there is no occasion for any definition and no occasion for section 588 being enacted at all. Section 588 says that

⁴⁵ Appeal from Order No. 216 of 1893 against the order of R. Holmwood, Esq., Officiating District Judge of Bhagulpur, dated 2nd of June 1893, affirming the order of Babu Soshi Bhusan Chowdhri, Munsif of Monghyr, dated 14th of April 1893.