

PRIVY COUNCIL.

RAM GOLAM SAHU

v.

BARSATI SINGH.

P. C.³
1908November 12,
December 15.

[On appeal from the High Court at Fort William in Bengal.]

Sale—Decree—Execution of decree—Sale under decree on mortgage—Subsequent appeal from mortgage decree when Appellate Court altered decree by increasing the amount and extending time for payment by mortgagors—Effect of appellate decree on the sale—Right to possession—Application by mortgagors for restoration to possession—Limitation—Civil Procedure Code (Act XIV of 1889), ss. 244 and 311—Former order giving possession to mortgagors.

The appellants, who were mortgagees, on 20th December 1900, obtained in a suit on their mortgage in the Court of a Subordinate Judge an ordinary decree for sale of the mortgaged property, and, pending an appeal by the appellants on the ground that they were entitled to a larger amount than had been allowed them by the decree, the mortgaged property was sold on the application of, and purchased by, the appellants, and they were put into possession under an order of the High Court, dated 18th April 1904.

On the appeal from the decree of the Subordinate Judge, the High Court, on 27th January 1904, made a decree for sale conditional on the payment by the respondents, the mortgagors, of an increased amount within 6 months from the date of the appellate decree. The respondents, who had already unsuccessfully taken objections under sections 311 and 244 of the Civil Procedure Code to the sale being confirmed, then made an application under section 244 for restoration to possession on the ground that the High Court had by its decree on appeal so modified the decree of the Subordinate Judge as to render the sale under it illegal. The Subordinate Judge held that the application was not one within the purview of section 244; that it was barred by limitation; and that the decree of the High Court did not invalidate the sale, and dismissed the application.

The High Court on appeal, holding that the application was rightly made under section 244, and was not barred; and that the sale under a decree, which was subsequently substantially altered on appeal, could not be otherwise than bad, reversed the Subordinate Judge's decree, and directed that possession should be restored to the respondents, but refused to disturb the possession of the appellants pending the appeal to His Majesty in Council.

Held, by the Judicial Committee that the decree of the High Court was inconsistent with its order of 18th April 1904 giving the appellants possession.

* *Present* :—Lord Macnaghten, Lord Atkinson, Sir Andrew Scoble, and Sir Arthur Wilson.

against which no appeal had been brought, and which could not be treated as null and void; that to allow the respondents to take advantage of the error in the decree of 27th January 1904 would entail expense and delay; that the merits of the case were not with them; and they had not offered to redeem the property.

Their Lordships therefore allowed the appeal, and restored the decree of the Subordinate Judge.

APPEAL from a decree (2nd June 1905) of the High Court at Calcutta, which reversed a decree (16th July 1904) of the Subordinate Judge of Mozufferpore.

The decree-holders were appellants to His Majesty in Council.

The principal question for determination in this appeal was as to the validity of a sale held in execution of a decree on 18th August 1903.

On 25th September 1899, the judgment-debtors, the present respondents, mortgaged the properties the subject of the sale to the decree-holders, who brought a suit on the mortgage and on 20th December 1900, obtained the ordinary decree for sale from the Court of the Subordinate Judge of Muzafferpore. The judgment-debtors did not appeal from that decree; but the decree-holders preferred an appeal on the ground that they were entitled to a larger sum under the mortgage than had been allowed them by the Subordinate Judge. On 27th January 1904, the High Court allowed the appeal and made a decree for sale, conditional upon payment within six months, of Rs. 1,56,329.

Whilst that appeal was pending the decree-holders applied on 20th and 21st August 1901 to the Subordinate Judge for an order absolute for sale under section 89 of the Transfer of Property Act (IV of 1882). The applications were refused, but on application to the High Court the Subordinate Judge was, on 14th April 1902, directed to make an order absolute for sale, which he did on 14th August 1902. In pursuance of that order the property was put up for sale, and, on 18th August 1903, purchased by the decree-holders: on 14th September 1903 objections to the sale were raised by the judgment-debtors under sections 244 and 311 of the Civil Procedure Code (Act XIV of

1908
 RAM GOLAM
 SAHU
 v.
 BARSATI
 SINGH.

1908
 RAM GOLAM
 SAHU
 v.
 BARSATI
 SINGH.

1882), but they were dismissed, and on 4th January 1904 the Subordinate Judge confirmed the sale. The judgment-debtors appealed from that order to the High Court and also opposed attempts by the decree-holders to obtain possession of the property purchased, but as to the possession the High Court on 18th April 1904 decided that the decree-holders were entitled to possession, and in May 1904 they were duly put into possession of the properties by the Court.

On 19th May 1904, the judgment-debtors made an application to the Subordinate Judge, which gave rise to the present appeal. It purported to be made under section 244 of Act XIV of 1882 and asked for a restoration to possession of the properties by setting aside the sale of 18th August 1903. The ground for setting it aside was stated to be the fact that on the decree-holders appeal to the High Court, that Court had by the decree of 27th January 1904 "modified" the decree of the Subordinate Judge dated 20th December 1900 and awarded the decree-holders a larger sum as due under the mortgage.

In answer to that application the decree-holders insisted on the validity of the sale, and urged that the only remedy to set it aside was by application under section 311 of Act XIV of 1882 a remedy, which was barred by limitation and had already been exhausted. They also pleaded that the orders of the High Court, dated 14th April 1902 and 18th April 1904, were final as against the judgment-debtors.

The Subordinate Judge on 16th July 1904 holding that the judgment-debtors could only apply under section 311 of Act XIV of 1882 and that such application was barred by limitation, and also that the decree of the High Court, dated 27th January 1904, did not invalidate the sale, dismissed the application with costs. In his judgment he said :—

" This application has been made only under section 244 of the Code of Civil Procedure, no mention having been purposely made in it of section 311 of the Code, under which only an execution sale is mainly set aside, because on a former occasion, an application under that section, coupled with section 244, had been made to set aside the sale, but was made unsuccessfully. There is now an appeal pending in the High Court against this Court's order, dated

the 4th January 1904, rejecting the last-mentioned application to set aside the sale.

“The judgment-debtors, without withdrawing the appeal mentioned above, have made this application before me under section 244, Civil Procedure Code, on the strength of the ruling in the case of *Chandun Singh v. Ram Deni Singh* (1) and other rulings referred to therein.

“In the first place, I would say that the judgment-debtors’ present application to set aside the sale is barred by limitation as it was not made within 30 days from the date of that sale, and no question of fraud having been now raised about it.

“In the second place I do not think that the application under notice is entertainable under section 244, Code of Civil Procedure. It does not come under clause (c) of that section, under which it was made. There is now no question in this case relating to the execution, discharge or satisfaction of the decree or to the stay of execution thereof. The question about the restoration to possession after possession has been taken by the auction purchasers, who are the decree-holders in this case, is not a question provided for by the section above quoted.

“In the case mentioned above the petition to set aside the sale must have been made under sections 311 and 244 of the Code of Civil Procedure. And, therefore, when the Court ordering the sale to be set aside on the ground that the decree, in execution of which that sale was made, was reversed by the Appellate Court, and was not in existence when the sale was made, also rightly ordered the restoration of the property to the possession of the judgment-debtors, who were ousted from it by the said sale. The present case is different from the case mentioned in the ruling. I may further observe that the latter case is distinguishable from the present, inasmuch as in that case there was an appeal against the whole decree, which was wholly reversed, and a new decree was substituted therefor by the Appellate Court. But in the case before me, there was no appeal against the portion of the mortgage decree, which was executed by the decree-holders after it was made absolute, and under which they brought to sale and purchased the judgment-debtors’ properties. Therefore, that decree was not reversed. The language of the Appellate Court’s order, by which it added to that decree a certain amount, which was not allowed by the Court of First Instance, could not change the substance of the thing. I take that order as directing the addition to the original decree of the amount it decreed in appeal, though it stated that it modified the original decree.”

From that decision the judgment-debtors appealed to the High Court, and a Divisional Bench (Rampini and Caspersz JJ.) reversed the decree of the Subordinate Judge and directed that possession of the property should be restored to the judgment-debtors on the ground that the sale was invalid as the only

1908

RAM GOLAM
SAHU
v.
BARSATI
SINGH.

1908
 RAM GOLAM
 SAHU
 v.
 BARSATI
 SINGH.

decree capable of execution was that dated 27th January 1904, and that the proper remedy was by application under section 244 of Act XIV of 1882.

The material portion of their judgment was as follows :—

“ The judgment-debtors contended before the Subordinate Judge that the sale of the 18th August 1903, held in execution of the mortgage decree, was bad, because that decree was subsequently modified ; and they were not bound to pay in the decretal amount until six months from the 27th January 1904. The learned Subordinate Judge has, however, disallowed their objection. He has held (1) that the application of the judgment-debtors is barred by limitation and it was not made within 30 days from the date of the sale, and (2) that their application does not come within the purview of section 244 of the Code of Civil Procedure.

“ We think that the order of the Subordinate Judge cannot be sustained.

“ If the application of the judgment-debtors had been made under section 311 of the Code of Civil Procedure, no doubt the period of limitation would be 30 days ; but the application being under section 244, the period of limitation is not 30 days, but 3 years.

“ Then, we do not think that the learned Subordinate Judge is right in holding that the application does not come within the purview of section 244. It is certainly, in our opinion, an application relating to the execution, discharge and satisfaction of a decree ; and, furthermore, we think that the sale of the 18th August 1903, under a decree, which was subsequently altered by this Court—and altered very substantially—cannot be held good. The decree, which alone can be executed in this case, is the decree of the 27th January 1904. That decree gave the judgment-debtors six months' time to redeem the property in and the sale, which was held about a year before that period had expired, must be bad.

“ We therefore decree this appeal and set aside the sale of the 28th August 1903, as also the proceedings delivering possession of the property to the decree-holders ”

On this appeal, which was heard *ex parte*—

DeGruyther, K.C., and *S. A. Kyffin* for the appellants, contended that the High Court was in error in holding that the sale of 18th August 1903 was bad by reason of the decree under which the sale took place having subsequently to such sale been modified on appeal in favour of the appellants : the sale, it was argued, was valid and was not rendered illegal by the decree dated 27th January 1904 of the High Court on appeal by the appellants. All that the High Court had power to do on that appeal was to deal with the amount awarded by the Subordinate Judge ; for, the respondents not having

appealed from, or filed objections to it, the rest of the Subordinate Judge's decree was final. A Court could not of its own motion deal with a portion of a decree against which portion there had been no appeal and no objections filed. Extending the time for payment of the decretal amount, as the High Court did in its decree of 27th January 1904, was an illegal exercise of its jurisdiction, and an order which that Court had no power to make under the Transfer of Property Act (IV of 1882). Reference was made to *Cheda Lal v. Bachullah* (1); Transfer of Property Act, sections 88, 89, 93, and Civil Procedure Code (Act XIV of 1882), section 545 and Schedule IV, Form No. 128. There was therefore, it was submitted, no such modification by the High Court of the decree of the Subordinate Judge dated 20th December 1900, in its decree of 27th January 1904 as invalidated the sale of the property purchased by the appellants.

The only procedure to set aside the sale was by application under section 311 of the Civil Procedure Code, but that remedy had been exhausted and was barred by lapse of time. The application now under appeal, so far as it asked for the setting aside of the delivery of possession of the property to the appellants, was not one which came within the provisions of section 244 of the Civil Procedure Code, and the High Court ought so to have held.

The orders of the High Court, dated 14th April 1902 under which the order absolute for sale of the property was made, and 18th April 1904 ordering possession to be given to the appellants, were final as against the respondents and could not now be disputed; yet the judgment of the High Court now under appeal was quite inconsistent with those orders, which were binding on the respondents. The position of the parties was somewhat analogous to that in *Mungul Pershad Ditchit v. Grija Kant Lahiri* (2). In any case the respondents could not be entitled to possession without redeeming the mortgage, dated 25th September 1899. The decree of the High

1908
 RAM GOLAM
 SAHU
 v.
 BARSATI
 SINGH.

(1) (1888) I. L. R. 11 All. 35, 38.

(2) (1881) I. L. R. 8 Calc. 51, 60; L. R. 8 I. A. 123, 132.

1908
 RAM GOLAM
 SAHU
 v.
 BARSATI
 SINGH.

Court appealed from should be set aside and that of the Subordinate Judge restored.

The judgment of their Lordships was delivered by—

LORD MACNAGHTEN. This appeal was heard *ex parte*. It certainly presents something like a puzzle owing to complications which have resulted from an error committed by the appellants at one stage of the proceedings. On the whole, however, their Lordships are of opinion that the appeal ought to succeed.

On the 20th of December 1900, the appellants obtained from the Subordinate Judge of Mozufferpore an ordinary decree for a sale of some mortgaged property. The amount for which the decree was passed was Rs. 1,14,000. The appellants' claim was for a considerably larger amount. They appealed to the High Court for a modification of the decree on the ground that the amount allowed was inadequate.

In August 1901, before the appeal to the High Court came on for hearing, the appellants applied to the Subordinate Judge for an order absolute for sale. The Subordinate Judge refused the application pending the appeal. But the High Court, on the petition of the appellants, directed the Subordinate Judge to make the necessary order. In their judgment the learned Judges of the High Court say—

“ It is suggested that in the appeal to this Court there may be an order or a decree for a further sum in favour of the petitioners and some confusion may result. But we have not to consider that matter at present, nor is it clear that any confusion will arise.”

On the 14th of April 1902 the order absolute was made. The property was put up for sale on the 18th of August 1903. It was purchased by the appellants. The sale was confirmed on the 4th of January 1904. But the Subordinate Judge, on the objection of the respondents, refused to put the appellants in possession.

On the 27th of January 1904, the appeal of the present appellants from the original decree of the 20th of December

1900 came on to be heard. The Court made an order modifying the decree in the appellants' favour, directing the respondents to pay the whole amount adjudged within six months, and, in case of default, directing the property to be sold.

1908
 RAM GOLAM
 SAHU
 v.
 BARSATI
 SINGH.

The next important date is the 18th of April 1904, when an appeal from the refusal of the Subordinate Judge to put the appellants in possession of the property was heard. The High Court, after hearing both parties, decided that the appellants were entitled to possession. They were accordingly put into possession and have remained in possession ever since.

As the respondents were represented by counsel or pleaders on that occasion, it cannot be doubted that the attention of the High Court was called to the fact that the six months allowed by the decree of the 27th of January 1904 had not expired, and that the sale had taken place under a decree of the Subordinate Judge inconsistent with the subsequent decree of the High Court.

The objection was apparent. It could not have been overlooked. How the High Court dealt with it does not appear. It may not have been pressed by the respondents, or the High Court may have been satisfied that, under the circumstances of the case, the form of the decree was a mere slip on the part of the appellants, or the Registrar of the Court, which misled nobody.

The next step was that the respondents, on the 19th of May 1904, applied to the Subordinate Judge claiming restoration to possession by setting aside the sale of the 18th of August 1903. The Subordinate Judge dismissed the application with costs. On appeal, however, to the High Court that Court reversed the decree of the Subordinate Judge, set aside the sale, and directed that possession of the property should be restored to the respondents.

From that decree the appellants have appealed to His Majesty in Council. Pending the appeal the High Court has refused to disturb the possession of the appellants, observing that "the case is in its circumstances very peculiar."

1908
 RAM GOLAM
 SAHUF
 v.
 BARSATI
 SINGH.

The appellants take their stand on the order of the High Court of the 18th of April 1904. Their Lordships think that the appellants are right and that the order now under appeal is inconsistent with the order of the 18th of April 1904, against which no appeal was brought, and which, in their Lordships' opinion, ought not now to be treated as null and void.

The merits of the case are not with the respondents. If they were allowed to take advantage of the error in the decree of the 27th of January 1904, it would only lead to expense and delay. They have not offered to redeem, and probably are not in a position to redeem, the property.

Their Lordships will therefore humbly advise His Majesty that the appeal ought to be allowed and that the order of the 2nd of June 1905 ought to be discharged, but without costs, and the decree of the Subordinate Judge of the 16th of July 1904 restored, and that any costs paid under the order of the 2nd of June 1905 ought to be repaid. Their Lordships do not think it is a case for giving the appellants any costs of the appeal.

Appeal allowed.

Solicitors for the appellants: *T. L. Wilson & Co.*

J. v. W.