

Before Mr. Justice Mitra and Mr. Justice Caspersz.

1907

May 28.

ABIR PARAMANIK

v.

JAHAR MAHMUD MANDAL.*

Mortgage—Sale of mortgaged property—Agreement—Solehnamah—Transfer of Property Act (IV of 1882), s. 89—Jurisdiction—Execution of decree.

A suit on mortgage was adjusted, and a decree made treating a *solehnamah* filed by the parties as a part of the decree. It was agreed that the amount due should be paid in instalments, and that the mortgaged property should be sold in default of payment. The decree as originally drawn stated that on failure to pay any one instalment, the whole amount would become due and the mortgaged property would, in the meantime, remain hypothecated, but it did not direct a sale of the property. Thereafter, on the application of the decree-holder, the decree was amended by inserting the words—"On failure to pay the money covered by the instalments, the mortgaged property should be sold for realization of the amount." The decree-holder then applied for and obtained an order absolute for sale.

On appeal, the said order was set aside on the ground that, having regard to the form of the decree as amended, no order under s. 89 of the Transfer of Property Act could be made:—

Held, that the parties having agreed that the decretal amount should be realized by sale of the hypothecated property, and the agreement having been expressed in proper form, the Court had full jurisdiction to carry out the intention of the parties, and the mortgaged property should be sold to satisfy the decretal amount: and that such execution accorded with the *cursus curiæ*.

Pisani v. Attorney General for Gibraltar(1) and *Sadasiva Pillai v. Ramalinga Pillai*(2) followed.

APPEAL by Abir Paramanik, the plaintiff.

On the 18th September 1898, the plaintiff instituted a suit on a deed of mortgage which was amicably adjusted, and a petition of *solehnamah* was filed. It was agreed that the amount due to the plaintiff should be paid in instalments, and that the mortgaged property should be sold in default of payment. On the 20th February 1900, the Court passed an order directing a decree to be

*Appeal from order, No. 437 of 1906, against the order passed by J. N. Roy, Officiating District Judge of Mymensingh, dated July 28, 1906, reversing the order of A. K. Roy, Munsif of Jamalpur, dated May 23, 1906.

(1) (1874) L. R. 5 P. C. 516.

(2) (1875) L. R. 2 I. A. 219.

drawn up in terms of the *solehnamah*, which was treated as a part of the decree in which it was stated that the amount should be payable in six years, and that on failure to pay any one instalment, the whole amount would become due and the mortgaged property would in the meantime remain hypothecated; the decree did not direct a sale of the property on the failure of the defendant to comply with the other terms of the *solehnamah*. When the decree-holder applied for execution, the defendant objected that no execution could be issued, unless the decree-holder obtained an order under s. 89 of the Transfer of Property Act directing the sale of the property. Thereupon, the decree-holder applied for an amendment of the decree, and the Court amended the decree by the insertion of the words: "On failure of the defendant to pay the money covered by the instalments, the mortgaged property should be sold for realization of the amount."

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Then the decree-holder applied for an order absolute for sale, to which the defendant objected; but the Munsif held that there was no bar to the Court making an order absolute, and he made the order accordingly.

On appeal by the defendant, the learned District Judge held that, having regard to the form of the decree as amended, no order under section 89 of the Transfer of Property Act could be made, and that the decree-holder could realise his money by a fresh suit only, and not by execution of the decree. Against this order the decree-holder appealed to the High Court.

*Babu Mukunda Nath Roy*, for the appellant. The decree as amended is a mortgage-decree, and the order-absolute for sale under s. 89 of the Transfer of Property Act was properly made. The lower Appellate Court erred in holding that the decree was a money-decree.

*Babu Pramatha Nath Sen*, (*Babu Naresk Chandra Sen Gupta* with him), for the respondent. The decree as it stood was not a mortgage-decree under the Transfer of Property Act, and the application for an order absolute for sale was not therefore maintainable. Decrees under the Transfer of Property Act are totally distinct from other decrees, and the provisions of the Civil Procedure Code relating to execution of decrees, and of the

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Limitation Act do not apply to the former: *Ajudhia Persad v. Baldeo Singh*(1), *Tiluck Singh v. Parsotein Proshad*(2), *Akikunmissa v. Roop Lal Das*(3), *Pramatha Chandra Roy v. Khetra Mohan Ghose*(4), *Bibijan v. Sachi Bewah*(5), and *Bibi Tasliman v. Harihar Mahto*(6). The decree-holder might execute the decree by attaching the property in the ordinary way, but he has not attached, and the provisions of s. 284 of the Civil Procedure Code cannot, therefore, apply. *Janki Prasad v. Baldeo Narain*(7) is a case similar to the present one, where it was held that the decree was a money-decree.

MITRA AND CASPERSZ JJ. This appeal arises out of a suit brought on the 18th September 1898 by the plaintiff, mortgagee on his mortgage. On the 20th February 1900, the parties came to an amicable adjustment of their dispute, and filed a petition of *solehnamah*. By that *solehnamah* the defendant agreed that a certain sum of money found to be due to the plaintiff should be paid in instalments up to the year 1312, the instalments being specified in the *solehnamah*. He further agreed that the mortgaged property should be sold in default of payment. The Court passed an order on the same day, the 20th February 1900, directing that a decree be drawn up in terms of the *solehnamah*. The decree was actually drawn up on the 23rd March following. The *solehnamah* was treated as a part of the decree, and the decree stated that the amount should be payable in six years, and that, on failure to pay any one instalment, the whole amount would become due and the mortgaged property would, in the meantime, remain hypothecated. The decree was not in proper form, as it did not direct a sale of the hypothecated property on the failure of the defendant to comply with the other terms of the *solehnamah*.

When the decree-holder applied for execution of the decree, an objection was made by the judgment-debtor that no execution could be issued, unless the decree-holder obtained an order under

(1) (1894) I. L. R. 21 Calc. 818.

(2) (1895) I. L. R. 22 Calc. 924.

(3) (1897) I. L. R. 25 Calc. 133.

(4) (1902) I. L. R. 29 Calc. 651.

(5) (1904) I. L. R. 31 Calc. 863.

(6) (1904) I. L. R. 32 Calc. 253.

(7) (1876) I. L. R. 3 A 216.

section 89 of the Transfer of Property Act directing the sale of the property. That objection was allowed. It is now contended before us, on behalf of the defendant, that his objection was wrongly allowed by the Court, and that the decree-holder ought to have appealed from that order.

Thereafter, the decree-holder applied for an amendment of the decree. Notice was issued on the judgment-debtor, and he objected to the amendment. The Court, after hearing both sides, came to the conclusion that the decree should be amended, and directed an amendment by insertion of words to the effect: "On failure of the defendant to pay the money covered by instalments, the mortgaged property should be sold for realisation of the amount." This was on the 27th February 1905. On the 3rd November 1905, the decree-holder applied for an order absolute for sale, that is, for an order directing the sale of the property in terms of the decree, as amended, the judgement-debtor having failed to pay the instalments as contemplated by the *solehnamah* and the decree. The application was opposed, but the Munsif held that there was no bar to the Court making an order absolute, and he made such an order.

On appeal from the order of the Munsif by the defendant to the District Judge, he held that, having regard to the form of the decree as amended, no order under section 89 of the Transfer of Property Act could be made, and that the decree-holder could realise his money by a fresh suit only, and not by execution of the decree. The learned Judge's view is that as the decree was not strictly in the form prescribed by the Transfer of Property Act, the provisions of the Act did not apply.

The decree-holder has now appealed from the order of the District Judge. It is conceded, and very properly conceded, by the learned vakil for the defendant, respondent, that the judgment of the District Judge, so far as it says that the remedy of the decree-holder lay in the institution of a suit under the decree of the Court, is erroneous.

The only question, therefore, for consideration is—Is the decree-holder entitled to obtain an order absolute for sale under ~~section~~ 89 of the Transfer of Property Act, and then sell the property; or may he realise his money by a sale of the property

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without such an order? The question is really one of form. The parties agreed that the money covered by the decree should be realised in a particular way, *i.e.*, by sale of the hypothecated property. The agreement of the parties has been expressed in proper form, though the form is not strictly in accordance with the Transfer of Property Act, and it could not be in strict form.

The Court gave effect to that intention by its decree, and the Court acted within jurisdiction. Decrees in the present form are common whenever payment is agreed to be made by instalments, and there is no law which says that the decree should not be in such a form.

The objection of the judgment-debtor to the amendment of the decree was most improper, and it was properly disallowed. After the amendment was made, the Court had full jurisdiction to carry out the intention of the parties. It is immaterial whether the provisions of section 89 of the Transfer of Property Act were strictly applicable, or whether the decree-holder should have had recourse to the ordinary procedure relating to the execution of decrees. Such execution accords with the *cursus curiæ*. The Court had to carry out the intention of the parties expressed in the decree made by it. In *Pisani v. Attorney General for Gibraltar*(1), Sir Montague E. Smith, in delivering the judgment of the Judicial Committee, observed: "The right of the parties as between themselves having been settled by an agreement, and the agreement not being void, it is for the Court to determine in what way justice should be done to the parties." In *Sadasiva Pillai v. Ramalinga Pillai*(2), the Judicial Committee observed, in a case where the decree did not direct realisation of mesne profits subsequent to the institution of the suit as to which application was made and allowed, that—"The Court had a general jurisdiction over the subject-matter, though the exercise of that jurisdiction of the particular proceeding might have been irregular. The case, therefore, seems to fall within the principle laid down and enforced by this Committee in the recent case of *Pisani v. Attorney General for Gibraltar*(1), in which the parties were held to an agreement that the questions between them should

(1) (1874) L. R. 5 P. C. 516.

(2) (1875) L. R. 2 I. A. 219.

be heard and determined by proceedings quite contrary to the ordinary *cursus curiæ*.”

Thus, there is ample authority to enable the lower Court to do justice as between the parties, and to direct enforcement of the decree as against the judgment-debtor. Section 89 of the Transfer of Property Act no doubt contemplates a certain state of things; but where such a state of things does not exist, that section does not exclude other ways of enforcing a decree, if such decree is otherwise valid in law. We have no doubt that the decree which was made in this case is a valid one, and that the mortgaged property should be sold to satisfy the decretal amount. Whether an order under section 89 of the Transfer of Property Act is necessary or not, the Court had general jurisdiction to direct a sale of the property either under section 284, of the Civil Procedure Code or under section 89 of the Transfer of Property Act, or under the two sections read together.

We direct that the lower Court do proceed to sell the property in accordance with the application made by the decree-holder.

A question may arise whether an attachment is necessary or not. Having regard to the form of the decree, we think that it is not necessary that there should be an attachment. The case should go back to the Munsif who should carry out the above directions.

The respondent must pay the appellant's costs, including costs of this Court.

*Appeal allowed.*

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