

APPELLATE CIVIL.

Before Mr. Justice Geidt and Mr. Justice Chitty.

RAJ KUMAR SINGH

v

SHEO NARAYAN SAHU.*

1906.

Jan. 31.

*Costs—Mortgage decree—Execution of decree for costs—Mortgaged properties—
Transfer of Property Act (IV of 1882) s. 90.*

A decree-holder in executing a mortgage decree must, for the purpose of recovering the costs awarded by the decree, proceed in the first instance against the property mortgaged; and in the event of the same being found insufficient he can proceed against properties other than the mortgaged property. The order for costs is a part of the mortgage decree.

Ruinessur Sein v. Jusoda(1) and *Damodar Das v. Budh Kuar*(2) distinguished.

Maqbul Fatima v. Lalta Prasad(3) followed.

APPEAL by Raj Kumar Singh and others, judgment-debtors.

The plaintiff obtained a mortgage decree against the defendants, but not for the full amount claimed in the Court of the Subordinate Judge of Saran; he appealed to the High Court against that portion of the decree which was not in his favour. The High Court modified the decree of the lower Court and ordered the defendants, amongst other things, to pay the plaintiff the sum of Rs. 503 for his costs. The plaintiff proceeded to execute the decree for costs, and applied for the sale of some properties of the defendants other than the properties mortgaged for the purpose of realizing the said costs.

The defendants, judgment-debtors, made an objection on the ground that the decree for costs could not be executed against them personally or their properties other than those mortgaged without, in the first instance, selling the latter. The lower Court negatived the objection and allowed the plaintiff to proceed against

* Appeal from original order, No. 530 of 1906, against the order of Saroda Prasad Bose, Subordinate Judge of Chapra, dated Aug. 18, 1906.

(1) (1886) I. L. R. 14 Calc. 185.

(2) (1888) I. L. R. 10 All. 179.

(3) (1898) I. L. R. 20 All. 523.

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the other properties. The judgment-debtors appealed to the High Court.

Babu Dwarka Nath Mitra, for the appellant. A decree-holder in executing the order for payment of costs in a mortgage decree cannot proceed against properties other than those mortgaged without selling the latter in the first instance. In a mortgage decree a general account should be taken once for all of the principal, interest, and costs due on a date to be fixed: *Sundar Koer v. Rai Sham Krishen*(1). The two cases, *Rutnessur Sein v. Jusoda*(2) and *Damodar Das v. Budh Kuar*(3), relied on by the lower Court relate to decrees in foreclosure suits and are distinguishable from the present suit which is one for sale. I am supported in my contention by a Full Bench ruling of the Allahabad High Court, *Maqbul Fatima v. Lalta Prasad*(4). See also Dr. Ghose's Mortgage, page 901.

Babu Harendra Krishna Mockerjee, for the respondent. All mortgage decrees should be treated alike; no distinction should be made between a foreclosure decree and a decree for sale. The two cases relied upon by the lower Court are therefore applicable: see also *Pran Kuar v. Durgu Prasad*(5).

GEIDT AND CHITTY JJ. The only question we have to decide is whether a decree-holder in executing a mortgage decree can, for the purpose of recovering the costs awarded by the decree, put up to sale properties other than the mortgaged property. The Subordinate Judge has held that he can, and in support of his view has referred to two cases, *Rutnessur Sein v. Jusoda*(2) and *Damodar Das v. Budh Kuar*(3). These, however, were not cases where the decrees had been for sale of the mortgaged properties. They were decrees passed for foreclosure where the mortgage had been by way of conditional sale. The present case is similar to *Maqbul Fatima v. Lalta Prasad*(4), decided by the Allahabad High Court, where it was held that the costs were really part of the

(1) (1906) I. L. R. 34 Calc. 150.

(3) (1888) I. L. R. 10 All. 179.

(2) (1886) I. L. R. 14 Calc. 185.

(4) (1898) I. L. R. 20 All. 523.

(5) (1887) I. L. R. 10 All. 127.

amount for which the mortgaged property had been ordered to be sold. We are clearly of opinion that the decree for costs is a part of the mortgage decree, and that the decree-holder must proceed in the first instance against the property mortgaged. It is only in the event of the mortgaged property being found insufficient to satisfy the mortgage decree that a decree-holder can proceed against the other properties in the manner provided by section 90 of the Transfer of Property Act.

In this view of the case we allow the appeal and set aside the order of the Subordinate Judge, allowing the decree-holder to proceed against properties other than the mortgaged properties.

The appellants are entitled to their costs from the respondents.

Appeal allowed.

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