APPELLATE CIVIL.

Before Mr. Justice Banerjee and Mr. Justice Brett.

SHYAMKISHEN

v.

SUNDAR KOER.*

1904

Jan. 20.

Appeal—Order for stay of sale—Mortgage decree—Civil Procedure Code (Act XIV of 1882) ss. 244, 291 and 588—Transfer of Property Act (Act IV of 1882) ss. 17 and 89—Order absolute for sale—Court's power to adjourn sale of mortgaged property.

An appeal lies against an order for stay of sale of property directed to be sold in execution of a mortgage decree notwithstanding that the said order is in terms one under s. 291 of the Code of Civil Procedure.

After an order absolute for sale had been made under s. 89 of the Transfer of Property Act, the Court had no power to adjourn the sale of the mortgaged property with a view to give time to the mortgagor to raise money to pay off the decree. It could adjourn the sale to a future date in order to have a better sale in the event of want of bidders or for other similar reasons.

Kedar Nath Raut v. *Kali Churn Ram*(1) distinguished. *Taniram* v. *Gajanan*(2) dissented from.

APPEAL by Shyamkishen and others, decree-holders.

In execution of a mortgage decree obtained by Shyamkishen and others the sale of the mortgaged properties was fixed for the 16th November, 1903. On the 10th November, the judgment-debtor Rani Sundar Koer put in an application in the third court of the Subordinate Judge at Patna, for a stay of sale, and the decree-holders raised various objections to the postponement of the sale. The learned Subordinate Judge having overruled the objection adjourned the sale. The material portion of his judgment was as follows.—

"The application urges two grounds for the stay of sale. First, that the judgment-debtor has applied to the Collector of Gya to place her estate, the Muksudpore Raj, under the Court of Wards, and that this matter is in the consideration of the Hon'ble Board of Revenue. Second, that the judgment-debtor has preferred an

* Appeal from Order No. 415 of 1903, against the order of Jogendra Nath Deb, Subordinate Judge of Patna, dated the 12th of November, 1903.

(1) (1898) I. L. R. 25 Calc. 703. (2) (1899) I. L. R. 24 Bom. 360.

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appeal to the Hon'ble High Court against my order of valuation of the properties of the judgment-debtor and the appeal is pending. The second ground falls under s. 545 of the Code of Civil Procedure. It has been contended by the learned pleaders for the decree-holders that s. 545 of the Civil Procedure Code has no application to a mortgage decree passed under the provisions of the Transfer of Property Act. The question is not free from doubt. But when an appeal has been preferred against the order of valuation passed by me, it will, I think, be simply fair to give an opportunity to the judgment-debtor to be heard in appeal by the Hon'ble Judges. No doubt under the provisions of sec. 545 when an appeal has been preferred it is for the Hon'ble High Court to stay or not the execution of the decree. But to hold the sale upon the valuation fixed by me before the appeal is heard would frustrate the appeal. The first ground is, I think, more reasonable. It appears from para. 3 of the copy of the Hon'ble Board's letter that the matter is under the consideration of the Hon'ble Board and that very early orders are expected. If the Hon'ble Board takes over the estate it will be more advantageous to the decree-holders, who will have a sure chance of being repaid. I do not think therefore that an adjournment of the sale to the 18th January 1904 will, in any way, prejudice the decree-holders. The time thus granted will be sufficient for the judgment-debtor to have the Hon'ble Board's opinion. The adjournment of the sale would necessitate a fresh proclamation. The pleader for the judgment-debtor states his client is ready to bear the expenses of that proclamation and the decree-holders will not be in any way prejudiced by a fresh proclamation."

Babu Satish Chunder Ghose (*Babu Khetter Mohun Sen* with him) for the respondent took a preliminary objection that no appeal lay to the High Court, the order being one under s. 291 and not specified in s. 588 of the Code of Civil Procedure.

Dr. Ashutosh Mookerjee (*Moulavi Mustapha Khan* with him) for the appellant. The effect of the order being stay of execution, the order was one under s. 244 of the Code of Civil Procedure, and is therefore appealable. On the merits the sale being one of mortgaged properties, after the decree absolute, the Court had no jurisdiction to adjourn the sale to enable the judgment-debtor to pay off the debt, regard being had to ss. 87 and 89 of the Transfer of Property Act. Although s. 291 of the Code of Civil Procedure gives the Court power to adjourn a sale, and, although that section has been made applicable to sales under the Transfer of Property Act, by virtue of rules made by the High Court under s. 104 of that Act, the rule making section 291 applicable to such sale is *ultra vires*, see *Kedarnath Raut* v. *Kali Churn Ram* (1) and *Tantram* v. *Gajanan* (2).

(1) (1898) I. L. R. 25 Calc. 703. (2) (1899) I. L. R. 24 Bom. 300.

Babu Satish Chunder Ghose. As by virtue of rules made by the High Court, s. 291 of the Code of Civil Procedure has been made applicable to sales under the Transfer of Property Act, the Court had ample power to adjourn the sale to pay off the decree-holder. It has been held in the case of *Raja Ram Singhji* v. *Chunni Lal*(1) that sections 291 and 310A of the Code of Civil Procedure will apply to a sale held in virtue of an order absolute for sale passed under s. 89 of the Transfer of Property Act, although no power is given under that Act to postpone the operation of an order under s. 89. The lower Court has used its discretionary power given under s. 291 of the Code of Civil Procedure and has adjourned the sale. The High Court ought not to interfere.

Dr. Ashutosh Mookerjee in reply.

BANERJEE AND BRETT JJ. This is an appeal from an order of the Court below postponing the sale of the mortgaged properties and giving the judgment-debtor Rani Sundar Koer, time to have her property taken charge of by the Court of Wards, so that arrangements might be made for paying off the decree.

At the hearing of the appeal a preliminary objection was taken on behalf of the respondent, the judgment-debtor, that no appeal lay from the order of the Court below, as it was an order under s. 291 of the Code of Civil Procedure, and not under s. 244. If it was an order under s. 291 simply adjourning the sale, no appeal lay from it, as an order under s. 291 is not made appealable by s. 588. But then the learned vakil for the appellants contends, and we think rightly, that the case comes under s. 244 and that the order of the Court below was an order in effect, if not in terms, for stay of execution of the decree. The order in terms is no doubt an order for stay of sale, but as the decree is a mortgage decree directing the sale of the mortgaged property, and as, until the mortgaged properties are sold and found to be insufficient to satisfy the decree, no other proceeding in execution against the judgment-debtor can be taken, the stay of sale of the mortgaged property virtually amounted to stay of execution altogether; and that

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being so, the order should be taken to be one determining a question coming under clause (*c*) of s. 244, and therefore being a decree within the meaning of section 2 of the Code.

An appeal therefore lies against that order.

Now the points urged in this appeal are, *first*, that the lower Court had no power under s. 545 of the Code of Civil Procedure to stay execution; *second*, that even if it be held that the Lower Court had power to stay the sale, it could not stay the sale for the purpose of giving time to the judgment-debtor to pay off the decree, the granting of such time being in contravention of the provisions of s. 89 of the Transfer of Property Act; and *third*, that if the Court below had power to adjourn the sale, it ought not to have exercised that power without imposing terms upon the judgment-debtor, having regard to the circumstances of this case.

With reference to the *first* point, the argument is, that as the appeal, pending which the sale was stayed, was not an appeal from the decree sought to be enforced, but was only an appeal from an order in the execution proceedings, and as section 545 does not authorize the Court of first instance to stay execution pending an appeal after the appeal has been preferred, the power of ordering stay of proceedings in such a case being exercisable only by the Appellate Court, the Lower Court had no power to make the order it has made.

This argument is no doubt correct, if the assumption on which it is based is so. But it does not prove that the Court below had no power to stay the sale; and there is nothing in the order of the Court below to show that the stay of sale was granted under section 545 of the Code of Civil Procedure, as the argument assumes.

The first contention of the appellants must therefore fail.

In support of the *second* contention it is urged that, as section 89 of the Transfer of Property Act, unlike section 87, makes no provision for extension of time for paying off the amount of the decree, but on the contrary expressly provides that upon the expiry of the time allowed for payment, an order absolute for sale of the mortgaged property or a sufficient part thereof shall be made, and thereupon the defendant's right to redeem and the security shall both be

extinguished, any adjournment of sale in a case like this was in contravention of the provisions of section 89 of the Transfer of Property Act, and was therefore illegal, and it is contended that, although section 291 of the Code of Civil Procedure gives the Court power to adjourn a sale and although that section has been made applicable to sales under the Transfer of Property Act by the rules made by the High Court under section 104 of that Act, the rule making section 291 applicable to such sales is *ultra vires*, it not being, as section 104 requires it to be, consistent with the Transfer of Property Act. And in support of this contention the observations of the majority of the learned Judges in the case of *Kedarnath Raut* v. *Kali Churn Ram*(1) and the case of *Taniram* v. *Gajanan*(2) have been relied upon.

We are of opinion that the broad contention urged on behalf of the appellants is not correct. We do not think that section 291 is necessarily and in all cases inconsistent with the provisions of section 89 of the Transfer of Property Act. The mortgagor may not, after the expiry of the time allowed for payment, be entitled to ask for any extension of time; but that does not prevent the Court from adjourning the sale for proper reasons, nor does it prevent the operation of that portion of section 291 which provides that the sale shall be stopped if, before the lot is knocked down, the debt and costs (including the costs of the sale) are tendered to the proper officer of the Court. It is one thing to grant the judgment debtor time to raise money to pay off the decree, it is quite another thing to allow the judgment-debtor to stop the sale of his property by paying down the amount of the decree, and not that alone, but something more, namely, the costs of the sale.

Section 89 of the Transfer of Property Act no doubt provides that, if default is made in payment within the time allowed, the Court is to make an order for the sale of the mortgaged property, or a sufficient part thereof, and thereupon the defendant's right to redeem and the security shall both be extinguished, but still the property does not cease to be the property of the defendant mortgagor, until the sale has taken place; and as the sale takes

(1) (1898) I. L. R. 25 Calc. 703. (2) (1899) I. L. R. 24 Bom. 300.

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place only for the purpose of realizing the amount of the mortgage debt and not for the mere purpose of having the property sold, there is no real conflict between section 89 of the Transfer of Property Act and that part of section 291 of the Code of Civil Procedure, which directs that upon payment of the amount of the decree together with costs of the sale, the sale shall be stopped.

As for the case of *Kedarnath Raut* v. *Kali Churn Ram*(1) that is quite distinguishable from the present, the question for determination there being whether section 310A of the Code was applicable to a sale of mortgaged property, that section not having been made applicable to sales under that Act. It is true in the course of his judgment the learned Chief Justice remarks that, even if section 310A of the Code had been extended by the rules of this Court to sales under the Transfer of Property Act, such extension would have been *ultra vires*, it being exceedingly doubtful, if it would have been consistent with the Transfer of Property Act, and that remark was concurred in by the majority of the Court; but it was not necessary for the decision of the case.

As for the Bombay case, with all respect for the learned Judges who decided that case, we are unable to adopt the view taken by them. But though that is so, we feel bound to observe that after the order absolute for sale had been made under section 89 of the Transfer of Property Act, the Court below had no power to adjourn the sale of the mortgaged property with a view to give time to the mortgagor to raise money to pay off the decree. That was a purpose for which it was not competent to the Court below to adjourn the sale. It could adjourn the sale to a future date in order to have a better sale, in the event of want of bidders, or for any other similar reason, but the object with which the sale was adjourned in this case was one that was not consistent with the provisions of section 89 of the Transfer of Property Act.

As to the *third* point we think the contention is so far correct that having regard to the circumstances of the case, when the sale was adjourned as a matter of indulgence to the judgment-debtor, terms ought to have been imposed upon her. But it is unnecessary to give any specific direction under this head, as any future

(1) (1898) I. L. R. 25 Calc. 703.

sale will have to be adjourned for other reasons, in the view we take of the case in appeal No. 417 of 1903.

The result, then, is that though the second contention of the appellants partially succeeds, and also the third, the appeal must be dismissed, subject to the observations indicated above, and under the circumstances of the case we make no order as to costs.

Appeal dismissed.

S. C. G.