

(1921) 08 CAL CK 0030
In the Calcutta High Court

Srimati Indramani Dasi

APPELLANT

Vs

Surendra Nath Mondal and Others

RESPONDENT

Date of Decision : 04-08-1921

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 34 Rule 14, Order 34 Rule 15
Transfer of Property Act, 1882 — Section 100, 99

Citation : AIR 1922 Cal 35 : 64 Ind. Cas. 852

Hon'ble Judges : Panton, J; Asutosh Mookerjee, J

Bench : Division Bench

Judgement

1. This is an appeal by the decree holder against an order of dismissal made on an application for execution of a decree for maintenance. The decree was made by consent of parties on the 27th May 1914. The petition of compromise, which was incorporated in the decree, stated that the plaintiff would be entitled to maintenance at the rate of Rs. 4 par month and that if the amount was not paid from month to month, the plaintiff would be entitled to realise the same from the defendant by execution of the decree. The petition further stated that a sum of Rs. 287 was payable on account of arrears of maintenance, and that this sum would be leviable in execution in two instalments of Rs. 200 and Rs. 87 respectively. The petition finally recital that all the properties mentioned in the schedule to the plaint would remain charged for the payment of the allowance settled as maintenance. The decree directs that the suit be decreed in accordance With the compromise, that the sum of Rs. 287 be paid by the defendants to the plaintiff and that on default of payment of the first instalment, the plaintiff do realise the whole amount by sale of the properties mentioned in the schedule. In answer to the present application for recovery of maintenance, at the prescribed rate, in execution, the judgment-debtors urged that the amount could not be recovered in execution and that it was obligatory on the plaintiff-decree holder to institute a suit for enforcement of the charge created by the decree. This contention was overruled by the Court of first instance, but on appeal the District Judge has given effect to the objection and dismissed the

application for execution, on the ground that the decree holder was not competent to sell the properties in execution without recourse to a suit for enforcement of the charge. On behalf of the appellant decree holder, it has been argued before us that the view taken by the District Judge is erroneous and that she is competent to execute the decree notwithstanding the provisions of Order XXXIV, Rules 14. and 15, Code of Civil Procedure. This view has been controverted on behalf of the respondents judgment debtors, who have further urged that the decree is for arrears of maintenance alone and does not, if correctly interpreted, entitle the plaintiff to realise future maintenance by execution.

2. In our opinion, the construction placed upon the decree by the respondents does not give effect to the intention of the parties. The decree incorporates the petition of compromise, which stated expressly that the amount of maintenance payable in future was fixed at Rs. 4 per month and that on default of payment such sum would be recoverable by the plaintiff in execution. The statement in the decree that the suit be decreed in accordance with the petition of compromise plainly gives effect to this clause. Stress is laid, on the fact that this clause was not explicitly recited in the decree, while the other clause was expressly incorporated, but that was done obviously for the reason that the sum specified had already fallen due. We cannot further overlook the circumstance that the construction now put forward had not been suggested by either of the parties in the Courts below. We hold accordingly that this is a decree for payment of future maintenance. The question thus Arises, whether the decree can be executed notwithstanding the provisions of Order XXXIV, Rules 14 and 15 of the Code of Civil Procedure, or whether the decree-holder is under an obligation to enforce the charge by a suit. We are of opinion that this question should be answered in favour of the decree holder.

3. Rule 14 of Order XXXIV provides as follows:--"Where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage, he shall not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage, and he may institute such suit notwithstanding anything contained in Order II, Rule 2."

4. Rule 15 provides as follows:--"All the provisions contained in this Order as to the sale or redemption of mortgaged property shall, so far as may be, apply to property subject to a charge within the meaning of Section 100 of the Transfer of Property Act, 1882." The language of Rule 14 makes it clear that the rule does not apply unless the decree obtained by the holder of the mortgage or charge falls within the description of a decree for payment of money in satisfaction of a claim arising under the mortgage or charge. The mortgage or charge mentioned in this rule must obviously be a mortgage or charge existing prior to the date of the decree, and not one created by the decree, This view has been adopted not only by this Court but also by the High Courts of Bombay, Madras and Patna. In

the case of Asad Ali Mollah v. Haider Ali 6 Ind. Cas. 826 : 38 C. 13 : 14 C. W.N. 918 : 12 C.L.J. 130 it was ruled that a decree of this description for maintenance drawn up in the form approved by the Full Bench in Ashutosh Bannerjee v. Lukhimoni Debya 19 C. 139 : 9 Ind. Dec. (N.S.) 538 (F.B.) may be executed without the institution of a suit; in other words, the decree holder is entitled to recover in execution, without further suits, the allowance as it accrues due. The same view was adopted in Ambalal Bapubhai v. Narayan Tatyaba 51 Ind. Cas. 929 : 43 B. 631 : 21 Bom. L.R. 69(sic), Sowbagia Ammal v. Manika Mudali 42 Ind. Cas. 975 : 33 M.L.J. 601 : 22 M.L.T. 386 : (1917) M.W.N. 782 : 6 L.W. 701, Kuttiventi Venkataramanamurthi V. Macherla Sundara Ramiah 47 Ind. Cas. 680 : 23 M.L.T. 355 and Brajasunder Deb v. Sarat Kumari 38 Ind. Cas. 791 : 2 P.L.J. 55 : (1917) Pat. 67 : 3 P.L.W. 202, We have been pressed, however, to adopt the contrary view taken in other cases, such as the decisions in Aubhoyessury Dabee v. Gouri Sunkur Panday 22 C. 859 : 11 Ind. Dec (N.S.) 568 and Matangini Dassee v. Chooneymoney Dassee 22 C. 903 : 11 Ind. Dec. (N.S.) 598. But we cannot overlook that these cases were decided u/s 99, Transfer of Property Act, which was differently expressed and has been replaced by the provisions of Order XXXIV, Rules 14 and 15 of the Code: Kissory Lal Chowdhury v. Raja Sewbux Bogla 3 Ind. Cas. 999 : 13 C.W.N. 787. In fact a similar view had been adopted in the case of Venkata subhamma v. Venkanna 17 M.L.J. 217, which was not followed in the later case of Ruttiventi Venkataramanamurthi v. Macherla Sundara Ramiah 47 Ind. Cas. 680 : 23 M.L.T. 355, which applied the rule enunciated in Sowbogia Ammal v. Manika Mudali 42 Ind. Cas. 975 : 33 M.L.J. 601 : 22 M.L.T. 386 : (1917) M.W.N. 782 : 6 L.W. 701. Amongst the cases in this Court decided after the repeal of Section 99, Transfer of Property Act, reference need be made only to the decisions in Tarak Nath v. Bhubaneshwar Mitra 30 Ind. Cas. 988 : 42 C. 780, Gobind Chandra Pal v. Kailash Chandra Pal 40 Ind. Cas. 230 : 25 C.I.J. 354 and Gobind Chandra Pal v. Kailash Chandra Pal 41 Ind. Cas. 73 : 45 C 530. The first of these cases supports the contention of the appellant. The second case need not detain us, as we find that the judgment was modified on review and the question now raised before us was left open. The third case is clearly distinguishable, as explained in Ambalal Bapubhai v. Narayan Tatyaba 51 Ind. Cas. 929 : 43 B. 631 : 21 Bom. L.R. 69(sic) In that case there was a charge antecedent to the suit which culminated in the decree. Consequently the view might very well be maintained that an application to execute the decree by enforcement of the pre existing charge was in contravention of Order XXXIV, Rule 14, Civil Procedure Code. We are consequently of opinion that it is not obligatory upon the petitioner to take recourse to a suit to enforce the charge created by the consent decree of the 27th May 1914, If this view were not adopted, the result would be to nullify the decision of the Full Bench in Ashutosh Bannerjee v. Lukhimoni Debya 19 C. 139 : 9 Ind. Dec. (N.S.) 538 (F.B.), where it was ruled that a decree for. maintenance may be made in such a form as to entitle the plaintiff to realise in execution not only the arrears which had accrued due at the date of the institution of the suit but also future maintenance, as it accrues from time to time. It is further plain from the report that the decree then upheld by

the Full Bench did create a charge on Immovable property, and, as pointed out by the Full Bench, decrees in this form had been familiar to the Courts for a considerable length of time.

5. Apart from these considerations, it is manifestly not open to the judgment-debtors who are bound by the consent decree to take this objection. This position is emphasised in the following passage in the judgment of the Full Bench in *Ashutosh Bannerjee v. Lukhimoni Debya* 19 C. 139 : 9 Ind. Dec. (N.S.) 538 (F.B.): "The decree was the decree of a Court possessing jurisdiction over the subject matter of the suit and was made by consent of parties; and, even if it were irregular, as the learned Judges of the Division Bench think, still on the authority of *Pisani v. Attorney General (Gibraltar)* (1874) 5 P.C. 516 : 30 L.T. 729 : 22 W.R. 900 and *Sadasiva Pillai v. Ramalinga Pillai* 2 I.A. 219 : 15 B.L.R. 383 (P.C.) : 24 W.R. 193 : 3 Sar. P.C.J. 519 : 3 Suth. P.C.J. 190, the appellant in this case having consented to the irregularity in the decree, is now precluded from raising any objection to its execution." The principle that a person who holds a mortgage or charge should have recourse to a suit is recognised for the benefit of the person against whom the mortgage or charge may have to be enforced, and it is clearly competent to such a person to waive the protection accorded to him by the provisions of Section 99, Transfer of Property Act, or the corresponding provisions of the Civil Procedure Code.. This view was indicated by Norris, J., in *Aubboyessury Dabee v. Gouri Sunkur Punday* 22 C. 859 : 11 Ind. Dec (N.S.) 568 in the following observation: ""We do not think the decree, which, no doubt, is nothing higher than an agreement between the parties, can be construed as Mr. Hill suggests. If the decree had said that in default of payment in Calcutta of the said sums,...the same shall immediately become due and realisable by execution by the attachment and sale of the properties set forth in the schedule, there might have been some force in the argument." The decree in the case before us is in these terms and it is. not competent to the judgment-debtors, after they had deliberately agreed to a decree in those terms, to resile in execution proceedings and contend that notwithstanding the express provision of the decree, the decree-holder must be driven to a separate suit.

6. The result is that this appeal is allowed, the order of the District Judge set aside and that of the Court of first instance restored. This order will carry costs both here and before the District Judge. We assess the hearing-fee in this Court at two gold mohurs.