

(1971) 01 AHC CK 0038

In the Allahabad High Court

Case No : Execution First Appeal No. 149 of 1969

Suraj Prasad Gupta and Another

APPELLANT

Vs

Chartered Bank and Another

RESPONDENT

Date of Decision : 21-01-1971

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 34 Rule 5
Income Tax Act, 1961 — Rule 16(1), 2

Citation : (1971) 41 AWR 199 : (1972) 83 ITR 494

Hon'ble Judges : S.N. Dwivedi, J; Hari Swarup, J; A.K. Kirty, J

Bench : Full Bench

Advocate : A.N. Kaul, G.N. Kunzru and Lalji Sinha, for the Appellant; A.S. Kapoor, Shambu Prasad and Rajeshwari Prasad, for the Respondent

Final Decision : Dismissed

Judgement

A.K. Kirty, J.—This appeal was heard by a Division Bench constituted by Dwivedi and Hari Swarup JJ. On a difference of opinion between them, the following question has been referred for opinion to another judge:

" Whether the expression "decree for the payment of money" in Rule 16(1) includes a decree for sale in enforcement of a mortgage under Order XXXIV, Rule 5, CPC ?"

2. Rule 16(1) referred to in the question is Rule 16(1) of Schedule II of the Income Tax Act, 1961, and reads as follows:

" 16. Private alienation to be void in certain cases.--(1) Where a notice has been served on a defaulter under Rule 2, the defaulter or his representative-in-interest shall not be competent to mortgage, charge, lease or otherwise deal with any property belonging to him except with the permission of the Tax Recovery Officer, nor shall any civil court issue any process against such property in execution of a decree for the payment of money."

3. Although a pure question of law has been referred for opinion, it seems

necessary to state the material facts very briefly. The respondent-bank had advanced a certain sum of money to the Cawnpore Rolling Mills (Private) Ltd. Appellant No. 1, Suraj Prasad Gupta, at the relevant time was the managing director of the said company. Appellant No. 2 is his brother. To secure the loan which was advanced by the bank to the company, the two appellants stood sureties and mortgaged bungalow No. 14/26, Civil Lines, Kanpur, to the bank on April 21, 1964. The loan in question not having been paid, the bank filed Suit No. 25 of 1966, both against the principal debtor, that is, the company and the two sureties, namely, the present appellants. In the suit a compromise decree was passed on April 16, 1966. This was a decree for sale under Order XXXIV, Rule 5 of the CPC (hereinafter referred to as " the Code ") It appears that there was some mistake in the decree and an application was made by the judgment-debtors for correction of the decree on July 12, 1966. Thereafter, the decree appears to have been corrected and on November 15, 1967, the respondent-bank applied for execution of the decree by sale of the mortgage security. The terms of the sale were settled on September 25, 1968, and November 18, 1968, was fixed for sale. On November 15, 1968, the present appellants appear to have made an application in the executing court for staying the sale on the ground that in view of Rule 16(1) of Schedule II of the Income Tax Act, the executing court has no jurisdiction to sell the property. On that date an order staying the sale was passed on the condition that the judgment-debtors waived fresh proclamation of sale in future. It appears that notices of demand for payment of arrears of Income Tax were given to appellant No. 1 under Rule 2 of Schedule II of the Income Tax Act on April 14, 1965, and August 18, 1965. The executing court by an order dated March 14, 1969, dismissed the objection of the appellants and directed the execution to proceed. It, however, further directed that in case any money is received by sale of the property it would not be given to any party until the question of priority between the Income Tax department and the respondent-bank is decided.

4. According to Dwivedi J., the words "decree for the payment of money" in Rule 16(1) are not intended to include a decree for sale of the mortgage security under Order XXXIV, Rule 5, of the Code. A contrary view has been taken by Hari Swarup J. The said two learned judges have given different reasonings for their respective opinions.

5. Section 222 of the Income Tax Act provides that when an assessee is in default or is deemed to be in default in making a payment of tax, the Income Tax Officer may forward to the Tax Recovery Officer a certificate under his signature specifying the amount of arrears due from the assessee and the Tax Recovery Officer on receipt of such certificate shall proceed to recover from such assessee the amount specified therein by one or more of the modes in accordance with the rules laid down in the Second Schedule. The modes mentioned in Section 222 are :

(a) attachment and sale of the assessee's movable property;

- (b) attachment and sale of the assessee's immovable property;
- (c) arrest of the assessee and his detention in prison ;
- (d) appointing a receiver for the management of the assessee's movable and immovable properties.

6. In the Income Tax Act itself there is no substantive provision for superseding or overriding the claim or rights of a secured creditor of the assessee. Schedule II mentioned in Section 222 contains statutory rules in accordance with which the modes of recovery mentioned in the section have to be exercised. Schedule II clearly, therefore, relates to procedure only and does not deal with substantive rights. It is true that arrears of Income Tax can be realised from the person and property of the assessee by following any of the modes mentioned in Section 222 of the Act. The provision for recovery of tax by any of the modes specified cannot, in the absence of any specific statutory provision, take away the rights of any third party in whose favour a mortgage security had already been created. When a mortgage is created a definite right accrues to the mortgagee and he acquires an interest in the very property itself which has been mortgaged to him. This interest cannot be denied to him unless a valid law is made in that behalf and, needless to say, such a law, if made, must not contravene Article 31 of the Constitution. I am, therefore, of the opinion that nothing can be read in Rule 16 of Schedule II of the Income Tax Act which may have the effect of denying the legal right of a mortgagee or a mortgagee in whose favour a decree for sale under Order XXXIV, Rule 5, of the Code, has been passed and that Rule 16 must be strictly construed and no extended or wide meaning can be given to the language of Rule 16(1). Rule 16 and in particular Sub-rule (1) and the expression "in execution of a decree for the payment of money" occurring therein must be given a restricted meaning. This expression is to be found in various provisions of the Code itself. On an examination of the same, vis-a-vis, certain other relevant provisions of the Code, it will, to my mind, be clear that the expression " decree for the payment of money " does not include a decree passed under Order XXXIV, Rule 5, for sale of a mortgage security.

7. The word " decree " has been defined in Section 2(2) of the Code. A decree can be either preliminary or final. There is an Explanation to Section 2(2) which reads:

" A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final."

8. It was necessary to advert to the definition of the word " decree " because Mr. Kunzru, learned counsel for the appellants, had contended that even in the case of a suit by a mortgagee on the basis of a mortgage, the suit in essence is a suit for recovery of money and that even under Order XXXIV, Rule 4, of the Code, a preliminary decree has to be initially passed and such preliminary decree is a decree which provides for payment of the sum found to be due to the mortgagee

by the mortgagor. It is, however, clear that the passing of a preliminary decree under Order XXXIV, Rule 4, of the Code, does not completely dispose of the suit itself. A preliminary decree under the said provision is a decree which merely enables the mortgagor by payment to the mortgagee or by deposit in court of the requisite amount to avert the sale of the mortgaged property. It will be noticed that under a preliminary decree the mortgagee-decree-holder does not get any right to execute the same and to realise the money by any of the modes mentioned in Section 51 of the Code. It is only when ultimately the judgment-debtor does not pay or deposit the requisite sum within the time allowed by the court that the decree-holder gets a right to apply for passing a final decree for the sale of the mortgaged property. It will thus be seen that there is a clear difference between a decree passed in favour of a simple creditor for recovery of money which can be executed at once and a preliminary decree under Order XXXIV, Rule 4, in favour of a mortgagee. To my mind, Rule 16(1) of Schedule II of the Income Tax Act covers a decree for payment of money passed in favour of a simple creditor and not a final decree for sale passed in favour of a mortgagee or a secured creditor under Order XXXIV, Rule 5, of the Code. If that were not so, under certain circumstances, a simple creditor who has obtained a decree for payment of money, in his favour may be placed at a more advantageous position than a creditor whose loan to the debtor is secured by a mortgage. A simple creditor may obtain a decree which may be executed very expeditiously and he may even be able to realise the decretal sum during the pendency of assessment proceedings against the judgment-debtor before any amount is found to be due from the judgment-debtor on account of Income Tax and before any notice of demand on him has been served in accordance with the provisions of the Income Tax Act. A mortgagee, on the other hand, even if he obtains a preliminary decree has to wait at least for six months before he can even apply for preparation of a final decree for sale of the mortgage security. Within this period of six months, during which the mortgagee decree-holder can do nothing, even though he has obtained a preliminary decree, Income Tax proceeding against the judgment-debtor which may be pending at the time of the filing of the suit may be completed and notice of demand may be served on the defaulter-assessee. If this is done, it would mean that the mortgagee-decree-holder, even though he may subsequently obtain a final decree for sale, would not be able to execute that decree. This could not have been intended by the legislature, when Rule 16(1) of Schedule II of the Income Tax Act was enacted.

9. Again, advertent to Section 51 of the Code, it will be noticed that one of the modes by which a decree can be executed is by arrest and detention in prison of the judgment-debtor. This mode of execution, which is available to a simple creditor who has obtained a decree in his favour and which sometimes is very effective, is not available to a mortgagee-decree-holder, Proviso to Section 51 also clearly brings out the essential distinction between a simple creditor and a secured creditor. Once a creditor obtains a mortgage, while getting certain advantage he has also to forgo many of the remedies which may be available to

a simple creditor. A distinction, therefore, must necessarily be made as between a decree-holder who has got a simple money decree, that is, " a decree for the payment of money " and a decree-holder who has got a decree for sale under Order XXXIV, Rule 5, of the Code. It may again be pointed out that Order XXI of the Code provides for passing of decrees in various kinds of suits but in the case of a secured creditor there are special and specific provisions contained in Order XXXIV. This also, to my mind, makes it clear that suits and decrees relating to mortgages of immovable property stand on an entirely different footing. The distinction between decrees in suits for recovery of money other than suits filed on the footing of a mortgage by a mortgagee is also to be found in Appendix D of the First Schedule to the Code, Form No. 2 of Appendix D relates to a simple money decree; whereas form No. 5-A relates to a preliminary decree to be passed under Order XXXIV, Rule 4, of the Code. It, therefore, appears to me that a simple money decree, that is, a decree for recovery of money simpliciter cannot be placed in the same category as a preliminary decree passed in favour of a mortgagee or a secured creditor under Order XXXIV, Rule 4 of the Code. Far less can a final decree for sale passed under Order XXXIV, Rule 5, of the Code, be equated with a simple money decree. I have already referred to Section 51 of the Code. I may further refer to some other provisions thereof. The expression " decree for the payment of money " or words to that effect are to be found in sections 34, 55, 58, 67 and 73 of the Code. I may refer to Rule 11 of Order XX of the Code which enables the court in the case of a decree for the payment of money, to order, for any sufficient reason at the-time of passing the decree, the payment of the amount decreed by installments. This power which has been conferred on the court under the said rule cannot be exercised by the court in the case of a suit filed by a mortgagee or a secured creditor. This would also indicate that a suit for recovery of a simple debt and the decree to be passed in such a suit stand entirely on a different footing from a suit on the basis of a mortgage and the decree to be passed in such a suit. I do not consider it necessary to refer to certain other provisions of the Code in which also specific reference has been made to the expression " decree for the payment of money " or expression to that effect.

10. I have already mentioned above that in the absence of a clear statutory provision, provided, however, that such statutory provision is valid, a secured creditor or a mortgagee cannot be deprived of his security or of his right to enforce sale of the mortgaged property in execution of a decree obtained by him on the foot of his mortgage. Even if a law were to be made depriving the mortgagee of the whole or part of the mortgage security or the proceeds thereof, it would, to my mind, be open to a mortgagee to question the validity of such law on the ground, inter alia, that such law contravenes the fundamental right guaranteed under Article 31 of the Constitution. I have also mentioned above that in the Income Tax Act itself there is no provision as such which directly or even by necessary implication deprives or purports to deprive a mortgagee-decree-holder of his right to enforce the sale of the mortgaged property in

execution of a decree passed in his favour under Order XXXIV, Rule 5, of the Code.

11. I have perused the judgments of my brothers, Dwivedi and Hari Swarup JJ. I have not, however, been able to persuade myself to agree with the view taken by my brother, Hari Swarup J. I entirely agree with the view expressed by my brother, Dwivedi J.

12. Mr. Kunzru, learned counsel for the appellants, contended that the cases referred to and relied on by Dwivedi J. in his judgment are not applicable to the case and can be clearly distinguished. Even after hearing him at some length I have not been able to agree with his submissions. Even if it is assumed that some of the cases relied on by Dwivedi J. are not directly in point, the position would remain the same, because, as discussed earlier, I have given my own reasons for coming to the conclusion that the expression " decree for the payment of money " in Rule 16(1) of Schedule II of the Income Tax Act does not include a decree for sale in enforcement of a mortgage-decree passed under Order XXXIV, Rule 5, of the Code. My answer to the question, which has been referred to me, therefore, is in the negative.

BY THE COURT

13. In accordance with the opinion of the third Judge, the appeal is dismissed with costs.