(1934) 06 CAL CK 0026

In the Calcutta High Court

Surendra Narain Shah and Others		APPELLANT
	Vs	
Kanai Lal Dugar and Another		RESPONDENT

Date of Decision : 15-06-1934

Acts Referred:

Citation : AIR 1934 Cal 735

Judgement

1. These appeals are by the judgment-debtors in an execution proceeding. The decree under execution is a compromise decree passed in a mortgage suit. The objection of the judgment-debtors was that the decree was incapable of execution. The learned Judge overruled that objection. Hence the present appeals by the judgment-debtors. The first point urged by the learned advocate for the appellants is that the decree is incapable of execution, inasmuch as it simply declared that by the compromise the plaintiff would be thereafter a mortgagee by conditional sale in respect of the properties mortgaged.

2. In other words, the contention is that the decree must be construed to be a decree declaring or creating rights which are unenforcible in execution and can be enforced only by a suit. The material portion of the decree in the present case is as follows:

It is ordered and decreed that the suit be decreed in terms of the Refanama (petition of compromise) filed on behalf of both parties, that the parties be bound by the terms of the compromise and they do get their respective remedies in accordance therewith and that the petition of compromise which has been filed do form part of the decree.

3. From the terms of the decree it is clear that the decree not only declared the rights of the parties under the Solenama but directed certain acts to be done:

Ordinarily the Indian Courts pass judgments which are to be enforced in execution and even when they create new relation involving fresh rights and obligations they provide fort working out the rights in execution. Barely do they create anew obligation without providing for its execution and indicating a suit as the only method of enforcing it: see Ramaswami v. M.P. M. Muthayya Chetty 1925 Mad 279.

4. The terms of the compromise and the decree embodying, those terms not only declared or created new rights or obligations but also provided for the working out of these rights in execution. The words in the Solenama "in default of the defendants executing the conveyance or putting the plaintiff in possession, the plaintiff will have aright to have it done by the Court are sufficiently wide and general to cover an application for execution of the decree itself to the competent Court: see Aswini Kumar v. Ram Gopal 1926 Cal 975. There is therefore no force in this contention. The next point urged in support of the appeals is that the decree is only a preliminary decree and therefore cannot be executed unless it is made final. It is urged that as the decretal amount is payable by instalments, the decree must be considered as a preliminary decree. It is now well settled on authorities that a compromise decree in a mortgage suit, in which the decretal amount is payable by instalments, is not a preliminary decree as contemplated by Order 21, Rule 34, Civil P.C. As regards the directions in the decree for the execution of the conveyance, it cannot be considered as a preliminary decree. That such a decree is executable is clear from Order 21, Rule 34, Civil P.C: Aswini Kumar v. Ram Gopal 1926 Cal 975. There can be no doubt that the direction about delivery of possession is not a preliminary decree. In fact the nature of the suit, the terms of the compromise and the decree based thereon would go to show that the decree put an end to the entire controversy between the parties in the suit and nothing remained to be done by the Court in the suit. This contention must therefore be overruled.

5. The last point urged by the learned Advocate for the appellants is that the execution of the decree is barred by limitation. The evidence in the case however shows that the six consecutive instalments were regularly paid. The default was in the payment of the last two instalments and this admittedly took place within three years from the date of the application for execution. There is therefore no force in this contention too. All the points urged in support of the appeals therefore fail.

6. As regards the cross objection we are of opinion that the decree holder is not entitled to get any further interest in as much as there is no provision of such interest in the compromise and the facts and circumstances of the case do not justify the claim of the decree-holder in this respect. The appeals and the cross-objections are therefore both dismissed, but there will be ''no order as to costs in either of them. The learned advocate for the appellants however prayed before us for extending the time for paying off the balance. In view of the facts and circumstances of this case we direct the judgment-debtors to pay the balance due to the decree-holders as found by the Subordinate Judge within two months from this date. In default they are directed to execute a kabala in favour of the decree-holders for the mortgaged properties excluding the land mentioned in Schedule (3) and present it for registration and place the decree-holders also in

possession of the property so conveyed after removing ths huts described in Schedule (3). In default the kabala may be executed by the executing Court on their behalf in respect of the said properties and we further order that the decree-holders do get possession of the said properties through the said executing Court. The order of the learned Subordinate Judge is confirmed subject to the above modification made by us.

