

(1931) 05 AHC CK 0017

Allahabad High Court

Case No: None

Jones, A.E.

APPELLANT

Vs

Ram Charan and Another

RESPONDENT

Date of Decision: May 8, 1931

Citation: AIR 1931 All 700

Hon'ble Judges: Sulaiman, Acting C.J.

Bench: Division Bench

Final Decision: Dismissed

Judgement

Sulaiman Ag. C.J.

1. This is a decree-holder's appeal arising out of an execution proceeding under rather peculiar circumstances. A final mortgage decree was obtained by the appellant decree-holder against the mortgagor on 9th April 1927. The decree awarded interest up to date and also gave to the decree-holder future interest.

2. The decree-holder filed "an application for execution of the final decree, calculating interest which had been entered in the decree up to the date of the decree but omitted from his application the interest which had accrued subsequently. As the mortgaged property was ancestral the execution was transferred to the Collector under Schedule 3, Civil P.C. The mortgaged property was sold, and about Rs. 12,000 were realized. Out of this Rs. 8,845 were sent to the civil Court by the Collector in order to pay up the amount for which execution had been sought. Unfortunately the Collector disposed of the balance of the amount without any express instructions from the civil Court by paying Rs. 1,300 to an attaching creditor, Ram Charan and the balance of Rs. 1,700 to the judgment-debtor himself.

3. The mortgage suit had been brought more than six years after the mortgage and it is therefore not open to the mortgagee decree-holder to apply for a simple money decree under Order 34, Rule 6 and recover the balance of the amount from other properties of the mortgagor. There is one more complication, namely, that while the

suit of Ram Charan against the mortgagor was pending in the Court of the Munsif, he applied for attachment before judgment of the sale proceeds in the hands of the Collector. The present decree-holder appellant intervened and objected to the attachment. His objection was disallowed; but Ram Charan undertook not to take out the money from the collectorate for some time so as to allow the mortgagee to have the Munsif's order set aside by a higher Court. No application was apparently made to get that order reconsidered. The result was that Ram Charan took out Rs. 1,300 and did not object to the payment of Rs. 1,700 to the judgment-debtor.

4. It seems to us that under Schedule 3, para. 9 (1) the Collector was bound to hold the balance at the disposal of the Court," that is to say, he had no power to dispose of the balance as he liked without instructions from the civil Court. Unfortunately a mistake was committed and the amount was disbursed.

5. If the decree-holder is entitled to an order against Ram Charan for the refund of the amount taken out by him, he would be equally entitled to a similar order for the refund of the amount taken out by the judgment-debtor. The mortgagee had a charge on the mortgaged property, and that charge would attach to the substituted security in the form of the sale proceeds which were realized by the sale of that property. There are however equities in favour of Ram Charan, who successfully resisted the objection raised by the mortgagee in the Court of the Munsif, where Ram Charan's application was pending. There are no such equities in favour of the mortgagor himself. It is also doubtful whether after what has happened the mortgagee can be allowed to follow the sale proceeds in the hands of the attaching creditor, who has taken them away after the civil Court held that he was entitled to do so. We think that the proper course open to the mortgagee decree-holder is to apply for execution of his decree for the balance of the interest still outstanding against the judgment-debtor, who has taken away Rs. 1,700 which was the substituted security for the mortgaged property. The amount has been taken away by him in the course of the execution proceedings, and the decree-holder has a remedy against him subject of course, to any other legal objection that there may be. This matter can be disposed of on the application for execution made by the decree-holder against Bhagwan Gir, the mortgagor. The order of the Court below relates to the application of the decree-holder to get the attachment by Ram Charan set aside. We must accordingly uphold this order. The appeal is dismissed with costs.