
Chaurasi Mahasarick and Another Vs Bhagan Sahu and Others

None

Court: Patna High Court

Date of Decision: June 5, 1923

Acts Referred:

Civil Procedure Code, 1908 (CPC) " Order 34 Rule 14#Transfer of Property Act, 1882 " Section 99

Citation: AIR 1924 Patna 20

Hon'ble Judges: Dawson Miller, C.J; Kulwant Sahay, J

Bench: Full Bench

Judgement

Dawson Miller, C.J.

This is an appeal on behalf of the judgment-debtors in a suit brought upon a mortgage in which a compromise decree

was passed. The Respondents who are the decree-holders sought to execute their decree. The judgment-debtors raised certain objections. The

Court rejected those objections and on appeal the District Judge affirmed the decision of the Subordinate Judge. From the decision of the District

Judge the judgment-debtors appeal to this Court.

2. It appears that the decree-holders instituted a suit against the judgment-debtors in order to enforce a mortgage executed in their favour by the

judgment-debtors. The result of that suit was a compromise. The compromise provided that the judgment-debtors should pay the sum due upon

the mortgage amounting to the sum of Rs. 3,800 by certain instalments, and in the event of default of three consecutive instalments, the decree-

holders were to be allowed to realise the entire amount, remaining due, from the person and other properties of the judgment-debtors, and in the

event of the amount due not being so realised, the decree-holders were to be entitled to realise the amount from the mortgaged property by sale.

The mortgaged property is a four annas share of Mouza Ghat Majbonarah, Touzi No. 445, and if the whole amount was not realised in that

manner then certain provision was made for proceeding against other property which is not material for the purpose of this appeal.

3. In June 1921 the decree-holders applied for execution of the decree, there having been a default in respect of three consecutive instalments

under the terms of the decree. It is important to bear in mind how the application for execution was framed. The application for execution was

framed as an application for execution against the property referred to in the compromise decree and for execution against that property in the

order in which it became liable under the compromise decree. The mode in which the assistance of the Court was required was first of all by

attachment and sale of the moveable properties of the judgment-debtors and secondly by attachment and sale of the mortgaged properties. The

moveable properties were set out in a schedule, the mortgaged properties were merely mentioned under the description given in the decree as the

four annas share of Mouza Ghat Majbonarah, Touzi No. 445. The moveable properties apparently could not be found, at all events they were not

attached, and, as far as " one can gather from the judgment of the Lower Courts, the judgment-debtors contended that they had no such moveable

properties. Having failed to effect execution by attachment of those moveable properties, the decree-holders applied to the Court for attachment

and sale of the mortgaged properties. In objection to that application certain points were taken on behalf of the judgment debtors. As already

stated both the lower Courts dismissed those objections and ordered the execution to proceed by attachment and sale of the mortgaged

properties.

4. The only two points which have been urged before us in this appeal are, first, that the case comes within the provisions of Order 34, Rule 14,

and therefore a further suit is necessary before the mortgaged properties can be sold, and secondly, that the application for sale of the mortgaged

properties in the present execution proceedings is in fact an amendment of the execution petition which under the decided cases, the Court has no

power to grant after registration of the petition.

5. With regard to the first point, I think it is clear that the decree obtained in the present case is something more than a decree for the payment of

money in satisfaction of a claim arising under the mortgage. Order 34, Rule 14 applies to a decree of that nature and it provides that the mortgagee

having obtained such a decree shall not be entitled to bring the mortgaged property to sale other-wise than by instituting a suit for sale in

enforcement of the mortgage; and it further provides that he may institute such a suit notwithstanding anything contained in Order 2, Rule 2. The

class of cases contemplated in Order 34, Rule 14 appears to me to be that class of cases in which a suit is brought upon the covenant to repay

contained in the mortgaged deed or upon the debt arising out of that covenant or in respect of some other obligation arising out of the mortgage

and not to a suit which is brought in order to enforce a sale of the mortgaged properties This Rule corresponds to or rather takes the place of

Section 99 of the Transfer of Property Act which is repealed by the Civil Procedure Code, and under the previous Act it had been held that a suit

of the nature described in Order 34, Rule 14, did not entitle the mortgagee to put to sale the mortgaged properties. The old enactment was, with a

slight modification, re-enacted in the CPC and still remains the rule. It seems quite obvious that there may be very good reasons for refusing to

allow the mortgaged properties to be sold merely because the mortgagee has obtained a decree against the mortgagor, not in the form of a

mortgage decree but merely in the form of a personal decree against the mortgagor, a decree which does not in any way affect the mortgaged

properties. In such a case it is clearly desirable that before the charge upon the mortgaged properties can be enforced there should be a decree

directing the enforcement of that charge. The present case is one entirely different. The decree obtained in the present case was with a slight

modification exactly the sort of decree obtained in an ordinary mortgage suit. The suit was a mortgage suit and a suit praying for the sale of the

mortgaged properties, but by a compromise between the parties instead of the ordinary form of mortgage decree being passed which would order

the judgment-debtor to pay the decretal sum within a certain time failing which it would order the mortgaged properties to be sold, the compromise

decree provided that the judgment-debtor should pay the decretal amount by certain instalments and if he should fail in the payment of three

consecutive instalments then execution for the whole amount due should issue against the other properties of the judgment debtors and in the event

of the amount not being realised in that manner, against the mortgaged properties. It is therefore clear that the decree itself in this case orders, in the

event of default and in the event of the other properties of the judgment-debtors proving insufficient, a sale of the mortgaged property itself, and I

can see no reason why it should be necessary in the event which has happened, for the decree-holders to have to bring another suit asking again

for the sale of the property merely because the other remedy given under the decree has proved infructuous. This case is altogether different to my

mind from the case contemplated in Order 34, Rule 14, and the appeal on that ground must fail.

6. With regard to the second point, it has no doubt been held in the case of Asgar Ali v. Troylukho Nath Ghose [1890] 17 Cal. 631 that under the

provisions of Order 21, Rule 17, no amendment of the execution petition is permissible after the petition has been registered. It would follow

therefore that, if the decree-holder wishes to execute his decree in some manner not provided for by the execution petition, he must bring a fresh

execution case for that purpose. In later cases, however, more particularly in the case of Jnanendra Kumar Roy v. Rishendra Kumar Roy 2

C.W.N. 540, and a more recent case in this Court, Ram Sumran Prasad v. Babu Ram Bahadur 1923 Pat. 224, it has been held that an application

to file a fresh list of properties against which execution is sought is not an amendment of the execution petition. The present case, however, is even

a clearer case than either of those mentioned, because in the present case upon looking at the execution petition filed, it appears that execution was

asked for not merely by attachment and sale of the moveable properties of the judgment-debtors but also by attachment and sale of the mortgaged

properties if the former should prove to be insufficient. It is therefore abundantly clear that the present application to be allowed to proceed against

the mortgaged properties comes directly within the execution petition itself, and it requires no amendment of the execution petition to enable the

Court to proceed against those properties.

7. For these reasons, I think that this appeal must fail on both grounds. The result is that the appeal is dismissed with costs to the respondents who

have appeared.

Kulwant Sahay, J.

8. I agree.