

---

(1872) 07 CAL CK 0012

Calcutta High Court

Case No: Motion on Rule Nisi, No. 348 of 1872

In Re: S.J. Leslie

Vs

APPELLANT

RESPONDENT

---

Date of Decision: July 12, 1872

---

### Judgement

Markby, J.

- The mortgage-deed is not before us, but it is stated to have been a conveyance by way of mortgage, and was made in Calcutta between Europeans; it was, therefore, probably in the ordinary English form. It contained a power of sale, and a covenant for repayment of the money. It is said that this was not a suit cognizable by the Judge of the 24-Pergunnas, because it was not a suit for land. It was contended that it was a suit upon a cause of action which arose in Calcutta, where the defendant was described as dwelling. There was some doubt whether the defendant in fact then resided in Calcutta, or elsewhere, but it was admitted that the defendant was not dwelling, or personally working for gain in the district of the 24-Pergunnas when the suit was brought: the plaintiffs however contended that the Judge of the 24-Pergunnas had jurisdiction, inasmuch as this was substantially a suit for land.

2. I think that the plaint, so far as it asks for a sale of the mortgaged property in satisfaction of the mortgaged debt, is a "suit for land" within the meaning of s. 15 of the CPC which regulates the jurisdiction in this case. Mr. Branson contended that these words should be read as signifying those suits alone in which the land itself is sought directly to be recovered. It was admitted that a much wider construction had been put by Macpherson, J., upon the similar words of the Charter of the High Court; that learned Judge holding that a suit for foreclosure by the mortgagee was as such a suit for land, in Bibee Jaun v. Meerza Mahommed Hadee 1 L.J., N.S., 40, and that a suit for redemption was so also, in Sreemutty Lalmoney Dossee v. Juddoonauth Shaw Id., 319, but it was contended that these decisions were not correct. We see no reason to suppose this. They have never been questioned as far as we are aware. On the contrary, the uniform practice of this Court on its Original Side has been in accordance with them. They are

also supported by the decision in *Surwan Hossein Shahazadah Golam Mahomed* 9 W.B., 170 where it was held that a suit brought to enforce a security against land was a suit for recovery of an interest in immoveable property within the meaning of cl. 12 of s. 1 of Act XIV of 1859. Upon the authority of these decisions, I hold that a suit for land includes any suit in which a decree is asked for operating directly upon the land, and therefore includes any suit brought to enforce a security upon land.

3. It was contended, however, that this was a suit neither for foreclosure nor redemption, nor in any way to enforce a security upon land, but simply for money, to be recovered by the sale of the plaintiff's property through an attachment and sale in the usual way. This however is not so. It is perfectly well established that a decree in a suit like the present in the Mofussil Courts enables the plaintiff to sell the mortgaged property as it stood at the time of the mortgage, and clean of all subsequent incumbrances; and that such a sale completely bars redemption; whereas a suit brought simply on the provision to repay the loan will only enable the plaintiff to sell the interest which the defendant has at the time of execution. I think that we cannot upon this rule enter into any inquiry as to the origin or validity of a procedure so well established.

4. This being so, I hold that this is a suit for land in the same sense that a suit for foreclosure or redemption on the Original Side has been held to be a suit for land. Lastly, it is said by Mr. Branson that the decree is, at any rate, without jurisdiction, so far as it directs execution to be taken out against the property of the defendant, other than the mortgaged property. This contention is to some extent right. The Judge had no jurisdiction to entertain a suit upon the covenant to repay. This has no connection with a suit for land; and so far as it is a cause of action, it did not arise within the 24-Pergunnas. Before, therefore, proceeding with this part of the suit, the leave of this Court should have been obtained. But then there is this difficulty in rectifying the error upon this application. The Judge of the 24-Pergunnas had authority to order the mortgaged property to be sold; he had also authority to find what sum was due from the defendant to the plaintiff upon the mortgaged security; he had also authority to order the defendant to pay costs. Now we have not the actual decree before us, but only the minutes of the decree, and supposing the decree to be in the same terms as the minutes, the only part of the decree which relates to this portion of the suit is that which directs that, "in the event of the said purchase-money being less than the total amount and principal, interest, and costs hereby declared to be due to the plaintiffs, the plaintiffs shall be at liberty to execute the decree against the defendant or his property for the balance which may remain due." But even this part of the decree is perfectly within the District Judge's jurisdiction so far as relates to costs; and if the only balance which is now due under the decree is for costs, or if the plaintiff is only executing the decree in respect of costs, the execution proceedings which are now being carried on, and which the plaintiff desires to get rid of, are perfectly legal. And we have no materials for separating the legal from the illegal part of this portion of the decree. Indeed, this result is not at all contemplated either by the petition on which the rule is founded, or by the ride itself, which both pray that the decree may be

altogether set aside; and that is the only point the Advocate-General has argued. I think, therefore, that we ought not to set aside any part of this decree, and that the rule should be discharged with costs.