

Darbari Mal Vs. Moola Singh and ors.

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Court : Allahabad

Decided On : Apr-16-1920

Reported in : AIR1920All155; 56Ind.Cas.139

Judge : Tudball and ;Sulaiman, JJ.

Appellant : Darbari Mal

Respondent : Moola Singh and ors.

Judgement :

Tudball and Sulaiman, JJ.

1. The facts of this case are very simple. The appellant is a puisne mortgagee. He sued and obtained a decree for the sale on the basis of his mortgage deed, which was dated the 4th of April 1906, on the 22nd of April 1912, His suit was brought within six years of the mortgage. He obtained a final decree for sale on the 20th January 1915. He has now made the present application for a decree over trader Order XXXIV, rule 6. In the meantime he has not put his decree into execution in any way whatsoever, nor has he attempted to bring the property to sale, The reason for this is that there was a prior mortgage upon the estate. The prior mortgagee sued and obtained a decree on the 21st of January 1913. The whole of the property was sold in satisfaction of the prior mortgage. The present appellant made no attempt to pay off the prior mortgage at any time. He has come into Court, as we have said above, asking for a decree under Order XXXIV, rule 6.

Order XXXIV, rule 6, runs as follows:

Where the net proceeds of any such sale are found to be insufficient to pay the amount due to the plaintiff, if the balance is legally recoverable from the defendant otherwise than out of the property sold, the Court may pass a decree for such amount.

2. The rule runs immediately after rule 5, clause 2, which says:

Where such payment is not so made the Court shall, on application made in that behalf by the plaintiff, pass a decree that the mortgaged property, or a sufficient part thereof, be sold and that the proceeds of the sale be dealt with as is mentioned in rule 4.

3. Rule, 6, therefore, clearly contemplates that the property should have been put to sale in execution of the decree before an application under rule 6 could be made. Both the Courts below have held that in the circumstances the plaintiff is not entitled to a decree as asked for and they have based their decision on a ruling of this Court to be found in *Kamta Prasad v. Syed Ahmad* 1 Ind. Cas. 799 : 6 A.L.J. 451 : 31 A. 373. That was a decision of a Division Bench of this Court sitting in Letters Patent Appeal, and the Court upheld the decision of a single Judge of this Court in that case. It will be seen on a perusal of the judgment in that case that Mr. Justice Banerji who delivered the judgment referred to the case of *Muhammad Akbar v. Munshi Ham A.W.N.* (1899) 208 and also to the case of *Badri Das v. Inayat Khan* 22 A. 404 : A.W.N. (1900) 132 : 9 Ind. Dec. (N.S.) 1305. All those rulings clearly apply to the facts of the present case, which it is impossible to distinguish from the facts of the cases concerned in those judgments. Our attention has been called to certain other decisions of this Court to be found in *Kedar Nath v. Chandu Mal* 26 A. 25 : A.W.N. (1903) 179 and in *Pirbhu Narain Singh v. Amir Singh* 29 A. 369 : A.W.N. (1907) 83, and it is suggested that these later rulings have deviated from the rulings in the former decision, but on a careful examination it will be seen that these cases were clearly distinguished from the older cases. In each of these the property for which the decree for sale had been passed had actually been sold and it was after such sale had taken place that an application was made for a decree over under Section 90 of the Transfer of

Property Act, with which Order XXXIV, rule 6, coincides. Our attention was also called to the decision of their Lordships of the Privy Council in *Jeuna Bahu v. Parmeshwar Narayan* 49 Ind. Cas. 620 : 17 A.L.J. 207 : 36 M.L.J. 215 : 23 C.W.N. 490 : 25 M.L.T. 278 : 29 C.L.J. 443 : 21 Bom L.R. 589 : 10 L.W. 26 : (1919) M.W.N. 347 : 12 Bur.L.T. 80 (P.C.). That case also does not help the present appellant. Its facts were very different. There a compound decree was given for the sale of the mortgaged property and for the recovery of the balance due thereafter by the sale of other property belonging to the mortgagor. There as a matter of fact the mortgaged property was sold, and it was in execution of the decree as it then stood that an attachment of other property was made and that property was subsequently sold. In a subsequent suit it was contended that the second attachment and sale were null and void because no decree for the balance, due could be passed until the mortgaged property had been sold. Their Lordships of the Privy Council pointed out that in such cases where a compound decree had actually been passed and had become final, the attachment and sale in execution of that decree could not be held to be invalid. At the utmost it cannot be more than a decision that a compound decree is binding if final. In the present case we have a decree for sale that has been obtained but has never been executed; no sale has taken place and yet the mortgagee has come into Court under the Order and rule mentioned to obtain a decree over. It is urged that it is very hard lines upon him that he cannot obtain it because the property has been sold in execution of the prior mortgagee's decree. We do not think it is at all hard lines for a foolish man. He took the second mortgage with his eyes open. He could have redeemed that mortgage; he could have obtained a decree on the basis of both mortgages and have put the property to sale and if the sale proceeds were insufficient, he could have applied for a decree under Order XXXIV, rule 6. He might, if he had liked, have dropped his mortgage completely, and brought a suit to recover his decree as against the person of the mortgagor in the beginning. He has done none of these things and he has merely his own foolishness to thank for being in the position in which he now finds himself. We think that it would be quite wrong to differ from the former rulings of this Court which have been consistently followed for many years. Our attention has been called to a ruling of the Oudh Court which is to the opposite effect. We do not think that the reasons therein are

sufficiently strong to entice us to strike out a new line and confuse the law as it is well understood in this Court. In our opinion the decision of the Court below is correct. We, therefore, dismiss the appeal with costs including fees on the higher scale.

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