Singa Raja and ors. Vs. Pethu Raja and ors.

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Court : Chennai

Decided On : Aug-16-1918

Reported in : (1918)35MLJ579

Appellant : Singa Raja and ors.

Respondent : Pethu Raja and ors.

Judgement :

1. This is an appeal from the decree for sale in a mortgage suit passed by the Subordinate Judge of Ramnad. The plaintiff obtained a preliminary decree on the 27th September 1916 and the appellant, the 3rd defendant complains that the Subordinate Judge at the time of passing the decree for sale refused to inquire into and recognise an alleged settlement of the decree out of Court on the 13th February 1917. The application for the decree for sale was made on the 25th June 1917 and therefore even if the procedure in Order XXI, Rule 2, Civil Procedure Code, were applicable the defendant was out of time and was too late to have the adjustment recorded. However, we think that the appeal fails on a larger basis. The scheme of the Code appears to us to be that if the amount made payable in the preliminary decree is not paid into Court within the time limited then the decree for sale is to be made. In this respect the provisions of Order XXXIV differ from Section 89 of the Transfer of Property Act which provided for payment to the plaintiff or into the Court. 0rder XXXIV, Rule 2 Clause (c) and Rule 5, Civil Procedure Code, provide that 'where on or before the day fixed the defendant pays into Court the amount declared due as aforesaid, together with such

subsequent costs as are mentioned in Rule 10 ' the Court is to pass a decree ordering the plaintiff to deliver up the documents and to re-transfer the mortgaged property and, if necessary, to put the defendant in possession. But Sub-rule 2 says where such payment is not so made, that is to say, where such payment is not made into Court, the Court shall, pass a decree ordering the sale of the mortgaged property or a sufficient part thereof. Forms of mortgage decrees are given in Appendix D and Forms 7 and 8 are drawn up in the same way. Form No. 7 says that if the defendants pay into Court the sum declared due on account of principal, interest and costs the plaintiff is to deliver up the documents, etc., and Clause (3) is that if the defendant pays the said sum as aforesaid (that is, into Court) the mortgagor may apply, etc. Therefore we are of opinion that the scheme of the Code, so far as mortgage decrees are concerned, is that if the amount due under preliminary decree has not been paid before the appointed day a decree for sale is to be made and the machinery for sale is to be set in motion. This decision is in accordance with the decision of the Calcutta High Court in Piran Bibi v. Jitendriya (1917) 25 Cal. L.J. 553. It 'may be that if between the passing of the preliminary decree and the passing of the decree for sale the defendant' obtains a certificate under the provisions of Order XXI, Rule 2, he can take advantage of that to reduce the amount for which the property is to be sold and the decision will be the same as if at the time when the decree for sale was being made he came forward and paid that amount into Court. We do not think that the decision in Jogendra Prasad Narain Singh v. Gourishankar Prasad Sahu (1917) 2 Pat. L.J. 533 amounts to more than this.

2. The provisions of the Code are imperative that if the money is not paid into Court within the time limited then there is to be a decree for sale. These provisions were advisedly inserted in modification of the corresponding provisions of Section 89 of the Transfer of Property Act and we are bound to give effect to them. On this ground the appeal fails and must be dismissed with costs.