**Sundermull and ors. Vs. John Carapiet Galstaun**

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**Court** : Kolkata

**Decided On :** Dec-10-1928

**Reported in** : AIR1929Cal387

**Appellant** : Sundermull and ors.

**Respondent** : John Carapiet Galstaun

**Judgement** :

Rankin, C.J.

1. This is an appeal from an order made by Lort Williams, J., upon a motion brought pursuant to a notice dated the fifth day of June, 1928 in the course of a suit to enforce a mortgage. It appears that the mortgage security was created in or about 1919 and that a sum of 12 lacs was advanced upon the security.

2. The suit in the course of which the order complained of is made was brought by the mortgagee Mr. Galstaun in June 1921 and that, as originally framed, was a suit against defendants 1 and 2-- the parties who had entered into the transaction with him. Defendant 3 was a puisne encumbrancer and at some stage of the suit certain other persons, some of whom were minors were made parties to the proceeding on the theory, that they might claim that they were interested in the mortgaged property being joint members of a Hindu Mitakshara family along with defendants 1 and 2.

3. The suit did not come on in the ordinary way for trial because it appears that on 25th March 1925 it was settled on the basis of certain terms scheduled to the consent decree of that date. It was declared with the consent of the parties appearing through their respective counsel that the said terms of adjustment ought to be carried out and the same were ordered and decreed accordingly The whole of the arrangement is given not in the body of the decree but in the schedule, that is to say, the language of the parties themselves is in the schedule Broadly speaking, the arrangement was this that these alleged Mitakshara co-sharers agreed that they had no interest in the mortgaged property, agreed to its being treated as a property which defendants 1 and 2 were entitled to pledge

4.. As regards defendant 3 he was not in a position to object to the enforcement of the mortgage Defendants 1 and 2, in these circumstances, proceeded to deal with the matter in this way that the arrears of interest upon the loan calculated up to the end of January 1925 were to be liquidated by the delivery of certain goods. That left to be dealt with a net sum of twelve lacs (Rs. 12,00,000) principal due upon the mortgage as from 1st February 1925 and with reference to this sum it was not necessary to make any calculation because there was a clean sum of twelve lacs (Rs.12,00,000) that was going to be dealt with by the arrangement. Now, the terms make defendants

1 and 2 admit that the sum of twelve lacs is due for principal' They then made them consent to a decree absolute for sale ' for the said amount carrying interest at the rate of 7 percent per annum from 1st February 1925 until payment in full. So the agreement is an agreement to an immediate decree absolute. The terms go on to provide for stay of execution of that decree:

the decree will not be executed by the sale of the mortgaged properties or otherwise for a period of 5 years on certain conditions.

5. The conditions of the stay were that defendants 1 and 2 would pay off one lac in each year and that they would pay interest by equal monthly instalments on the amount due from time to time by the 15th of each month There is a clause which says that in the event of default in making those payments the whole of the balance of the decretal amount, interest and costs then due and unpaid will at once 'become due' and the plaintiff will be at liberty:

to execute the decree by sale of the mortgaged properties in suit through Court in the usual way.

6. I am not of opinion that any light is thrown upon the present controversy by any other terms in this eon sent decree. A certain sum became the decretal amount, and order absolute for sale was made. It was stayed for a period of 5 years upon certain terms. It was provided that if these terms were not complied with, the plaintiff was to be at liberty to execute the decree by sale of the mortgaged properties in suit through Court in the usual way. It appears that default was made and on 27th January 1926 the plaintiff made an application to enforce his decree. By that time it is obvious that it was necessary to make a calculation to find out how much had been paid of this sum of twelve lacs with interest at 7 percent per annum from 1st February 1927. Accordingly there was a reference to the Registrar and he did report on the matter. Ultimately a final order for sale under this consent decree was made on 9th August 1926. On that date there was really for the first time a final order for sale:

It is ordered and decreed that he premises comprised in the mortgage in the said decree mentioned or a sufficient part thereof be sold with the approbation of the said Registrar to the best purchaser or purchasers.

and so forth.

7. Thereafter last year and in the present year the properties were sold but they failed to produce sufficient to cover the amount, The order complained of, has been made by the learned Judge on the application of the plaintiff for a personal decree for the balance against defendants 1 and 2. It is to be pointed out that there is an order in the rules of the original side which gives a direction to this effect that when an ordinary preliminary decree is being drawn up it shall always include a clause to say that leave is reserved to the plaintiff to make an application for personal judgment after a sale has been carried out. In the present case the terms of the decree were not drawn up by the Court's office at all. The decree in this case so far as the Court was concerned was a decree that certain parties having agreed to certain things in the schedule it is ordered that it should be carried out. The learned Judge has rightly, in my judgment, come to the conclusion, that in this case there was a clear personal liability resting upon the borrowers in respect of the money lent and two contentions have been advanced before us.

8. The first is the contention as a matter of procedure and of an examination of the terms of Order 34, Civil P.C., to the effect that Rule 6 does not in terms apply to this case and that it is not possible to get a personal decree in this suit whether or not any personal liability remains upon defendants 1 and 2.

9. The second contention is that upon a true construction of this consent decree the bargain between the parties was a bargain that the mortgage should be enforced in a certain way that it means and intends that it was not to be enforced in any other way in particular, not, to be enforced by a personal judgment. In my, opinion both of these contentions fail. It has been pointed out on the strength of the case reported in Bechu Singh v. Bicharam Sahu [1909] 10 C.L.J. 91 that when you read the rules in Order 34 the provisions for a preliminary decree and a final decree have to be read to gether. According to the strict interpretation the provisions as to a final decree apply only where there has been a preliminary decree of the kind contemplated by the previous rule. In the same way when we come to R 6 it is contended that the words:

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,

that this rule operates only where the previous proceeding has been in exact compliance with Rules 4 and 5. It is said that because in this case the consent decree was not a preliminary decree in complete accordance with Rule 4 and because there has not been a final decree in complete accordance with Rule 5, therefore, the operation of Rule 6 cannot be tolerated in these proceedings and that there is no provision whereby judgment can be had against the defendants personally even supposing that there was no bargain to the effect that the defendants should be relieved of their personal liability. I reject that argument entirely. It is well settled in Indian law that when a mortgagee brings a suit to enforce his mortgage the Court will not allow him to enforce it by a personal judgment against the borrower until he has exhausted his remedies against the (security. According to the view taken by many Indian Courts it is wrong at the time of making a final order for sale to order that if the proceeds are insufficient there will be a personal decree. The usual practice is certainly that the personal decree is not even granted until the sale has been carried out and the deficiency ascertained. It is a form of relief which, in the ordinary way, will not be given to a mortgagee unless and until this stage has been reached, I need not say that the power of the Court to give that form of relief does not depend upon Rule 6, Order 34, which is a provision giving direction to the Court as to the time and manner at and in which the relief is to be given. In the present case if there was a departure by consent from the strict form of order for sale it is to my mind, nonetheless erroneous to contend that there must needs be a substantial departure in principle and in substance from the provision of Rule 6. As regards the power of the Court in the mortgage suit to make the order, I am not of opinion, that the inclusion of the clause reserving leave to the plaintiff operates any magic in this matter. I have no doubt at all that it was open to the Court on motion in this case to give a personal judgment against the mortgagors for the balance.

10. I come now to the only contention that appears to me to have any relation to the merits the contention, namely whether there is enough in this consent decree to show that the plaintiff gave up his right to a judgment for the balance against these mortgagees. The fact that in the terms of settlement nothing was said about a

personal judgment, seems to me to have no such meaning as is contended for. In the ordinary way a decree such for example as might be passed by any mofussil Court under or by an analogy to the terms of the Code of Civil Procedure would contain no reference to the right to a personal judgment. An order of the kind contemplated by the Code would be made in due course. In this case the parties had not got to the stage at which, in law, the right to get a personal decree had accrued to them. I do not think that the mere fact that the consent terms are silent is any good reason for supposing the parties to intend the very extraordinary consequence to be operated by the mere silence that the lender was to forego his right to recover his money back from the borrower if the security be deficient. I agree with the learned Judge on an examination of the terms of the document that there is something in this document pointing to the contrary. I do not think it can be put higher than that. I do not say that it amounts to an impossibility but there is something in the document which points against the idea that it was any part of this bargain that the plaintiff should give up his right to a personal judgment. An ordinary decree absolute for sale is, strictly speaking, a decree that may only be executed by sale. But when a declaration is made that a certain sum of money is due upon a security one may and often does talk of executing the decree by sale and then afterwards by getting a personal judgment and enforcing that. In this case the decree absolute was to be stayed for 5 years. It was only stayed and the terms of the stay were:

will not be executed by sale of the mortgaged properties or otherwise for a period of 5 years.

11. In my judgment those words would ordinarily point to the obtaining of a personal judgment for the balance unrealized by the sale. Then:

to execute the decree by sale of the mortgaged properties in suit through Court in the usual way,

must mean, in my opinion, that the ordinary process will apply because the conditions of the stay have not been fulfilled. If it had been intended that there should be an exception of so important a character as to deprive the plaintiff of the benefit of a personal covenant I can only say that I do not think that either of those clauses would have been used.

12. In my opinion, the order made by the learned Judge is right for the reasons which he has given and this appeal should be dismissed with costs

Buckland, J.

13. I agree.