1940 *Present :* **Wijeyewardene and Cannon JJ.**

AIYADURAI *v.* CHITTAMBALAM

64—D. C. Jaffna 2,284.

Mortgage action—Application to re-issue commission to sell—Not an application to execute a decree—Not time-barred—Civil Procedure Code, s. 337—Mortgage Ordinance, s. 12 (6) (Cap. 74).

An application for the re-issue of a commission to sell in a mortgage action is not an application to execute a decree within the meaning of section 337 of the Civil Procedure Code and is not time-barred under the section.

The words "the decree" in section 12 (6) of the Mortgage Ordinance mean either the final decree entered under section 86 of the Civil Procedure Code or the decree absolute under section 14 of the Mortgage Ordinance.

***Perera v. Jones et al.* referred to.**

THIS was a mortgage action in which decree *nisi* was entered in September, 1927, and decree absolute on June 11, 1928. In December, 1928, a writ was issued to the Fiscal to execute the decree and was returned at the request of the defendants who paid the costs of the action. In March, 1938, the appellant to whom the decree had been assigned was substituted plaintiff in place of the original plaintiff.

On June 2, 1938, the substituted plaintiff applied for the issue of a commission for the sale of two of the mortgaged lands, which was granted. The commissioner sold the lands but the sale of one land fell through owing to the failure of the purchaser to implement the sale by the payment of the balance three-fourths of the purchase price.

On May 19, 1939, the substituted plaintiff applied for the re-issue of the commission for the sale of that land. The property was sold and the commissioner made his return to Court.

The defendants moved to set aside the sale on the ground among others that the application for the re-issue of the commission made on May 19, 1939, was barred by section 337 of the Civil Procedure Code. The learned District Judge allowed the application.

H. V. Perera, K.C. (with him *M. Balasunderam*), for the substituted plaintiff, appellant.—The sections of the Civil Procedure Code relating to execution of decrees are not applicable to the hypothecary decree entered in this case under section 12 of Ordinance No. 21 of 1927 (Cap. 74). The sale was conducted by a commissioner. The District Judge was wrong in setting aside the sale in question for want of notice and for non-compliance with the requirements of section 337 of the Civil Procedure Code.

Hypothecary action is defined in section 2 of the Mortgage Ordinance. What is contemplated in section 12 is a judicial sale of the hypothecated property. The decree is essentially one for sale by Court and not one for money. In a decree under section 12, there is no command to pay money within the meaning of section 217 of the Civil Procedure Code. In *Perera v. Jones et al.*[1], the applicability of section 347 of the Civil Procedure Code

[1] *(1940) 41 N. L. R. 193 ; 16 C. L. W. 119.*

to auctioneer's sales in mortgage actions was fully argued, and the reasoning in that judgment would cover the questions involved in the present case. The principle underlying the decision in that case has to be followed.

N. Nadarajah (with him *V. F. Gooneratne, N. L. Jansz* and *Dharmakirti Pieris*), for respondents.—Section 337 of the Civil Porcedure Code provides for the limitation of execution of decrees. The corresponding enactment in India is section 48 of the Indian Code the scope of which is discussed in *Subbarayan v. Natarajan et al.*[1] In England the matter is governed by section 8 of the Real Property Limitation Act of 1874 (37 and 38 *Vict. Cap. 57*)—*Hebblethwaite et al. v. Peever.*[2]

[WIJEYEWARDENE J.—Is there no time limit for the first application under section 337 ?]

No, that defect in our law is discussed in *Peries v. Cooray*[3].

Proceedings for sale of mortgaged premises are execution proceedings, and the procedure is governed by the Civil Procedure Code. In a mortgage action, whether it be for the recovery of the money lent or for the sale of the mortgaged property, the one object is the realisation of the debt. The decree in this case says so, and every hypothecary decree says so, *i.e.*, the purpose of the sale is the satisfaction of the mortgage debt. The hypothecary decree is essentially a decree for the payment of money and is not any the less so because a particular property is directed to be sold. See, for example, *14 Madras Law Journal 31, 15 Madras Law Journal 126, Don Jacovis v. Perera*[4], *Silva et al. v. Singho et al*[5], *Muttu Raman Chetty et al. v. Mohammadu.*[6] According to section 12 of the Mortgage Ordinance itself the position would seem to be clear, namely, that the mortgaged property is to be sold for the purpose of satisfying the money debt.

Proceedings for sale under a final decree are proceedings in execution. In that sense a mortgage sale is a sale in execution and the requirements of section 337 of the Civil Procedure Code had to be complied with. It is respectfully submitted that the ruling in *Perera v. Jones et al.* is one which should be considered or else be restricted to the inapplicability of section 347. Sections 255-288 and 290-297 of the Code were expressly mentioned in section 12 of the Mortgage Ordinance solely as a result of the ruling in *Walker v. Mohideen.*[7] It does not, however, follow that the other sections of the Code are rendered inapplicable. It has been held, for example, that sections 343 and 344 are applicable in mortgage actions —*Annamalay Chetty v. Sidambaram Chetty*[8], *Peries et al. v. Somasunderam Chetty*[9] (*where the sale was by a commissioner*), *Arunachalam Chettiar v. Paulus Appuhamy*[10], *Creasy v. Jayawardene*[11], *Perera v. Abeyratne et al.*[12] In South Africa, too, a sale of mortgaged property is regarded as a sale in execution—*Wille on Mortgage and Pledge in S. Africa (1920) p. 369.* See also *Chitaley and Rao's Commentary on the Indian Civil Procedure Code, Vol. 3, p. 2429.*

[1] *A. I. R. 1922 Mad. 269.*
[2] *(1892) 1 Q. B. 124.*
[3] *(1909) 12 N. L. R. 362.*
[4] *(1906) 9 N. L. R. 166.*
[5] *(1910) 13 N. L. R. 173.*
[6] *(1919) 21 N. L. R. 97.*
[7] *(1924) 26 N. L. R. 310.*
[8] *(1931) 33 N. L. R. 277.*
[9] *(1924) 2 Times 189.*
[10] *(1936) 39 N. L. R. 43.*
[11] *(1936) 1 C. L. J. 35.*
[12] *(1912) 15 N. L. R. 414.*

The decree entered in this case is not governed by Ordinance No. 21 of 1927. Decree *nisi* was entered in September, 1927, and later made absolute under section 86 of the Civil Procedure Code.

H. V. Perera, K.C., in reply.—This case falls under the Mortgage Ordinance.

[WIJEYEWARDENE J.—We would like to hear you only on the point whether this was not a sale in execution.]

The hypothecary action is an action to enforce a real right. The distinction between the personal action and the hypothecary part in a mortgage action is dealt with in *Ramanathan v. Perera et al.*[1] There is a combination of two actions in the usual mortgage action. The hypothecary part of the decree should be considered separately and as something apart from the personal action—*Kandappa Chettiar v. Ramanayake et al.*[2] The hypothecary part is governed by the Mortgage Ordinance.

In the cases cited on behalf of the respondent, the word "execution" was used in a loose sense. And sections 343 and 344 of the Civil Procedure Code would be applicable by virtue only of the inherent powers possessed by Court in respect of hypothecary sales. Section 218 of the Civil Procedure Code is the basic section for the execution of a decree for money, and the sale of any property seized is essentially at the instance of the judgment-creditor although under the control of Court. Whereas in a judicial sale under section 12 of the Mortgage Ordinance, the sale is directly by the Court. The distinction between execution sales and judicial sales is discussed in *Freeman's Void Judicial Sales (4th ed.)*, *Chapter I.*

Cur. adv. vult.

October 30, 1940. WIJEYEWARDENE J.—

The present appeal arises out of certain proceedings in an action on a mortgage bond executed in June, 1922. The action was filed in January, 1927, and decree *nisi* was entered in September, 1927, in accordance with the procedure which obtained in our Courts prior to the Mortgage Ordinance No. 21 of 1927 (*Legislative Enactments, Vol. 2, Chapter 74*) which came into operation on January 1, 1928. A decree absolute was entered on June 11, 1928.

The decree did not give any directions as to the conduct and conditions of the sale. In December, 1928, a writ was issued to the Fiscal to execute the decree. The writ was returned unexecuted as, according to the petitions filed by the second and third defendants, the plaintiffs apparently agreed to stay execution at the request of the defendants who paid them the full costs of the action.

The first defendant died in 1931 and her children, the original second, fourth, fifth and sixth defendants and another had to be substituted in her place. The journal entries show that there has been considerable difficulty in serving most of the notices issued in the course of the proceedings in this action.

In 1933, the plaintiffs assigned the decree to one S. J. Thamboo who in turn conveyed his interest in the decree in August, 1936, to one P. S. Aiyadurai. In March, 1938, P. S. Aiyadurai was substituted as plaintiff in place of the original plaintiffs after due notice to all the judgment debtors.

[1] *(1929) 31 N. L. R. 304 at 308.*

[2] *(1936) 38 N. L. R. 33.*

On June 2, 1938, the substituted plaintiff applied for the issue of a commission to one N. Kandiah for the sale of the two mortgaged lands which may, for convenience of reference, be called the Kankesanturai property and the Tellippalai property. The Court granted the application and fixed February 9, 1939, as the returnable date of the commission. The Commissioner of sales duly carried out the sale in terms of the conditions of sale approved by Court and declared the two properties sold for Rs. 3,000 and Rs. 550, on January 11, 1939. The purchaser of the Kankesanturai property made only a deposit of Rs 750 and failed to pay the balance three-fourths of the purchase price. On March 9, 1939, the Court confirmed the sale of the Tellipallai property for Rs. 550. On July 20, 1939, after due notice to the judgment-debtors and the defaulting purchaser of the Kankesanturai property, the substituted plaintiff was issued an order of payment for Rs. 1,300 or thereabouts—the money realised by the sale of the Tellippalai property and the deposit forfeited in respect of the Kankesanturai property.

On May 19, 1939, the substituted plaintiff applied for a re-issue of the commission to Mr. Kandiah for the sale of the Kankesanturai property and the Judge allowed the re-issue of the Commission. At the sale held under the authority of the commission in October, 1939, the Kankesanturai property was sold for Rs. 3,270 and the commissioner made his return to Court on October 25, 1939. The second defendant and the third defendant (husband of the fourth defendant) thereupon filed papers on November 18, 1939, to have the sale of the Kankesanturai property set aside.

The present appeal is from the order of the Additional District Judge granting the application of the second and third defendants. The grounds for the decision of the learned Judge are :—

(i.) Notice of the application made to Court on June 2, 1938, for the issue of the commission has not been served on the second defendant.

(ii.) Notice of the application made to Court on May 19, 1939, has not been served on the second defendant.

(iii.) The application for the re-issue of the commission made on May 19, 1939, was barred by section 337 of the Civil Procedure Code as it was made 10 years after the decree.

On an examination of the journal sheet I find an entry which reads—

27.10.38.

Mr V. Manikvasagar for petr. Notice served on 1, 2 and 3 substd. defts. Absent. Application allowed.

C. C.

It is not disputed that C. C. are the initials of the chief District Judge of Jaffna. It is true that this entry is not supported by the Fiscal's return to the notice as no such return is to be found in the record though the earlier journal entry made on October 20, 1938, reads : "Return to notice recd. duly served". The second defendant who gave evidence at the inquiry denied that he received the notice in question. He admitted in cross-examination that he knew a few days before the sale that the sale was going to take place but he refrained from taking any action to stay the sale. There is another fact which militates strongly

against the second defendant's statement that the notice was not served on him. Even when he received a notice of the later application of the substituted plaintiff to draw the sum of Rs. 1,300 realised as a result of the sale of January 11, 1939, he did not take any steps to inform the Court about the alleged failure to serve notice of sale on him.

It is moreover not easy to understand why the second defendant thought it necessary to allege a failure to serve the notice on him with regard to the first issue of the commission while making no allegation whatever either in the petition or in his evidence regarding the notice of the application for the re-issue of the commission, when it is remembered that the sale which the second defendant attacks, is, at least ostensibly, the sale of the Kankesanturai property held on the re-issue of the commission. There is, of course, the suggestion made by Mr. Advocate Niles in his cross-examination of the second defendant that, in making the present application, he is acting at the request or in the interest of the defaulting purchaser, S. Ratnasingam, who now finds that he has lost Rs. 750 in consequence of his default in paying to the Court the balance purchase money of the Kankesanturai property in respect of the earlier sale. It is difficult however to give any consideration to that suggestion in the absence of more definite evidence on that aspect of the matter. But, in all the circumstances of the case I think that the bare statement of the second defendant is insufficient to displace the strong presumption raised in favour of the substituted plaintiff by the journal entry of October 27, 1938, and the conduct of the second defendant.

I think the additional District Judge has erred in basing his decision on the second ground. It is not stated either in the affidavit filed in support of the present application or in the evidence given at the inquiry that there has been a failure to give the second defendant notice of the application made in May, 1939. The parties were, therefore, not at issue on this point and I think it would be distinctly unfair especially to the purchaser who bought the property at a sale held under the orders of Court that the sale should be set aside on a ground of which he had no notice.

The third reason given by the District Judge involves a consideration of the sections of the Civil Procedure Code dealing with sales in execution and especially of section 337. Now section 337 reads :—

> "When an application to execute a decree for the payment of money or delivery of other property has been made under this chapter and granted, no subsequent application to execute the same decree shall be granted unless . . . . also no such subsequent application shall be granted after the expiration of ten years from any of the following dates, namely the date of the decree sought to be enforced or . . .".

That section, it will be observed, does not make any provision regarding subsequent applications when the first application has been refused. The reason for it, no doubt, lies in the fact, that in cases where the first application is refused the principles of *res judicata* may come into operation to bar a subsequent application. But the section also does not limit the time within which the first application should be made—*vide Peries v. Cooray*[1]—differing therein from the provisions of the corresponding

[1] *(1909) 12 N. L. R. 362.*

section 48 of the Indian Code of Civil Procedure, 1908, which makes specific reference to Article 180 of the second schedule to the Indian Limitation Act, 1877. There is also no other enactment in our law, so far as I am aware, fixing the time of limitation in respect of a decree of a Civil Court, as a result of the repeal of section 5 of Ordinance No. 22 of 1871 by the Civil Procedure Code, 1889. The position, therefore, is that under our law it is only a second or subsequent application "to execute a decree for the payment of money or delivery of other property" that is barred by limitation The question that has to be considered therefore on the present appeal is whether the application for a re-issue of a commission made on May 19, 1939, falls within the category of applications referred to by me in the preceding paragraph. In deciding this question it has to be borne in mind that it is not possible to deduce from section 337 of the Code any general principle in favour of the limitation of decrees by lapse of time and that the section is more or less of the nature of a highly penal provision preventing a judgment-creditor altogether, in certain circumstances, from recovering a sum of money that a competent Court has decided to be due to him—*vide P. L. K. N. M. K. Chetty v. Perera*[1]; and *Muttukarupen Chettiar v. Pathirana.*[2]

By his application of May 19, 1939, the substituted plaintiff asked for a re-issue of a commission to the commissioner of sales appointed by Court on the application of June, 1938, to sell one of the mortgaged properties which the Court had decreed specifically to be sold in the event of the defendants making default in the payment of the amount due by them. Is the sale asked for a sale in execution within the meaning of section 337 of the code or is it a judicial sale?

The following passage from *Freeman's Void Judicial Sales (4th ed.)* Chapter 1, section 1, appears to me to bring out in relief the essential differences between the two kinds of sales :—

> "Precisely what sales can accurately be denominated 'judicial' is not very well settled. Of course they must be the result of judicial proceedings, and the order, decree or judgment on which they are based must direct the sale of the property sold. There can be no judicial sale except on a pre-existing order of sale. And probably the order of sale is not alone sufficient to entitle the sale to be called judicial. In a State where an Administrator's sale though made by virtue of an order of Court, was not required to be reported to the Court nor to be confirmed, Judge Story held it not to be a judicial sale. If, however, a sale ordered by the Court is conducted by an officer appointed by, or subject to, the control of the Court, and requires the approval of the Court before it can be treated as final, then it is clearly a judicial sale
>
> . . . Execution sales are not judicial. They must it is true be supported by a judgment, decree or order. But the judgment is not for the sale of any specific property. It is only for the recovery of a designated sum of money. The Court gives no directions, and can give none concerning what property shall be levied upon. It usually has no control over the sale beyond setting it aside for non-compliance with the direction of the statutes of the State. The chief differences between execution and judicial sales are these : the former are based

[1] *(1916) 19 N. L. R. 140.*

[2] *(1940) 16 C. L. W. 55.*

on a general judgment for so much money, the latter on an order to sell specific property ; the former are conducted by an officer of the law in pursuance of the directions of a statute, the latter are made by the agent of a Court in pursuance of the directions of the Court; in the former the sheriff is the vendor, in the latter the Court; in the former the sale is usually complete when the property is struck off to the highest bidder, in the latter is must be reported to and approved by the Court."

In the light of the above passage the sale of the particular mortgaged property seems to me to be a judicial sale and not a sale in execution. In this connection it is not without interest to find that the Mortgage Ordinance, 1927, refers to hypothecary actions as actions "to enforce payment of a mortgage by a judicial sale of the mortgaged property"—*vide Legislative Enactment, Vol. 2, Chap. 74, s. 2*).

The Counsel for the respondents contended, however, that the words "application to execute a decree" had a wider connotation than could be gathered from the words "execution sales" as used in the above extract. Now the right to execute decrees for payment of money gives the power to the judgment-creditor to seize and sell only such saleable property as is mentioned in section 218 of the Code. Then section 223 requires the judgment-creditor who wishes to effect such seizure and sale to put the Fiscal in motion by a written "application for execution of decree" made to Court and containing the various particulars set out in section 224. On receipt of the writ the Fiscal is required by section 225 within a time regulated by the distance of the judgment-debtor's residence from the office of the Fiscal to make a demand from the judgment-debtor. If the debtor fails to comply with such demand or if he is absent, then the Fiscal is authorized to "proceed to seize and sell" property. The property to be seized and sold should in the first instance be such unclaimed property of the judgment-debtor as may be pointed out and surrendered to him for the purpose by the judgment-debtor. Section 237 sets out the mode of seizing immovable property and provides for the publication of such seizures in a certain specified way, while section 256 requires the sale to be advertised in the *Government Gazette* if its value exceeds Rs. 1,000. It is not necessary to examine the sections of the Code further. Now, on an order to sell mortgaged property the Commissioner has an unfettered power to sell the mortgaged property. He need not make any demand for the payment of money nor is it necessary for him to observe the requirements of sections 237 and 256. He is bound only to conduct the sale according to the conditions of sale approved by Court. The sections which I have mentioned—and there are others—are against the contention of the respondent's Counsel that the legislature intended to give a very wide significance to the words "application to execute a decree".

I shall now consider the further argument urged on behalf of the respondents that the application of May 19, 1939, cannot be regarded as an application under the Mortgage Ordinance as a decree *nisi* was entered in this case in September, 1927, and section 12 of the Ordinance is applicable "only where the decree is made after" January 1, 1928. Now section 4 shows that Chapter 2 which includes section 12 applies, in the absence of express provision to the contrary, "to mortgages created or

arising and to hypothecary actions instituted before or after the commencement of the Ordinance". Such express provision is found, for instance, in section 6 (5), section 10 (3) and section 12 (6). The intention of the legislature, therefore, was to make the provisions of Chapter 2 of the Ordinance generally applicable to all hypothecary actions except when the legislature has in express terms laid down that they should not be made so applicable. It is I think relevant to note in this connection that the Mortgage Ordinance, 1927, section 12, was specially enacted in order to meet the somewhat difficult situation created by the decision in *Walker v. Mohideen*[1] and to give the necessary relief by empowering the Courts to give directions in the mortgage decree or subsequently in regard to the enforcement of the decree. In these circumstances the express provisions of section 12, sub-section 6, limiting the application of section 12 should not be given an extensive interpretation so as to restrict artificially the scope of the section. The Mortgage Ordinance made a substantial change in the nature of decrees entered in mortgage actions. Under the old procedure as laid down in the code, the Court had to enter a decree *nisi* on non-appearance of the defendant (*vide* section 85 of the code) and later enter the decree absolute under section 86 if the defendant failed to show cause against the decree *nisi*. The Mortgage Ordinance altered this procedure by enacting in section 14 that "where a hypothecary action instituted after the commencement of the Ordinance is heard *ex-parte* under section 85 of the Civil Procedure Code the decree shall be decree absolute and not a decree *nisi*". The position therefore is that in the case of hypothecary actions filed before the commencement of the Ordinance and heard *ex-parte* under section 85 of the Code there would always be a decree *nisi* followed by a decree absolute whether the day on which the decrees had to be entered fell before or after the commencement of the Ordinance, while in the case of hypothecary actions filed after the commencement of the Ordinance there would be only a decree absolute in similar circumstances.

I hold that the words "the decree" in section 12 (6) means the final decree or the decree absolute whether made under section 86 of the Code or section 14 of the Ordinance.

The Counsel for the appellant urged in support of his appeal that a mortgage decree should not be regarded as a decree for the payment of money when the judgment-creditor seeks to enforce the hypothecary part of it and for that reason also, the present application was not governed by section 337 of the Code. This is a question which has been discussed a great deal in the various High Courts in India under section 230 of the Indian Code of Procedure (1882) which contained, as section 337 of our Code, the words: "Where an application to execute a decree for the payment of money or delivery of other property has been made". When the new Indian Code was framed, the Indian Legislature set at rest the conflict of judicial opinion by making the corresponding section of the new Code (section 48), refer to cases "where an application to execute a decree not being a decree granting an injunction has been made". There are local decisions in which it has been held that a mortgage decree is a decree for payment of money within the meaning of

[1] *26 N. L. R. 310.*

section 337 (*vide Muthu Ramen Chetty v. Mohamadu* [1]) I do not think it necessary to express an opinion on this point in view of the decision I have reached that the present application is not an application for execution within the meaning of section 337 of the Code.

Several authorities were cited to us in the course of the argument as having a bearing on the word "to execute a decree". It is sufficient to refer to the latest decision *Perera v. Jones and another* [2], where this Court considered the scope of section 347 of the Code. The *ratio decidendi* in that case supports the view I have expressed with regard to the scope of section 337.

I would allow the appeal with costs here and in the Court below.

CANNON J.—I agree.

Appeal allowed.