Present: De Sampayo J. and Schneider A.J.

1919.

MUTTU RAMAN CHETTY *et al. v.* MOHAMMADU *et al.*

144—D. C. Kurunegala, 1,998.

Subsequent order—Civil Procedure Code, s. 337—Amendment of decree—Mortgage decree is decree for payment of money.

The "subsequent order" contemplated in section 337 (b) of the Civil Procedure Code is one which may be made under the provisions of sections 320, 322, 334, and 335 of the Code for the recovery by execution of a sum of money as damages in default of compliance with the substantial decree either to deliver movable property or to do or abstain from doing some specified act.

A Court has no jurisdiction to amend or alter its decree, except in conformity with section 189, Civil Procedure Code.

A mortgage decree is a decree for the payment of money within the meaning of section 337, Civil Procedure Code.

THE facts appear from the judgment.

A. Drieberg, for defendants, appellants.

Samarawickreme, for plaintiffs, respondents.

Cur. adv. vult.

March 17, 1919. SCHNEIDER A.J.—

In this case, on December 15, 1902, a mortgage decree was entered in favour of the plaintiffs. The decree directed that the defendants should jointly and severally pay a sum of money, and in default of such payment that the mortgaged property should be sold by the Fiscal in satisfaction of the decree, and if the proceeds of such sale should be insufficient, that the balance was to be recovered by execution levied upon any other property of the defendants. This is the usual form of decree, except, perhaps, for the direction that the sale was to be held by the Fiscal. Apparently no steps were taken under the decree till January, 1911, at which date most of the original parties were dead. Application on behalf of the plaintiffs was then made by petition for substitution of parties in place of those deceased. *Inter alia*, the applicants prayed that the second defendant should be substituted as the legal representative of the deceased first defendant, alleging that he was the brother and heir of the deceased, whose share of the property mortgaged was below Rs. 1,000 in value, and that he was in possession of the property of the deceased. They also prayed that execution should issue against the second defendant personally, and also as such legal

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representative. This part of the application is extraordinary, and, in my opinion, should never have been allowed. The facts alleged do not constitute the second defendant the legal representative of the deceased defendant, nor is the application for writ in order (*vide* sections 394 and 224 of the Civil Procedure Code).

The second defendant filed a statement of objections to this application. He pleaded, among other matters, that the decree had been satisfied by payment. Eventually he consented to the substitution of parties and the issue of writ upon the condition that " no warrant of arrest should issue against him in the event of the balance due under the decree not being recovered. " This was on November 2, 1911, in the ordinary form given in Schedule II. of the Code, that is, to levy execution upon the property of the defendants without special mention of the mortgaged property. Under the writ the Fiscal seized four of the lands mortgaged, and applied to the Court, in May, 1912, for an extension of the writ to enable him to sell them. The returnable date of the writ was then extended to December 31, 1912, but on December 20, 1912, it was returned to Court by the Fiscal with a report to the effect that it could not be executed, as the plaintiffs had failed to deposit the fees necessary for advertising the sale. Before this report a claim had been made to one of the lands seized, and was reported to Court in June, 1912. This claim was upheld after an inquiry on May 22, 1913. On February 3, 1913, the plaintiffs moved for a re-issue of the writ, which was disallowed on the ground that a fresh writ should issue; but on May 12, 1913, the plaintiffs' motion to be allowed to purchase the property seized and for credit was granted. Evidently upon this order the Fiscal sold three of the lands seized, and reported the sale to Court in June, 1913. The next step in execution was an application for writ made on March 9, 1917. To this application two objections were taken, namely, (1) that due deligence to procure complete satisfaction of the decree upon the last preceding application had not been exercised; (2) that a period of ten years had expired from the date of the decree. These objections are founded upon the provisions of section 337 of the Code.

After hearing argument the District Judge made order allowing the application, with costs. This appeal is from that order. The learned District Judge holds that the period of ten years should be reckoned from November 2, 1911, and not from the date of the decree (December 15, 1902), because the order of November 2, made with the consent of the defendant, was " a subsequent order, " such as is contemplated under section 337 (*b*). I am unable to agree with him. A Court has no jurisdiction to alter or amend its decree, except in conformity with the provisions of section 189 of the Code, in order to bring the decree into harmony with the judgment or to rectify a clerical or arithmetical error. The " subsequent order " contemplated in section 337 (*b*) is one which may be made under the

provisions of sections 320, 322, 334, and 335 of the Code, for the recovery by execution of a sum of money as damages in default of compliance with the substantial decree, either to deliver movable property or to do or abstain from doing some specified act. Plaintiff-respondents' counsel did not attempt to support the order upon this reason given by the learned District Judge. The second reason given by the District Judge is that the debtor's false plea of payment of the decree, made in order to gain time, was an act which prevented the plaintiffs recovering their money. The District Judge here refers to the payment pleaded by the second defendant against the first application for writ. This reason, too, does not appear to me a good one for allowing the plaintiff's application.

No serious attempt was made to support it at the argument of this appeal. Section 337 permits an application for execution after the ten-year time limit being granted by a Court, " where the judgment-debtor has by fraud or force prevented the execution of the decree. "

Respondents' counsel wanted us to give an extensive interpretation to the term " fraud, " and cited *Fernando v. Latibu*,[1] where this had been done. There it was held that the systematic evasion of service of process by a debtor by which execution was prevented was " fraud " within the meaning of the section. But, however extensive the meaning placed on fraud be, it is not possible upon the facts in this case to hold that there has been fraud. Even granting that the plea of payment was false, and that such a plea amounts to fraud (neither of which is correct), the plea did not in fact prevent execution. On the contrary, the defendants' consent to the order of November 2, 1911, was a step in aid of execution for writ issued on the 18th of that month. The respondents' counsel's main endeavour to support the District Judge's order was founded, not upon the reasons given by the District Judge, but upon quite other ground. He submitted that a mortgage decree was not " a decree for the payment of money " in so far as its character of a mortgage decree was concerned, and that, therefore, in so far as the decree declared the property mortgaged bound and executable and liable to be sold, it did not come within the purview of section 337 of the Code. He sought to differentiate this case from the case of *Don Jacovis v. Perera* [2] and of *Silva et al. v. Singho et al.*, [3] by the fact that in both these cases the application was to recover the balance due on the decree after the mortgaged properties had been discussed. But it is beyond doubt that the ground of the decision in both those cases was the same, namely, that a mortgage decree was a decree for the payment of money (meaning thereby the whole of the sum decreed) within the meaning of section 337, although it contains the other elements which constitute it a mortgage decree.

[1] *(1914) 18 N. L. R. 95.*

[2] *(1906) 9 N. L. R. 166 ; 3 Bal. 118.*

[3] *(1910) 13 N. L. R. 173.*

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In his judgment in the earlier case, Lascelles A.C.J. said: " We are asked to hold that a mortgage decree is not a decree for the payment of money within the meaning of section 337 of the Civil Procedure Code, and that, consequently, the District Judge was wrong in acting under that section. In order to decide whether the decree in this section falls under the designation of a decree for the payment of money, there is no better test than the language of the decree itself. The decree orders the defendant to pay the plaintiff Rs. 282, with interest and costs, within one month from date, and in default of payment directs the sale of the hypothecated property. It would be doing violence to the language employed to hold that such a decree is not a decree for the payment of money. It clearly is a decree for the payment of money as well as a mortgage decree, and there is no reason why such a decree should not be considered to be, what it plainly is, a decree for the payment of money. "

In the latter case, Hutchinson C.J. said: " The appellants first contended that the decree in this case is not ' a decree for the payment of money, ' and that, therefore, the requirement of section 337 of the Civil Procedure Code as to ' due diligence ' does not apply. I have no doubt that it is a decree for payment of money. It begins by ordering the defendants to pay the whole debt. It is true that it directs that in default of payment it is to be enforced in a particular manner in the first instance, viz., by sale of the mortgaged property; but none the less it has decreed the payment. I agree on this point with *Don Jacovis v. Perera.* [1] The facts in that case are not fully reported, but I have seen the record. The decree was in 1892, and was like the one in the present case; writ was issued in 1893, not for the sale of the mortgaged property, but against the debtor's property generally; the plaintiff obtained an order for its re-issue in 1902, but did not actually re-issue it, and took no further steps till 1906. The Court held that the decree was for payment of money. " I feel not only bound by these decisions, but, if I may venture to say so, I am in entire accordance with them. It seems to me that there is no indication in the Code of any intention to treat mortgage decrees differently in regard to time limitations for execution. It was also argued by respondents' counsel that as the decree contained a direction that the Fiscal should sell the mortgaged property, there was no necessity for an application for execution to be made under chapter XXII of the Code, and that, therefore, section 337 would not apply, as that section only deals with applications to execute decrees made under that chapter. Whatever substance there may be in this argument as a general proposition, it is inapplicable in this case, as the applications for execution were in fact made under chapter XXII. The question whether the plaintiffs' application should be disallowed because due diligence had not been used to procure complete satisfaction of the decree on the last preceding application has not

[1] *(1906) 9 N. L. R. 166 ; 3 Bal. 118.*

been dealt with by the learned District Judge. If it had been necessary to consider it here, I would have held that the plaintiffs' application should be disallowed on this ground also.

I would, therefore, set aside the order appealed from, and dismiss the plaintiffs' application, with costs in both Courts.

DE SAMPAYO J.—I agree.

Set aside.