May 2, 1910

Present: The Hon. Sir Joseph T. Hutchinson, Chief Justice, and Mr. Justice Wood Renton.

SILVA *et al. v.* SINGHO *et al.*

D. C., Matara, 3,009.

"Decree for the payment of money"—Mortgage decree—Due diligence—Civil Procedure Code, s. 337.

A decree in a mortgage action for the payment of money due on the mortgage bond and in default thereof for the sale of the mortgaged property, and the realization of any balance of the debt still remaining unpaid after such sale, is a "decree for the payment of money" within the meaning of section 337, Civil Procedure Code.

Writ was issued in this case in January, 1908; under it the mortgaged lands and also some other unmortgaged lands of the judgment-debtor were sold. In October, 1909, plaintiffs made an application for the re-issue of the writ for the unsatisfied portion of the decree, and filed an affidavit explaining the delay to have been due to the difficulty of finding out other properties of the debtor.

Held, that there was no lack of due diligence on the part of the plaintiffs, and that they were entitled to have the writ re-issued.

THE facts are fully set out in the judgment of Hutchinson C.J.

Bawa, for the plaintiffs, appellants.

No appearance for the respondents.

Cur. adv. vult.

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The plaintiffs got judgment on March 25, 1903, on a mortgage bond. The decree is in the form which is usual in such cases; it decrees that the defendants do pay to the plaintiffs the debt and interest and costs within seven days; in default the specially mortgaged property (described) is to be sold and the proceeds applied in or towards payment; and if the proceeds are not enough, the defendants are to pay to the plaintiffs the deficiency.

The first application for execution was made in July, 1906; the District Court refused it because of the delay, but this Court (see *10 N. L. R. 312*) allowed it, and the writ was issued in January, 1908; under it the mortgaged lands and also some unmortgaged lands of the second defendant were sold, but the proceeds of sale were not enough to pay the debt, and a balance is still due. The plaintiffs then in October, 1909, made the present application, which is for re-issue of the writ, and filed an affidavit explaining the delay to have been due to the difficulty of finding out other unmortgaged properties of the defendants. The District Court refused

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the application on the ground that the plaintiffs did not exercise due diligence on the last issue of the writ; the Judge observed that after the sale of the mortgaged land the plaintiffs did nothing for a year and a half, and that " due diligence " requires that if the writ is unsatisfied the debtor shall be examined and, if necessary, committed to prison, and that nothing of that kind had been done.

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 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, and apparently thought that on the facts it was obvious that there had been a want of due diligence on the application made in 1902.

In the present case, however, it is not so clear that there was any absence of due diligence on the last preceding application, *i.e.*, on the application which was granted in January, 1908. There were six properties mortgaged; they were all sold under the writ; and perhaps that was all that the writ ought to have directed to be done in the first instance in accordance with the decree; but it seems that the writ was for execution against all the debtor's property, and two other properties which were not named in the mortgage or in the decree were sold under the writ. The plaintiff has sworn that the reason why no more was sold was because of the difficulty of finding any other property; and that seems likely, and is not contradicted. What else could he have done either on the application or in pursuance of the writ which he obtained on it? It is said that he could have had the debtors arrested or examined as to their means. But the decree directed that the mortgaged properties should be sold first, and if the proceeds of those sales were insufficient, he had the right to obtain execution for the deficiency, and then after the return to the writ would have come the time, if necessary, to make a further application to examine the debtors. I think that he showed due diligence, and that he is entitled now to have the writ re-issued or to have a new writ issued. The respondents should pay the costs of the appeal.

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

WOOD RENTON J.—

The questions that we have to decide in this case are, first, whether a decree in a mortgage action for the payment of the money due on the mortgage bond, and in default thereof for the sale of the mortgaged property and the realization of any balance of the debt still remaining unpaid after such sale, is " a decree for the payment of money " within the meaning of section 337 of the Civil Procedure Code; and secondly, if so, whether the appellants have satisfied the requirements of that section as to due diligence. The learned District Judge has answered the first of these questions in the affirmative, and the second in the negative.

With regard to the question as to whether or not the decree comes within the meaning of the words " a decree for the payment of money " in section 337, I think that the Judge is clearly right. The decision of the supreme Court in *Don Jacovis v. Perera*[1] is a local authority on the point by which we are bound. I agree with all that my Lord the Chief Justice has said in regard to that case. I have examined the Indian authorities to which Mr. Bawa referred us (*Ram Charan Bhagat v. Sheobarat Rai*,[2] *Fazil Howladar v. Krishna Bundhoo Roy*,[3] *Kartick Nath Pandey v. Juggernath Ram Marwari*,[4] *Jadu Nath Prasad v. Jagmohan Das*[5]), but they appear to me to be distinguishable on the facts, inasmuch as in each of them the decree in question was primarily a decree for sale. Whether that is so or not, we are bound by the Ceylon decision, to which I have already referred, and in the reasoning of which I entirely concur. I think that the decree before us in this case is clearly one for the payment of money, although the special mode of enforcing payment is indicated in it in case of default.

With regard to the question of fact involved in the second of the two findings above referred to, the District Judge was in my opinion wrong. All that the appellants were bound to do in the first instance in case of default of payment was to sell the mortgaged properties. This they did, and I cannot see that there was any lack of due diligence either in their original proceedings or in the subsequent proceedings with which we are here specially concerned. I concur in the order proposed by the Chief Justice.

Appeal allowed.

[1] *(1906) 9 N. L. R. 166 ; 3 Bal, 118*
[2] *(1894) I. L. R. 16 All. 418.*
[3] *(1897) I. L. R. 25 Cal. 580.*
[4] *(1899) I. L. R. 27 Cal. 285.*
[5] *(1903) I. L. R. 25 All. 641.*