

1933

Present : Akbar J. and de Silva A.J.

IMPERIAL BANK OF INDIA, LTD. *v.* SILVA *et al.*201—D. D. (*Inty.*) Colombo, 48,903

*Mortgage decree—Order for payment by instalments—Civil Procedure Code, s. 194—Ordinance No. 22 of 1927, s. 12.*

In a mortgage action the Court has power to order the payment, by instalments, of the money due under the decree.

**A** PPEAL from an order of the District Judge of Colombo.

L. A. Rajapakse, for defendants-appellants.

N. E. Weerasooria, for plaintiff-respondent.

May 31, 1933. De SILVA A.J.—

The plaintiff in this case sued the defendants for the recovery of the balance sum of Rs. 72,182.94 due on a mortgage bond executed on February 18, 1931, for a sum of Rs. 79,431.53. It appears from the evidence of the second defendant, which has not been challenged, that the loan was originally given without security and that later, when called upon, the defendants furnished the security now sued upon, and also handed to the plaintiff a number of promissory notes in their favour. They have also assigned a mortgage bond. It appears both from the evidence and from the findings of the learned Judge that the defendants have acted entirely honestly and made every endeavour to pay off the claim of the plaintiff as expeditiously as possible. They asked for time to pay the amounts sued upon, the learned Judge has given them time and made order that for a period of one year from October 15, 1932, the defendants should pay the sum of Rs. 1,000 a month. During the second year that they should pay the sum of Rs. 2,000 per month and during the third year they should pay Rs. 3,000 a month. He was of opinion that the security which the bank held was adequate, and I have no reason to doubt the correctness of this view.

The defendants on this appeal ask that the order be altered in their favour and that a reduction be made in the amounts which they have been ordered to pay. They urge that although they have endeavoured, and still continue to endeavour, to pay off the claim of the plaintiffs as quickly as possible, the sums of Rs. 2,000 and Rs. 3,000 a month which they have been ordered to pay are more than they can meet and that the effect of the order would in all probability be to place the lands mortgaged upon the market for sale in execution.

The plaintiffs have filed a cross appeal on which they urge that they are entitled to immediate execution in law and that the order of the learned District Judge is bad. Two points arise for decision in this case, the first a point of law whether it is competent for a Court to enter an order for payment by instalments on an action on a mortgage bond and the second whether, if such a power exists, the order under consideration is proper in the circumstances of this case.

It has been assumed in certain decisions that a Court has no power to enter a decree for instalments on an action on a mortgage bond, but counsel for the plaintiff has not been able to point out, and I have been unable to discover, any case in which the question has been considered. Section 194 of Chapter XX, of the Civil Procedure Code says "In all decrees for the payment of money, except money due on mortgage of movable or immovable property, the Court may order that the amount decreed to be due shall be paid by instalments with or without interest, and the Court may in its discretion impose such terms as it may think fit as to giving security for the payments so to be made". Different sections of Chapter XX, deal with different kinds of decrees and give directions as to the nature of the provision they are to make. Section 194 relates to all decrees for the payment of money, except for the payment of money due on mortgages. Section 201, which has since been repealed, dealt with decrees for the payment of money due on mortgages. The words "except money due on mortgage" in section 194 were intended in my opinion to confine the scope of the section and to exclude mortgage decrees from its operation. This is the plain meaning of the words and I cannot find in section 194 or in any other section a prohibition against the entering of an instalment decree on a mortgage action. To ascertain the powers of a Court with regard to mortgage decrees one had to turn to section 201 and there was nothing in section 201 inconsistent with the entering of an instalment decree. It was clear that the Court could have given time to pay, and it is unreasonable that the Court should not have had the power to have given time on condition that money was paid by instalments at stated intervals. In the absence of a provision of law which prohibits the ordering of instalments I think it was competent to a Court under section 201 to have made such order. Section 201 has been repealed by section 19 of Ordinance No. 22 of 1927 and section 12 of this last-named Ordinance provides that in a mortgage decree the Court shall order that in default of payment of the mortgage money within a period mentioned in the decree the mortgage property shall be sold. It is competent to a Court therefore to prescribe a period and thereby to give time for the payment of the amount due

on a mortgage. I see nothing in the existing law which prevents a Court from fixing the period conditionally, the payment of instalments being made the condition for granting time. I think this is both reasonable and in accordance with the law. I think therefore that the point of law must be answered in favour of the defendants.

The next question which arises is whether the amounts ordered to be paid by the learned District Judge should be left as they are or whether they should be altered. It appears from the affidavit filed by the defendants that on actions filed by them against their debtors, the latter have been given time to pay by the District Court of Negombo. It also appears that in respect of the notes handed by them to the plaintiff as security there is every possibility of recovering the amounts due, but that if sudden pressure were brought to bear the chances of recovery would be prejudiced by reason of the fact that the makers might fail in business. It also appears that the original debt was reduced by a considerable amount at the date of the institution of the action and that if the defendants have complied with the order of the learned District Judge the amount would have been still further reduced by now. The possibility of the security depreciating below the amount now due to the plaintiffs is remote, and I do not think that the giving of time to the defendants would place upon the plaintiff a risk which he should not be called upon to bear. The circumstances of the defendants have been fully explored in the lower Court and on a consideration of the evidence there led I am of opinion that the order of the learned District Judge should stand, subject to the variation that from October 1, 1933, they should pay a sum of Rs. 1,500 per month (and not Rs. 2,000 per month as ordered by the District Judge) and from October 1, 1934, a sum of Rs. 2,500 a month (and not Rs. 3,000 a month as ordered by the District Judge) and that if such payments are made writ for the balance should not issue till October 1, 1935. The decree should also be altered to make it perfectly clear that the words "highest bidder" in the phrase "then immediately thereafter to the highest bidder" mean the highest bidder at a sale subject to no reservation as to price held independently of the two earlier sales referred to. Subject to these variations the decision appealed from is affirmed. I do not think that there should be any costs of this appeal.

AKBAR J.—I agree.

*Varied.*