

1935

Present : Akbar and Koch JJ.

RAMANATHAN CHETTIAR v. IBRAHIM et al.

178—D. C. Matara, 7,820.

*Mortgage action—Decree entered in favour of plaintiff—No provision in decree as to time of payment of money decreed—Application by plaintiff for order to sell—Defendant's application to pay by instalments—Powers of Court—Ordinance No. 21 of 1927, s. 12.*

In a mortgage action the Court, in entering judgment in favour of the plaintiff for the money due on the bond, has power to fix the period within which the money is to be paid or order such payment to be made by instalments.

Under section 12 of the Mortgage Ordinance the Court has power, even subsequent to the decree, in giving directions for the sale to fix the period within which the money should be paid, so long as it does not alter or vary the original decree in that respect.

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

N. E. Weerasooria, for plaintiff, appellant.

No appearance for respondent.

April 1, 1935. AKBAR J.—

This is an appeal by the plaintiff in a mortgage action in which decree has been entered of consent and on which a part of the money due on the bond has been paid, against the order of the District Judge who allowed the defendant nine months' time to pay the balance amount due. The decree which was signed on February 2, 1933, merely states that the defendant is to pay the sums of money due on the bond with interest and further interest on the principal sum from a certain date until payment in full and costs. Then there is a further direction that in default of payment of this amount, interest and costs, "within such time" the premises mortgaged by the bond should be sold by a certain auctioneer and the proceeds applied towards the payment of the amount, interest and costs. The decree did not state, it is to be observed, in the first place the period of time during which the money was to be paid nor did it give directions as to the conduct and conditions of the sale.

In the original application that the defendant-appellant made for time to pay the balance amount he really asked for the privilege of paying by instalments. This, the Judge refused, because it would be a variation of the terms of the decree itself inasmuch as the decree ordered the payment of the full sum and not by instalments.

After refusing the application for payment by instalments he went on to give the defendant nine months' time to pay the balance amount due. The question arises whether the District Judge had the power to give this time in the manner in which he has done in this case. There are two decisions of this Court which have some bearing on this question. The first case is the *Bank of Chettinad v. Palmadan Chetty*<sup>1</sup>. The second case is the *Imperial Bank of India Ltd. v. Silva and others*<sup>2</sup>.

In the first case the effect of the judgment was that where a mortgage decree orders that the defendant shall pay forthwith the sum due and that in default of payment the premises mortgaged be sold, the Court has no power to vary the order subsequently by allowing the defendant the privilege of paying the money by instalments. In the second case there too it was a mortgage action and before the decree was passed the defendant asked for the concession of paying the mortgage debt by instalments, which concession was allowed by the District Judge and entered in the original decree. The defendant then appealed to this Court asking for a reduction of the amounts ordered to be paid by way of instalments and there was a cross appeal by the plaintiff, in which he asked for immediate execution in law and the contention was put forward that the District Judge had no power to allow the mortgage debt to be paid by instalments in a mortgage action.

The Supreme Court considered the effect of section 12 of the Mortgage Ordinance, No. 21 of 1927, and the old section 201 of the Civil Procedure Code, and came to the conclusion that in a mortgage action the Court had the power to order the payment by instalments of the money due under a decree. I see no reason to disagree with both these judgments. But in section 12 of the Mortgage Ordinance of 1927 it is stated that in a hypothecary action, where it is found that the mortgage ought to be enforced, the decree shall order that, in default of payment of the mortgage money within the period mentioned in the decree, the mortgaged property shall be sold, and the Court may, if it thinks fit, in the decree or subsequently give such directions as to the conduct and conditions of the sale and the person to conduct the sale, &c.

The Supreme Court in the second case held that as it was within the power of the Court to fix the period within which the money was to be paid, it had also the power to order the payment of the money in whatever way it liked, even by instalments.

The first case held that where the decree specifically stated that the money was to be paid forthwith or within a definite period, it could not be varied afterwards so as to affect this period within which the money was to be paid. Under section 12, even subsequent to the decree the Court can give directions as to the conduct and conditions of the sale. But these conditions of sale must be with reference to the original decree and

<sup>1</sup> 33 N. L. R. 358.

<sup>2</sup> 34 N. L. R. 246.

they must not have the effect of altering or contradicting or varying the period fixed by the Court, in the original decree itself. That is how I interpret section 12 and the effect of the two judgments.

In this case the decree unfortunately did not fix the period within which the money was to be paid nor did it state after what period the property was to be sold. All these are conditions which the Court could impose under section 12 of Ordinance No. 21 of 1927 in respect of any application made by the mortgagee to execute his decree. So that the Court had the power when specifying the conditions of sale to fix the period after which the property was to be sold.

Unfortunately the District Judge had not these fine points before him in his mind when he made his order on the application to pay money by instalments which he rightly refused; but without considering the points mentioned by me his order merely gave the defendant nine months' time to pay.

The application was by the plaintiff to issue a commission to the auctioneer named in the decree to sell the property. The proper course the District Judge should have followed would have been to fix the conditions under which the sale was to be carried out, and in those conditions to fix the period within which the balance was to be paid.

The appeal should therefore be allowed in order that the Judge may on the application of the plaintiff fix those conditions under which the sale is to be carried out and incidentally fix a period after which the sale is to be carried out.

I should like the District Judge to keep specifically in mind the fact that the order allowing nine months' time was made so far back as September 19, 1934, and a good part of that time has been consumed whilst this case was in appeal. In fixing the new period in the conditions of sale after which the sale is to be carried out, the District Judge should keep in mind the fact that the whole of the nine months or at any rate a portion of the nine months has already elapsed.

The order is set aside and the case sent back for the purpose indicated but I will make no order as to costs.

KOCH J.—I agree.

*Set aside.*

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