

1931

Present: Lyall Grant J. and Maartensz A.J.

FERNANDO v. SILVA.

14—*D. C. Kalutara*, 13,183

Mortgage decree—Decree for payment of money—Examination of judgment-debtor—Excussion of mortgaged property—Civil Procedure Code, s. 219.

A mortgage decree is a decree for the recovery or payment of money within the meaning of section 219 of the Civil Procedure Code.

A PPEAL from an order of the District Judge of Kalutara.

Hayley, K.C. (with him *E. S. Fernando*), for appellant.

H. V. Perera, for respondent.

March 30, 1931. LYALL GRANT J.—

This is an appeal by a judgment-creditor from the refusal of the District Judge of Kalutara to make an order for examination of the debtor under section 219 of the Civil Procedure Code in regard to her means of satisfying the decree.

The judgment in question was a mortgage decree. Action was taken on a mortgage against the executrix of the mortgagor. Judgment was obtained in default and a decree *nisi* entered in ordinary form on July 22, 1926. The decree was made absolute on December 23, 1926.

On August 24, 1927, the plaintiff applied for issue of writ, and an order to sell was issued returnable on December 15, 1927.

On November 11, 1927, the judgment-creditor obtained leave to bid at the sale.

On February 15, 1928, the order to sell was returned to Court unexecuted as the lands had already been sold to pay off stamp duties from the defendant's estate.

On April 27, 1928, the plaintiff applied for a notice on the defendant under section 219, in the ground that the property had been sold and that he did not know of other property belonging to the defendant.

After various delays, notice was served on the defendant personally on June 9, and on July 10 objections were filed. On August 7 the defendant's objections were dismissed with costs in her absence and an attachment order issued.

On September 23, 1930, objection was taken by the defendant that the plaintiff was bound first to discuss the mortgaged property. She pointed out that the first sale by order of the Stamp Commissioner fell through owing to the purchaser discovering that the property was subject to a mortgage and that for the same reason the property fetched a low price on the second occasion.

It was also alleged that the property on the second occasion was bought on behalf of the plaintiff.

After various delays the matter was inquired into on October 30, 1930, and an order was made refusing the plaintiff's application for an examination of the defendant under section 219 of the Code.

It may here be mentioned that the "plaintiff" is more properly the judgment-creditor and the "defendant" the judgment-debtor, but the appeal describes them as the plaintiff and the defendant respectively and for convenience I will adhere to these designations.

At the inquiry it appeared that the land in question was sold by the Fiscal at the instance of Crown on August 15, 1927, for Rs. 1,000 to H. J. Fernando, who is a nephew of the plaintiff.

The sale was cancelled and the deposit forfeited as the purchaser said he did not know of the mortgage when he bought the land.

At the second sale on November 12, 1927, the land was bought by M. A. Rodrigo for Rs. 355. Rodrigo is the plaintiff's brother-in-law. At this sale the existence of the mortgage was disclosed.

It further appeared that on April 19, 1930, Government issued notice that it proposed compulsorily to acquire this land. In response to this notice the plaintiff made a claim at the Kachcheri on September 24, 1930, in respect of his mortgage decree. So far as appears, the decision of that claim is still pending.

The question argued before us on appeal was whether, in these circumstances and at this juncture, the plaintiff has a right to examine the defendant in regard to the other assets of the estate of which she is executrix, or whether he is first bound to exhaust his remedies against the land mortgaged.

Appellant's Counsel maintained that the decree upon which the plaintiff had obtained judgment was primarily a money decree and that the plaintiff was not bound to pursue his security into the hand of third parties before discussing the other assets of the original debtor.

Respondent's Counsel on the other hand maintained that section 219 does not apply: that section 201 applies and that where this section applies, section 219 has no application. Section 219 is necessarily confined to the circumstances mentioned in section 218 where the creditor has power to sell all the debtor's property.

He quoted certain Indian cases:—*Fazil Howladar v. Krishna Bundhoo Roy*¹, *Kartick Nath Pandey v. Juggernath Ram Marwara*², and *National Bank of India v. A. K. Ghuznavi*³, to show that a mortgage decree is not a money decree.

The contrary has however been held to be the case in Ceylon. (*Vide Don Jacovis v. Perera*⁴ and *Silva v. Singho*⁵.)

¹ 25 Calcutta 580.

² 27 Calcutta 285.

³ 43 Calcutta 285.

⁴ 9 N. L. R. 167.

⁵ 13 N. L. R. 173.

On these authorities and on the terms appellant's contention that a mortgage decree is, in Ceylon at any rate, a money decree.

Respondent's Counsel directed our attention to the fact that the decree provides for the sale of a specified property and only directs the defendant to pay any deficiency arising after the sale of such property.

He further referred to a judgment of Sir Thomas de Sampayo in *Wijesekera v. Rawal*¹, which held that a mortgage creditor must sell the mortgaged property first.

As against this argument Mr. Hayley pointed out that the judgment and the authorities on which it was based did not in any case apply where the mortgaged property has changed hands.

He referred to *Voet XX.*, 4, 3, which, however, is not conclusive of the matter.

I do not think it is necessary in this case to lay down a general rule either to the effect that a person holding a mortgage decree must follow the property mortgaged through all vicissitudes before recovering on his personal decree or to the contrary effect as I have come to the conclusion on other grounds, that in the circumstances of the present case, there were grounds on which the learned District Judge was justified in refusing at the present stage an examination of the defendant.

The plaintiff has made a claim, based on the mortgage decree, to the Crown which has now acquired the land.

He has elected to follow the land and to recover from it. If his application to the Crown succeeds, his debt may be paid in full from that source.

In these circumstances, I think the refusal of the District Judge to allow him at the present stage to examine the defendant is justified.

The appeal is dismissed with costs.

MAARTENSZ A.J.—I agree.

Appeal dismissed.

¹ 20 N. L. R. 126.