

1906.
June 29.

Present: The Hon. Mr. A. G. Lascelles, Acting Chief Justice, and
Mr. Justice Middleton.

DON JACOVIS *v.* PERERA.

D. C., Colombo, 2,369.

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

A mortgage decree which orders the defendant to pay to the plaintiff a certain sum of money within a certain time and directs that, in default of such payment, the property hypothecated be sold to satisfy the debt, is a decree for the payment of money, and the provisions of section 337 of the Civil Code apply to such a decree.

A PPEAL from an order of the District Judge (J. R. Weinman, Esq.) refusing to issue execution.

The facts sufficiently appear from the judgment of Lascelles A.C.J.

F. M. de Saram, for the plaintiff, appellant.—This is an action on a mortgage. A decree was entered for the payment of the money due on the bond and mortgage decree that the property be sold on failure to pay the money. The decree being a mortgage decree, it

is submitted that the provisions of section 337 of the Code do not apply, *Ram Chand v. Shobanat Rai* (1). In that case the decree was under the Indian Transfer of Property Act, No. 4 of 1882. Sections 86 and 88 of that Act deal with suits for foreclosure of mortgages. Section 86 provides for a decree where the action is for foreclosure, and section 88 where the action is for the payment of money. Section 201 of our Civil Procedure Code is similar to these sections, and the Indian decision is applicable and should be followed.

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Cur. adv. vult.

29th June, 1906. LASCELLES A.C.J.—

The District Judge has disallowed the plaintiff's application for a notice on the defendant to show cause why an order should not be made for sale in execution of the balance due under the mortgage decree.

We are asked on the authority of *Ram Chand v. Shobanat Rai* (1) 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 action 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.

The decree referred to in the Allahabad case seems to have been in the form prescribed by the Transfer of Property Act, 1882, and would be in the common English form directing an account to be taken of what is due for principal interest, and costs under the Mortgage Act, a sale in default of payment within a specified period.

It is to be noted that in the Allahabad case the Court came to the conclusion that it was the intention of the Legislature that the section corresponding to section 337 of the Ceylon Code should apply to mortgage decrees, and the Court thought it only reasonable that some definite time should be fixed within which all decrees should be executed, if they are to be executed at all. The decision was based solely on the ground that the Legislature had not used apt words for giving effect to what the Court thought must have been its intention.

(1) *I. L. R.* 16, *All.* 418.

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In the case of a decree in the form usual in Ceylon mortgage suits the difficulty does not arise.

LASCELLES
A.C.J.

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.

It is therefore possible to give effect to what the Indian Judges thought must have been the intention of the Code. I would dismiss the appeal.

MIDDLETON J.—I entirely agree.

