

1932

*Present: Akbar J. and Jayewardene A.J.*BANK OF CHETTINAD *v.* PALMADAN CHETTY.134—*D. C. Colombo, 44,518.**Mortgage decree—Entered in first instance—Application to vary terms of decree—Payment by instalments—Civil Procedure Code, s. 194.*

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 by making what is, in effect a decree for payment by instalments.

A decree for payment by instalments must be made in the first instance. Such a decree cannot be entered in a mortgage action.

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

H. V. Perera, for the plaintiff, appellant.

Weerasooria (with him *Nadarajah*), for the defendant, respondent.

May 6, 1932. AKBAR J.—

The point to be decided in this appeal seems to be a clear one and of some importance to practitioners. On June 8, 1931, the plaintiff-appellant obtained an ordinary mortgage decree, the 1st clause of which ordered the defendant to pay forthwith to the plaintiff a sum of Rs. 65,371.50, together with interest at 9 per cent. from the date thereof till payment in full, and costs of the action; the 2nd clause declared that the premises and property described in the schedule to the decree were to be bound and executable for the payment of this sum; and the 3rd clause stated that in default of payment of this sum "forthwith as aforesaid the said premises and property declared specially bound and executable as aforesaid" be sold subject to a certain mortgage. On June 9, the very next day, the defendant-respondent filed a petition in which, after alleging that the action of the plaintiff in trying to sell the property hypothecated would mean ruin to him and his credit would be completely gone, he asked that the execution proceedings be stayed and that he be given 18 months' time to pay the plaintiff his claim. The matter came up for inquiry before the District Judge and in spite of objection taken by plaintiff's counsel, evidence was heard and he made an order dated July 3, 1931, whereby he allowed the application in these terms:— the execution proceedings were to be stayed upon condition that the defendant paid the plaintiff or deposited in court a sum of Rs. 20,000 within two weeks from that date; secondly, the oil and other produce lying in the premises (which had already been ordered to be sold by the mortgage decree) were not to be sold or disposed of by the defendant save for the purpose of paying the aforesaid amount of Rs. 20,000; and then a further third condition that the defendant do pay into Court on the first day of each month, commencing on August 1, a sum of Rs. 1,000 and at the expiration of 18 months thereafter the full amount of the

balance due under the decree. If the defendant was to commit a default in the fulfilment of any of the conditions the plaintiff was to be declared entitled to apply for and obtain an order to sell forthwith.

Mr. Weerasooria contended that the District Judge had the power to make this order under section 343 and section 344 of the Civil Procedure Code. He cited certain cases in which the Supreme Court has held that section 343 could be invoked even by a mortgagor to stay proceedings under a decree ordered under section 201 of the Civil Procedure Code because section 343. was of general application. The cases cited were *Peries v. Somasunderam Chetty*¹ and *Lucyhamy v. de Alwis*², but those cases, it will be seen, did not contain the element which has given all the trouble in this case, namely, that there was no variation of the decree in those cases. In this case, in my opinion, the order made by the District Judge on July 3, 1931, was a direct variation of the decree which had already been entered on June 8, 1931. One has only to place the two orders side by side to see how entirely inconsistent they are one with the other. The mortgage decree of June 8, 1931, orders the payment forthwith of the full sum and in default of payment the whole property was to be sold at once. By the order of July 3 the effect of this decree is entirely stopped and the direction of the carrying out of the execution proceedings is left virtually in the hands of the defendants, the only condition being the payment of Rs. 20,000 within 2 weeks, and he was left with the sole discretion of selling all the oil and other produce lying in the premises for the purpose of paying this sum of Rs. 20,000. Further, even though the defendant did not ask to be allowed to pay by instalments, the District Judge in effect ordered the defendant to pay by instalments Rs. 1,000 per month and the balance was to be paid at the end of 18 months. I think it is idle to contend that this is not a variation of the original decree.

There is one other point which I should like to mention in this connection, and that is that under section 194 the Court is given the power to order the payment of money by instalments, but it is quite clear from chapter XX. of the Code and the cases of *Supramaniam v. Perumal*³ and *Carpen v. Nallan*⁴ that such an instalment decree must be entered in the first instance; it cannot be entered as a variation of a decree already entered. Further, section 194 specifically excludes all money due on mortgages of movable or immovable property from this power given to the Court to enter such instalment decrees. So that the appellant has succeeded in getting an instalment decree which was prohibited to him under section 194 by allowing a mortgage decree to be entered in the first instance and then by asking for a stay of proceedings under section 343.

Mr. Weerasooria rather hesitatingly pointed to section 344 as also being a section under which he could claim to come in. I need only mention in this connection a judgment pointed out to me by my brother Jayawardene, namely, the case of *Allis Appu v. Ran Menika*⁵ in which

¹ 2 *Times of Ceylon Law Reports* 189.

² 2 *Times of Ceylon Law Reports* 145.

³ 1 *N. L. R.* 371.

⁴ 2 *C. L. R.* 111.

⁵ *Times of Ceylon Law Reports* 11

my brother Garvin said that section 344 of the Civil Procedure Code related to the execution of decrees and enabled a court to dispose of questions relating to the execution which arose between the parties instead of referring them to a separate action, and that it did not confer a special power on the Court to set aside its own decree.

I think I have said enough to show that the order made by the District Judge allowing the defendant's application was clearly wrong and that it should be set aside.

Owing to this order and owing to this appeal, the respondent has practically got the full benefit of the order made in his favour.

I set aside the order and allow the appeal, with costs in both courts.

JAYEWARDENE A.J.—I agree.

Appeal allowed.