

e. 1.

CASES

DECIDED IN THE

HIGH COURT OF BOMBAY.

Appellate Civil Jurisdiction.

Special Appeal No. 223 of 1864.

1864.
August 5.

A'TMA'RA'M BALLA'L KA'GJI.....*Appellant.*
SADA'SHIV HARI MAHA'JANI.....*Respondent.*

*Small Cause Court—Immoveable Property—Special Appeal—Act XLII.
of 1860—Act XXIII. of 1861, Sec. 27.*

A suit brought to enforce a debt or demand not exceeding Rs. 500 which is secured upon, and must in law be primarily satisfied out of, immoveable property, is not a suit of the nature cognisable in Courts of Small Causes, under Sec. 27 of Act XXIII. of 1861, so as to exclude a right to special appeal.

This is so, though the plaint on the face of it seeks recovery in the alternative, either from the mortgagor personally, or from the mortgaged property.

THIS was a special appeal from the decision of A. T. Crawford, Senior Assistant Judge of Ratnágiri, in Appeal Suit No. 279 of 1862.

In the original suit A'tmárám (the special appellant) sued Vináyak and Sadáshiv (the special respondent) to recover a balance of Rs. 329 and interest thereon, part of a sum advanced by A'tmárám to Vináyak on the security of a third-share of a khotí village, a house, and other property. Vináyak having failed to pay interest regularly, his right, title, and interest in the said thir-dshare were sold under a decree of a Civil Court to Sadáshiv. A'tmárám brought the present suit against Vináyak and Sadáshiv to recover the balance due to him under his mortgage, either from the defendants

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personally, or from the third-share of the khotí which had been sold to Sadáshiv.

The Šadr Amín decreed for A'tmárám; and, Sadáshiv having appealed, the Senior Assistant Judge modified the decree of the Šadr Amín, by declaring the third-share of the khotí not to be liable in the hands of Sadáshiv (the purchaser under the decree) for A'tmárám's claim, which he decreed should be satisfied by sale of the house and other property mortgaged by Vináyak (exclusive of the third share of the khotí), and also, if necessary, from Vináyak personally.

On the special appeal coming on for hearing, before ARNOULD, Acting C.J., and NEWTON, J., a preliminary point was taken, viz., whether, under Sec. 27 of Act XXIII. of 1861, any special appeal lay from this decision of the Senior Assistant Judge, on the ground that the suit was one of the nature cognisable in Courts of Small Causes, under Act XLII. of 1860 (the Mofussil Small Causes Act); and that, as the debt or demand, to recover which it was instituted, did not exceed Rs. 500, no special appeal could lie.

Cur. adv. vult.

ARNOULD, C. J. :—We are of opinion that the original suit in this case was not of a nature cognisable in a Court of Small Causes, within the meaning of Act XXIII. of 1861, Sec. 27; and that, therefore, though the claim did not exceed Rs. 500, the right to file a special appeal was not excluded.

The original suit in this case was brought to recover the balance of a sum secured by mortgage of immoveable property; and the plaintiff claimed to recover the same, either from that portion of the mortgaged property which had passed into the hands of a purchaser under a decree, or from the residue of the mortgaged property which still remained in the hands of the mortgagor, or from the mortgagor (the defendant Vináyak) and the purchaser (the second defendant Sadáshiv) personally. The decree of the Šadr Amín was against the second defendant, Sadáshiv, personally, or against that portion of the property which had passed into his hands as purchaser. The decree of the Senior Assistant

Judge was against the residue of the mortgaged property which remained in the hands of the mortgagor, or, if necessary, against the mortgagor personally.

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This, then, was a suit brought to recover money advanced on the security of moveable property, and seeks to have the plaintiff's claim enforced in the first instance against the immoveable property so mortgaged to secure it. It was a suit in which the decree, supposing it to pass for the plaintiff, would have to be satisfied principally or primarily, if not exclusively, out of immoveable property.

This does not appear to this Court to be a suit "of the nature cognisable in Courts of Small Causes, under Act XLII. of 1860." That Act does not give any power to the courts constituted under it to execute decrees against immoveable property in the first instance, nor consequently to entertain suits where such mode of execution is the principal and primary, if it be not indeed the sole, legal mode of enforcing the claim.

Execution in the Small Cause Courts must be in the first instance against *moveable property* only. If the moveable property is not sufficient, then (by Sec. 11 of Act XLII. of 1860) the Small Cause Court is empowered, not indeed *itself* to proceed to execute the unsatisfied portion of the decree against immoveable property, but to supply the judgment creditor with a copy of its decree and a certificate of the sum remaining due, in order that the Civil Court, "having *general jurisdiction*" in the district, may carry out the execution against the immoveable property.

In the original suit, out of which the present special appeal arises, the debt or demand for which it was instituted was secured on immoveable property; and the decree in such suit was one which must legally have been enforced by execution against immoveable property, either exclusively, or at all events in the first instance.

That being so, it was not, in the opinion of this Court, a suit cognisable in a Court of Small Causes under Act XLII. of 1860; and therefore the preliminary objection to the right to bring a special appeal in this case must be overruled.