

4 B. 25 = 4 Ind. Jur. 460.

[26] APPELLATE CIVIL.

*Before Mr. Justice M. Melvill and Mr. Justice F. D. Melvill.*BHAGVANDAS AND ANOTHER (*Applicants*) v. HATHIBHAI
(*Opponent*).^{*} [4th September, 1879.]*Civil Procedure Code (Act X) of 1877, s. 266 Proviso (c)—Agriculturist's house—Specific mortgage.* 4 B. 25 = 4 Ind. Jur. 460.

S. 266 of the Civil Procedure Code (Act X) of 1877, proviso (c), does not prohibit the sale of property specially mortgaged, albeit that the property be materials of a house, belonging to or occupied by an agriculturist.

[*Diss.*, 1900 P.L.R. 357 (359) = 35 P.R. 1900 ; *D.*, A.W.N. 1888, 154.]

THIS was an application for the exercise of the High Court's Extraordinary Jurisdiction and for the reversal of the orders of the District Judge of Ahmedabad and the Subordinate Judge of Borsad.

The petitioner was the holder of a decree against the opponent, who was an agriculturist, and who had mortgaged a house which the decree directed should be sold in satisfaction thereof; and the only question for decision was whether proviso (c) of s. 266 of Act X of 1877 was intended to protect the house of an agriculturist when specifically mortgaged by him. Mr. Izon, the Judge, and Khan Saheb Modi, the Subordinate Judge, to whom the decree-holder applied for execution, were of opinion that that was the intention of the Legislature, and they accordingly refused to sell the house.

Nagindas Tulsidas, for the applicants.—The object of the present application is to give effect to a decree for sale founded upon a mortgage, and not for the attachment of property in ordinary execution. Section 266 does not apply to this case, and the decree-holder does not rely on it, but upon the order for sale contained in his decree to which his mortgage entitled him; *Motabhai Motilal v. Chandra Sheharraim* (1).

Rao Saheb *Vasudev Jagannath*, for the opponent.—Section 266, proviso (c), is clear and specific. It does not exempt the case of a specific mortgage from the operation which the Legislature intended this section to have in favour of an agriculturist. The Court cannot sanction the construction contended for, without [26] specifically adding to the Code, and going against the distinct language and intention of the Legislature.

JUDGMENT.

The judgment of the Court was delivered by

M. MELVILL, J.—In this case the judgment-creditor applied for the sale of the house of his judgment-debtor (an agriculturist) which had been specifically mortgaged to him. The decree, in execution of which the application was made, directed that the debt should be recovered from the mortgaged property, or from the debtor personally. We are of opinion that the sale of the house, under these circumstances, should be made, for we cannot suppose that it was the intention of s. 266 of Act X of 1877 to prohibit the sale of property specifically mortgaged. The

^{*} Civil Application No. 59 of 1879.

(1) Printed Judgments (1878), p. 171.

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orders of the Courts below are reversed, and it is ordered that the application of the plaintiff for the sale of the house be granted. The defendants to bear the costs in the Court of first instance. The parties to bear their own costs in appeal and in the application to this Court.

Order accordingly.

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APPELLATE CIVIL.

Before Mr. Justice M. Melvill.

In re MANOHAR G. TAMBEKAR.
[11th September, 1879.]

Petition of Review—Court Fees Act (VII of 1870), s. 7, and sch. I, arts. 4 and 5—Stamp.

When a plaint or memorandum of appeal comprises a number of claims, and a portion only of such claims has been allowed by the judgment, the party seeking a review should be required to stamp his application with a fee sufficient to cover the amount of the claims in regard to which he wishes the Court to review its judgment: Act VII of 1870, sch. I, arts. 4 and 5.

[N.F., 31 A. 294 = 6 A.L.J. 215 = 1 Ind. Cas. 209; R., 12 B. 98; D., 2 C.W.N. 292.]

THIS was a reference by A.C. Watt, Taxing Officer, High Court, appellate side, to the Honourable the Chief Justice under s. 5 of the Court Fees Act, 1870. He stated the case thus:—

"The point for decision was whether the petition of review should be stamped with reference to the amount of relief prayed for in [27] the review, or should it be stamped with reference to the original and whole amount of the appeal * * *. The amount of relief prayed for in the review is Rs. 40,000, whereas the amount of the appeal is over 2 lakhs * * *. The words in sch. I of the Court Fees Act, under the column headed 'Proper fee' in arts. 4 and 5, are 'the fee leviable on the plaint or memorandum of appeal,' and it has always been the practice in the Registrar's office to demand a stamp on review petitions calculated on the amount of the appeal as it originally was, and not with reference to the relief sought for in review. This practice may, perhaps, be in strict accordance with the words quoted, but it operates harshly, and in this particular case may prohibit the review. As the matter is of general importance, it is referred for the final decision of the Honourable the Chief Justice under s. 5 of the Court Fees Act (VII of 1870)."

The Chief Justice, under the provisions of the same section, referred the question for disposal to the Hon. Mr. Justice Maxwell Melvill.

Shantaram Narayan, for the petitioner.—The words "on the plaint or memorandum" should be liberally construed. They mean that such a fee should be taken as would be leviable on the plaint or memorandum of appeal which would be requisite if there were a fresh plaint or memorandum seeking the additional relief which the review asks for.

JUDGMENT.

M. MELVILL, J.—Article 5, sch. I, of the Court Fees Act, 1870, provides that an application for review of judgment, if presented before the ninetieth day from the date of the decree, shall bear a fee equal to one-half of the fee leviable on the plaint or memorandum of appeal.