

1883

TATYA
VITHOJI
v.
BAPU
BALAJI.

appropriate so much out of the Rs. 40 to that part of his claim. There then remained due to him a sum of Rs. 142-15-4. This sum the defendant (now plaintiff) still owes, and under the decree of 1874 must pay as the consideration of recovering his land.

It is said there was a subsequent agreement between the parties, modifying the terms of the decree ; but this, not having been certified to the Court, cannot be taken notice of as against the mortgagee's rights as judgment-creditor, though it may be made the ground for a separate suit.

The decrees of the Courts below are reversed, and the rights and obligations of the parties defined as aforesaid. The plaintiff is to pay the defendant's costs throughout.

Decree reversed.

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Nánábhái Hariddás.

MAHADAJI V. KARANDIKAR, PLAINTIFF, v. HARI D. CHIKNE,
DEFENDANT.*

1883
June 28.

The Code of Civil Procedure, Act X of 1877, Secs. 210, 320, 321, 322 and 325—Mortgage—Decree for sale sent to Collector for execution—Collector no power to vary decree—Responsibility of Collector to judgment-creditor—Power of Court to call for record.

A Collector, to whom a decree for sale of mortgaged property has been transferred for execution under section 320 of the Civil Procedure Code, is limited to one of the three courses specified in section 321, and may not depart from them ; much less may he do what the Court itself could not do in such a case—allow payment of the debt to be made by instalments.

A Collector, to whom a decree has been so transferred for execution, acts ministerially, and, when he delegates his functions to an Assistant or a Mámlatdár, incurs a risk of having to answer in damages to the person who is by any error or mistake deprived of the fruits of his judgment ; and this risk attaches independently of malice or negligence.

The Court that has made a decree or judicial order, which has been transmitted to the Collector for execution, is not deprived of the judicial powers with respect to it which may still at any particular time be competent to such Court, and which it would have had had the order been placed in the hands of its own ordinary officer, the názir. In the exercise of such powers the Court has authority to recall its own record transmitted to the Collector.

* Civil Reference, No. 62 of 1882.

THIS was a reference, under section 617 of the Code of Civil Procedure, by Rav Saheb Gopal Amrit, Subordinate Judge of Medha in the district of Satara.

The plaintiff obtained a decree of the Medha Court against the defendant, which directed that the former should recover the amount therein specified by sale of certain property which had been specifically mortgaged to him. In execution of the decree the Court attached the property, and transferred further execution, under section 320 of the Code of Civil Procedure, to the Collector of Satara, who in turn delegated this duty to the mamlatdar of Javli. During the pendency of the execution proceedings before the latter officer, the plaintiff applied to the Subordinate Judge, and represented that the decree was not being executed in accordance with the order of the Court, inasmuch as, instead of an immediate sale of the mortgaged property, payment of the judgment debt by instalments had been ordered. The Subordinate Judge thereupon directed the mamlatdar to submit the proceedings; but the mamlatdar, professing to act under Government notifications No. 499 of 24th January, 1880, and No. 3600 of 24th May, 1880, declined to do so, with the approval of the Assistant Collector and the Collector. The Subordinate Judge, therefore, referred the matter for the orders of the High Court. He propounded two questions—(1) whether the Collector can order payment by instalments, or effect any other settlement not sufficient to satisfy the decree at once, without the consent of the parties; and (2) whether the Court has the power of recalling its proceedings with a view to passing any order which it might deem proper, either of its own motion, or on the application of either party? As regards the first question, the Subordinate Judge was of opinion that the Court itself which passed the decree could not vary it, except in certain cases, such as those mentioned in sections 202 and 210 of the Code of Civil Procedure and section 20 of the Dekkhan Agriculturists' Relief Act XVII of 1879; much less, therefore, an officer entrusted merely with the execution of the decree, and that there was no difference in this respect between its own ordinary officer, the nazir, and the Collector. The contention, that otherwise sections 323, 324 and 325 would be inoperative, did not seem to him to be good in face of

1883

MAHADAJI
KARANDI-
KAR
v.
HARI D.
CHIKNE.

1883
 MAHADAJI
 KARANDI-
 KAR
 v.
 HARI D.
 CHIKNE.

the explicit provisions of section 322, which restricts the applicability of those sections to decrees other than those ordering the sale of immoveable property in pursuance of a contract specifically affecting the same. He thought that the Government notifications did not enlarge the scope of the applicability of these sections. It was only open to the Collector to adopt one of the three courses prescribed in section 321. As regards the second question, the Subordinate Judge held that the Collector's proceedings were a part of the Court's record, and must necessarily, therefore, be under the supervision and control of the Court; that this power had not in any way been affected by any of the provisions of the Code of Civil Procedure; and that the Court had the same power over the Collector as it had over its nazir in this respect.

Pandurang Balibhadra appeared for the plaintiff.

The defendant did not appear in person or by pleader.

Hon'ble Rav. Saheb V. N. Mandlik, Government Pleader, appeared for the Collector, to whom a notice had been issued by order of the High Court.

Pandurang Balibhadra.—The powers of a Collector in the matter of the execution of the decree in question are set out in sections 321 to 325 of the Code of Civil Procedure. They show that the Collector has certain powers and certain duties. Those powers are not co-extensive with the powers of the Court, and the duties specified are to be carried out under the orders of the Court. In the case of the execution of a decree for the sale of mortgaged property the Collector is a subordinate ministerial officer of the Court, and is bound implicitly to obey its orders. In matters of dispute the Legislature by section 322 B provides a reference to the Court. In *Bahirji v. Babajirav*(1) the point was raised, but not decided. Melvill, J., there said: "It may be that the party aggrieved by the action of the Collector has no remedy, except by suit, against the Collector; but I am very far from expressing an opinion that such is the case. The order of the Subordinate Judge was for the sale of immoveable property, and the Collector is bound by section 321 to execute such order in one of three prescribed modes. If he does not adopt any of these

(1) Printed Judgments for 1882, p. 64.

modes, but does something which the law does not allow, and which is not in any sense a sale, or the equivalent of a sale, he does not carry out the order of the Court; and the Court, whose order is thus disobeyed, has power to set aside the Collector's proceedings, and to enjoin him to carry out its order according to law." Pinhey, J., differed, and said the order made by the Collector was not within the intention and scope of section 321 (b), but he was of opinion that the only way in which the order could be declared illegal was by the judgment-creditor suing the Collector to obtain such a declaration. In the present case it is clear that the Court itself could not make an order for payment by instalments, section 210 of the Code of Civil Procedure being inapplicable; *Shankarpa Dargo Patel v. Danpa Virantpa*(1); *Hardeo Ds v. Hukam Singh* (2); and *Bachchu v. Madad Ali* (3).

The Government Pleader said he was not instructed to address the Court on the merits. He only wished for a decision of the Court for the guidance of the Collector and his subordinates.

WEST, J.—The decree in the present case was one for sale of property to satisfy a claim on a mortgage. To such cases the provisions of section 210 of the Code of Civil Procedure, as to the allowance of payment by instalments, do not apply. This has been repeatedly ruled—see *Shankarpa Dargo Patel v. Danapa Virantapa*(1); *Hardeo Das v. Hukam Singh*(2); and *Bachchu v. Madad Ali* (3). From these it is plain that the Court itself could not, in this case, have made a decree for payment by instalments. Much less, then, could the officer charged with the duty of executing its decree, vary that decree so as to give it an illegal effect in carrying it into execution. The decree having been one for a sale "of immoveable property in pursuance of a contract specifically affecting the same," the Collector's discretion was limited to a choice amongst the three courses specified in section 321 of the Code of Civil Procedure. Amongst these there is not any provision for paying by instalments a sum decreed to be realized as a whole and immediately.

1883

MAHADAJI
KARANDI-
KARv.
HARI D.
CHIKNE.

(1) I. L. R., 5 Bom., 604.

(2) I. L. R., 2 All., 320.

(3) I. L. R., 2 All., 649.

1883

MAHADAJI
KARANDI-
KAR
v.
HARI D.
CHIKNE.

In taking on himself the responsibility of departing from the decree sent to him for execution, a Collector acting by his own acknowledgment ministerially, when he delegates his function to an assistant or a mamlatdar, incurs a risk of having to answer in damages to the person who is by any error or mistake deprived of the fruits of his judgment. In *R. v. Ingall* (1) it is said that "a person damnified by the failure to perform a statutory duty is entitled to maintain an action;" and in *Pickering v. James* (2) Bovill, C. J., says; "It is a general rule of law that where a ministerial duty is imposed, an action lies for breach of it, without malice or negligence." Some of the many cases of actions against sheriffs serve to illustrate this principle, and a Collector will do well to refer the parties concerned to the Court whenever questions arise in which his duty is not clearly marked out by the terms of the Code or other statute law, under which he may have to execute a decree or judicial order.

The Court that has made a decree or judicial order, which has then been transmitted for execution to a Collector, is not deprived of the judicial powers with respect to it which may still, at any particular time, be competent to such Court, and which it would have had, had the order been placed in the hands of its own ordinary officer, the nazir. These powers cannot often be called into exercise, but when they are, the Court has, and must have, authority to recall its own record transmitted to the Collector.

Costs of this reference to be paid by the judgment-debtor.

(1) L. R., 2 Q. B. D. at p. 207.

(2) L. R., 8 C. P. at p. 503.

APPELLATE CIVIL.

1883

July 4.

Before Mr. Justice West and Mr. Justice Nanabhai Haridas.

BALVANTRAV OZE (ORIGINAL PLAINTIFF), APPELLANT, v. GANPAT-
RAV JADHAV AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Co-owners of a forest—Tenancy-in-common—Mortgage by one co-tenant—Mortgage in possession—Licensees from mortgagor and co-tenant—Cutting and removing produce—Rights of licensees—Remedy of mortgagee—Damages—Account.

* Second Appeal, No. 255 of 1882.