

4. Whether this was done with or without the assent of her sisters, or any of them ; and.

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5. With what legal consequences ?

Three of the sisters—Jeyba, Rupa, and Kadvi—are dead. Jeyba's husband claims no right, and she has left no children. Rupa's only son, Guman, is dead, and no one seems to have come forward to represent him. Kadvi's daughter, Oomed, withdrew from the appeal. With reference to these circumstances the Courts below should determine :—

6. Whether the deed is to be construed as making a gift to the daughters of the donor jointly, or to them severally, or as tenants-in-common, or in what mutual relation, and with what consequences on the claim of the plaintiffs.

We direct that the findings be forwarded to this Court within two months. Further proceedings meanwhile adjourned. Fresh evidence may be received on the new issues.

Case remanded.

APPELLATE CIVIL.

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

SHRIDHARNARAYAN (ORIGINAL PLAINTIFF), APPELLANT, v. ATMARAM GOVIND (ORIGINAL DEFENDANT), RESPONDENT.*

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July 23.

Insolvency—Mortgage—Secured creditor—Receiver—The Code of Civil Procedure (Act X of 1877), Secs. 352 to 355.

A judgment-debtor, arrested and imprisoned in execution, applied to be declared an insolvent, and included a mortgage-debt in his application. Notice was issued to the mortgagee, who failed to appear and prove his claim, and was consequently omitted from the schedule prepared under section 352 of the Code of Civil Procedure. A receiver was appointed under section 354 ; the whole of the property of the insolvent was made over to the receiver, including the nine fields mortgaged, which the insolvent held as tenant of the mortgagee. The receiver sold one out of the nine fields to satisfy the creditors entered in the schedule, and ultimately restored the remaining eight fields to the judgment-debtor. The mortgagee then sued to eject the judgment-debtor for default in payment of rent. The latter pleaded his discharge under section 355.

* Second Appeal, No. 373 of 1882.

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Held—that the discharge did not affect the mortgage-debt, and that a receiver is bound, as a condition of dealing with mortgaged property, in every case to pay off the mortgage, even when the mortgagee has not sought to be placed in the schedule,—the position of the mortgagee being essentially different from that of the unsecured creditor.

Case of *Chotalal v. Nahansa* (1) distinguished.

THIS was a second appeal from the decision of M. B. Baker, Judge of Ratnagiri, reversing the decree of Rav Saheb G. G. Soman, Subordinate Judge of Malvan.

The defendant on the 12th of July, 1873, mortgaged nine fields to the plaintiff, with possession for ten years, for Rs. 1,350, and rented them from the plaintiff for ten years, at Rs. 108 *per annum*, under a lease dated 14th July, 1873, the rent being payable in lieu of interest. In 1878 the defendant was arrested, under a decree obtained against him by one Balsheth, and applied to be declared insolvent. In his petition he entered the mortgage-debt due to the plaintiff, and said that he held the lands as a tenant. A notice under section 347 of the Code of Civil Procedure was served on the plaintiff. On the 9th of July, 1879, the defendant was declared an insolvent, and his property was made over to the Nazir as receiver. On the 3rd of February, 1880, an order was passed, directing the receiver to convert the property into money, and the names of two creditors, who had proved their debts, were entered in the schedule. Two other creditors afterwards appeared, and their names were entered in the schedule by an order dated 20th November, 1880. The plaintiff did not appear till 4th March, 1881, when he petitioned to have his debt entered in the schedule, and to have certain property sold, subject to his mortgage lien. This petition was rejected on the ground that it was too late. One of the nine fields was sold by the receiver, the scheduled creditors were paid, and the residue of the property was handed over to the defendant. The plaintiff then filed two suits—one to recover from the defendant arrears of rent, and the other, the present one, to recover possession of the fields themselves, alleging default on the part of the defendant to pay rent. The Subordinate Judge awarded both the claims. The District Judge rejected the claims, relying on the case of *Chotalal v. Nahansa* (1). The plaintiff appealed to the High Court.

Yashvant V. Athle for the appellant.—Declaration of insolvency does not annul securities. There was no security in the case relied on by the Judge; that was one of a pure personal contract. Under section 356, cl. (d), of the Code of Civil Procedure it was imperative on the receiver to discharge the plaintiff's mortgage-debt before he could pay the scheduled creditors. Under section 352 the creditor who appear are bound to produce their evidence, but not those who do not appear. All that was vested in the receiver was the 'insolvent's property'—that is, his right title and interest in it.

Shantaram Narayan for the respondent.—Section 352 provides that creditors of the insolvent "shall" prove their claims, and the case of *Chotalal v. Nahansa* shows that all the creditors must appear and prove their claims. They are called upon to appear, and have a further period of grace allowed them by section 353. If they do not appear within that time their debts become absolutely barred. The object of the Legislature in framing the insolvency sections in the Code of Civil Procedure was to give the debtor a chance of clearing him completely, and at once, from all his liabilities. Section 357 provides that the debtor's property shall still be liable after his discharge for debts due to scheduled creditors, and mention of non-scheduled creditors is purposely omitted, as an insolvent would gain nothing if, after his discharge, he were again made liable for debts incurred before his insolvency which the creditors had not come forward to prove. The entire property of the debtor vests in the receiver under section 354, and the creditors can only claim payment under the schedule. The plaintiff in this case had notice of the insolvency, and of his being included in the schedule put in by the defendant. That he did not get his debt satisfied, was due to his own laches. To allow the present suit would be to defeat the object of the insolvency provisions enacted in the Code of Civil Procedure.

The judgment of the Court was delivered by

WEST, J.—The property of the insolvent in this case vested, no doubt, in the receiver under section 354 of the Code of Civil Procedure. All the right title and interest of the insolvent might thereon have been sold in every part of his estate. Each creditor entered in the schedule, framed by the Court under section 352,

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would then have stood in the position of a judgment-creditor against the insolvent for the amount entered opposite such creditor's name in the schedule. A judgment-creditor, however, has not a right to deprive a mortgagee, or other holder of a charge on the judgment-debtor's property, of his rights under his security ; and the receiver, acting for the judgment-creditors as a body, has no more right than they, acting collectively, would have to annul a mortgage. He must pay off a mortgage-debt in every instance as the equitable condition of his making the property mortgaged as distinguished from the equity of redemption available for the general body of the creditors. It is, indeed, only in so far as the property is in excess of the amount secured upon it that it can be regarded as assets of the insolvent at all. By the mortgage the ownership has been divided into portions, whereof only one still belongs to the mortgagor, while the other belongs to the mortgagee.

It would seem, then, that, under section 356, cl. (d), of the Code of Civil Procedure, the receiver ought, as a condition of dealing with mortgaged property in every case, to pay off the mortgage, even when the mortgagee has not sought to be placed in the schedule, and so rank as a judgment-creditor. The mortgagee's position is essentially different from that of the unsecured creditor, as in *Chotalal v. Nahansa* (1). But in the present case it appears further that, after the sale of a small portion of the quasi-insolvent's property, the proceeds enabled the receiver to pay off the creditors, or to satisfy them, and he then, under the order of the Court, restored to the defendant here the property which had been temporarily vested in the receiver. That property embraced the defendant's interest as mortgagor and as lessee in eight out of the nine fields now in question. He had mortgaged them for ten years, and taken a lease from the plaintiff for the same term. His interest in one was sold: in the other eight his interest was the same when they were restored to him as when they were taken from him by the receiver. There had not been any sale of these fields so as to create an intervening interest in return for a valuable consideration, such that it would thenceforward pass free—if it could at all pass free—from the

(1) Printed Judgments for 1882, p. 89.

incumbrance in favour of the mortgagee, now plaintiff. The defendant therefore is in, as he was before, as tenant of the plaintiff, subject to the terms of the lease, and amongst others to the plaintiff's right of re-entry on default in payment of the stipulated rent.

We, therefore, reverse the decree of the District Court, and restore that of the Subordinate Judge, with costs throughout on the respondent.

Decree reversed.

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APPELLATE CIVIL.

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

GURUPADAPA BASAPA (ORIGINAL PLAINTIFF), APPELLANT, v. VIR,
BHADRAPA IRSANGAPA (ORIGINAL DEFENDANT), RESPONDENT.*

1883
July 25.

Limitation Acts—Which applicable—Decree—Execution—Art. 179, Sch. II of Act XV of 1877—Application to keep alive decree.

The plaintiff obtained a decree against the defendant in 1872. He first applied for its execution in 1874, and his application was disposed of on the ground that the requisite court fee had not been paid. His next application was in 1876, and it was disposed of because no property could be found to satisfy the decree. His third application, made on the 10th of March, 1879, was one asking merely that the decree might be kept alive. He now applied for the fourth time on the 26th of November, 1881, and sought execution of the decree.

Held that the law of limitation applicable to proceedings in execution is not the law under which the suit was instituted, but the law in force at the date of the application for execution, in absence of a legislative provision to the contrary (such as that contained in section 1 of Act IX of 1871). The law of limitation therefore to be applied to the application of the 10th March 1879 was Act XV of 1877; and inasmuch as that application did not ask for any step to be taken towards executing the decree, it was not in accordance with art. 179, sch. II of Act XV of 1877, and did not save the present application from being barred.

Mangal Prasad's case (1) explained.

THIS was a second appeal from the decision of A. C. Watt, Judge of Dharwar, reversing the order of Rav Saheb R. G. Bhadabade, Subordinate Judge of Haveri.

* Second Appeal, No. 398 of 1882.

(1) L. R., 8 I. A., 123.